No. S25A0300

In the Supreme Court of Georgia

STATE OF GEORGIA,
Appellant,

v.

SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, et al.,
Appellees.

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

Hon. Robert C. I. McBurney, Presiding

BRIEF OF THE RAINBOW PRO-LIFE ALLIANCE & SECULAR PRO-LIFE AS AMICI CURIAE IN SUPPORT OF APPELLANT

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INTRODUCTION

Justice Ellington has noted that in evaluating the constitutionality of Georgia's Living Infants Fairness and Equality (LIFE) Act, this Court must "grapple with Georgia's historical recognition of a liberty interest, often shorthanded as 'a right to privacy,' to be let alone to live according to one's own preferences, subject only to such restraints as are

necessary for the common welfare."[1] The right to privacy protects the liberty of competent people to engage in private, consensual acts that do not harm others. However, it allows for the General Assembly to prohibit acts it reasonably considers harmful to others. Georgia's right to privacy has always existed alongside limits on abortion like those found in the Living Infants Fairness and Equality (LIFE) Act.

INTEREST OF AMICI CURIAE

The Rainbow Pro-Life Alliance (RPLA) is a nonsectarian, nonpartisan, educational organization that promotes the pro-life ethic within the LGBT+ community while encouraging involvement within the pro-life community. RPLA's particular emphasis is on the unborn and the needs of their parents. RPLA promotes collaboration within the pro-life movement. Neither pregnant people, their co-parents, nor their offspring are property of the state or to another. Liberty must belong to them all.

Secular Pro-Life's mission is to:

(1) Advance secular arguments against abortion;

(2) Create space for atheists, agnostics, and other secularists interested in anti-abortion work; and

[1] *State v. SisterSong Women of Color Reprod. Just. Collective*, 317 Ga. 528, 560 (2023) (Ellington, J., dissenting).

(3) Build interfaith coalitions of people interested in advancing secular arguments.

Secular Pro-Life envisions a world in which (1) people of all faith traditions, political philosophies, socioeconomic statuses, sexualities, races, and age groups oppose abortion; (2) men and women have and embrace control over whether they conceive children; and (3) society fully supports expectant parents, growing families, and children born and unborn.

VIEWS OF AMICI CURIAE

1. The right to privacy protects competent people's liberty to engage in private, consensual acts that do not harm others.

Georgia's right to privacy protects the liberty of competent people to engage in private, consensual acts that do not harm others. It pre-dates the past three state constitutions.[2] This Court's earliest decision specifically recognizing the right to privacy is *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190 (1905). The right had never before been articulated definitively by an American court of last resort.[3] *Pavesich* relied on an influential 1890 article setting forth a right to privacy, written by Samuel D. Warren and future U.S. Supreme Court justice Lewis D. Brandeis. *See id.* at 206 (referencing Samuel D. Warren &

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[2] *See* GA. CONST. OF 1983; GA. CONST. OF 1976; GA. CONST. OF 1945.

[3] *See Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 682 (1957).

Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)). Warren and Brandeis distinguished between privacy rights and harm to others. They based their understanding of the right to privacy on the common law's respect for every person's "full protection in person and in property."[4] Before even discussing privacy, they noted the common law "right to life" and its protection of every person from battery.[5] Only then did Warren and Brandeis argue that the law also recognized "the right to be let alone" and to develop one's intellectual and emotional life.[6] They characterized this right to privacy as self-ownership.[7]

Their idea was developed more fully in *Pavesich*. *Pavesich* did not understand itself to be revolutionizing the law. It characterized the right to privacy as being both derived from natural law and recognized in precedent.[8] *Pavesich* found basis for the right to privacy in "the instincts of nature," in every person's recognition that "there are

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[4] Warren & Brandeis, *supra*, at 193.

[5] *Id.*

[6] *See id.* at 195.

[7] *See id.* at 205.

[8] *See* 122 Ga. at 195. "It was not extraordinary" at the time for Georgia courts to look to natural law in discerning what unenumerated rights merited judicial protection. Anita L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187, 1198 (2012).

matters private and there are matters public."[9] *Pavesich*'s right to privacy shielded what is "purely private."[10]

Such protection supplemented—without contradicting—the right to life. Without protection for privacy, this Court held, the right to life would be impaired.[11] The law protects "something more than the mere right to breathe and exist"; although "the most flagrant violation" of the right to life would be its "deprivation," the right to privacy guarantees a right to a fuller life.[12] It ensures for each person "a right to enjoy life in any way that may be most agreeable and pleasant to him," to "live as one will," as long as the exercise of that freedom "does not invade the rights of his neighbor or violate public law or policy."[13]

Harm to others was the right to privacy's boundary line for *Pavesich*.[14] Its content: a wide range of liberty for activities affecting only competent, willing people.[15] That line has hardly moved in the

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[9] *Pavesich*, 122 Ga. at 194.

[10] *Id.*

[11] *Id.* at 195.

[12] *Id.*

[13] *Id.*

[14] *See id.* at 197 (referring to assaults and physical restraints upon others as being beyond the right's protection).

[15] *See Christensen v. State*, 266 Ga. 474, 481 (1996) (Sears, J., dissenting) ("[A] citizen's private conduct is constitutionally protected

century-plus of precedent that has followed.[16] *Pavesich* itself held that the right to privacy protected image and likeness rights from non-consensual commercial use.[17] In 1982, this Court held that the right to privacy allowed a prisoner to refuse medical treatment, later holding that this right belongs also to patients being kept alive through artificial respiration.[18] Four years later, the Court exempted private

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from intrusion by the State so long as such conduct does not injure another. Put another way, the power of the State to regulate and control the private, consensual, non-commercial conduct of its adult citizens is confined only to those instances where such conduct adversely affects the rights of others."); *cf. id.* at 485 (in obiter dicta) (accepting the constitutionality of "victimless crimes" like drug offenses and seatbelt laws because "the party who becomes injured as a result of breaking those laws often becomes a burden on society"); *Blincoe v. State*, 231 Ga. 886, 887 (1974) (applying rational-basis scrutiny to a right-to-privacy challenge to marijuana laws, but citing only federal precedent).

[16] Framers of the Georgia Constitution of 1983 "made no effort" to alter the right to privacy. Dorothy T. Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 341, 378 (1985).

[17] *See* 122 Ga. at 220.

[18] *See State v. McAfee*, 259 Ga. 579 (1989); *Zant v. Prevatte*, 248 Ga. 832, 834 (1982); *Kirby v. Spivey*, 167 Ga. App. 751, 753 (1983).

information found in government files from open-records laws.[19] In dicta in 2003, this Court suggested that the choice of whether or not to donate one's organs after death is "veiled in the right of privacy."[20] The right to privacy is also a safeguard for parents' rights.[21]

Notably, Georgia's right to privacy also protects non-public sexual activity between competent, consenting people. Not because that right requires absolute individual autonomy for anything related to sexuality or family (as discussed below, it does not).[22] But because "unforced sexual behavior conducted in private" is treated as private by any normal person, as this Court held while invalidating a ban on

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[19] *See Harris v. Cox Enters.*, 256 Ga. 299, 302 (1986); *cf. Multimedia WMAZ, Inc. v. Kubach*, 212 Ga. App. 707 (1994) (en banc) (allowing a suit against a media company for disclosing plaintiff's AIDS diagnosis). *Amici*'s support for the aims of the LIFE Act should not be taken to convey endorsement of O.C.G.A. § 16-12-141 (f).

[20] *Barnhill v. State*, 276 Ga. 155, 156 (2003).

[21] *See In the Interest of M.F.*, 298 Ga. 138 (2015); *State v. Jackson*, 269 Ga. 308 (1998); *Brooks v. Parkerson*, 265 Ga. 189, 192 (1995) (collecting cases); *Borgers v. Borgers*, 347 Ga. App. 640, 647–48 (2018) (Dillard, C.J., concurring fully and specially).

[22] *Cf. Multimedia WMAZ, Inc.*, 212 Ga. App. at 716 (Beasley, P.J., concurring specially) ("*Pavesich* did not describe the right as being scattered in penumbras throughout the guarantees of the bill of rights," as would the later *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

consensual sodomy in its landmark 1998 decision in *Powell v. State*.[23] Indeed, this Court could not "think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private" sexual activity.[24] The fact that *Powell* was driven by privacy as understood by *Pavesich*—not by limitless autonomy in all things sexual—is clear from the limits of its holding.[25] *Powell* acknowledged that the right to privacy

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[23] 270 Ga. 327, 332 (1998). "Sodomy" is used in this brief as a legal term. *See* O.C.G.A. § 16-6-2.

[24] 270 Ga. at 332.

[25] *Cf. Griswold*, 381 U.S. at 485–86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 930 (1973) ("[T]he Court in *Griswold* stressed that it was invalidating only that portion of the Connecticut law that proscribed the use, as opposed to the manufacture, sale, or other distribution of contraceptives. That distinction (which would be silly were the right to contraception being constitutionally enshrined) makes sense if the case is rationalized on the ground that the section of the law whose constitutionality was in issue was such that *its enforcement would have been virtually impossible without* the most outrageous sort of governmental prying into the privacy of the home.").

does *not* protect "sexual activity taking place in public" nor that "performed in exchange for money."[26]

This Court has recognized a broad right to privacy protecting the liberty of competent people. The contexts in which it has been applied range from the use of personal images to whether to accept medical treatment, from how to parent to what consensual sexual activity to undertake. However, as *Pavesich* carefully explained, Georgia's right to privacy has never protected what the General Assembly reasonably deems harm to unwilling others—such as abortion.

2. The right to privacy does not protect what the General Assembly reasonably considers harm to others.

Pavesich insisted that the right to privacy had to "be kept within its proper limits."[27] It could not be an excuse for one to "invade the rights" of others.[28] The government had a role in identifying and establishing these rights—the right to privacy could not become a reason to "violate public law or policy" enacted pursuant to the social contract.[29]

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[26] *Powell*, 270 Ga. at 333; *see also In re J.M.*, 276 Ga. 88, 89 (2003) (reversing delinquency adjudication against a sixteen-year-old for private, consensual, non-commercial sexual activity with a peer).

[27] 122 Ga. at 201.

[28] *Id.* at 195.

[29] *Id.* at 194–95.

No right merited more protection than the right to life, especially against its "deprivation."[30] Indeed, the right to privacy recognized by *Pavesich* was "the complement of the right to the immunity of one's person."[31] The right to privacy protected the right to *self*-ownership, not dominion of one person over another.[32]

Three cases illustrate well the limited extent of Georgia's right to privacy and lawmakers' authority to determine what counts as harm to others. First, in *Jefferson v. Griffin Spalding County Hospital Authority*, this Court held that the government could protect the right to life of an unborn child even though doing so required that the child's mother undergo a surgical procedure over her objection.[33] The mother in that case was "due to begin labor at any moment" and her unborn child was almost certain to die if she had a vaginal delivery, but almost certain to live if delivered by Caesarean section.[34] The mother's life was not at risk, but she believed that "whatever happen[ed] to the child [would] be the Lord's will."[35]

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[30] *Id.* at 196.

[31] *Id.* at 213.

[32] *See id.* at 220.

[33] 247 Ga. 86 (1981) (per curiam).

[34] *See id.* at 88.

[35] *Id.*

The trial court noted that the life of the mother and the child were "inseparable."[36] It deemed it "appropriate to infringe upon the wishes of the mother to the extent . . . necessary to give the child an opportunity to live."[37] It recognized the government's "interest in the life of this unborn, living human being" and found the intrusion upon the mother "outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live."[38] It ordered the mother to undergo a Caesarean section.[39]

This Court summarily denied the mother's motion to stay that order.[40] Concurring, Presiding Justice Hill admitted that before the case arose, he "would have thought" the government's power "to order a competent adult to submit to surgery" to be "nonexistent."[41] He noted precedent protecting the right of competent adults to refuse medical treatment where there is "no state interest other than saving the life of the patient" (precedent Georgia would soon follow).[42] However, because

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[36] *Id.* at 87.

[37] *Id.*

[38] *Id.* at 89.

[39] *See id.*

[40] *See id.*

[41] *Id.* (Hill, P.J., concurring).

[42] *Id.* at 89–90; *see also McAfee*, 259 Ga. 579; *Zant*, 248 Ga. 832; *Kirby*, 167 Ga. App. 751.

"this child was facing almost certain death, and was being deprived of the opportunity to live," he would uphold the "unborn child's right to live."[43] In another concurral, Justice Smith likewise saw the intrusion onto the mother as "extraordinary," but deemed "the state's compelling interest in preserving the life of this fetus" to be "beyond dispute."[44]

The *Jefferson* Court reached this conclusion even though the mother raised both privacy and religious objections to the surgery—and even though the General Assembly had yet to recognize the personhood of

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[43] *Jefferson*, 247 Ga. at 90 (Hill, P.J., concurring).

[44] *Id.* at 91. Whether or not the right to privacy always triggers strict scrutiny is unclear. It does, according to *Powell*. *See* 270 Ga. at 333. But two years before that decision, the Court evaluated a right-to-privacy challenge only based on rational-basis scrutiny. *See Christensen*, 266 Ga. at 476; *id.* at 482 (Sears, J., dissenting) (criticizing the majority). Here, it followed *Blincoe*, 231 Ga. at 887, which upheld a ban on marijuana possession under the right to privacy applying rational-basis scrutiny—but cited only federal precedent for doing so. In *Jefferson*, one of the concurrals noted that there was no alternative way to save the unborn child's life, a consideration relevant to strict scrutiny. *See* 247 Ga. at 91 (Smith, J., concurring). But in *Clark v. Wade*, 273 Ga. 587, 596–98 (2001), discussed below, the Court resolved a privacy challenge by citing the need for a compelling government interest, then proceeding without specific analysis of tailoring (although it did adopt a narrowing construction of the statute at issue).

unborn children as it has through the LIFE Act. This Court saw the protection of the life of "an innocent third party" as a governmental duty so compelling that it overrode not one but two constitutional rights.[45] Where there was no other way to secure a human's right to life, other liberties had to yield. This Court should show similar respect for the General Assembly's determination that most unborn children are entitled to the same protection at an earlier stage.

Secondly, in *Warren v. State*, a defendant argued that Georgia's rape law exempted acts committed by a husband against his wife.[46] This Court noted that common law allowed a man to avoid rape charges by marrying his victim.[47] Part of the rationale for that was legal history deeming wives to be their husbands' chattel such that "rape was nothing more than a man making use of his own property."[48] Another justification—one with particular relevance to modern debates about abortion—was that the wife's "very being or legal existence" was either "suspended" or "incorporated and consolidated into that of her

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[45] *McAfee*, 259 Ga. at 581 (referring to *Jefferson*).

[46] *See* 255 Ga. 151, 151–52 (1985).

[47] *See id.* at 153.

[48] *Id.*

husband."[49] Because "*there was only one legal being*, the husband, he could not be convicted of raping himself."[50]

This Court repudiated that shameful history and held that there is no marital exception to criminal liability for rape.[51] Further: it respected the General Assembly's authority to enact that judgment. The *Warren* Court noted significant social changes around women's rights and legal status.[52] It acknowledged Georgia's constitutional protections for life, liberty, property, and person.[53] It then observed that statutes enacted by the General Assembly respected every Georgian's rights to personal security and personal liberty "without limitation," as well as a bevy of rights for women regardless of their marital status.[54] Finally, the Court observed that the General Assembly had "recognized that there can be violence in modern family life and . . . enacted special laws to protect family members who live in the same household from one another's violent acts."[55] It described rape as "almost total contempt for the personal integrity" of women, as well as of autonomy and even of

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[49] *Id.* at 154.

[50] *Id.* (emphasis added).

[51] *See id.* at 152.

[52] *See id.* at 154.

[53] *See id.* (*citing* GA. CONST. OF 1983, art. I, § I, ¶ I; *id.* art. I, § II, ¶ II).

[54] *Id.* at 154–55 (*citing*, *inter alia*, O.C.G.A. § 1-2-6).

[55] *Id.* at 155.

"self."[56] The Court honored the General Assembly's decision to deviate from common law rules regarding wives "as chattel or demeaned by denial of a separate legal identity and the dignity associated with *recognition as a whole human being*."[57] It recognized that Georgia's statutory laws concerning rape had never provided for a marital exception.[58] It closed by rejecting summarily the defendant's reliance on a right to privacy case because that precedent "dealt only with consensual sodomy."[59]

The Court's conclusion was clear: the right to privacy does not protect acts the General Assembly reasonably deems harmful to non-consenting others.[60] Not even if those acts are sexual in nature. Not even if they were arguably tolerated or otherwise imperfectly protected at common law. While bans on private acts founded solely upon moral offensiveness lack a "compelling justification" and "unduly oppress[] the

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[56] *Id.*

[57] *Id.* (citation omitted) (emphasis added).

[58] *Id.* at 156.

[59] *Id.* at 157 (addressing *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd by* 478 U.S. 186 (1986)).

[60] *See Powell*, 270 Ga. at 333 ("Implicit in our decisions curtailing the assertion of a right to privacy in sexual assault cases . . . is the determination that the State has a role . . . in protecting minors and others legally incapable of consent from sexual abuse, and in preventing people from being forced to submit to sex acts against their will.")

individual," limits that are instead based on reasonable concerns about harm to unwilling others do not.[61] Georgia's right to privacy did not stop the General Assembly from extending the rights to security, integrity, and selfhood to those human beings deemed previously not to be full legal persons. Especially when Georgia law had long done so.

Warren supports upholding the LIFE Act. The General Assembly has once more decided that basic rights associated with personhood have to protect a class of human beings.[62] It did so to protect the same sort of fundamental rights that it acknowledged statutorily for married

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[61] *Id.* at 334–35; *see also Christensen*, 266 Ga. at 481 (Sears, J., dissenting) ("[A] citizen's private conduct is constitutionally protected from intrusion by the State so long as such conduct does not injure another. Put another way, the power of the State to regulate and control the private, consensual, non-commercial conduct of its adult citizens is confined only to those instances where such conduct adversely affects the rights of others."); *id.* at 486 (in obiter dicta) ("Crimes such as rape, incest, the sexual exploitation of children, prostitution, public indecency, and sexual battery all serve to protect others and are supported by compelling State interests . . . .").

[62] *See* O.C.G.A. §§ 1-2-1 (b) (defining "natural person" as "any human being including an unborn child"), 16-12-141 (limiting abortion generally to cases where an unborn child does not yet have a detectable heartbeat).

women.[63] And it did so by building from longstanding Georgia laws.[64] This was exactly the sort of legislative determination this Court upheld in *Warren*, and the outcome of this case should be the same: the LIFE Act should be upheld.

There is a third case where this Court upheld the General Assembly's modification of privacy rights to protect basic human rights. In *Clark v. Wade*, this Court considered the constitutionality of replacing legislatively the parental-unfitness standard for custody disputes with the best-interest-of-the-child standard.[65] The change went to the very heart of privacy concerns (and part of the challenge raised privacy rights); this Court had held many times that the right to

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[63] *See* Living Infants Fairness and Equality (LIFE) Act, 2019 Ga. HB 481, 2019 Ga. Laws 234, § 2, ¶¶ 1–5; *see also Members of Med. Licensing Bd. of Ind. v. Planned Parenthood of Greater Nw.*, 211 N.E.3d 957, 979 (Ind. 2023) ("[T]he State's interest in protecting prenatal life . . . reflects a legislative view that legal protections inherent in personhood commence before birth. And the State points to biological markers consistent with this conclusion—including fetal brain development, a heartbeat, and breathing—which lead the State to emphasize that 'unborn children, being human beings, have all the characteristics of a human being,' and many of those characteristics are 'acquired in the earliest stages of pregnancy.'") .

[64] *See* Part 3 *infra*.

[65] 273 Ga. at 593.

privacy gives strong protection to parental rights and the best-interest-of-the-child standard reduced that protection.[66]

The Court still upheld the legislation.[67] It noted that the shift could favor "the health and welfare of the child," specifically by preventing "either physical harm or significant, long-term emotional harm."[68] The Court held that "in certain circumstances, the legislature may enact statutes that permit a child's interest to prevail over a parent's constitutional right to custody."[69]

Respect for the General Assembly's ability to protect children is a theme of this Court's precedent. The government has a compelling interest in children's welfare; protecting their physical wellbeing is so compelling a governmental interest that it is "beyond the need for elaboration."[70] To prevent "harm to the child," the government can override the right to privacy that normally safeguard parental decision-making.[71] When injury to a child is possible, such as in difficult circumstances where "parents can not or will not reach out to others for help"—this is often the case in difficult and unexpected pregnancies—

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[66] *See Clark*, 273 Ga. at 589, 591, 593; *Brooks*, 265 Ga. at 193.

[67] *See id.* at 599.

[68] *Id.* at 590, 598.

[69] *Id.*at 597.

[70] *Phagan v. State*, 268 Ga. 272, 274 (1997) (citation omitted).

[71] *Brooks*, 265 Ga. at 193.

"government not only is authorized but is compelled to invade the intimacy and privacy of the parent-child relationship in order to provide children with a healthy alternative."[72] The General Assembly has determined that such a compelling need justifies the LIFE Act.

One case has held that Georgia's right to privacy can allow parents to assist indirectly in ending the life of their child, but only under extremely specific circumstances. In *In re L.H.R.*, the Court noted that adults have a right to refuse medical treatment "in the absence of a conflicting state interest"—like the life of an unborn child, as in *Jefferson*.[73] The Court held that the right to refuse treatment belongs

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[72] *Id.* at 195–96 (Sears, J., concurring). As the U.S. Supreme Court recently noted, unprecedented help exists for expectant parents in crisis. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 258–59 (2022) ("Americans who believe that abortion should be restricted . . . note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted 'safe haven' laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.").

[73] 253 Ga. 439, 446 (1984).

also to children.[74] It further held that parents can exercise this right on behalf of their infant who is "terminally ill with no hope of recovery" and "exists in a chronic vegetative state with no reasonable possibility of attaining cognitive function."[75] This judgment was out of recognition of the role of families in asserting the right of unconscious people to refuse treatment, as well as the right of parents to speak for minor children more generally.[76]

The tragic situations accommodated by *In re L.H.R.* are not akin to abortion. *In re L.H.R.* allowed parents to exercise vicariously their children's right to refuse treatment. Georgia recognizes no right to suicide that a child's parents could vicariously exercise.[77]

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[74] *Id.*

[75] *Id.* at 445–46.

[76] *See id.* at 445.

[77] Georgia's right to privacy does not require the sanctioning of suicide; *Pavesich* spoke of the right to privacy as "something more than the mere right to breathe and exist," not something less than it, and protected the liberty to "live as one will," not to die—without life, there is no privacy. 122 Ga. at 195; *cf. Loethen v. State*, 158 Ga. App. 469, 472 (1981) (Deen, P.J., dissenting) (discussing the statute criminalizing damage to property: "Appellant's argument that since suicide and attempted suicide are not illegal he cannot be convicted of an offense which tends only to endanger his own life has no merit. The same arguments could be made as to euthanasia, infanticide and abortion,

The question presented by this case is whether the General Assembly is allowed to extend its protection of human life further back than the scenario presented by *Jefferson*. That case, *Warren*, and *Clark* all confirm that the answer is yes.

3. Limits on abortion have always coexisted with Georgia's right to privacy.

According to *Powell*, the key question in determining the scope of Georgia's right to privacy is not history alone, but also logic (which afforded protection to acts that had long been criminal).[78] Still, this Court has also held that "a constitutional provision [must be interpreted] according to the original public meaning of its text."[79] To

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although the latter is illegal under certain conditions. This state affirmatively has expressed an overriding and compelling interest, if not a public policy, in the preservation of all human life.").

[78] *See Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) ("The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time.").

[79] *Olevik v. State*, 302 Ga. 228, 235 (2017).

locate original meaning, Georgia courts look to "contemporaneous sources."[80]

Limits on abortion are not merely contemporaneous with Georgia's right to privacy: they pre-date *Pavesich*. Abortion after quickening was "a very heinous misdemeanor" at common law.[81] Georgia's criminal prohibition on unauthorized abortions dates to at least 1833.[82] Georgia was in line with national trends:

> by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; . . . by the late 1950s at least 46 States prohibited abortion 'however and whenever performed' except if necessary to save 'the life of the mother'; and . . . when *Roe* [*v. Wade*, 410 U.S. 113 (1973)] was decided in 1973 similar statutes were still in effect in 30 States.[83]

As the U.S. Supreme Court recently noted in rejecting a federal constitutional right to an abortion, until well into the twentieth century,

> there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed

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[80] *Smith v. Baptiste*, 287 Ga. 23, 32 (2010) (Nahmias, J., concurring specially).

[81] BLACKSTONE, 1 COMMENTARIES *125–26.

[82] *See* Roe, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting) (citing Ga. Pen. Code, 4th Div., § 20 (1833)).

[83] *Dobbs*, 597 U.S. at 260 (citation omitted).

> down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.[84]

Roe struck many of its contemporaries as an unwarranted expansion of the right to privacy. Justice Rehnquist described prior precedent as recognizing "the claim of a person to be free from unwanted state regulation of consensual transactions," a description aligning well with *Pavesich* and other Georgia case law.[85] Legal academic John Hart Ely, who supported abortion rights as a matter of policy, thought *Roe* "a curious place" to have begun expanding privacy rights because "there is more than simple societal revulsion to support legislation restricting abortion: Abortion ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice."[86] Ely thought—

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[84] *Id.* at 241.

[85] *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting). To the extent the enforcement of abortion limits poses extrinsic difficulties, Georgia law has ways of protecting pregnant women's privacy. *See Hillman v. State*, 232 Ga. App. 741, 741, 743–44 (1998) (holding women not liable under the criminal abortion statute for their own abortions and rejecting an interpretation of that law that could risk intense scrutiny of women who suffer miscarriages).

[86] Ely, *supra*, at 923–24.

differing from the General Assembly's judgment in the LIFE Act—that "a fetus may not be a 'person in the whole sense,'" but "certainly not nothing."[87] Georgians thought unborn children were more than "nothing" in maintaining abortion limits as the right to privacy rose.

The U.S. Supreme Court recently agreed that *Roe* went far beyond other precedent regarding the right to privacy. "What sharply distinguishes the abortion right from the rights recognized" in other privacy cases is that abortion "destroys" what that Court has called "potential life" and what many consider "the life of an 'unborn human being.'"[88]

Holding image and likeness rights, using contraception, engaging in consensual sexual activity, refusing medical treatment, maintaining confidential information, donating one's own organs after death, parenting: no legislature believes any of these exercises of the right to privacy "ends an innocent life."[89] No legislature reasonably could. But in passing the LIFE Act, the General Assembly *did* reasonably believe it was responding in the best way it could to "a profound moral issue on

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[87] *Id.* at 931.

[88] *Dobbs*, 597 U.S. at 257 (citations omitted).

[89] *Id.* at 224.

which Americans hold sharply conflicting views."[90] Just as had previous Georgia lawmakers who kept abortion limits in place before and after *Pavesich*.

CONCLUSION

In a 1927 speech to the Georgia Historical Society, the author of *Pavesich*—Justice Andrew T. Cobb—indicted Georgia for its indifference to lynchings, asking: "The Right to Live: Will the State Protect It"?[91] He had come a long way from his family's earlier support for slavery and the Confederacy.[92] As a commentator wrote decades

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[90] *Id.* This Court has held that "line-drawing and balancing of rights and interests" are "regularly and properly done by legislatures," including when it comes to setting the exact boundary between the right to privacy and harm to others. *Conley v. Pate*, 305 Ga. 333, 338 (2019) (citation omitted); *see also* Part 2, *supra* (especially the discussions of *Warren* and *Clark*); *contrast SisterSong Women of Color Reprod. Just. Collective*, 317 Ga. at 561–62 (Ellington, J., dissenting) ("[T]he trial court must interrogate, and not assume as a given, the state's claimed interest in preserving human life from the time of conception. A clear enunciation of the basis for and scope of the interest the legislation is intended to protect is necessary to the determination of whether the state's interest is compelling and whether the legislation is narrowly tailored to serve only that interest.").

[91] *See* Allen, *supra*, at 1207 & n.143.

[92] *See id.* at 1205–06.

later, his "claiming a 'right to live' on behalf of Jewish and black victims of lynching appropriated natural law for humane and just purposes."[93]

The General Assembly reasonably determined that it *would* protect the right to live by limiting abortion. It decided that Georgia had advanced in its appreciation for what many people believe to be precious human life. While Georgia's right to privacy has protected a great degree of personal liberty, it has always allowed for limits based on good-faith determinations of harm like the one the General Assembly has reached. The LIFE Act should be upheld.

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[93] *Id.* at 1208–09.

Certificate of Service

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