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# THE GEORGIA LIFE ACT: LIMITING WOMEN’S STATE CONSTITUTIONAL RIGHT TO PRIVACY

PHOEBE VARUNOK\*

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## INTRODUCTION

The Supreme Court has engrained the right to privacy in its jurisprudence, whereby both state constitutions and jurisprudence routinely give hallowed deference to as an implied right.<sup>1</sup> For decades, the Supreme Court and the states left to the individual, married or single, the right to be free from unwarranted governmental intrusion in matters fundamentally connected to a person's decision to bear a child.<sup>2</sup>

Choosing not to have a child is as intimate as the choice to bear a child.<sup>3</sup>

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1. See *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969), rev'd, 402 U.S. 62 (1971) (discussing that Supreme Court jurisprudence indicates that a woman's liberty and right to privacy extends to family, marriage, and sex and thus includes the right to remove an unwanted child). But cf. *Griswold v. Connecticut*, 381 U.S. 479, 481-84 (1965) (holding that the spirit of the First, Third, Fifth, and Ninth Amendments as applied to the Fourteenth Amendment create a general "right to privacy" and "marital right to privacy" that may not be unduly intruded upon by a state and the United States governments).

2. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (arguing that the decision to bear a child, made between married or unmarried persons, shall not be subject to unwarranted governmental intrusion); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (establishing the fundamental right to procreate and prohibiting the government from enforcing procedures that infringe on the right).

3. See e.g. *Eisenstadt*, 405 U.S. at 454 (quoting Justice Jackson's concurrence from

The decisions handed down in *Roe v. Wade* and *Planned Parenthood v. Casey* established that a pregnant woman's option to terminate the pregnancy is a private liberty.<sup>4</sup> States act either as champions for the right to access abortion services or as roadblocks by restricting a woman's ability to access abortion procedures.<sup>5</sup>

In recent years, several states introduced and passed abortion legislation prohibiting certain procedures prior to the detection of a fetal heartbeat.<sup>6</sup> Detection of a fetal heartbeat can occur as early as six weeks into pregnancy, often before a woman is aware of her pregnancy.<sup>7</sup> A detectable fetal heartbeat became the new "viability" standard—but the word "viability" is a misnomer. Viability means a child is reasonably likely to survive upon birth.<sup>8</sup> Fifty percent of fetuses survive after being born twenty-three to twenty-four weeks post-gestation.<sup>9</sup>

Reasonable access to abortion services in states like Georgia dwindled prior to the passage of this legislation.<sup>10</sup> Since 2014, only fourteen clinics in

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*Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (arguing that arbitrary governmental action occurs when officials target legislation at a population on a discretionary basis).

4. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right to privacy broadly encompasses a woman's decision whether to terminate her pregnancy). Although this comment refers to 'women' as those individuals who have abortion procedures, this author acknowledges that not every person that has a uterus can get pregnant and wishes to have an abortion identifies as a woman.

5. See *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (highlighting that admitting privilege requirements imposed on abortion clinics in Texas makes it unduly difficult for operation of the clinics to persist).

6. See K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html> (documenting states that have proposed heartbeat abortion bills, states whose courts have blocked such bills, and the current political landscape that makes these bills amenable).

7. See Jordan Dahme, *Heartbeat Bans and Gonzales: How the Door was Opened for a New Era of Anti-Abortion Legislation*, 25 TEMP. POL. & CIV. RTS. L. REV. 51, 52 (2016) (exploring how the *Gonzales* decision gave proponents of heartbeat abortion bans three ways to justify restrictive abortion legislation).

8. See *Roe*, 401 U.S. at 160-62 (defining "viability" as the fetus's potential ability to live outside the womb occurring about twenty-four weeks into pregnancy).

9. See Gene Emery, *Survival rates for extremely preterm babies improving in U.S.*, REUTERS: HEALTH NEWS (Feb. 15, 2017, 5:15 PM), <https://www.reuters.com/article/us-health-preemies-survival-impairments/survival-rates-for-extremely-preterm-babies-improving-in-u-s-idUSKBN15U2SA> (analyzing statistics that demonstrate the average length of time fetuses can survive outside the womb).

10. See *State Facts about Abortion: Georgia*, GUTTMACHER INST. (May 2018), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-georgia> (showing

Georgia provided abortions, while ninety-six percent of Georgia counties have no abortion clinics, leaving fifty-eight percent of women in the state without access to a clinic.<sup>11</sup> In Georgia, women of varying ethnicities, ages, and education levels receive abortions annually.<sup>12</sup> Passing the Living Infants Fairness and Equality Act (“the LIFE Act”) in Georgia imposes more intrusive regulations on women that will substantially diminish their state constitutional guaranteed right to privacy.<sup>13</sup>

This Comment argues that the LIFE Act is unconstitutional as a violation of Georgia’s already rigid state right to privacy.<sup>14</sup> Part I evaluates Georgia’s tradition of upholding and applying its state right to privacy in different facets of life, namely family and intimate life.<sup>15</sup> Part I also examines the LIFE Act, its provisions, restrictions, and legislative history.<sup>16</sup> Further, Part I explores a similar fetal heartbeat statute in Iowa that courts blocked, relying on the state’s right to privacy framework.<sup>17</sup>

Part II demonstrates how the LIFE Act is unconstitutional by applying tests and considerations from past Georgia cases, finding the right to privacy in the protection of the family and intimate life matters, and examining the act’s intrusive abortion regulations.<sup>18</sup> Part II further asserts that in states where similar fetal heartbeat bills failed due to deference to privacy rights,

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where women obtain abortions, pregnancies and their outcomes, and current restrictions on abortion in Georgia).

11. *See id.* (demonstrating that many women live in areas that remain without access to an abortion clinic or provider).

12. *See generally id.* (illustrating populations that received abortions in 2014: twenty-nine percent white, twenty-eight percent black, twenty-five percent Hispanic, and nine percent of other racial and ethnic groups).

13. *See* The LIFE Act, H.B. 481, 154th Leg., at 4 (Ga. 2019) (prohibiting abortions when there is embryonic or fetal cardiac activity and mandating that a mother and fetus should be treated as separate patients during doctor’s exams because a fetus is considered a natural living person).

14. *See* GA. CONST. OF 1983, art. I, § I, Para. I. (establishing that it is unconstitutional to violate an individual’s liberty without due process); *see also* *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 194 (1905) (holding that the Georgia constitution provides all of the state’s citizens with the right to privacy).

15. *See infra* Part I (exploring Georgia’s jurisprudence surrounding the right to privacy in matters of family and intimate life).

16. *See infra* Part I (discussing the contents of the LIFE Act, its implications, provisions, and legislative history).

17. *See infra* Part I (examining why Kentucky courts blocked a fetal heartbeat bill in the context of the state’s history upholding privacy rights).

18. *See infra* Part II (demonstrating that courts in Georgia should find the LIFE Act unconstitutional on the basis of case precedent).

Georgia courts can use state constitutional arguments to invalidate the LIFE Act.<sup>19</sup> Part III demonstrates that the policy surrounding abortion going forward in Georgia may lead to an omnibus abortion ban.<sup>20</sup> Part III also recommends that Georgia provide women and children with better access to health and educational services, in addition to improving its foster care system, if state courts find the LIFE Act is constitutional.<sup>21</sup> Lastly, this article concludes by reiterating that the Georgia LIFE Act violates its state constitutional right to privacy and is thus unconstitutional as it stands.<sup>22</sup>

## I. BACKGROUND

### A. *Georgia's Steadfast Tradition to Upholding the Right to Privacy*

At the turn of the twentieth century, an appellate court in Georgia first recognized the right to privacy in the United States.<sup>23</sup> The Supreme Court of Georgia concluded in *Pavesich v. New England Life Insurance Co.* that the Georgia state constitution guarantees privacy liberties, with some limitations.<sup>24</sup> The First Amendment places limitations on the right to privacy when it interferes with expressions concerning a matter of legitimate public interest.<sup>25</sup> The Court considers several factors when invoking the right to privacy, such as authority to display another's likeness, waiver of privacy,

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19. See *infra* Part II (arguing that Georgia should evaluate the LIFE Act by looking to a state with a similar tradition of privacy law jurisprudence, where a similar bill was struck down).

20. See *infra* Part III (discussing the dangers of failing to apply privacy law jurisprudence to abortion and how it could lead to further abortion restrictions).

21. See *infra* Part III (exploring opportunities for Georgia to improve services for women and children if the LIFE Act is found to be constitutional).

22. See *infra* Part IV (concluding that the LIFE Act violates Georgia's strong adherence to the right to privacy and should be found unconstitutional).

23. See *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 194 (1905) (stating that the right to privacy buttresses from natural law and that some matters are private while others public); see also *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 882 (Ga. 1957) (asserting that the first recognition of the right to privacy in the United States was from the Georgia Supreme Court).

24. See *Pavesich*, 122 Ga. at 219-20 (concluding that the right to privacy is guaranteed to Georgia citizens and prohibits publication of someone's personal form, likeness, or private information); see also *Ambles v. State*, 383 S.E.2d 555, 557-58 (Ga. 1989) (stating that the right to privacy is fundamental).

25. See *Pavesich*, 122 Ga. at 204 (explaining that speech rights outweigh privacy rights when a conflict arises over the publication of a matter affecting the public interest); see also *Cox v. Brazo*, 303 S.E.2d 71, 73-74 (Ga. 1983) (precluding an individual from asserting a privacy interest in information that they publicize prior to a separate disclosure of the information).

status as a public figure, and the commercial nature of the speech.<sup>26</sup> The right to privacy in Georgia extends beyond publications into the intimate areas of an individual's life.<sup>27</sup>

The right to privacy includes the right to possess intimate material in one's home.<sup>28</sup> In the landmark Supreme Court case *Stanley v. Georgia*, police arrested a man after investigators found that he was in possession of film that depicted obscene images of sexual intercourse and nudity.<sup>29</sup> The Court held that, notwithstanding Georgia's legitimate interests, the state exceeded its authority by prohibiting an individual from *viewing* obscene or intimate material in the privacy of their home.<sup>30</sup> To disallow the possession of and the ability to view obscene material in the privacy of an individual's home violates the First and Fourteenth Amendments, and thus, denies that individual their right to privacy.<sup>31</sup>

The right to privacy enables an individual to be free from unnecessary public scrutiny when certain expressions do not implicate public interest.<sup>32</sup> The Georgia Supreme Court did not examine legislation regulating the right to privacy, as it relates to consensual sexual encounters in one's home, until *Powell v. State* in 1998.<sup>33</sup> Individuals are protected from government

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26. See *Pavesich*, 122 Ga. at 217-18 (denoting the list of possible exceptions with respect to privacy rights).

27. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding an individual may possess lewd material in the privacy of his or her own home); see also *Powell v. State* 510 S.E.2d 18, 24 (Ga. 1998) (holding that a statute that prohibits private, consensual, and noncommercial sodomy violates Georgia's fundamental right to privacy).

28. See *Stanley*, 394 U.S. at 566-67 (averring that the state does not have a legitimate interest to control an individual's undesirable thoughts and consumption of obscene material).

29. See *id.* at 559-60 (examining whether an individual is criminally liable for mere possession of obscene materials).

30. See *id.* at 565-66 (explaining that Georgia does not have the authority to regulate the thoughts of its citizens or the materials he or she wishes to view) (emphasis added).

31. See *id.* at 567-68 (opining that the government may not place a restriction on what an individual chooses to consume because an individual's right to read or observe what he pleases is fundamental to the scheme of ordered individual liberty).

32. See *Georgia Power Co. v. Busbin*, 254 S.E.2d 146, 149 (Ga. Ct. App. 1979) (holding that publication of privileged information between an employee and employer violates the ability to be free from any wrongful intrusion into an individual's private life). But see *Hines v. Columbus Bank & Trust Co.*, 223 S.E.2d 468, 469 (Ga. Ct. App. 1976) (holding that a singular letter inquiry into the business information of a citizen by a bank conducting due diligence is not an invasion of privacy).

33. See *Powell v. State* 510 S.E.2d 18, 30 (Ga. 1998) (examining whether the right to privacy precludes legislation that prohibits sodomy without force in a private home between two parties legally capable of consenting to the sexual act).

intrusion when they exercise their right to personal liberty by consenting and withdrawing from public view to engage in private sexual acts.<sup>34</sup> But where there is a legitimate state interest, the Court may limit the right to privacy as it pertains to sexual activity.<sup>35</sup> When an act is void of any public benefit and unduly oppresses an individual's right to privacy however, it oversteps the bounds of permissible state police power and is unconstitutional in Georgia.<sup>36</sup>

Under Georgia's conception of privacy rights, medical examinations and records are highly protected.<sup>37</sup> Georgia prohibits the publication of a person's medical history, conditions, and records unless there is a waiver authorizing the release of that information.<sup>38</sup> Disclosure of a medical condition, particularly one like AIDs, to one's family and friends abrogates privacy protections.<sup>39</sup> Further, even if a health provider owns and possesses a patient's medical records, Georgia prohibits the distribution of those records without the patient's consent.<sup>40</sup> A third party's disclosure of medical

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34. See *id.* at 24 (holding that legislation prohibiting sodomy has no public benefit and that consensual sex in private is an activity that fundamentally deserves privacy protections); see also *In re J.M.*, 575 S.E.2d 441, 442-43 (Ga. 2003) (holding that sexual intercourse between two consenting sixteen-year-olds did not violate Georgia's fornication statute because the right to privacy protects legally consensual, private sex from criminalization).

35. See *Powell*, 510 S.E.2d at 24 (listing sexual acts that are unprotected by the right to privacy: sex in a public place, sex where one party is incapable of consent, sexual assault, rape, and prostitution).

36. See *id.* at 26 (holding that criminalization of consensual sodomy impinges upon the guaranteed right to privacy because it serves no legitimate government purpose). But see *Morrison v. State*, 526 S.E.2d 336, 338 (Ga. 2000) (holding that public commerce in sex, even in private, is not afforded the right to privacy).

37. See *King v. State*, 535 S.E.2d 492, 494 (Ga. 2000) (exploring whether medical records needed for prosecution are protected by the right to privacy); see also *Multimedia Wmaz v. Kubach*, 443 S.E.2d 491, 495 (Ga. App. Ct. 1994) (affirming the award of damages to a man with AIDs who agreed to appear anonymously on a television program to discuss his experience with AIDs and was not given anonymity).

38. See *Multimedia Wmaz*, 443 S.E.2d at 494 (holding that a person may choose to broadcast their medical records anonymously and still be guaranteed privacy protections after the anonymity promised is violated).

39. See *id.* (explaining that disclosure of AIDs to one's family members, friends, support groups, and medical personnel does not constitute waiver because those recipients understand the information is intended to be kept private).

40. See *King*, 535 S.E.2d at 495 (holding that information contained in medical records reflect the current state of a person's body and is thus protected from exhibition without his or her consent); see also *Thurman v. State*, 861 S.W.2d 96, 98 (Tex. App. 1993) (holding that medical records should be given more privacy protection than phone or bank records).



records is only valid if Georgia law requires the production of those records, and the patient is on notice of the authorized disclosure.<sup>41</sup>

Georgia courts similarly afford privacy protections to family life matters.<sup>42</sup> In *Brooks v. Parkerson*, the Georgia Supreme Court held that a “Grandparent Visitation Statute” was unconstitutional because it authorized courts to allow child visitation by grandparents over the objection of fit parents.<sup>43</sup> The court found that the law violated the private realm of family units and parents’ ability to establish a home, raise children, and parent freely.<sup>44</sup> The Court acknowledged that the right to privacy enables parents to control their children without undue governmental intrusion.<sup>45</sup>

### *B. The LIFE ACT: Provisions, Restrictions, and Legislative History.*

On May 7, 2019, the Governor of Georgia, Brian Kemp, signed the Living Infant Fairness and Equality Act (“LIFE Act”) into law.<sup>46</sup> Seeking to reflect the policy that Georgia recognizes unborn children as natural persons, lawmakers drafted the bill to amend previous abortion legislation.<sup>47</sup> The

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41. See *King*, 535 S.E.2d at 495 (holding that the state is justified in invading a citizen’s privacy to obtain medical records when it reflects state interest and is narrowly tailored to that interest).

42. See *Brooks v. Parkerson*, 454 S.E.2d 769, 772 (Ga. 1995) (holding that O.C.G.A. § 19-7-3 is unconstitutional because it invaded the private, protected interest of the family unit).

43. See *id.* at 771-72 (acknowledging the long-established tradition that parents should be able to raise their children without undue state interference); see also *Hunter v. Carter*, 485 S.E.2d 827, 830 (Ga. Ct. App. 1997) (averring that factfinders and legislators must ultimately prioritize the interests of parents when issues arise regarding grandparent visitations).

44. See *Brooks*, 454 S.E.2d at 772 (underscoring that the Georgia constitution’s privacy protection insulates the family unit and its decisions).

45. See *e.g. id.* (recognizing that parents have the right to parent their children privately, without undue governmental interference); see also *Borgers v. Borgers*, 820 S.E.2d 474, 480 (Ga. Ct. App. 2018) (noting the Georgia constitution protects parent’s right to familial relations with his or her children); see *e.g. Bazemore v. Savannah Hosp.*, 155 S.E. 194, 197 (Ga. 1930) (holding it violates the right to privacy to use a child’s likeness without the parent’s permission).

46. See Vanessa Romo, *Georgia’s Governor Signs ‘Fetal Heartbeat’ Abortion Law*, NPR: LAW (May 7, 2019, 11:41 AM), <https://www.npr.org/2019/05/07/721028329/georgias-governor-signs-fetal-heartbeat-law> (detailing the signing-into-law ceremony where the governor gave an impassioned speech about the bill and how Georgia respects life at all stages).

47. See LIFE Act, H.B. 481, 154th Leg. (2019) (demonstrating the changes made in the Official Georgia Code to reflect that an unborn child is considered a natural person if it has a detectable heartbeat).

LIFE Act further makes any natural person, including that of an unborn child with a detectable heartbeat, part of the official Georgia population.<sup>48</sup> The Act defined a detectable human heartbeat as embryonic or fetal cardiac activity or the steady rhythmic contraction of the heart within the womb.<sup>49</sup>

The LIFE Act provides three exceptions for abortion when the fetus heartbeat is detectable.<sup>50</sup> First, the physician may perform an abortion upon determination that a medical emergency to the mother exists.<sup>51</sup> Second, the physician may perform an abortion if the gestational age of the fetus is twenty weeks or less when the pregnancy is the result of rape or incest.<sup>52</sup> To fall within the rape or incest exception however, the mother must file an official police report alleging rape or incest before undergoing an abortion.<sup>53</sup> Third, abortion is legal if the physician determines that the pregnancy is medically futile.<sup>54</sup>

Under section four of the LIFE Act, the physician must render medical aid during an abortion if the fetus is capable of sustaining life.<sup>55</sup> Additionally, officials must make the mother's health records available to the district attorney in the jurisdiction where the abortion procedure occurs or where the woman resides.<sup>56</sup>

Finally, any violation made under section four of the LIFE Act is punishable by imprisonment of one to ten years.<sup>57</sup> Any violation could result

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48. *See id.* (granting an unborn fetus with the same rights as any other natural person in Georgia).

49. *See id.* (setting forth the requirement that an abortion is prohibited when a physician detects a fetal heartbeat).

50. *See id.* (stating three narrow exceptions when an abortion is permitted under the LIFE Act).

51. *See id.* (explaining the medical emergency exception, although neither the bill or statute define what is considered a medical emergency).

52. *See id.* (stipulating the physical and gestational age of a fetus that may be aborted in cases of rape or incest).

53. *See id.* (permitting abortion in cases of rape or incest so long as it is documented in an official police report).

54. *See id.* (defining "medically futile" as an unborn child who has a profound and irremediable congenital or chromosomal anomaly rendering the child incapable of sustaining life after birth).

55. *See id.* (stating that a physician or clinician performing an abortion must render available medical assistance under circumstances when life may be sustained by the fetus outside of the womb).

56. *See id.* (requiring that medical records are made available to government officials).

57. *See* Ga. Code Ann. § 16-12-140(a)-(b) (2019) (detailing that a prison sentence is appropriate when a person uses any medicine, drug, or instrument on a woman with the

in the revocation of the physician's license or to penalties.<sup>58</sup> While section four makes affirmative defenses available to both the women and physicians involved in the abortion, the party asserting the defense has the burden of proving the affirmative defense elements to a jury.<sup>59</sup>

*C. The Right to Privacy and Other Fundamental Rights Blocking a Fetal Heartbeat Bill in Iowa*

Georgia is one of many states that proposed and passed a fetal heartbeat abortion statute.<sup>60</sup> Like other legal challenges against the LIFE Act in Georgia, pro-choice groups in Mississippi, Iowa, and Tennessee challenged their state's respective abortion legislation in both federal and state court.<sup>61</sup>

Iowa governor, Kim Reynolds, signed Senate File 359 into law on May 4, 2018, prohibiting abortions after the detection of a fetal heartbeat.<sup>62</sup> Iowa previously only allowed the performance of abortions before twenty-weeks into the gestational period—Senate File 359 further restricted abortions to a period before most women are aware of their pregnancy.<sup>63</sup> Shortly after Iowa enacted Senate File 359, Planned Parenthood of the Heartland (“PPH”) and other parties filed a lawsuit against Governor Reynolds challenging the state constitutionality of Senate File 359.<sup>64</sup>

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intent to produce a miscarriage or abortion).

58. See *id.* § 43-34-8(a)(7) (2019) (granting authority to the Georgia Composite Medical Board to discipline any physician engaged in unprofessional, unethical, or deleterious conduct); see also *id.* § 43-34-8(b)(1)(F) (including penalties for physicians that may include license revocation).

59. See Complaint at 27, *SisterSong v. Kemp*, (N.D. Ga. 2019) (No. 1:19-mi-99999-UNA) (highlighting that few affirmative defenses are available to women and physicians).

60. See Patricia Mazzei & Alan Blinder, *Georgia Governor Signs 'Fetal Heartbeat' Abortion Law*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/heartbeat-bill-georgia.html> (listing Iowa and other states as those that have proposed fetal heartbeat statutes akin to the LIFE Act).

61. See Complaint at 27, *SisterSong* (challenging the constitutionality of the LIFE Act using federal law and jurisprudence); Mazzei & Blinder, *supra* note 60 (reporting several constitutional challenges in federal court against states with bills like the LIFE Act).

62. See Sasha Ingber, *Iowa Bans Most Abortions as Governor Signs 'Heartbeat' Bill*, NPR (May 5, 2018, 11:22 A.M.), <https://www.npr.org/sections/thetwo-way/2018/05/05/608738116/iowa-bans-most-abortions-as-governor-signs-heartbeat-bill> (reporting that the Iowan fetal heartbeat abortion bill was the first of its kind as it prohibits all abortion after six weeks with few exceptions).

63. See *id.* (detailing contrasting procedure deadlines between Iowa's prior abortion law and the new law).

64. See *Women's Rights Groups File Lawsuit to Strike Down Iowa's*

In 2018, Iowa State Judge Michael Huppert found the Iowa fetal heartbeat bill unconstitutional under the Iowa State Constitution.<sup>65</sup> Chief Justice Huppert relied on the people of Iowa's right to privacy, finding that the right is central to making personal decisions about a person's bodily integrity and family composition.<sup>66</sup> Further, the court emphasized that Iowa has a steadfast tradition in protecting profoundly personal decisions like that of starting a family, parenting, and child rearing.<sup>67</sup> Ultimately, the court held that Iowa's jurisprudence and constitutional tradition support the right to have autonomy and dominion over one's own body, and thus, ruled the fetal heartbeat bill unconstitutional.<sup>68</sup>

## II. ANALYSIS

### *A. Georgia Courts Must Observe Its Right to Privacy Deference to Evaluate the State Constitutionality of the LIFE Act because it Has Continually Afforded Right to Privacy Deference to Intimate Matters that are Akin to Abortion.*

#### *1. Georgia Courts Routinely Apply the Right to Privacy to Intimate Life Matters and Therefore the LIFE Act Must Receive the Same Right to Privacy Treatment Because Abortion is an Intimate Life Matter.*

Georgia courts routinely give deference to the right to privacy as it pertains to matters of the body such as consensual sexual intercourse.<sup>69</sup> The Court

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*Unconstitutional New Abortion Law*, PLANNED PARENTHOOD OF THE HEARTLAND (May 15, 2018), <https://www.plannedparenthood.org/planned-parenthood-heartland/newsroom/womens-rights-groups-file-lawsuit-to-strike-down-iowas-unconstitutional-new-abortion-law> (announcing that the ACLU, PPH, and several doctors challenged Iowa's heartbeat bill).

65. See *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 213 (Iowa 2018) (highlighting that it is the obligation of the Iowa Supreme Court to ensure that no law intrudes upon an interest protected by the Iowa constitution).

66. See *id.* at 234 (positing there is a nexus between the fundamental right to privacy and the right to make private personal decisions, such as having a child).

67. See *id.* at 237 (likening the right to make personal life decisions to a fundamental right that should not be intruded upon warrantlessly by the state).

68. See *id.* (announcing that Iowa's constitution implicitly guarantees the right to make private personal decisions based upon one's own needs, and thus, the ability to access an abortion shall not be infringed upon by the state).

69. See *In re J.M.*, 575 S.E.2d 441, 442 (Ga. 2003) (defining consensual sexual intercourse as unforced sex between individuals who are legally capable of consenting); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (averring the First Amendment allows for a citizen to consume any material in the privacy of their home); *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (holding that the government may not prohibit sodomy so long

averred that the right to privacy guaranteed in the Georgia Constitution is more extensive than the right granted in the Constitution of the United States.<sup>70</sup> The Supreme Court of the United States endows each individual in Georgia with the right to satisfy his or her own emotional or physical needs within the privacy of their home without undue governmental interference.<sup>71</sup>

The Supreme Court protects from governmental intrusion, per Georgia constitutional law, that merely possessing and consuming obscene materials in the privacy of one's home is not a punishable offense.<sup>72</sup> So long as individuals view or consume obscene material in private, then the government may not intrude.<sup>73</sup> Similarly, pregnant women who want to obtain an abortion may make the decision to have an abortion in private, away from public scrutiny.<sup>74</sup> Additionally, pregnant women may obtain an abortion conducted in the privacy of a doctor's office, outside the view of public scrutiny.<sup>75</sup> Applying the ruling from *Stanley*, if a woman's decision to obtain an abortion and the procedure itself are both conducted in private, whether the fetus is six-weeks-old or twenty-weeks-old is irrelevant.<sup>76</sup> Given that physicians perform abortions in a private office or clinic outside of public view, *Stanley's* holding controls.<sup>77</sup>

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as it is done in private and is consensual); *In re J.M.*, 575 S.E.2d at 441-42 (stating that sexual intercourse between two consenting people in private is not a violation of the fornication statute).

70. See *Powell*, 510 S.E.2d at 21-22 (describing how the right to privacy originated in Georgia Courts and the state's robust jurisprudence surrounding the right to privacy).

71. See generally *Stanley*, 394 U.S. at 565-66 (confirming that the state may not control the content of a persons' thoughts or the contents of her library).

72. See *id.* at 566 (acknowledging that the state cannot punish or control an individual based upon their private thoughts).

73. Compare *Roth v. United States*, 354 U.S. 476, 492-94 (1957) (declaring that the First Amendment does not protect those who violate an obscenity statute by publicly distributing obscene materials to unwilling viewers), with *Stanley*, 394 U.S. at 564 (identifying that the possession of obscene material does not violate an obscenity statute if it was viewed and consumed privately in the home).

74. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (concluding that the right to personal privacy extends to a woman's decision to have an abortion, but this right is not unlimited).

75. See e.g. *Brown v. Ginnett Emergency Specialists, P.C.*, No. 10EV010234Y, 2010 Ga. State LEXIS 341, at \*15 (Sept. 7, 2010) (concluding that medical privacy rights are in place to protect the patient from unwanted outside scrutiny).

76. See *Stanley*, 394 U.S. at 567 (stating that private consumption of obscene material will not extend to the public).

77. Cf. *Thornburgh v. American College of Obstetricians & Gynecology*, 476 U.S. 747, 762 (1986) (stating that doctors' appointments performing an abortion procedure are protected by privacy and confidentiality).

Applying *In re J.M.* and *Powell v. State* to the LIFE Act and Georgia's right to privacy with respect to sexual acts and encounters, the legislation's enactment is unconstitutional.<sup>78</sup> Georgia enshrouds with privacy protection the act of consensual sex, if unforced in a private space between those who are legally capable of consenting.<sup>79</sup> Sexual intercourse is naturally one of the most intimate and private activities—this private affair must be free from government intrusion because it is of no legitimate concern to the public.<sup>80</sup> There is no compelling state interest to prevent sexual intercourse in private.<sup>81</sup> The law protects private sexual intercourse that results in pregnancy, planned or otherwise, from governmental intrusion as there is no legitimate interest to intrude on family planning.<sup>82</sup>

When a woman becomes pregnant, she often does not know that she is pregnant until well after the gestational age the LIFE Act defines.<sup>83</sup> Privacy rights protect the private decision that the woman and her partner make to keep the child, as it was the act of private sexual intercourse that led to the pregnancy.<sup>84</sup> However, the LIFE Act removes from Georgia's citizens the private decision to obtain an abortion post-heartbeat detection.<sup>85</sup> The Georgia Court in *In re J.M.* alluded to the state having a compelling interest

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78. See *In re J.M.*, 575 S.E.2d 441, 444 (Ga. 2003) (holding that there is an insufficient state interest to regulate private, unforced sexual conduct of persons who can legally consent that may overcome the right to privacy); *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) (adjudicating that sexual encounters in private between legally consenting people is embraced by the right to personal liberty and is thus free from governmental interference).

79. See *Powell*, 510 S.E.2d at 24 (ascertaining that there is no other activity more reasonably deserving of privacy than sexual activity).

80. Cf. *In re J.M.*, 575 S.E.2d at 442-43 (stating that right to privacy protects sexual activities and should allow individuals to be let alone to participate in those activities).

81. See *id.* at 444 (espousing that there is an insufficient government interest in regulating private, sexual conduct).

82. See *Eisendstadt v. Baird*, 405 U.S. 438, 453 (stating that if the right to privacy is to mean anything it is to disallow the government from intruding on a married or unmarried couples' decision to bear and beget a child).

83. See LIFE Act, H.B. 481, 154th Leg. (Ga. 2019); Jordan Dahme, *Heartbeat Bans and Gonzales: How the Door was Opened for a New Era of Anti-Abortion Legislation*, 25 TEMP. POL. & CIV. RTS. L. REV. 51, 58 (2016) (noting that the detection of a fetal heartbeat may occur as early as six weeks into gestation, often before a woman knows that she is pregnant).

84. See *Skinner v. Oklahoma*, 313 U.S. 535, 541 (1942) (holding that the right to procreate is a fundamental right afforded to all individuals); see also *Powell*, 510 S.E.2d at 24 (protecting the right to have sex privately without governmental regulation).

85. See Ga. H.B. 481 (prohibiting any abortion procedure to be performed post fetal heartbeat detection with three strict exceptions).

in shielding the public from the intimacies of others by intruding upon consensual sexual acts.<sup>86</sup> However, the state may not exercise control over these intimate acts and decisions, whether sexual or involving an abortion, that are inherently private and personal.<sup>87</sup>

The LIFE Act's mandate that a woman may not receive an abortion in the case of incest or rape, unless she files an official police report, also violates the right to privacy.<sup>88</sup> Georgia courts routinely recognize that sexual acts are a private matter, thus protecting these acts from unwarranted governmental interference.<sup>89</sup> Rape and incest are both acts of sexual violence and intimately affect the physical, emotional and mental state of survivors.<sup>90</sup> Georgia consistently grants its citizens the right to be let alone to make their own decisions without intrusion from the state, including the right to disclose rape or incest.<sup>91</sup> The LIFE Act provision denies women the right to choose not to disclose their rape or incest.<sup>92</sup> If a woman decides not to disclose her rape or incest to law enforcement—for a myriad of reasons—she must follow

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86. See *In re J.M.*, 575 S.E.2d at 444 (finding that shielding the public from the intimacies of others is irrelevant if these intimacies are conducted in private).

87. See *id.* (reiterating that privacy protects lawful, consensual sexual activities that take place in private).

88. See GA. H.B. 481 (mandating that if the gestational age of an unborn fetus is twenty weeks or less and the pregnancy is a result of rape or incest then an abortion is permissible past heartbeat detection if the mother filed an official police report alleging the rape or incest).

89. See *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) (holding that private sodomy and other sexual activities between those who consent are protected by right to privacy and are free from unwarranted governmental intrusion); *In re J.M.*, 575 S.E.2d at 442-43 (underscoring that right to privacy protects private intimate activities and are free from the unwanted scrutiny by the government and the public); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (confirming that the state may not control the contents of a person's private thoughts and experiences); *Cf. Ambles v. State*, 383 S.E.2d 555, 557-58 (Ga. 1989) (identifying that privacy is a fundamental right).

90. See Complaint at 27, *SisterSong v. Kemp*, (N.D. Ga. 2019) (No. 1:19-mi-99999-UNA) (enumerating that many survivors of rape or incest are unable to file a police report for fear of violent retaliation); see also *Currington v. State*, 606 S.E.2d 619, 622 (Ga. Ct. App. 2004) (showcasing evidence that a survivor of rape may suffer emotional and mental pain as a result of his or her rape). See generally *Doe v. Bd. Of Regents of the Univ. Sys. of Ga.*, 452 S.E.2d 776, 781 (Ga. Ct. App. 1994) (explaining that the purpose of the confidentiality statute for rape survivors is to help victims cope with their trauma and encourage rape reporting).

91. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70-71 (Ga. 1905) (advocating that the right to privacy exists and a Georgia citizen in his or her home is entitled to protection against unwanted scrutiny by either the public or government).

92. See *id.*

through with the pregnancy.<sup>93</sup> After *Pavesich*, the seminal right to privacy case, Georgia regularly endows its citizens with the ability to keep their own personal information private; the LIFE Act provision denies women this right by requiring disclosure of rape or incest in order to obtain an abortion procedure post-heartbeat detection.<sup>94</sup> Georgia has continually given deferential right to privacy treatment to consensual private sexual acts.<sup>95</sup> However, Georgia courts do not apply the same right to privacy deference to the private decisions and acts that would allow for a woman to terminate her pregnancy.<sup>96</sup> There is a right to privacy nexus between the private act that creates a pregnancy and that which terminates the pregnancy.<sup>97</sup> Applying the right to privacy tests from the relevant jurisprudence to the provisions in the LIFE Act shows that the act violates the Georgia Constitution on its face and is thus invalid.<sup>98</sup>

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93. See Ga. H.B. 481 (stating the need for an official police report); see also Complaint at 27 (explaining many women are unable to file a police report within the timeframe set out by the LIFE Act and for fear of reliving the trauma by or possible retribution by their rapist).

94. See *Pavesich*, 50 S.E. at 78 (maintaining that the right to be let alone derives from exercising the personal right to use one's property as one wishes and is afforded protection from unwanted scrutiny from the public).

95. See *Powell v. State*, 510 S.E.2d 18, 23-24 (holding that legislation that prohibits a specific sexual act does not provide for any public benefit and that private, consensual sexual activity is highly deserving of the right to privacy protection); *Stanley v. Georgia*, 394 U.S. 557, 566-67 (1969) (declaring that Georgia does not have a legitimate interest in monitoring less than desirable thoughts and the consumption obscene materials if they are used by an individual in private); *In re J.M.*, 575 S.E.2d at 442-443 (Ga. 2003) (averring that the state does not have a legitimate interest in criminalizing private, consensual sex per the implied right to privacy in the Georgia Constitution).

96. See Ga. H.B. 481 (prohibiting any woman to obtain an abortion after a fetal heartbeat is detectable and granting citizenship rights to an unborn fetus).

97. See *Eisenstadt v. Baird*, 405 U.S. 438, 488 (1972) (identifying that the decision of whether to have a child is not to be subject to government interference as this decision is protected by the right to privacy).

98. Compare Ga. H.B. 481 (criminalizing abortion after cardiac activity is detected in a fetus except in three narrow circumstances where post-fetal heartbeat abortion is permissible), with *In re J.M.*, 575 S.E.2d at 442-43 (asserting that Georgia legislation may not criminalize private, consensual sexual acts between those who are legally able to consent to those acts); compare *Powell*, 510 S.E.2d at 24 (finding that consensual sexual activity is most deserving to be given right to privacy protection from unwarranted governmental intrusion and regulation), with Ga. H.B. 481 (prohibiting women from having an abortion procedure after a fetal heartbeat is detected unless in the case of rape, incest, or medical emergency).



2. *Georgia Courts Routinely Apply the Right to Privacy to Medical Records and Therefore the LIFE Act Must Receive the Same Right to Privacy Treatment Because the LIFE Act Implicates the Release of Medical Records.*

Georgia courts have regularly afforded right to privacy protections as they relate to the distribution and publication of medical records to third parties.<sup>99</sup> The LIFE Act provision requiring the reporting of medical records and the current location of a woman who receives an abortion to either the district attorney of where the abortion is performed, or where the woman receiving the procedure resides, directly violates the privacy protection afforded to Georgia citizens with respect to medical records.<sup>100</sup> The right to privacy, alongside the Georgia constitution, protects any medical records containing past and current procedures, conditions, and general health data from unnecessary distribution to third parties.<sup>101</sup>

Applying the reasoning the Georgia Court used in *King v. State*, the LIFE Act provision forcing women to report the abortion procedure to the relevant district attorney violates Georgia's fundamental right to privacy.<sup>102</sup> Because Georgia recognizes a broader interpretation of the right to privacy than the United States Constitution, the right to privacy encompasses personal health records.<sup>103</sup> The LIFE Act requires disclosure of a woman's health records to the appropriate district attorney, even when a physician performs an abortion

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99. See *King v. State*, 535 S.E.2d 492, 495 (Ga. 2000) (maintaining that a patient has a reasonable expectation that the private data pertaining to the state her body is to remain private and may not be disclosed to a third party without a patient's consent); *Multimedia Wmaz v. Kubach*, 443 S.E.2d 491, 493-94 (Ga. Ct. App. 1994) (emphasizing that privacy is not waived when a person discloses her medical conditions to family and friends).

100. See Ga. H.B. 481 (providing that a woman may have access to an abortion if the pregnancy was a result of rape or incest if the medical records are made available to public officials); *King*, 535 S.E.2d at 495 (averring that the distribution of a person's private medical records may not be distributed unless there is a pending criminal action against that person requiring the disclosure of those records).

101. See *King*, 535 S.E.2d at 496 (holding that the constitutional right to privacy prohibits any initial unauthorized disclosure of medical records to anyone).

102. Compare *King*, 535 S.E.2d at 495 (applying the right to privacy to medical records so long as they are not needed per another Georgia law, specifically where there is a compelling interest), with Ga. H.B. 481 (requiring that an abortion procedure performed in the case of incest or rape be reported to the district attorney without a compelling need on part of the state to have this information).

103. See *King*, 535 S.E.2d at 495 (reiterating that the right to privacy in Georgia is more extensive than granted by the U.S. Constitution and as such, that right extends to medical records).

before detecting a heartbeat, thus violating Georgia's privacy protection of health records from third party disclosure.<sup>104</sup>

Upon application of the right to privacy tests from publication of medical records jurisprudence to the provisions from the LIFE Act, the act violates the Georgia Constitution on its face and is thus invalid.<sup>105</sup>

*3. Georgia Courts Routinely Apply the Right to Privacy to Family Life Matters and Therefore the LIFE Act Must Receive the Same Right to Privacy Treatment Because the LIFE Act Implicates Family Life and Decision-Making.*

Georgia courts consistently apply the right to privacy in matters concerning family life, including: parental decision-making and visitation rights of extended family.<sup>106</sup> The LIFE Act prohibits a woman from deciding whether or not to start a family.<sup>107</sup> Georgia courts have denounced state interference with the parental right to familial relations.<sup>108</sup> The LIFE Act infringes upon a potential parents' right to privacy of raising a child in a way she sees fit.<sup>109</sup>

Georgia courts have invalidated statutes that blatantly curtail a parent's

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104. See Ga. H.B. 481 (requiring for automatic disclosure of health records regardless of whether the abortion is performed within the viability period); see e.g. *King*, 535 S.E.2d at 496 (explaining that state interference with the right to privacy must avoid subjecting Georgia citizens to undue oppressiveness).

105. Compare *King*, 535 S.E.2d at 495 (emphasizing that right to privacy deference extends to the unwarranted distribution of medical records), with Ga. H.B. 481 (mandating an automatic disclosure of complete medical records of a woman obtaining an abortion procedure to the local district attorney regardless of whether the abortion was performed before fetus heartbeat detection).

106. See *Brooks v. Parkerson*, 454 S.E.2d 769, 771 (Ga. 1995) (concluding that parents have a constitutional interest to raise their children without undue state interference); *Borgers v. Borgers*, 820 S.E.2d 474, 480 (Ga. Ct. App. 2018) (opining that a parent's natural right to familial relations is protected under the right to privacy); see also *In re L.H.R.*, 321 S.E.2d 716, 722 (Ga. 1984) (recognizing that there is a presumption that parents possess what a child lacks in making decisions for the child).

107. See Ga. H.B. 481 (denying an abortion procedure to be performed after cardiac activity of the fetus is detected).

108. See *Borgers*, 820 S.E.2d at 480 (recognizing that Georgia courts have repeatedly safeguarded a parent's right to raise his or her child in a manner of their choosing).

109. See Ga. H.B. 481 (providing that an unborn fetus with a heartbeat is a natural person who should be treated and afforded the rights of a born child); see also *Complaint at 27, SisterSong v. Kemp*, (N.D. Ga. 2019) (No. 1:19-mi-99999-UNA) (explaining that the LIFE Act could force women to carry a child to term and parent this child against her will).

decision to raise their child as they wish.<sup>110</sup> Family autonomy is a cherished value in Georgia courts.<sup>111</sup> Applying the Georgia court's precedent invalidating statutes covering familial decisions to the LIFE Act's provisions encompassing the decision to become a parent, the act is unconstitutional because it impinges upon the right of a family to make their own decisions.<sup>112</sup> Choosing to have or not have a child is a parental decision in itself.<sup>113</sup> If the Georgia courts apply its case precedent of parental right to privacy to make their own decisions on how to parent, then it would be unconstitutional to prohibit a pregnant woman from making the decision of whether she is willing and able to become a parent.<sup>114</sup>

*B. Georgia Courts Should Evaluate the LIFE Act with its Own Right to Privacy Deference Because Iowa, a State That Has Like Deference to the Right to Privacy and Bodily Autonomy, Blocked an Iowa Fetal Heartbeat Bill Identical to Georgia's LIFE Act Using Privacy Deference*

Both Georgia and Iowa passed almost identical fetal heartbeat statutes through their respective Republican-controlled state legislatures.<sup>115</sup> Additionally, Georgia and Iowa courts afford great deference to the right to make personal private decisions and maintain bodily autonomy and integrity.<sup>116</sup> Iowa used its state constitution to strike down a heartbeat bill

110. See *Brooks*, 454 S.E.2d at 772 (concluding that the parental right to control one's child is protected by the Georgia constitutional right to privacy).

111. See *Maddox v. Queen*, 257 S.E.2d 918, 921 (Ga. Ct. App. 1972) (Deen, C.J., concurring) (enumerating that there is an established fundamental right to privacy for those decisions surrounding the family unit); see also *State v. Jackson*, 496 S.E.2d 912, 916 (Ga. 1998) (affirming that there is a fundamental liberty interest in the privacy and integrity of family units and that parents have supreme interests in the care of their children).

112. Compare *Jackson*, 496 S.E.2d at 916 (establishing that there is a fundamental interest of an individual making decisions for his or her own family), with Ga. H.B. 481 (disallowing women to decide when to begin a family or become a parent by prohibiting abortion procedures after six weeks).

113. See *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (ascertaining that it would be unreasonable for a state to implement a law that punishes a single person for sexual intercourse by forcing that person to carry an unwanted child).

114. Compare *Brooks v. Parkerson*, 454 S.E.2d 769, (Ga. 1995) (striking down a grandparent visitation statute that infringed upon a parents right to make private familial decisions), with Ga. H.B. 481 (excluding the right for a woman to choose when to become a parent after a fetal heartbeat has been detected).

115. Compare Ga. H.B. 481 (prohibiting abortion procedures after a fetal heartbeat is detected), with Senate File 359, Iowa Code §§ 146C.1-146C.2 (2018) (prohibiting abortion procedures after a fetal heartbeat has been detected).

116. Compare *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 194-195 (1905)

using the constitutionally-protected fundamental rights to privacy, personal decision-making, and bodily autonomy.<sup>117</sup> When Georgia, having similar state constitutional precedent to Iowa, applies its like deference to the right of privacy and bodily integrity, it will find the LIFE Act unconstitutional.<sup>118</sup>

Bodily autonomy and dignity are central to the fundamental right to privacy, and both Iowa and Georgia state constitutions and courts fiercely guard it.<sup>119</sup> When finding the fetal heartbeat ban unconstitutional under the Iowa state constitution, the Iowa Court referred to and used a similar court decision on abortion laws as Georgia.<sup>120</sup> If Georgia courts not only applied their own jurisprudence surrounding the right to privacy to the LIFE Act, but also considered other states that have like deference to the right to privacy that found their own fetal heartbeat statutes unconstitutional, then the Georgia Supreme Court would find that the LIFE Act is unconstitutional on its face.<sup>121</sup>

The fundamental right to privacy protects profoundly personal decisions regarding childbearing, family, and procreation.<sup>122</sup> Parenthood and the

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(establishing that Georgians are entitled to the right to privacy), *with* *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 235, 245 (Iowa 2018) (acknowledging that the right to have an abortion is not deeply rooted in Iowa's state constitution, but the right to make private personal decisions for one's own bodily integrity is fundamental), *and* *McQuiston v. City of Clinton*, 872 N.W.2d 817, 832 (Iowa 2015) (establishing that Iowans have the right to make personal private decisions about family, procreation, and childrearing without unwarranted governmental intrusion).

117. *Cf. Reynolds*, 915 N.W.2d at 236 (underscoring that Iowa constitutional doctrines, such as the right to privacy and the right to make personal decisions, are not static but recursive issues evolving with society).

118. *See Pavesich*, 122 Ga. at 194 (finding that the right to privacy is a fundamental right derived from natural law principles and applies to all Georgia citizens).

119. *Compare Reynolds*, 915 N.W.2d at 237 (recognizing that the right to privacy and the right to make one's own decisions without unwarranted governmental intrusion is implicitly afforded to women when faced with the decision of whether to terminate a pregnancy), *with Pavesich*, 122 Ga. at 194-195 (establishing that the right to privacy, the right to uninterrupted quiet enjoyment of one's life, and the right to control one's own body are immutable).

120. *See Reynolds*, 915 N.W. at 240 (finding that a woman's choice to terminate her own pregnancy is an inherently intimate decision that may not be infringed upon unnecessarily by the government).

121. *Compare id.* at 245 (invalidating the Iowa Fetal Heartbeat Act under the Iowa state constitution and using other state decisions to proffer its conclusion), *with Powell v. State*, 510 S.E. 2d 18, 23-24 (holding that private sexual intercourse that is consensual is protected by the fundamental right to privacy and beyond the bounds of governmental regulation), *and The LIFE Act*, H.B. 481, 154th Leg. (2019) (mandating that women may not have an abortion after a fetal heartbeat is detected).

122. *Compare McQuiston v. City of Clinton*, 872 N.W.2d 817, 832 (Iowa 2015)

decision to procreate is more than a biological function but also proffers moral and legal responsibilities on potential parents to provide for his or her child.<sup>123</sup> While privacy in familial decisions is not an absolute entitlement to secrecy, it is more so the recognition that the state is incapable of assessing whether each person who may seek an abortion is ready to assume the many obligations and responsibilities that come with parenthood.<sup>124</sup> The LIFE Act rescinds a woman's right to make her own personal decision of deciding when to become a parent. It also infringes upon the privacy tests from both the Iowa decision to invalidate a fetal heartbeat statute and the like Georgia jurisprudence protecting the right to privacy in familial and parenthood matters, and thus should be found unconstitutional and invalid.<sup>125</sup>

### III. POLICY RECOMMENDATION

It is inherently dangerous to restrict abortion to the extent that it forces a woman to maintain a pregnancy and carry a child to term.<sup>126</sup> Abortion is a

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(holding that there are substantive due process protections including the right to privacy surrounding procreation and family in Iowa), *with Brooks v. Parkerson*, 454 S.E.2d 769, 772 (Ga. 1995) (concluding that privacy interests enable parents to maintain a high degree of discretion when making personal decisions for their families).

123. See *Reynolds*, 915 N.W.2d at 237 (finding that women have the right to privately determine whether they are capable of making the life-altering decision to carry a child to term and this decision can be made without state interference because the state is unable to adequately assess if each individual woman is capable of becoming a parent); *Borgers v. Borgers*, 820 S.E.2d 474, 482 (Ga. App. Ct. 2018) (Dillard, C.J. concurring) (averring that the constitutional right to private familial relations is not provided by the government but rather predates the government, and therefore, the government may not intrude unduly in private familial matters without a compelling interest).

124. See *Reynolds*, 915 N.W.2d at 237 (averring that decisions of personal magnitude like deciding whether to procreate and become a parent is a fundamentally private decision that is best assessed by the person considering becoming a parent rather than the state government).

125. See Ga. H.B. 481 (disallowing women to choose exactly when and in what manner to begin a family if a fetal heartbeat is detectable); *Reynolds*, 915 N.W.2d at 234 (underscoring that privacy protections surrounding personal decisions about family, procreation and child rearing are embodied in the Iowa state constitution); *Brooks*, 454 S.E.2d at 772 (stating that a parents' right to rear children without state interference is a protected privacy interest that is protected by the Georgia state constitution).

126. See Complaint at 24-25, *SisterSong v. Kemp*, (N.D. Ga. 2019) (No. 1:19-mi-99999-UNA) (advancing that a woman's risk of death associated with child birth is fourteen times higher than that associated with a legal abortion); American Health Rankings, United Health Found., *Maternal Mortality* (2019), [https://www.americanhealthrankings.org/explore/health-of-women-and-children/measure/maternal\\_mortality](https://www.americanhealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality) (analyzing Center of Disease Control Data from 2011-2015 that demonstrates the risk of maternal mortality and other pregnancy-related deaths is on the rise throughout

safe medical procedure and carrying a child to term could pose greater risks to a woman's health as the pregnancy progresses.<sup>127</sup> If the LIFE Act is found to be constitutional, the sustainability of abortion clinics and providers in Georgia would be jeopardized because of the reduction of women qualifying for an abortion.<sup>128</sup> Women who are unable to obtain an abortion, because they surpassed the viability period, or left her rape or incest unreported, would have to travel out of state.<sup>129</sup> If the LIFE Act is found constitutional by the Georgia Court, women in Georgia will lose access to abortion providers and will be unable to make the private decision of whether to have a child.<sup>130</sup>

If the LIFE Act is found to be valid under the Georgia Constitution, the Georgia state government must take affirmative steps to improve access to healthcare for women and better its foster care system if pregnant women must now carry their children to term.<sup>131</sup> Women in Georgia face one of the

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the United States); Ga. Dep't Pub. Health, Maternal Mortality Review Comm., *Maternal Mortality Report 2014* (March 2019) at 11, [https://dph.georgia.gov/sites/dph.georgia.gov/files/related\\_files/site\\_page/Georgia%20Maternal%20Mortality%20Report%202014.pdf](https://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/site_page/Georgia%20Maternal%20Mortality%20Report%202014.pdf) (identifying that Black women in Georgia are over three times more likely to experience pregnancy-related complications that result in death).

127. See Alison Kodjak, *Landmark Report Concludes Abortion in U.S. is Safe*, NPR: PUBLIC HEALTH (Mar. 16, 2018, 11:00 A.M.), <https://www.npr.org/sections/health-shots/2018/03/16/593447727/landmark-report-concludes-abortion-is-safe> (profiling National Academies of Sciences, Engineering, and Medicines study on four methods of abortion procedures and finding that abortion provided in the U.S. are safe and effective with complications being a rare occurrence).

128. See Complaint at 33, *Sistersong v. Kemp* (explaining that those with clinics will have to turn potential patients away if they do not comply fully with H.B. 481); Ben Nadler & Sanya Mansoor, *Georgia Governor Signs Restrictive 'Heartbeat' Abortion Ban*, AP NEWS (May 7, 2019) (underscoring that the few clinics that serve Georgian women will be subject to closure and will further push licensed doctors who perform abortion procedures from practicing in Georgia, leading to a potential decrease in overall maternal care and increase in prenatal death).

129. See Gray Chapman, *Who Stands to Lose the Most Under Georgia's Anti-Abortion Bill?*, ATLANTA MAGAZINE: NEWS & OPINION (Mar. 20, 2019), <https://www.atlantamagazine.com/news-culture-articles/who-stands-to-lose-the-most-under-georgias-anti-abortion-bill/> (highlighting that women who live in rural areas may lose the nearest abortion clinic, and thus, be forced to travel out of state to receive an abortion procedure).

130. See e.g. Complaint at 7, 21, *Sistersong v. Kemp* (explaining that the LIFE Act will divert the scarce resources abortion clinics have from providing abortions forcing them to shut down and effectively eliminate Georgia women's ability to access abortion in her state).

131. See Ariel Hart, *Georgia Maternal Death Rate, Once Ranked Worst in U.S., Worse Now*, ATLANTA JOURNAL-CONSTITUTION: POLITICS (Sept. 28, 2018),

highest risks of pregnancy-related deaths in the nation—over fifty-percent of these deaths were preventable with adequate healthcare services.<sup>132</sup> The LIFE Act provides a viable fetus to the same care as that of any other Georgia citizen; thus, it requires that the fetus have access to adequate healthcare.<sup>133</sup> Therefore, if Georgia requires a woman to carry a child to term upon viability and affords it the same rights of a natural person, then improved healthcare is necessary.<sup>134</sup>

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<https://www.ajc.com/news/state--regional-govt--politics/georgia-maternal-death-rate-once-ranked-worst-worse-now/qG8xWYMufowW2OEiiZNDRmM/> (explaining that maternal deaths in the U.S. are highest in Georgia due to public health care providers missing the warning signs of hemorrhage, hypertension, seizure and depression that can be brought on during pregnancy); *Georgia: 2016 Health of Women and Children Report*, AMERICAN HEALTH RANKINGS (2016), <https://www.americashealthrankings.org/learn/reports/2016-health-of-women-and-children-report/state-summaries-georgia> (finding that women's healthcare is ranked forty-fourth in the U.S. and infants' healthcare is ranked forty-eighth in the U.S.); Mitch Jaugstetter, *Georgia Faces Massive Foster Care Crisis as Number of Kids Needing Homes Surges*, THE TELEGRAPH (Jun. 29, 2018, 7:49 PM), <https://www.macon.com/news/local/article212960864.html> (reporting a sixty percent increase from 2014-2018 of children in foster care, and that the number of foster homes statewide falls short of the growing need); *Demographics of Children in Foster Care*, GEORGIA: DIVISION OF FAMILY & CHILDREN SERVICES (2019), <http://fostergeorgia.com/demographics-of-children-in-foster-care/> (noting that Black children and White children make up the majority of the fifteen thousand children in Georgia foster care as of May 2019).

132. See *Georgia: 2016 Health of Women and Children Report*, AMERICAN HEALTH RANKINGS (finding that Georgia women face the highest risk of pregnancy-related deaths in the country and the state Department of Public Health should act to reduce this statistic).

133. See Ga. H.B. 481 (proclaiming that an unborn fetus with a heartbeat is a natural person who is guaranteed the rights of any 'born' natural person and is considered a part of the Georgia population).

134. See Ga. H.B. 481 (granting the same rights and privileges to an unborn fetus as any other infant outside of the womb and affords the fetus the right to be treated as an individual and separate patient from its mother); The Editorial Board, *Georgia Abortion Bill Would Hurt State's Health Economy*, THE EMORY WHEEL (Apr. 1, 2019), <https://emorywheel.com/georgia-abortion-bill-would-damage-states-health-economy/> (identifying that forty percent of counties in Georgia do not have access to pediatricians in 2018 and almost half of counties did not have OB-GYNs. Further, Georgia's healthcare crisis affects the most vulnerable: pregnant women, infants, and children); Hart, *Georgia Maternal Death Rate, Once Ranked Worst in U.S., Worse Now* (identifying that the lack of quality and competence demonstrated in healthcare for pregnant in Georgia has led to many infant and maternal deaths that are otherwise preventable. Calling for an increase in pregnancy-related healthcare spending to combat the maternal mortality crisis in Georgia).

## CONCLUSION

The language of the LIFE Act reverses the plethora of privacy jurisprudence that has been repeatedly afforded to Georgia citizens for over a century.<sup>135</sup> The Act disallows Georgia women from keeping their intimate decisions regarding when they wish to bear and parent a child private.<sup>136</sup> It further requires that a woman disclose her rape or incest before she is able to receive an abortion, and failure to disclose the incident forces a woman to carry the child to term against her will, destroying her ability to choose when to become a parent.<sup>137</sup>

The LIFE Act significantly limits Georgia women's right to privacy by placing obstacles to accessing abortion procedures, and the narrow exceptions the LIFE Act provides offer women little ability to circumvent those obstacles.<sup>138</sup> Moreover, the LIFE Act violates the Georgia state constitution and substantially infringes upon Georgia's fundamental right to privacy.<sup>139</sup>

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135. See *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 194 (1905); *King v. State*, 535 S.E.2d 492, 495 (Ga. 2000) (establishing that the right to privacy is a fundamental right derived from real property rights, but it is not without its limits if it impinges upon First Amendment freedoms); *Powell v. State*, 510 S.E.2d 18, 23 (1998) (mandating that Georgia may not pass legislation that prohibits individuals from participating in certain sexual acts when those acts are private and consensual); *Borgers v. Borgers*, 820 S.E.2d 474, 480 (Ga. App. Ct. 2018) (explaining that parents maintain sole discretion to raise their children and may not be subjected to undue governmental intrusions).

136. See Ga. H.B. 481 (promulgating the rule that to get an abortion post-viability in the case of rape or incest, a woman must officially file a report to the police before being able to obtain an abortion procedure).

137. Compare Ga. H.B. 481 (mandating that women may obtain an abortion so long as she reports her rape or incest to the police) with *Borgers*, 820 S.E.2d at 480 (allowing parents to freely bring up their children without undue interference).

138. See Ga. H.B. 481 (mandating that an unborn fetus is considered a natural person at the time of heartbeat detection and women are prohibited from obtaining an abortion post detection unless they are able to qualify for one of the three exceptions).

139. See GA. CONST. OF 1983, Art. I, § I, Para. I. (enumerating that all Georgia citizens may not be deprived of life, liberty, or property without due process of law); *Pavesich*, 122 Ga. at 194-195 (declaring that there is a fundamental right to privacy that is derived from natural law and entitles a person to quiet enjoyment of his or her life).