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## HB 481 - Heartbeat Bill

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## PERSONS AND THEIR RIGHTS

*Persons and Their Rights: Amend Chapter 2 of Title 1 of the Official Code of Georgia Annotated, Relating to Persons and Their Rights, so as to Provide that Natural Persons Include an Unborn Child; to Provide that such Unborn Children Shall Be Included in Certain Population Based Determinations; to Provide Definitions; Offenses Against Public Health and Morals: Amend Article 5 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, Relating to Abortion, so as to Provide Definitions; to Revise the Time when an Abortion May Be Performed; to Provide for Exceptions; to Provide for the Requirements for Performing an Abortion; to Provide for a Right of Action and Damages; to Provide for Affirmative Defenses; Alimony and Child Support: Amend Chapter 6 of Title 19 of the Official Code of Georgia Annotated, Relating to Alimony and Child Support, so as to Provide a Definition; to Provide a Maximum Support Obligation for Certain Circumstances; Parent and Child Relationship Generally: Amend Chapter 7 of Title 19 of the Official Code of Georgia Annotated, Relating to Parent and Child Relationship Generally, so as to Provide that the Right to Recover for the Full Value of a Child Begins at the Point When a Detectable Human Heartbeat Exists; Woman’s Right to Know: Amend Chapter 9A of Title 31 of the Official Code of Georgia Annotated, Relating to the “Woman’s Right to Know Act,” so as to Provide for Advising Women Seeking an Abortion of the Presence of a Detectable Human Heartbeat; to Provide for the Content of Certain Notices; to Repeal Certain Penalties; Physician’s Obligation in Performance of Abortions: Amend Chapter 9B of Title 31 of the Official Code of Georgia Annotated, Relating to Physician’s Obligation in Performance of Abortions, so as to Require Physicians Performing Abortions to Determine the Existence of a Detectable Human Heartbeat Before Performing an Abortion; to Provide for the Reporting of Certain Information by Physicians; Income Taxes: Amend Chapter 7 of Title 48 of the Official Code of Georgia Annotated, Relating to Income Taxes, so as to Provide that an Unborn Child with a Detectable Human Heartbeat is a Dependent Minor for Income*

***Tax Purposes; to Provide for Legislative Findings; to Provide for Related Matters; to Provide for Standing to Intervene and Defend Constitutional Challenges to this Act; to Provide a Short Title; to Provide for Severability; to Provide an Effective Date; to Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS: O.C.G.A. §§ 1-2-1 (amended); 16-12-141 (amended); 19-6-15 (amended); 19-7-1 (amended); 31-9A-3, -4, -6.1 (amended); 31-9B-2, -3 (amended); 48-7-26 (amended)

BILL NUMBER: HB 481

ACT NUMBER: 234

GEORGIA LAWS: 2019 Ga. Laws 711

SUMMARY: The Act adds an unborn child with a detectable human heartbeat to the definition of a natural person and includes such unborn child in state population counts. The Act defines abortion, prescribes when abortions may be performed, provides exceptions to abortion performance limitations, establishes requirements for performing an abortion, and provides for a right of action, damages, and affirmative defenses. The Act permits alimony and child support payments starting when an unborn child has a detectable human heartbeat. Parents have the right to recover the full value of a child's life when a detectable human heartbeat exists. The Act requires that women seeking an abortion be advised that a detectable human heartbeat exists, provides for certain notices to the woman, and repeals certain penalties. The Act requires physicians who perform

abortions to determine the presence of a detectable human heartbeat before performing an abortion and requires physicians to report certain information concerning such abortions. The Act considers an unborn child with a detectable human heartbeat a dependent minor for income tax purposes. The Act also provides for legislative findings and provides standing to intervene and defend constitutional challenges to the Act. The Act provides a short title, provides for severability of claims, provides an effective date, and repeals conflicting laws.

EFFECTIVE DATE: January 1, 2020

*History*

House Bill (HB) 481 is one of many abortion regulations introduced and enacted in Georgia. In the mid-nineteenth- and early twentieth-century, abortions were illegal in the United States (U.S.).<sup>1</sup> The rise of the women’s rights movement in the 1960s was a driving force behind the major changes in abortion laws across the country.<sup>2</sup> By 1973, when the United States Supreme Court announced its decision in the landmark abortion case *Roe v. Wade*, seventeen states had legalized abortion.<sup>3</sup>

In 1968, Georgia enacted a criminal abortion law generally patterned after the American Law Institute’s 1962 Model Penal Code, which replaced more than ninety years of statutory law.<sup>4</sup> By 1973, the Model Penal Code’s section on abortion served as a template

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1. *Listeners Ask About the History of U.S. Abortion Laws*, NPR (June 5, 2019, 5:08 AM), <https://www.npr.org/2019/06/05/729874374/listeners-ask-about-the-history-of-u-s-abortion-laws> [<https://perma.cc/VDR2-JQRM>].

2. *Id.*

3. *Id.*

4. *Doe v. Bolton*, 410 U.S. 179, 182 (1973).

statute for nearly a quarter of the states with abortion laws.<sup>5</sup> The Model Penal Code abortion statute generally outlawed abortions subject to three exceptions: (1) carrying the pregnancy to term would cause harm to the mother, (2) the fetus was unlikely to survive after birth, and (3) the pregnancy was the result of rape or incest.<sup>6</sup>

Georgia's 1968 abortion law tracked the Model Penal Code's structure, but it provided no exception for incest.<sup>7</sup> Instead, Georgia's law provided for abortions only in cases of rape, severe fetal deformity, or instances of severe or fatal injury to the mother.<sup>8</sup> Further restrictions on abortion included a residency requirement, a written confirmation by three physicians and a three-member special committee approving justification for the abortion for one or more of the statutorily enumerated reasons, performance of the abortion by a board-licensed facility under the approval of a three-person committee at that hospital, and certifications in situations of rape.<sup>9</sup>

The 1968 abortion law and its specific restrictions on abortion were the focus of the Supreme Court case *Doe v. Bolton*, decided as a companion case to the seminal abortion case *Roe v. Wade*.<sup>10</sup> In *Doe*, the Court acknowledged states' rights to "readjust its views and emphases in the light of the advanced knowledge and techniques of the day."<sup>11</sup> Despite this, the Court struck down Georgia's abortion law as unconstitutional, finding that certain restrictions violated the Privileges and Immunities Clause of the Constitution and that many restrictions were not rationally related to the regulation of abortions.<sup>12</sup> Together with *Roe*, *Doe* reaffirmed the Supreme Court's holding that terminating a pregnancy via abortion is a constitutionally protected right.<sup>13</sup>

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5. *Id.*

6. Carl W. Tyler, Jr., *The Public Health Implications of Abortion*, 4 ANN. REV. PUB. HEALTH 223, 245 (1983).

7. *Id.*

8. *Doe*, 410 U.S. at 179; *see also* Tyler, *supra* note 6, at 245.

9. *Doe*, 410 U.S. at 183–84.

10. *See id.* at 179; *see also* *Roe v. Wade*, 410 U.S. 113 (1973). The same 7-2 majority that struck down provisions of Texas law in *Roe* ruled in *Doe*. *Doe*, 410 U.S. at 179; *Roe*, 410 U.S. at 166.

11. *Doe*, 410 U.S. at 191.

12. *Id.* at 199, 200.

13. *Id.* at 189. Although the Court reaffirmed this constitutional right in both cases, the Court was careful to note that such a right is not absolute. *See id.*

The next major development in Georgia abortion law was the passage of the “Woman’s Right to Know Act,” signed into law by Governor Sonny Perdue (R) on May 10, 2005.<sup>14</sup> The Georgia General Assembly passed the Woman’s Right to Know Act to ensure women made an informed decision when choosing to have an abortion.<sup>15</sup> The Woman’s Right to Know Act permitted the performance of an abortion only after the patient gave voluntary, informed consent to the procedure at least twenty-four hours in advance, except in cases of medical emergency.<sup>16</sup> To give informed consent, the Act required that the pregnant woman be provided with certain accurate, objective information about abortions and pregnancy before proceeding with the procedure.<sup>17</sup> Such information included: the medical risks of the procedure, the probable gestational age of the unborn child, the medical risks of carrying the pregnancy to term, the medical assistance available for childcare, and information about the father’s liability for child support.<sup>18</sup>

Following the Woman’s Right to Know Act, the Georgia General Assembly passed legislation in 2012 that prohibited the performance of abortions after twenty weeks.<sup>19</sup> In the final hours of the 2012

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14. O.C.G.A. § 31-9A (2019); *see* ABORTION: A WOMAN’S RIGHT TO KNOW, GA. DEP’T HUMAN RES. 2 (2016), [http://dph.georgia.gov/sites/dph.georgia.gov/files/related\\_files/document/PatientEducationBookEN.pdf](http://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/document/PatientEducationBookEN.pdf) [<https://perma.cc/2CT4-FYQY>].

15. *Women’s Right to Know (WRTK)*, GA. DEP’T PUB. HEALTH, <https://dph.georgia.gov/womens-right-know-wrtk> [<https://perma.cc/E8F8-7LNY>] (last visited Sept. 8, 2019) (“The Act requires women obtaining an abortion be informed of relevant issues, including: (1) Medical risks of abortion, (2) Abortion methods and associated medical risks, (3) The possible detrimental psychological effects, (4) Medical risks of carrying a pregnancy to term, (5) Probable gestational age of the fetus at the time the abortion is to be performed, (6) The father’s responsibility, (7) Medical assistance benefits may be available to prenatal care, childbirth, and neonatal care, (8) Information on free ultrasounds.”).

16. ABORTION: A WOMAN’S RIGHT TO KNOW, *supra* note 14, at 2 (quoting Gov. Sonny Perdue (R)) (“Women have a right to learn about all of the options available to them in the event of an unwanted pregnancy. The Woman’s Right to Know Act is a common sense approach to a sensitive issue and it reflects the mainstream values that Georgians share.”).

17. Press Release, Office of Governor Sonny Perdue, Governor Perdue Signs Woman’s Right to Know Act (May 10, 2005) (on file with the Georgia State University Law Review), [https://sonnyperdue.georgia.gov/00/press/detail/0%2C2668%2C78006749\\_79688147\\_93037734%2C00.html](https://sonnyperdue.georgia.gov/00/press/detail/0%2C2668%2C78006749_79688147_93037734%2C00.html) [<https://perma.cc/8CB9-WFP4>].

18. *Id.*

19. Christopher Quinn, *Georgia Lawmakers Pass Abortion Bill on Last, Emotional Day*, ATLANTA J.-CONST. (Mar. 29, 2012), <https://www.ajc.com/news/state—regional-govt—politics/georgia-lawmakers-pass-abortion-bill-last-emotional-day/3ITcvRRMhCGoN7semLomkK/> [<https://perma.cc/5AF5-V7MN>]; Sarah C. M. Roberts, Heather Gould & Ushma D. Upadhyay,

legislative session, Georgia lawmakers passed HB 954, commonly referred to as the “fetal pain” bill because Georgia legislators asserted that a fetus can feel pain at twenty weeks’ gestation, which grants the state an interest in protecting that potential fetal life.<sup>20</sup> Before Georgia’s enactment of its twenty-week abortion ban, Georgia had been one of the last places in the South where abortion procedures remained available later in the pregnancy term.<sup>21</sup> Although Georgia was the tenth state to pass a twenty-week abortion ban, Georgia was the first state to impose a twenty-week abortion restriction in a place where substantial numbers of abortions had been provided.<sup>22</sup>

Though the original “fetal pain” bill sought to ban abortions after twenty weeks entirely, the finalized law allowed for some abortions to take place at the twenty-week mark or later under certain circumstances.<sup>23</sup> Effectively, Georgia legislators tightened an existing loophole without eliminating it entirely.<sup>24</sup> The twenty-week abortion ban narrowed medical exemptions for ending pregnancies and required abortions performed after twenty weeks to be performed in a manner that brings the fetus out alive.<sup>25</sup> Unlike the Living Infants Fairness and Equality (LIFE) Act, the 2012 law did not include an exception for rape or incest;<sup>26</sup> however, the 2012 legislation did provide an exception allowing for the protection of the life and health of the mother.<sup>27</sup> The twenty-week ban also protected doctors from

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*Implications of Georgia’s 20-Week Abortion Ban*, 105 AM. J. PUB. HEALTH e77, e77 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4504323/> [<https://perma.cc/AD3X-AF7H>] (“Although Georgia’s ban has been referred to as a 20-week ban, it actually bans abortion providers from performing abortions starting at 22 weeks from a woman’s last menstrual period (LMP).”).

20. Quinn, *supra* note 19; Kristina Torres, *Deal Signs ‘Fetal Pain’ Abortion Bill into Law*, ATLANTA J.-CONST. (May 1, 2012), <http://www.ajc.com/news/state—regional-govt—politics/deal-signs-fetal-pain-abortion-bill-into-law/GFIMCEQt1hJQI8B3t1HOQP/> [<https://perma.cc/V8MR-KW6V>].

21. Stephannie Stokes, *Once Blocked, Georgia’s 20-Week Abortion Ban Can Now Be Enforced*, WABE (May 25, 2016), <https://www.wabe.org/once-blocked-georgias-20-week-abortion-ban-can-now-be-enforced/> [<https://perma.cc/6QZF-XP59>]. In fact, women from across the country, including from the “entire South, Midwest and Northeast” came to Georgia to receive abortions after twenty weeks. *Id.*

22. Roberts et al., *supra* note 19.

23. Quinn, *supra* note 19. The bill specifically allowed for abortions after the 20-week mark for “medically futile” pregnancies, allowing doctors to perform abortions when a fetus had congenital and chromosomal defects. *Id.*

24. *Id.*

25. Torres, *supra* note 20.

26. O.C.G.A. § 16-12-141 (Supp. 2019) (effective Jan. 1, 2020); *see also* Torres, *supra* note 20.

27. § 16-12-141(c)(1)(A)–(c)(2); *see also* Kate Brumback, *Challenge to Georgia 20-Week Abortion Ban Goes to High Court*, AP NEWS (Jan. 22, 2017, 12:21 PM),

civil suits arising out of the law and from felony charges and prison time of up to ten years.<sup>28</sup>

The “fetal pain” bill passed on the last day of the legislative session in 2012 out of a compromise, which produced an additional exemption for physicians performing abortions after twenty weeks to conduct the procedure if the fetus has congenital or chromosomal defects.<sup>29</sup>

The American Civil Liberties Union (ACLU) filed a lawsuit challenging Georgia’s “fetal pain” law in 2012, winning an injunction that partially blocked the full enforcement of the law during the case’s legal proceedings.<sup>30</sup> The ACLU challenged the twenty-week abortion ban as unconstitutional, claiming the law directly conflicted with the Supreme Court’s decision in *Roe v. Wade*.<sup>31</sup> Fulton County Superior Court Judge Esmond Adams dismissed the case on sovereign immunity grounds.<sup>32</sup> After lifting the injunction, the legal window for performing abortion procedures fell to the twenty week mark.<sup>33</sup> After five years, the Supreme Court of Georgia upheld the State’s twenty-week abortion ban, which became fully effective in 2017.<sup>34</sup>

Researchers at Advancing New Standards in Reproductive Health (ANSIRH) analyzed the impact of Georgia’s twenty-week abortion

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<https://apnews.com/f9a69451ba72494c810695dc376a0f6e> [<https://perma.cc/4B76-A4KF>].

28. Torres, *supra* note 20.

29. *Id.* The language in the bill requires these defects to be significant and “irremediable” anomalies that are “incompatible with sustaining life after birth.” *Id.*

30. Stokes, *supra* note 21. According to the ACLU, the organization learned four months after the decision that the judge had agreed with Georgia’s Attorney General and dismissed the case in 2015. *Id.* During the four months, the ACLU lost its opportunity to appeal the decision to a higher court. *Id.* The Georgia law became partially effective on January 1, 2013. Sarah Roberts et al., *Georgia’s Later Abortion Ban*, ANSIRH, <https://www.ansirh.org/research/georgias-later-abortion-ban> [<https://perma.cc/TK2A-XTZL>] (last visited Sept. 6, 2019); Roberts et al., *supra* note 19. To adhere to the law, abortion providers generally quit providing abortion care starting at twenty-four weeks from the LMP with very limited exceptions for some fetal anomalies and for maternal health reasons. *Id.*

31. Stokes, *supra* note 21.

32. *Id.* Sovereign immunity is a legal principle that protects the state from suit by its citizens. *Id.*

33. Emanuella Grinberg, *The Abortion Ruling No One Knew About: Georgia’s 20-Week Ban*, CNN (updated May 27, 2016, 12:10 AM), <https://www.cnn.com/2016/05/26/health/georgia-abortion-law-20-weeks/index.html> [<https://perma.cc/C2HR-C9S2>].

34. Theresa Garcia Robertson, *Georgia’s 20-Week Abortion Ban to Be Enforced*, GEORGIAPOL.COM (June 19, 2017, 3:49 PM), <https://www.georgiapol.com/2017/06/19/georgias-20-week-abortion-ban-enforced/> [<https://perma.cc/RQD3-RHBC>]; Roberts et al., *supra* note 30.



ban.<sup>35</sup> These researchers found that between 2012 and 2013, abortions after the twenty-week mark dropped by 40%.<sup>36</sup> The decrease included abortions impacted by the law—meaning abortions performed after twenty-four weeks—as well as abortions not impacted by the law—meaning abortions performed between twenty and twenty-two weeks.<sup>37</sup> The researchers also noted that they did not find an increase in abortion procedures performed before twenty-four weeks, which indicates that the enactment of the law did not lead women to have abortions earlier.<sup>38</sup> In fact, the researchers stated that the legislation either drove women to travel outside the State of Georgia to obtain an abortion or drove women to continue their pregnancies.<sup>39</sup>

By March 2018, Brian Kemp, then-candidate for Georgia governor, made signing one of “the toughest abortion laws in the country” a signature campaign promise in his bid for state office.<sup>40</sup>

“If abortion rights activists want to sue me . . . bring it!” he tweeted only hours after Mississippi passed a law outlawing abortions, except for those performed in medical emergencies or those performed due to fetal abnormalities.<sup>41</sup> In contrast, the two Democratic candidates in Georgia’s gubernatorial race were outspoken advocates of abortion rights; however, Democratic

35. Roberts et al., *supra* note 30.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (“Prior to part of the ban going into effect in 2013, women traveled from throughout the South, the Midwest, and the Northeast to receive abortion care in Georgia after 24 weeks. Because of the law, these services were no longer available south of Maryland or east of Texas. The 2012 law that restricted later abortion care in Georgia had implications beyond Georgia, and impacted women throughout the South, the Midwest, and parts of the Northeast. . . . When a type of abortion care, such as later abortion care, is already scarce in a geographic region, banning it in one state in that region has an impact on women’s health and access well and beyond that state.”). Currently, abortion procedures have declined by more than 18% over twenty-three years in Georgia. Maya T. Prabhu, *Abortions in Georgia Decline by Nearly 20% in Past 25 Years*, ATLANTA J.-CONST. (July 30, 2019), <https://www.ajc.com/news/state—regional-govt—politics/abortions-georgia-decline-nearly-past-years/9lzGsPtQWOUzTzrTew27GK/> [https://perma.cc/RLF9-XBEQ]. Experts say the drop in the number of abortion procedures in Georgia is due to expanding access to birth control. *Id.*

40. Greg Bluestein, *Kemp Vows to Outdo Mississippi and Sign Nation’s ‘Toughest’ Abortion Law*, ATLANTA J.-CONST. (Mar. 20, 2018), <https://www.ajc.com/blog/politics/kemp-vows-outdo-mississippi-and-sign-nation-toughest-abortion-restrictions/82QEEBkthVKOKaG7qW7LII/> [https://perma.cc/X3WS-BCGE].

41. *Id.* Notably, the Mississippi bill contained no exception for rape or incest. *Id.*

nominee Stacey Abrams opted out of making her stance on abortion a central tenet of her campaign.<sup>42</sup>

By the time HB 481 came before the Georgia General Assembly, pregnant women had to meet several requirements before they could obtain an abortion. Women had to wait twenty-four hours after an initial appointment with a physician before having a second appointment for performance of the procedure,<sup>43</sup> and the ban on abortions after twenty weeks still remained in effect. In this context, Georgia Representatives and Senators introduced the most recent change to Georgia's abortion laws in the 2019 legislative session.

### *Fetal Heartbeat Bills in the United States*

Although highly controversial in the media, Georgia's newest abortion law, the LIFE Act, commonly known as Georgia's "heartbeat" bill, did not pass in isolation.<sup>44</sup> Several states have passed heartbeat bills as recently as the 2019 legislative session and as early as 2011.<sup>45</sup> These heartbeat bills prohibit abortions after a fetal heartbeat is detected, which may occur as early as six weeks into the pregnancy.<sup>46</sup> The first heartbeat bill was introduced in Ohio in 2011.<sup>47</sup> Although Ohio's bill failed to pass, it became a "blueprint" for other state legislators with similar legislative goals.<sup>48</sup>

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42. Greg Bluestein, *Social Issues Recede to Backdrop but Remain Key to Some Georgia Voters*, ATLANTA J.-CONST. (Oct. 10, 2018), <https://www.ajc.com/news/state—regional-govt—politics/social-issues-recede-backdrop-but-remain-key-some-georgia-voters/IT9GbL8u3c4UhG8UvI6ExI/> [https://perma.cc/YFW6-XBSS] (“And Democrat Stacey Abrams has upped her focus on the same themes she’s embraced since entering the race: expanding Medicaid and boosting school funding. She’s likely to only wade into debates over, say, abortion rights, if specifically asked about them by voters.”).

43. Emanuella Grinberg, *The Reality for Women Seeking Abortions in Alabama and Georgia*, CNN (May 23, 2019, 10:32 PM), <https://www.cnn.com/2019/05/23/us/abortion-restrictions-georgia-alabama/index.html> [https://perma.cc/7BD4-U3GC]. This requirement could be waived in cases of medical emergencies, where women received mandatory counseling either over the phone or via a website. *Id.*

44. Anne Ryman & Matt Wynn, *Does It Seem Like Abortion Bans Are Sweeping the US? Thank Copy and Paste.*, ARIZ. REPUBLIC & USA TODAY (June 20, 2019, 2:10 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/06/19/abortion-laws-2019-how-heartbeat-bills-passed-ohio-missouri-more/1506440001/> [https://perma.cc/Y272-E4RX].

45. *Heartbeat Bans*, REWIRE.NEWS: LEGISLATIVE TRACKER (May 30, 2019), <https://rewire.news/legislative-tracker/law-topic/heartbeat-bans/> [https://perma.cc/2V5Z-EUNA]; Ryman & Wynn, *supra* note 44.

46. *Heartbeat Bans*, *supra* note 45.

47. *Id.* On Valentine's Day in 2011, anti-abortion activist Janet Porter and the Faith2Action

In 2013, North Dakota<sup>49</sup> and Arkansas<sup>50</sup> passed heartbeat bills that prohibited abortions early in pregnancy.<sup>51</sup> Both laws were met with court challenges and blocked.<sup>52</sup> Ohio passed a second heartbeat bill successfully in 2016, prohibiting abortions once a fetal heartbeat was detected.<sup>53</sup> Governor John Kasich (R) vetoed the 2016 legislation and signed a twenty-week abortion law instead.<sup>54</sup>

In 2018, Iowa passed Senate File 359, a law that prohibited performing abortions after six weeks, when a fetal heartbeat is detectable.<sup>55</sup> Planned Parenthood and the ACLU of Iowa challenged the law, claiming it violated Iowa's Constitution.<sup>56</sup> The Polk County District Court of Iowa deemed Iowa's six-week abortion prohibition violative of the Iowa Constitution and issued a permanent injunction.<sup>57</sup> In December 2018, Ohio passed another heartbeat bill, HB 258, which prohibited abortions once a fetal heartbeat is detected—this time, removing the requirement of using a transvaginal ultrasound to detect the cardiac activity.<sup>58</sup> Thus, the Ohio law effectively prohibited abortions from nine to twelve weeks,

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organization sent thousands of heart-shaped balloons to Ohio's statehouse, thanking legislators who supported Ohio's heartbeat bill, HB 125. *Id.*

48. *Id.*; see also Ryman & Wynn, *supra* note 44.

49. *North Dakota Human Heartbeat Protection Act (HB 1456)*, REWIRE.NEWS: LEGISLATIVE TRACKER (Aug. 20, 2013), <https://rewire.news/legislative-tracker/law/north-dakota-human-heartbeat-protection-act/> [https://perma.cc/MVP6-G5NB]. North Dakota's law prohibited abortions around six weeks, when a fetal heartbeat was detected by an "acceptable medical practice." *Id.* Generally, an "acceptable medical practice" meant a transvaginal ultrasound. *Id.*

50. *Arkansas Human Heartbeat Protection Act (SB 134)*, REWIRE.NEWS: LEGISLATIVE TRACKER (Aug. 13, 2013), <https://rewire.news/legislative-tracker/law/arkansas-human-heartbeat-protection-act/> [https://perma.cc/T7WK-UL8F]. Arkansas passed the Human Heartbeat Protection Act (SB 134) in 2013, which prohibited abortions when the pregnancy reached twelve weeks and a fetal heartbeat was present. *Id.*

51. *Heartbeat Bans*, *supra* note 45.

52. *Id.* The Eighth Circuit Court of Appeals blocked both Arkansas and North Dakota's law in the summer of 2015, and the United States Supreme Court declined to review either case. *Id.*

53. *Id.* The 2016 Ohio law did not contain an exception for rape or incest. *Id.*

54. *Id.*

55. *Heartbeat Bans*, *supra* note 45.

56. *Id.*

57. Press Release, Planned Parenthood of the Heartland, Iowa's 6-Week Abortion Ban Struck Down as Unconstitutional (Jan. 22, 2019), <https://www.plannedparenthood.org/planned-parenthood-heartland/newsroom/iowas-6-week-abortion-ban-struck-down-as-unconstitutional> [https://perma.cc/JND8-S5QV]. The Iowa court ruled that the law "would relegate the individual rights of Iowa women to something less than fundamental." *Id.*

58. *Heartbeat Bans*, *supra* note 45.

when an abdominal ultrasound can detect a fetal heartbeat.<sup>59</sup> However, Governor Kasich vetoed the legislation once more.<sup>60</sup>

In 2019, sixteen states, including Georgia, introduced “heartbeat” legislation, prohibiting abortions as early as six weeks.<sup>61</sup>

*Bill Tracking of HB 481*

*Consideration and Passage by the House*

Representative Ed Setzler (R-35th) introduced Georgia’s heartbeat bill to the Georgia House of Representatives on February 25, 2019.<sup>62</sup> The House first read the bill the following day on February 26, 2019.<sup>63</sup> The House assigned the bill to its Health and Human Services Committee, where the bill passed by committee substitute after a three-hour hearing on March 7, 2019.<sup>64</sup>

The House Health and Human Services Committee substitute added that HB 481 amended Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to income taxes, to provide that a natural person carried in the womb constitutes a dependent minor for income tax purposes.<sup>65</sup> This version added:

Chapter 7 of Title 48 of the Official Code of Georgia Annotated, relating to income taxes, is amended by revising subsection (a) of Code Section 48-7-26, relating to personal exemptions, as follows:

(a) As used in this Code section, the term “dependent” shall have the same meaning as in the Internal Revenue Code of 1986; provided, however, that any natural person, including an unborn

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59. *Id.*

60. *Id.*

61. *Id.* The fifteen other states are Florida, Illinois, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, South Carolina, Tennessee, Texas, and West Virginia. *Id.*

62. Georgia General Assembly, HB 481, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20192020/HB/481> [hereinafter HB 481, Bill Tracking].

63. State of Georgia Final Composite Status Sheet, HB 481, May 15, 2019.

64. *Id.*

65. HB 481 (HCS), 2019 Ga. Gen. Assemb.

child at any stage of development who is carried in the womb shall qualify as a dependent minor.<sup>66</sup>

The Committee substitute also strengthened some of the bill's language by making the following changes: (1) provisions were added for medically futile pregnancies, and (2) provisions were added for pregnancies resulting from rape or incest where an official police report had been filed alleging the specific offenses of rape or incest.<sup>67</sup>

To address medically futile pregnancies, the Committee added lines 153–154: “. . . unless the pregnancy is diagnosed as medically futile, as such term is defined in Code section 31-9B-1 . . . .”<sup>68</sup> The exceptions for rape and incest were provided for by adding the following language at lines 164–166: “(C) Because of a pregnancy with an unborn child of 20 weeks or less gestational age that resulted from rape or incest in which an official police report has been filed alleging the offense of rape or incest.”<sup>69</sup>

Finally, the effective date of the Act was moved back from July 1, 2019, to January 1, 2020.<sup>70</sup>

#### *Consideration and Passage by the Senate*

On March 8, 2019, the Georgia Senate read and referred the bill to the Senate Science and Technology Committee.<sup>71</sup> The Chairperson of the Committee, Senator Renee Unterman (R-45th), sponsored HB 481 in the Senate.<sup>72</sup> The Science and Technology Committee passed the bill by Committee substitute by a vote of 3 to 2, adding more substantive changes than the House.<sup>73</sup>

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. State of Georgia Final Composite Status Sheet, HB 481, May 15, 2019.

72. HB 481, Bill Tracking *supra* note 62.

73. SENATE COMMITTEE ON SCIENCE & TECHNOLOGY, MEETING MINUTES, at 12 (Mar. 18, 2019), <http://www.senate.ga.gov/committees/Documents/2019Minutes142.pdf> [<https://perma.cc/5DQ6-T2XP>].

The Senate Committee substitute strengthened the language of the bill. It also added a major substantive change, allowing pregnant women to collect child support once a human heartbeat is detected.<sup>74</sup> The Senate also carefully defined what the bill means by a “heartbeat,” altering the language to read a “detectable human heartbeat.”<sup>75</sup>

The Committee substitute amended Chapter 7 of Title 19 of the Official Code of Georgia Annotated, as it relates to parent-child relationships in general, providing a right to recovery for the full value of a child when a *detectable* human heartbeat exists. The detectable human heartbeat standard was also added in other places throughout this iteration of the bill and would carry through to the bill’s final version.<sup>76</sup>

On March 22, 2019, the Georgia Senate adopted the Senate Committee substitute and passed the bill by a vote of 34 to 18.<sup>77</sup>

#### *Reconsideration and Passage by the House*

Because the Senate passed the bill by Committee substitute, the bill went back to the Georgia House on March 29, 2019, for the House to approve of the Senate’s changes.<sup>78</sup> The House approved of the Senate’s changes, and the House sent the bill to Governor Brian Kemp (R) on April 4, 2019.<sup>79</sup>

Governor Kemp signed HB 481 into law on May 7, 2019, to be effective on January 1, 2020.<sup>80</sup>

#### *The Act*

The Act amends the following portions of the Official Code of Georgia Annotated: Chapter 2 of Title 1, relating to the definition of

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74. HB 481 (SCS), 2019 Ga. Gen. Assemb.

75. *Id.*

76. *Id.*

77. Georgia Senate Voting Record, HB 481, #227 (Mar. 22, 2019).

78. State of Georgia Final Composite Status Sheet, HB 481, May 15, 2019.

79. *Id.*

80. 2019 Ga. Laws 711, § 15, at 718; State of Georgia Final Composite Status Sheet, HB 481, May 15, 2019.

persons; Article 5 of Chapter 12 of Title 16, relating to abortions and the performance of abortions; Chapter 6 of Title 19, relating to child support and alimony; Chapter 7 of Title 19, relating to the relationship between parent and child; Chapter 9A of Title 21, relating to the “Woman’s Right to Know Act;” Chapter 9B of Title 31, relating to responsibilities and requirements of physicians when performing abortions; and Chapter 7 of Title 48, relating to income taxes.<sup>81</sup> The overall purpose of the Act is to recognize the personhood of an unborn child under Georgia law and to restrict the receipt and performance of abortions attempted after a “detectable human heartbeat” exists.<sup>82</sup>

The Act includes “unborn child” in Georgia’s definition of a “natural person,” significantly changing Georgia policy.<sup>83</sup> Concerning the legal rights and any restrictions imposed through the Act, those rights and restrictions apply once a human heartbeat exists.<sup>84</sup> According to Representative Ed Setzler (R-35th), the human heartbeat is a “definable, measurable threshold” used to mark the point at which the legal status of an “unborn child” will apply in full.<sup>85</sup>

### *Section 1*

Section 1 of the Act establishes the name and citation for the new law as the “Living Infants Fairness and Equality (LIFE) Act.”<sup>86</sup>

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81. 2019 Ga. Laws 711, at 711–12

82. *Id.*; Video Recording of Senate Science and Technology Committee Hearing at 45 min., 34 sec. (Mar. 14, 2019) (remarks by Rep. Ed Setzler (R-35th)), <https://livestream.com/accounts/26021522/events/8751687/videos/194075744> [hereinafter Science and Technology Committee Hearing].

83. Maya T. Prabhu, *Georgia Legal Experts: Impact Unclear in Granting ‘Personhood’ to Fetus*, ATLANTA J.-CONST. (June 3, 2019), <https://www.ajc.com/news/state—regional-govt—politics/georgia-legal-experts-impact-unclear-granting-personhood-fetus/Pya0HzXMy56B60hYYubNbp/#> [https://perma.cc/CJT5-KLGN].

84. Science and Technology Committee Hearing, *supra* note 82, at 48 min., 24 sec. (remarks by Rep. Ed Setzler (R-35th)).

85. *Id.*

86. 2019 Ga. Laws 711, § 1, at 712.

### *Section 2*

Section 2 of the LIFE Act contains findings by the Georgia General Assembly that recognize the benefits of providing an unborn child with full, legal recognition above the minimum requirements of federal law.<sup>87</sup> These findings specifically convey the “unalienable Rights” from the Declaration of Independence and the “fundamental rights of all persons” under the Fourteenth Amendment of the U.S. Constitution.<sup>88</sup> The General Assembly also presented scientific findings that support placing “unborn children [in] a class of living, distinct persons,” recognizing unborn children “as persons.”<sup>89</sup> Section 2 concludes with an assertion of Georgia law and policy, which provides “full legal recognition to an unborn child above the minimum requirements of federal law,” applies rights contained in Article I, Section 1, Paragraphs I and II of the Constitution of the State of Georgia to unborn children, and establishes the new policy in the State of Georgia “to recognize unborn children as natural persons.”<sup>90</sup>

### *Section 3*

Section 3 of the Act amends Code section 1-2-1, regarding “classes of persons generally.”<sup>91</sup> The Act adds subsection (b) to Code Section 1-2-1, defining “[n]atural person” as “any human being including an unborn child.”<sup>92</sup> Representative Setzler asserted that the purpose of this provision is to recognize that “human life begins in the womb.”<sup>93</sup> Representative Setzler also specifies that the legal benefits accrue to the “unborn child” once there is a detectable

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87. 2019 Ga. Laws 711, § 2, at 712; Video Recording of Senate Proceedings at 35 min., 30 sec. (Mar. 25, 2019, PM 1) (remarks by Sen. Renee Unterman (R-45th)), <https://www.youtube.com/watch?v=EkMhsybtgNw> [hereinafter Senate Proceedings Video].

88. 2019 Ga. Laws 711, § 2, at 712.

89. *Id.*

90. *Id.* at 713.

91. 2019 Ga. Laws 711, § 3, at 713 (codified at O.C.G.A. § 1-2-1 (2019) (effective Jan. 1, 2020)).

92. *Id.* (codified at § 1-2-1(b)).

93. Science and Technology Committee Hearing, *supra* note 82, at 45 min., 34 sec. (remarks by Rep. Ed Setzler (R-35th)).



human heartbeat.<sup>94</sup> Section 3 also establishes the inclusion of an “unborn child with a detectable human heartbeat” to be included in certain state-wide population counts.<sup>95</sup> Inclusion of the “unborn child” in state-wide population determinations serves to further recognize the “value of the [unborn] child.”<sup>96</sup>

Section 3 provides definitions of a “detectable human heartbeat” and “unborn child.”<sup>97</sup> These definitions were included at the request of members on both sides of the bill to ensure absolute clarity in the Act.<sup>98</sup> According to the Act, a “detectable human heartbeat” is “embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac.”<sup>99</sup> An “unborn child” is “a member of the species *Homo sapiens* at any stage of development who is carried in the womb.”<sup>100</sup> During the Health and Human Services Committee Hearing, Representative Setzler asserted that the medical details contained in the Act are defined by “the medical standard of care.”<sup>101</sup>

#### *Section 4*

Section 4 of the Act, which includes lines 109 through 113, contains the operative part of the abortion-specific provisions.<sup>102</sup> Section 4 amends Code section 16-12-141 as it relates to abortion by revising the restrictions placed on the performance of abortions and

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94. *Id.* at 47 min., 21 sec.

95. 2019 Ga. Laws 711, § 3, at 713 (codified at § 1-2-1(d)); Video Recording of House Health and Human Services Committee Hearing at 54 min., 48 sec. (Mar. 6, 2019) (remarks by Rep. Ed Setzler (R-35th)), <https://www.youtube.com/watch?v=K-W-5EhXKzw> [hereinafter HHS Committee Hearing] (“[The provision] allows the state to take children in the womb into account in these kinds of statewide population counts.”).

96. HHS Committee Hearing, *supra* note 95, at 54 min., 59 sec. (remarks by Rep. Ed Setzler (R-35th)).

97. 2019 Ga. Laws 711, § 3, at 713 (codified at § 1-2-1(e)(1)–(2)).

98. Science and Technology Committee Hearing, *supra* note 82, at 50 min., 9 sec. (remarks by Rep. Ed Setzler (R-35th)).

99. 2019 Ga. Laws 711, § 3, at 713 (codified at § 1-2-1(e)(1)).

100. *Id.* (codified at § 1-2-1(e)(2)).

101. HHS Committee Hearing, *supra* note 95, at 55 min., 56 sec. (remarks by Rep. Ed Setzler (R35th)).

102. Science and Technology Committee Hearing, *supra* note 82, at 50 min., 19 sec. (remarks by Rep. Ed Setzler (R-35th)).

the availability of records.<sup>103</sup> First, Section 4 presents five term definitions related to the Code section: “abortion,”<sup>104</sup> “detectable human heartbeat,”<sup>105</sup> “medical emergency,”<sup>106</sup> “medically futile,”<sup>107</sup> and “spontaneous abortion.”<sup>108</sup> The crux of Section 4 lies in its prohibition of abortions of “an unborn child” with a “detectable human heartbeat” as determined according to Code section 31-9B-2.<sup>109</sup> The Act provides three exceptions to the prohibition.<sup>110</sup> First, the Act does not prohibit the performance of an abortion if a physician, using “reasonable medical judgment,” determines that a “medical emergency exists.”<sup>111</sup> Second, the Act’s prohibition does not apply if the “unborn child” has a gestational age of twenty weeks or less,<sup>112</sup> and the pregnancy resulted from rape or incest where an “official police report” has been filed alleging such offenses.<sup>113</sup> Finally, the Act does not apply if a physician, using

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103. 2019 Ga. Laws 711, § 4, at 713 (codified at O.C.G.A. § 16-12-141 (Supp. 2019) (effective Jan. 1, 2020)).

104. *Id.* (codified at § 16-12-141(a)(1)). According to Section 4, an “abortion” is a purposeful act involving the use, prescription, administration of any instrument, substance, device or other means to terminate a pregnancy knowing such termination is reasonably likely to cause death to an unborn child. *Id.* However, such an act is not an abortion if the act is performed to either remove a dead unborn child caused by spontaneous abortion or to remove an ectopic pregnancy. *Id.* (codified at § 16-12-141(a)(1)(A)–(B)).

105. The definition of a “detectable human heartbeat” in Section 4 is identical to the definition used in Section 3 of the Act. *Compare* 2019 Ga. Laws 711, § 4, at 713 (codified at § 16-12-141(a)(2)) *with* 2019 Ga. Laws 711, § 3, at 713 (codified at O.C.G.A. § 1-2-1(e)(1) (2019) (effective Jan. 1, 2020)).

106. The Act defines “medical emergency” as a circumstance which necessitates an abortion to prevent the pregnant woman’s death or to prevent “substantial and irreversible physical impairment of a major bodily function.” 2019 Ga. Laws 711, § 4, at 713–14 (codified at § 16-12-141(a)(3)).

107. The term “medically futile” is a term used to describe a pregnancy—a “medically futile” pregnancy is one where “in reasonable medical judgment, an unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth.” *Id.* at 714 (codified at § 16-12-141(a)(4)).

108. The Act defines a “spontaneous abortion” as “the naturally occurring death of an unborn child,” which includes miscarriages and stillbirths. *Id.* at 714 (codified at § 16-12-141(a)(5)).

109. *Id.* at 714 (codified at § 16-12-141(b); *see also* O.C.G.A. § 31-9B-2 (2019) (effective Jan. 1, 2020)).

110. 2019 Ga. Laws 711, § 4, at 714 (codified at § 16-12-141(b)); *see also* Senate Proceedings Video, *supra* note 87, at 36 min., 27 sec. (remarks by Sen. Renee Unterman (R-45th)).

111. 2019 Ga. Laws 711, § 4, at 714 (codified at § 16-12-141(b)(A)(1)).

112. O.C.G.A. § 31-9B-1 supplies the definition of “probable gestational age of the unborn child.” § 31-9B-1.

113. 2019 Ga. Laws 711, § 4, at 714 (codified at § 16-12-141(b)(B)(2)).

“reasonable medical judgment” determines that the pregnancy is “medically futile.”<sup>114</sup>

Section 4 also requires any available medical aid to be rendered to the child if the abortion results in a child capable of sustained life.<sup>115</sup> The Act prohibits the performance of abortions that violate subsection (a) of Code section 31-9B-2.<sup>116</sup> The Act also prohibits the performance of abortions after the first trimester, unless the abortion is conducted in a licensed hospital, licensed ambulatory surgical center, or in a health facility licensed as an abortion facility through the Department of Community Health.<sup>117</sup> Additionally, only licensed physicians may perform abortions under Article 2 of Chapter 34 of Title 43.<sup>118</sup>

Section 4 states, “Health records shall be available to the district attorney of the judicial circuit in which the act of abortion occurs or the woman upon whom an abortion is performed resides.”<sup>119</sup> According to the Act, a woman who receives an abortion in violation of the Code section may pursue civil action and receive damages from the person who violated the Code under Georgia tort law.<sup>120</sup> Section 4 also establishes five affirmative defenses to prosecution under the Act.<sup>121</sup> Under Code section 16-12-141(h), it is an affirmative defense to prosecution if a licensed physician, an advanced practice registered nurse, a registered professional nurse,<sup>122</sup> a licensed practical nurse,<sup>123</sup> a licensed pharmacist,<sup>124</sup> or a licensed physician assistant<sup>125</sup> provides care or treatment to a pregnant woman that results in the “accidental or unintentional injury to or death of an

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114. *Id.* at 714 (codified at § 16-12-141(b)(B)(2)(3)).

115. *Id.* at 714 (codified at O.C.G.A. § 16-12-141(c)); Senate Proceedings Video, *supra* note 87, at 36 min., 27 sec. (remarks by Sen. Renee Unterman (R-45th)).

116. O.C.G.A. § 16-12-141(d); O.C.G.A. § 31-9B-2(a).

117. O.C.G.A. § 16-12-141(e)(1).

118. *Id.* § 16-12-141(e)(2).

119. *Id.* § 16-12-141(f).

120. *Id.* § 16-12-141(g).

121. *Id.* § 16-12-141(h).

122. *See* O.C.G.A. § 43-26-3(1.1) (2016) (defining “advanced practice registered nurse” and “registered professional nurse”).

123. *See id.* § 43-26-32(5) (defining a “licensed practical nurse”).

124. *See* O.C.G.A. § 26-4-4 (2014) (defining “the practice of pharmacy”).

125. *See* O.C.G.A. § 43-34-102 (2019) (defining “licensed physician assistant”).

unborn child.”<sup>126</sup> Additionally, it is an affirmative defense to prosecution under Section 4 of the LIFE Act if a pregnant woman sought an abortion because she “reasonably believed” receiving an abortion “was the only way to prevent a medical emergency.”<sup>127</sup>

*Section 5*

In Section 5, the LIFE Act amends Code section 16-6-15 as it relates to child support, to guidelines for determining the amount of an award, to the continuation of duty of support, and to the duration of support by adding a new subsection.<sup>128</sup> Section 5 of the Act establishes that “child” means “child or children,” which includes “any unborn child with a detectable human heartbeat,” as defined in Code section 1-2-1.<sup>129</sup> The new subsection added to Code section 19-6-15 also determines the maximum amount of support that may be imposed on the father of an unborn child by the court to be “the amount of direct medical and pregnancy related expenses of the mother of the unborn child.”<sup>130</sup> Post-partum, the provisions of Code section 19-6-15 apply in full.<sup>131</sup>

*Section 6*

Section 6 amends Code section 19-7-1 by changing paragraph (1) of subsection (c) regarding which parent holds parental power, how such parental power is lost, and the recovery for the homicide of a child.<sup>132</sup> Section 6 revises Code section 19-7-1 to state that regarding “the homicide of an unborn child,” the right to recover for the full value of the life of such “unborn child” must start when a “detectable human heartbeat” exists.<sup>133</sup>

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126. O.C.G.A. § 16-12-141(h)(1)–(4).

127. *Id.* § 16-12-141(h)(5).

128. 2019 Ga. Laws 711, § 5, at 715.

129. O.C.G.A. § 19-6-15(4)(a.1)(1) (Supp. 2019) (effective Jan. 1, 2020).

130. *Id.* § 19-6-15(4)(a.1)(2).

131. *Id.*

132. 2019 Ga. Laws 711, § 6, at 715.

133. O.C.G.A. § 19-7-1(c)(1) (Supp. 2019) (effective Jan. 1, 2020); *see* O.C.G.A. 1-2-1 (2019) (effective Jan. 1, 2020) (defining “detectable human heartbeat”). Representative Setzler discussed this particular provision as a recognition of the point of quickening, which under English common law

*Section 7*

Section 7 of the Act amends Code section 31-9A-3, regarding voluntary and informed consent to abortion and the availability of an ultrasound.<sup>134</sup> Section 7 changes Code section 31-9A-3, relating to the “Woman’s Right to Know Act.”<sup>135</sup> Before the LIFE Act, the Woman’s Right to Know Act required that a pregnant woman be informed, either over the phone or in person, of the medical risks associated with the abortion procedure and the medical risks associated with carrying an unborn child to full term.<sup>136</sup> The LIFE Act modifies this by requiring the physician who will perform the abortion to inform the pregnant woman of a “detectable human heartbeat” at the time the abortion would be performed.<sup>137</sup> Section 7 of the LIFE Act additionally requires that pregnant women seeking an abortion be informed of the presence of a “detectable human heartbeat” before going forward with the procedure.<sup>138</sup>

*Section 8*

Section 8 of the Act revises Code section 31-9A-4 as it relates to the information that the Department of Public Health makes available, including the format requirements, availability, and website requirements.<sup>139</sup> According to Section 8, the Department of Public Health must make available certain materials concerning “unborn children with a detectable human heartbeat” or concerning “unborn children” of twenty weeks’ or more gestational age.<sup>140</sup> The Department of Public Health must publish information stating that an

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referred to the point at which a mother could feel the baby moving inside the womb. Science and Technology Committee Hearing, *supra* note 82, at 58 min., 50 sec. (remarks by Rep. Ed Setzler (R-35th)). The quickening threshold was “the legally significant threshold at the presence of a heartbeat.” *Id.* The recognition of this threshold in this new legislation was deemed “Quickening 2.0” by Representative Setzler and was considered the appropriate legal threshold by which to determine the full value of the life of a child. *Id.*

134. 2019 Ga. Laws 711, § 7, at 716.

135. O.C.G.A. § 31-9A-3(1)(B) (2019) (effective Jan. 1, 2020).

136. *Id.* § 31-9A-3(1)(A), (C).

137. *Id.* § 31-9A-3(1)(B).

138. 2019 Ga. Laws 711, § 7, at 716 (codified at § 31-9A-3(1)(B)).

139. 2019 Ga. Laws 711, § 8, at 716 (codified at § 31-9A-4(a)(3)).

140. § 31-9A-4(a)(3).

“unborn child” may have a “detectable human heartbeat” at six weeks’ gestational age.<sup>141</sup> The Department of Public Health must also publish information that states “an unborn child has the physical structures necessary to experience pain” by twenty weeks’ gestation.<sup>142</sup> These materials must include evidence showing “unborn children” at twenty weeks’ gestation trying to “evade” stimuli in a way that an infant or an adult would interpret as a pain response.<sup>143</sup> Also included in these materials must be the fact that anesthesia is often administered to unborn children of twenty weeks’ or more gestation who receive prenatal surgery.<sup>144</sup> Section 8 of the Act provides that the Department of Public Health’s materials must be “objective, nonjudgmental, and designed to convey only accurate scientific information about an unborn child at the various gestational ages.”<sup>145</sup>

### *Section 9*

Section 9 of the LIFE Act repeals Code section 31-9A-6.1, which relates to civil and professional penalties for violations and the requirements for seeking such penalties.<sup>146</sup> This particular section, before the LIFE Act, required that doctors who failed to comply with existing abortion laws be reported to the state medical board.<sup>147</sup>

### *Section 10*

Section 10 of the Act revises Code section 31-9B-2, as it relates to the requirement of determining the “probable gestational age of [an] unborn child.”<sup>148</sup> Section 10 of the Act prohibits the performance of

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. 2019 Ga. Laws 711, § 8, at 717 (codified at O.C.G.A. § 31-9A-4(a)(3)).

146. 2019 Ga. Laws 711, § 9, at 717.

147. O.C.G.A. § 31-9A-6.1 (2019) (repeal effective Jan. 1, 2020). This statute also established evidentiary requirements for plaintiffs seeking civil relief from doctors who violated the law (a clear and convincing standard) and denied standing to any female who made false representations of either her name or age in soliciting an abortion. *Id.*

148. 2019 Ga. Laws 711, § 10, at 717 (codified at O.C.G.A. § 31-9B-2 (2019) (effective Jan. 1,

any abortion, except in cases of a “medical emergency” or a “medically futile” pregnancy, unless the licensed physician performing the abortion has first determined whether a “detectable human heartbeat” exists.<sup>149</sup> Additionally, this section provides that a physician’s violation of this Code section constitutes “unprofessional conduct” for purposes of Code section 43-34-8(a)(7), as it relates to medical licensing sanctions.<sup>150</sup>

### *Section 11*

Section 11 of the LIFE Act revises Code section 31-9B-3(a), regarding reporting requirements of physicians and departments, confidentiality, and failure to comply.<sup>151</sup> Any physician who performs or tries to perform an abortion must report to the department according to Code section 31-9A-6 requirements and according to the forms, rules, and regulations adopted and promulgated by the department.<sup>152</sup> The physician’s report must include whether a “detectable human heartbeat” exists, the “probable gestational age,” and the method and basis of the physician’s determinations.<sup>153</sup> If a “detectable human heartbeat exists,” a pregnant woman has a “medically futile” pregnancy, a “medical emergency exist[s],” or a pregnancy results from rape or incest, the physician performing the abortion must report such determinations.<sup>154</sup> Finally, the physician must also report the method used to perform the abortion.<sup>155</sup>

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2020)).

149. § 31-9B-2(a).

150. *Id.* § 31-9B-2(b); O.C.G.A. § 43-34-8(a)(7) (Supp. 2019).

151. 2019 Ga. Laws 711, § 11, at 717.

152. § 31-9B-3(a).

153. *Id.* § 31-9B-3(a)(1).

154. *Id.* § 31-9B-3(a)(3)(2).

155. *Id.* § 31-9B-3(a)(4)(3).

*Section 12*

Section 12 of the Act amends Code section 48-7-26, relating to personal exemptions for income taxes in Georgia.<sup>156</sup> Under the Act, any “unborn child with a detectable human heartbeat” qualifies as a dependent minor for income tax purposes.<sup>157</sup> To qualify for the tax deduction, the pregnancy must be “medically verified,” tracking the same standard of a medically verified pregnancy test that applies to individuals under the Medicaid system in Georgia.<sup>158</sup>

Georgia legislators voiced concerns about miscarriages and the effect of a miscarriage on a tax write-off under the Act.<sup>159</sup> Representative Setzler explained that the Section 12 provision recognizes the life of the child, even if the mother miscarries because the child still “counts as a member of the family.”<sup>160</sup>

*Section 13*

Section 13 of the Act establishes citizen standing and the right to intervene and defend in any action that challenges any part of the LIFE Act.<sup>161</sup>

*Section 14*

Section 14 of the Act provides for the severability of all provisions in the LIFE Act according to Code section 1-1-3.<sup>162</sup>

*Section 15*

Section 15 of the Act establishes that the Act becomes effective on January 1, 2020.<sup>163</sup>

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156. 2019 Ga. Laws 711, § 12, at 718.

157. O.C.G.A. § 48-7-26(a) (2017).

158. HHS Committee Hearing, *supra* note 95, at 1 hr., 16 min., 24 sec. (Mar. 6, 2019) (remarks by Rep. Ed Setzler (R-35th) and Rep. Sharon Cooper (R-43rd)).

159. *Id.* at 1 hr., 30 min., 19 sec. (remarks by Rep. Dexter Sharper (D-177th)).

160. *Id.* at 1 hr., 30 min., 57 sec. (remarks by Rep. Ed Setzler (R-35th)).

161. 2019 Ga. Laws 711, § 13, at 718.

162. 2019 Ga. Laws 711, § 14, at 718.



*Analysis*

Georgia's LIFE Act has gained national attention from several major news outlets throughout the country.<sup>164</sup> Central to the Act's coverage in the media is criticism of the Act for its constitutionality and of the implications the Act has for reproductive healthcare access and availability in Georgia.<sup>165</sup> Given the Act's novel recognition of an "unborn child with a detectable human heartbeat" as a "natural person" entitled to the full legal rights and benefits of personhood, the LIFE Act presents several interesting constitutional points and yields numerous potential consequences.<sup>166</sup>

*Constitutionality Analysis*

The LIFE Act faces several constitutional hurdles, but these hurdles may be exactly what proponents of the bill are hoping for.<sup>167</sup>

163. 2019 Ga. Laws 711, § 15, at 718.

164. See Jamie Ducharme, *Abortion Advocates File Lawsuit Challenging Georgia Heartbeat Law*, TIME (June 28, 2019), <https://time.com/5617050/georgia-abortion-lawsuit/> [<https://perma.cc/6LEA-93RA>]; 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> [<https://perma.cc/R82B-B3VH>]; Alanne Orjoux, Jessica Ravitz & Jason Hanna, *Georgia's Governor Signs a Controversial Abortion Bill Into Law*, CNN (May 7, 2019, 6:53 PM), <https://www.cnn.com/2019/05/07/health/georgia-abortion-bill/index.html> [<https://perma.cc/9Z5K-7UTJ>]; Emily Wax-Thibodeaux & Ariana Eunjung Cha, *Georgia Governor Signs 'Heartbeat Bill,' Giving the State One of the Most Restrictive Abortion Laws in the Nation*, WASH. POST (May 7, 2019, 12:02 PM), [https://www.washingtonpost.com/national/health-science/georgia-governor-signs-heartbeat-bill-giving-the-state-one-of-the-most-restrictive-abortion-laws-in-the-nation/2019/05/07/d53b2f8a-70cf-11e9-8be0-ca575670e91c\\_story.html](https://www.washingtonpost.com/national/health-science/georgia-governor-signs-heartbeat-bill-giving-the-state-one-of-the-most-restrictive-abortion-laws-in-the-nation/2019/05/07/d53b2f8a-70cf-11e9-8be0-ca575670e91c_story.html) [<https://perma.cc/5QSY-VXH9>].

165. Alexandra Hutzler, *Is Georgia's 'Heartbeat' Abortion Bill Legal? Controversial Law Bans Abortions Before Many Women Know They're Pregnant*, NEWSWEEK (May 7, 2019, 4:36 PM), <https://www.newsweek.com/georgia-heartbeat-abortion-law-court-challenges-1418348> [<https://perma.cc/Z9KK-83U2>]; Kate Smith, *Georgia's "Heartbeat" Bill, a Ban on Nearly All Abortions, Challenged In Court*, CBS NEWS (June 28, 2019, 12:50 PM), <https://www.cbsnews.com/news/georgia-heartbeat-bill-ban-on-nearly-all-abortions-challenged-in-court-today-2019-06-28/> [<https://perma.cc/FSQ6-HCWR>]; Sam Whitehead, *Inside the Possible Legal Challenges To Georgia's Abortion Law*, WABE (May 28, 2019), <https://www.wabe.org/inside-the-possible-legal-challenges-to-georgias-abortion-law/> [<https://perma.cc/6SGZ-58YF>].

166. Prabhu, *supra* note 83.

167. Hutzler, *supra* note 165; Tara Law, *Here Are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana and Elsewhere*, TIME (July 2, 2019, 5:21 PM), <https://time.com/5591166/state-abortion-laws-explained/> [<https://perma.cc/4LAX-EH6M>]; Rachana Pradhan, *Pushing for 'Heartbeat' Abortion Bills, More States Try to Force Supreme Court to Revisit Roe*, POLITICO (Mar. 27, 2019, 3:33 PM), <https://www.politico.com/story/2019/03/27/heartbeat-abortion-bills-roe-v-wade-1301449>

Abortion opponents have said the Act is intended to bring a new case to the Supreme Court,<sup>168</sup> and Georgia's law is just one of many meant to provoke a response from the Supreme Court.<sup>169</sup> This process began just weeks after the Act's passage, when the ACLU of Georgia filed a highly anticipated lawsuit challenging the measure.<sup>170</sup> The suit argues that the Act violates a woman's constitutional right to access an abortion up until twenty-four weeks of pregnancy.<sup>171</sup> Further, the plaintiffs argue that principles of precedent preclude this prohibition, specifically under *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>172</sup> The ruling in any potential case is likely to make its way through the appeals courts, and potentially up to the Supreme Court, which anti-abortion supporters hope will lead to a reversal of *Roe* and *Casey*.<sup>173</sup> However, similar measures in other states have been consistently struck down by both

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[<https://perma.cc/VGT9-C7QY>].

168. Sarah Mervosh, *Georgia Is Latest State to Pass Fetal Heartbeat Bill as Part of Growing Trend*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/us/georgia-fetal-heartbeat-abortion-law.html> [<https://perma.cc/9LLH-ECFF>].

169. Hutzler, *supra* note 165 (quoting Talcott Camp, Deputy Director of the ACLU Reproductive Freedom Project) ("This bill is part of an orchestrated national agenda to push abortion care out of reach and we won't stand for it."); Law, *supra* note 167.

170. Maya T. Prabhu, *Georgia Abortion Providers File Lawsuit Challenging 'Heartbeat' Law*, ATLANTA J.-CONST. (June 28, 2019), <https://www.ajc.com/news/state—regional-govt—politics/georgia-abortion-providers-file-lawsuit-challenging-heartbeat-law/B25hOp7YXU4cMERih31pcO/>

[<https://perma.cc/659G-SRZS>]. The ACLU promised legal action against Governor Kemp months before he actually signed the bill. Emily Wax-Thibodeaux & Reis Thebault, *Georgia Legislators Pass 'Heartbeat Bill' That Would Ban Most Abortions*, WASH. POST (Mar. 29, 2019, 4:00 PM), [https://www.washingtonpost.com/national/georgia-legislators-pass-heartbeat-bill-banning-most-abortions/2019/03/29/1cc3ec58-516c-11e9-8d28-f5149e5a2fda\\_story.html](https://www.washingtonpost.com/national/georgia-legislators-pass-heartbeat-bill-banning-most-abortions/2019/03/29/1cc3ec58-516c-11e9-8d28-f5149e5a2fda_story.html) [<https://perma.cc/M97T-QFS5>]. The plaintiffs are suing Governor Brian Kemp (R), State Attorney General Chris Carr, Georgia Department of Public Health Commissioner Kathleen Toomey, members of the Georgia Composite Medical Board and its director, and the district attorneys where the plaintiffs reside or run their businesses. Prabhu, *supra* note 170.

171. Jim Galloway, *SisterSong v. Brian Kemp Is Part Lawsuit, Part Feminist Manifesto*, ATLANTA J.-CONST. (June 28, 2019), <https://www.ajc.com/blog/politics/sistersong-brian-kemp-part-lawsuit-part-feminist-manifesto/xIOgSYL1KjxOyJeH3uhRkM/#> [<https://perma.cc/3L9B-D8QU>]; Prabhu, *supra* note 170. The head plaintiff in the suit is the SisterSong Women of Color Reproductive Justice Collective, "a nod to the ACLU's contention that women of color are likely to be disproportionately impacted" by the new law. Galloway, *supra* note 171. Other plaintiffs party to the lawsuit include seven women's health care organizations in Georgia and three professors at Emory University School of Medicine in the obstetrics and gynecology specialty. *Id.*

172. Prabhu, *supra* note 170.

173. *Id.*

federal and state courts, paving the way for lengthy and heated litigation over the Georgia law.<sup>174</sup>

### *Abortion Rights in the United States*

Georgia's LIFE Act is one of several state laws enacted to trigger the U.S. Supreme Court's review of its 1973 *Roe v. Wade* decision.<sup>175</sup> In 1973, the Supreme Court decided *Roe v. Wade*, finding that the Constitution protects the right to personal privacy, which includes a woman's right to terminate her pregnancy via abortion.<sup>176</sup> This constitutional protection of the right to obtain an abortion falls within the broader "right to privacy" grounded in the "penumbras" of the Bill of Rights, established in earlier Supreme Court precedent protecting an individual's constitutional right to reproductive autonomy and privacy.<sup>177</sup> However, the Supreme Court noted in *Roe* that the right to obtain an abortion is not an absolute right; states may regulate abortion provided they show a compelling state interest exists—primarily in the protection of the woman's health and in the protection of the potential life of the fetus.<sup>178</sup> Since *Roe*, the Court has consistently reaffirmed constitutional protections of this right to

174. Wax-Thibodeaux & Thebault, *supra* note 170. Kentucky's version of a heartbeat bill was struck down by a federal judge, and a 2018 Iowa law was struck down by the state supreme court. *Id.*

175. Rachana Pradhan, *Pushing for 'Heartbeat' Abortion Bills, More States Try to Force Supreme Court to Revisit Roe*, POLITICO (Mar. 27, 2019, 3:33 PM), <https://www.politico.com/story/2019/03/27/heartbeat-abortion-bills-roe-v-wade-1301449> [<https://perma.cc/NLS2-B5ZC>].

176. *Roe v. Wade*, 410 U.S. 113, 153 (1973). *Roe v. Wade* is recognized as the seminal case on abortion rights, recognizing the right to obtain an abortion as a fundamental liberty protected by the Fourteenth Amendment of the Constitution. Memorandum from the Ctr. Reprod. Rights, Constitutional Protection for the Right to Abortion: From *Roe* to *Casey* to *Whole Woman's Health* 1, <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/factsheets/Constitutional-Protection-for-the-Right-to-Abortion-Fact-Sheet2.pdf> [<https://perma.cc/MJR9-SJZY>] [hereinafter Constitutional Protection].

177. *Eisenstadt v. Baird*, 405 U.S. 438, 472 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); Constitutional Protection, *supra* note 176.

178. *Roe*, 410 U.S. at 154. The Court established a trimester framework, holding that during the first trimester of pregnancy, the state could not interfere with a woman's right to choose to obtain an abortion. *Id.* at 164. During the second trimester, state regulations "reasonably related to maternal health" were allowed, but the state could not keep women from obtaining an abortion. *Id.* At the point of fetal viability at the end of the second trimester, the state's interest in potential human life allowed the state to prohibit abortions, except when an abortion necessarily preserved the health or life of the mother. *Id.* at 164–65.

privacy by protecting the individual's right to make personal decisions about family and childbearing.<sup>179</sup> The Court has held that without access to abortion, the right to individual privacy in the context of family and childbearing is meaningless.<sup>180</sup>

Following *Roe*, the U.S. Supreme Court handed down another landmark abortion decision in 1992—*Casey*.<sup>181</sup> In *Casey*, the Court reaffirmed *Roe*'s central holding, protecting a woman's right to obtain an abortion.<sup>182</sup> However, the Court established a new test to use when balancing the woman's constitutionally protected right to privacy against the state's interest in both women's health and the potential life of the unborn fetus.<sup>183</sup> The new "undue burden" standard allows states to regulate abortion before the fetus is viable, as long as the regulation does not create an undue burden on the woman.<sup>184</sup> The Court defined an undue burden as "a state's regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."<sup>185</sup> *Casey*'s undue burden standard allowed state governments to regulate abortions at the pre-viability stage, regulation that was previously beyond the state's power under *Roe*.<sup>186</sup> Thus, after *Casey*, abortion was legal; however, the procedure became vulnerable to state regulation because the undue burden standard created more opportunities for statutory restrictions than available immediately after *Roe*.<sup>187</sup>

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179. Constitutional Protection, *supra* note 176.

180. *Id.*

181. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

182. *Id.* at 871; Gary Knapp, *Supreme Court's Views as to Validity, Under Federal Constitution, of Abortion Laws*, 111 L. Ed. 2d 879 (2012). *Casey* stated that under the Fourteenth Amendment's Due Process Clause, a woman has a constitutionally protected right to choose to have an abortion before fetal viability without interference from the state because before viability, a state's interests are not strong enough to support banning abortion or imposing significant barriers to a woman's effective right to choose to have the procedure. *Id.* The trimester framework established in *Roe* was overturned by the Court in *Casey* because the trimester framework "misconceive[d] the nature of the woman's interest [and] undervalue[d] the State's interest in potential life." *Casey*, 505 U.S. at 873.

183. *Casey*, 505 U.S. at 872.

184. *Id.* at 873–79.

185. *Id.* at 877.

186. Katherine Kubak et al., *Twentieth Annual Review of Gender and the Law: Annual Review Article: Abortion*, 20 GEO. J. GENDER & L. 265, 270 (2019).

187. *Id.* at 270; see Roy G. Spence, Jr., *The Purpose Prong of Casey's Undue Burden Test and Its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or Its*

In 2016, the Supreme Court decided *Whole Women's Health v. Hellerstedt*.<sup>188</sup> The Court struck down Texas regulations that constituted undue burdens because they barred a woman's right to obtain an abortion by forcing numerous abortion clinics to shut down.<sup>189</sup> The Court clarified that state abortion regulations are impermissible if they place a "substantial obstacle in the path of women seeking a pre-viability abortion" if the regulation produces no "medical benefits sufficient to justify the burdens."<sup>190</sup>

### *Constitutionality of Georgia's LIFE Act*

Among the heavily debated points about the LIFE Act is the law's constitutionality.<sup>191</sup> Representative Ed Setzler (R-35th), author and cosponsor of the LIFE Act, claims the Act is not "waving its fist at *Roe*; it's answering *Roe*."<sup>192</sup> In *Roe*, the Supreme Court asserted that the word "person" in the Constitution "does not include the unborn," meaning that constitutional rights only apply postnatally.<sup>193</sup> In answering *Roe*, the LIFE Act attempts to fill in gaps missing from Texas's argument in *Roe* by establishing the "personhood" of the "unborn child with a detectable human heartbeat" as the new legislative policy in Georgia.<sup>194</sup>

Thus, the LIFE Act expands the definition of a "person" beyond the requirements of federal law.<sup>195</sup> Representative Setzler argues that this broader definition of a "person" is legally sound because states

*Progeny*, 33 WHITTIER L. REV. 77, 79 (2011) (recognizing that *Casey* narrowed abortion rights).

188. *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

189. *Id.* at 2313.

190. *Id.* at 2300.

191. Bill Rankin, *Digging Deeper: Could Georgia Abortion Law Challenge Roe v. Wade?*, ATLANTA J.-CONST. (Apr. 26, 2019), <https://www.ajc.com/news/local/could-georgia-abortion-law-challenge-roe-wade/WiipMbWRW8DC6lrl8qzksJ/> [<https://perma.cc/JF4W-Q2MY>]; see Hutzler, *supra* note 165.

192. David French, *Alabama and Georgia Are Throwing Down the Gauntlet Against Roe*, GOOD., NAT'L REV. (May 15, 2019, 2:46 PM), <https://www.nationalreview.com/2019/05/alabama-and-georgia-are-throwing-down-the-gauntlet-against-roe-good-2/> [<https://perma.cc/AHD4-XH4S>].

193. *Roe v. Wade*, 410 U.S. at 113, 157–58; Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, OHIO ST. L.J. 75, 88 (2013).

194. 2019 Ga. Law 711, § 3, at 713.

195. 2019 Ga. Law 711, § 2, at 712 (codified at O.C.G.A. 1-2-1 (2019) (effective Jan. 1, 2020)); Jonathan F. Will, I. Glenn Cohen & Eli Y. Adashi, *Personhood Seeking New Life with Republican Control*, IND. L.J. 499, 502 (2018) ("The U.S. Constitution does not define the term 'person' nor does it state when life begins.").

may generally recognize constitutional rights more expansively than the federal law requires.<sup>196</sup> He relies on a passage from Justice Blackmun’s majority opinion in *Roe*, which states “[i]f this suggestion of [fetal] personhood is established, the appellant’s case [in support of abortion], of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>197</sup> Some legal scholars disagree about whether recognizing fetal personhood necessarily leads to banning abortions, but Justice Blackmun’s statement may have given rise to this “personhood movement.”<sup>198</sup> By according an unborn child with the full, legal status of personhood, almost any abortion performed would in turn violate state homicide laws.<sup>199</sup>

By including a fetus in the State’s legal definition of a “natural person,” the law grants that fetus full legal recognition as a “natural person” once fetal cardiac activity is detected—typically occurring around six weeks of pregnancy.<sup>200</sup> Georgia state officials work to defend the LIFE Act in court—specifically, officials in the Office of the Attorney General.<sup>201</sup> The legal challenge to the LIFE Act filed by the ACLU in June 2019 argues that the Act “bans practically all abortions” and “criminalize[s] abortion from the earliest stages of pregnancy.”<sup>202</sup>

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196. Science and Technology Committee Hearing, *supra* note 82, at 41 min., 36 sec. (remarks by Rep. Ed Setzler (R-35th)); *see also* Ed Setzler, *Ed Setzler: The LIFE Act Protects Mothers & Unborn Children*, Opinion, MARIETTA DAILY J. (Apr. 13, 2019), [https://www.mdjonline.com/opinion/ed-setzler-the-life-act-protects-mothers-unborn-children/article\\_8f86c6ec-5cd5-11e9-8cc1-9b2b1db3bacc.html](https://www.mdjonline.com/opinion/ed-setzler-the-life-act-protects-mothers-unborn-children/article_8f86c6ec-5cd5-11e9-8cc1-9b2b1db3bacc.html) [<https://perma.cc/78V7-FDQR>] (“Informed by the *Roe* decision itself, the LIFE Act is built on the long-established foundation of a state’s authority to recognize a person’s fundamental rights more expansively than the minimum required by federal law. As examples of this, Georgia law currently provides persons more expansive privacy and eminent domain protections than the minimum standard the U.S. Constitution requires.”).

197. *Roe*, 410 U.S. at 156–57; Will et al., *supra* note 195, at 502; Setzler, *supra* note 196.

198. Will et al., *supra* note 195, at 502.

199. *Id.*

200. Science and Technology Committee Hearing, *supra* note 82, at 48 min., 56 sec. (remarks by Rep. Ed Setzler (R-35th)) (“The legal status is going to apply with respect to any restrictions and tax benefits and other benefits at the heartbeat because that’s a definable, measurable threshold.”).

201. Whitehead, *supra* note 165 (quoting spokesperson for the Office of the Attorney General Chris Carr) (“At the Department of Law, it is our constitutional duty to defend the laws of the State of Georgia. . . . HB 481 was passed by Georgia’s duly elected General Assembly and signed into law by the Governor, and our office will defend this law.”).

202. Verified Complaint for Declaratory and Injunctive Relief at 3, *SisterSong v. Kemp*, 1:19-cv-02973-SCJ (N.D. Ga. June 28, 2019) [hereinafter ACLU Complaint].

The ACLU argues that the Act directly conflicts with *Roe v. Wade*.<sup>203</sup> Current federal law allows women to terminate their pregnancies before the point of fetal viability and prohibits states from banning abortion during the pre-viability period.<sup>204</sup> Some legal experts claim Georgia's law violates the federal Constitution because it bans abortions at six weeks, before a fetus is viable.<sup>205</sup> The ACLU of Georgia's Legal Director, Sean J. Young, notes that some federal judges have struck down laws similar to Georgia's.<sup>206</sup> However, he recognizes that passing laws like the LIFE Act is precisely the way to challenge what is considered constitutional.<sup>207</sup>

State legislators across the country have recently passed legislation banning abortions that will face legal challenges in court.<sup>208</sup> Given the conservative majority in the United States Supreme Court after President Donald Trump's (R) appointments of Neil Gorsuch and Brett Kavanaugh to the bench, state legislators have passed numerous anti-abortion laws seeking a legal challenge to *Roe v. Wade*.<sup>209</sup> At a minimum, these state legislators hope "to undercut *Roe* and subsequent decisions that reaffirmed abortion rights, the idea being that each legal challenge makes it a little harder to obtain an abortion

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203. Stephanie Sundier, *Georgia Sued over Fetal Heartbeat Abortion Ban*, JURIST (July 1, 2019, 8:44 AM), <https://www.jurist.org/news/2019/07/georgia-sued-over-fetal-heartbeat-abortion-ban/> [<https://perma.cc/LE9A-4XPB>].

204. Becky Kellogg, *What to Know about New Abortion Law: Law Professor Weighs In*, 11ALIVE (May 14, 2019, 11:09 AM), <https://www.11alive.com/article/news/health/what-to-know-about-new-abortion-law-law-professor-weighs-in/85-acf26222-c160-4e02-a060-d0b9ff5a725a> [<https://perma.cc/WYP2-ZSD7>] (quoting Deborah Dinner, Associate Professor of Law, Emory University School of Law).

205. *Id.* (quoting Deborah Dinner).

206. Whitehead, *supra* note 165.

207. *Id.* (quoting Sam Young, Legal Director, ACLU of Georgia) ("[Supporters of the law] have a view of the [C]onstitution, and the courts are there to test their views. We think the precedent is on our side that this law deprives women of their autonomy and freedom to make their own healthcare decisions and we intend to argue that vigorously in court.").

208. Emma Green, *The New Abortion Bills Are a Dare*, ATLANTIC (May 15, 2019), <https://www.theatlantic.com/politics/archive/2019/05/alabama-georgia-abortion-bills/589504/> [<https://perma.cc/63LP-KTCT>]; Eric Levenson, *Alabama's Anti-Abortion Law Isn't Alone. Here Are All the States Pushing to Restrict Access*, CNN (May 16, 2019, 3:04 PM) <https://www.cnn.com/2019/05/16/politics/states-abortion-laws/index.html> [<https://perma.cc/5R9A-XQJ2>] ("Mississippi Gov. Phil Bryant signed a 'heartbeat' bill in March. Exceptions are to prevent a woman's death or her serious risk of impairment.").

209. Green, *supra* note 208; Hutzler, *supra* note 165; Levenson, *supra* note 208.

in the United States.”<sup>210</sup> Ultimately, these state legislators seek to make abortion an illegal practice nationwide.<sup>211</sup> Many state legislators sponsoring these abortion bills believe the bans mount challenges to “one of the most inhumane and flawed Supreme Court decisions of our time.”<sup>212</sup>

Given the numerous state-level abortion bans enacted across the country, there is no guarantee as to which state law will come before the Supreme Court.<sup>213</sup> For years, abortion opponents have established state-level restrictions on abortions to trigger court challenges.<sup>214</sup> However, in recent years, most of those efforts have failed at higher court levels.<sup>215</sup>

Still, the Supreme Court justices may hesitate before overturning *Roe*.<sup>216</sup> Precedent is a critical and powerful legal principle, which promotes consistency of the laws and their enforcement over time.<sup>217</sup> If Georgia’s LIFE Act comes before the Supreme Court, the nine justices may confront a decision to overturn almost fifty years of jurisprudence on abortion.<sup>218</sup>

### *Potential Consequences of the LIFE Act in Georgia*

The LIFE Act changes several provisions in the Georgia Code, implicating Georgia residents in various ways.<sup>219</sup> Particularly, the Act’s recognition of an “unborn child with a detectable human heartbeat” as a “natural person” under Georgia law has several significant implications for Georgia’s economy and healthcare system.

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210. Green, *supra* note 208; Rankin, *supra* note 191.

211. Green, *supra* note 208.

212. *Id.*

213. *Id.*

214. Law, *supra* note 167.

215. Mazzei, *supra* note 164.

216. Green, *supra* note 208.

217. *Id.*; Jeffrey Toobin, *The Abortion Fight and the Pretense of Precedent*, NEW YORKER (May 19, 2019), <https://www.newyorker.com/magazine/2019/05/27/the-abortion-fight-and-the-pretense-of-precedent> [https://perma.cc/3E36-EQHV].

218. Green, *supra* note 208.

219. 2019 Ga. Laws 711, § 1, at 712.



*Economic Implications of the LIFE Act*

Opponents of the Act have voiced concerns about the costs to implement the law in Georgia, as well as the massive litigation costs many foresee.<sup>220</sup> For example, Representative David Dreyer (D-59th) stated his concern for the criminal enforcement costs that will accompany the Act to implement its provisions.<sup>221</sup> Representative Sharon Cooper (R-43rd) showed concern about the increasing costs to Georgia taxpayers that will accompany provisions requiring “medically verified pregnancies” for pregnant mothers to qualify for the tax deduction provided under Section 12 of the Act.<sup>222</sup> However, Act proponents insist that the tax provision will minimally impact families, only amounting to about \$172.50, which is the maximum amount of a full tax write off for a child.<sup>223</sup> Representative Setzler stated that his main purpose for the Section 12 tax deduction was not to provide Georgians with a tax benefit, but rather, to recognize “the cost and the significance of a human being coming into this world.”<sup>224</sup>

Opponents of the law have demonstrated concerns that the law’s criminalization of abortions ultimately will require pregnant mothers to secure adequate prenatal care or be subject to prosecution for her failure to act.<sup>225</sup> Many opponents also argue that the law will create

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220. HHS Committee Hearing, *supra* note 95, at 1 hr., 33 min., 28 sec. (Mar. 6, 2019) (remarks by Rep. David Dreyer (D-59th)).

221. *Id.* Representative Dreyer suggested that the bill “provides standing for individuals to continually sue the State of Georgia over the provisions in [the] bill,” leading to the potential for “massive costs.” *Id.* Dreyer also noted that the potential tax costs for the associated tax provisions were unknown. *Id.*

222. *Id.* at 1 hr., 16 min., 33 sec. (remarks by Rep. Sharon Cooper (R-43rd)). *See* 2019 Ga. Laws 711, § 12, at 718.

223. HHS Committee Hearing, *supra* note 95, at 1 hr., 31 min., 4 sec. (remarks by Rep. Ed Setzler (R-35th) (“I’m not touting this as a big windfall.”)); *see also* Science and Technology Committee Hearing, *supra* note 82, at 57 min., 53 sec. (remarks by Rep. Setzler (R-35th) (estimating the “net impact” of the tax deduction provision on a family to approximate to around \$238)).

224. Audio Recording of House Proceedings at 18 min., (Mar. 7, 2019) (remarks by Rep. Ed Setzler (R-35th)), [https://www.temi.com/editor/t/xRipfMslM2KK2Dc8ETHOdrvCRYFN-PBWe8169e7t5r\\_vfN\\_0-3lxbx0TaME7THyBapZroFdaUouJXrnrDcpKsBJ8Qqs?loadFrom=SharedLink&ts=182.25](https://www.temi.com/editor/t/xRipfMslM2KK2Dc8ETHOdrvCRYFN-PBWe8169e7t5r_vfN_0-3lxbx0TaME7THyBapZroFdaUouJXrnrDcpKsBJ8Qqs?loadFrom=SharedLink&ts=182.25).

225. *Hearing on S. 160 Before the H. Comm. on the Judiciary*, 116th Cong. 5 n.4 (2019) (testimony of Jen Jordan, Georgia State Senator) (“The fact of the intent to extend criminal liability to pregnant women is confirmed by the inclusion of a new affirmative defense from criminal prosecution.”); *see also* 2019 Ga. Laws 711, § 4, at 715 (“(h) It shall be an affirmative defense from prosecution under this article . . . if: (5) A woman sought an abortion because she reasonably believed that an abortion was the

“massive” legal costs through both constitutional challenges to the Act and through individual challenges enabled by the Act’s standing provision, which allows individuals to continuously sue the State of Georgia over the Act.<sup>226</sup>

Another economic implication of the Act in Georgia stems from the threats of major film companies’ withdrawal from the state due to the LIFE Act’s passage.<sup>227</sup> High-profile actors, including Alyssa Milano, publicly opposed the Act, vowing to boycott all film and media projects within the state.<sup>228</sup> Estimates place the impact of such a boycott or withdrawal of media projects at about \$9.52 billion.<sup>229</sup> But film industry threats of boycott are nothing new in Georgia. Disney and Marvel supported a plan to boycott the state after Georgia passed a religious freedom bill, which was opposed as “antigay,” and was ultimately vetoed.<sup>230</sup>

Movie studios had mixed reactions to the LIFE Act.<sup>231</sup> At least three independent production companies<sup>232</sup> released statements disavowing any further business in the state, but larger movie

only way to prevent a medical emergency.”).

226. HHS Committee Hearing, *supra* note 95, at 1 hr., 33 min., 28 sec. (remarks by Rep. David Dreyer (D-59th)).

227. Sasha Ingber, *Media Companies May Stop Productions in Georgia over New Abortion Law*, NPR (May 30, 2019, 2:33 PM), <https://www.npr.org/2019/05/30/728232942/media-companies-may-stop-productions-in-georgia-over-new-abortion-law> [<https://perma.cc/HC48-KZRX>]. Film and media production companies, including Warner Media, Walt Disney Co., and NBCUniversal have threatened to withdraw film productions in Georgia. *Id.*

228. Lauren Padgett, *Alyssa Milano Denounces ‘Heartbeat’ Abortion Bill at State Capitol*, 11ALIVE (updated Apr. 2, 2019, 6:34 PM), <https://www.11alive.com/article/news/politics/alyssa-milano-denounces-heartbeat-abortion-bill-at-state-capitol/85-49bee40c-b2cd-4d0a-a4c3-dd590bab25b4> [<https://perma.cc/DCB6-YZM6>].

229. Jenni Fink, *Georgia Anti-Abortion ‘Heartbeat Bill’ Could Have a \$9.52 Billion Negative Economic Impact, Passes House*, NEWSWEEK (Mar. 29, 2019, 3:21 PM), <https://www.newsweek.com/georgia-anti-abortion-heartbeat-bill-passes-house-could-have-952-billion-1375611> [<https://perma.cc/K3RW-58ZF>].

230. Cara Buckley, *Hollywood Invested Big in Georgia. A New Abortion Law is Causing Some Tensions.*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/arts/hollywood-georgia-abortion.html>. [<https://perma.cc/7KTH-GLB4>].

231. Steven Zeitchik, *Georgia’s Abortion Bill Has Some Hollywood Filmmakers Vowing a Boycott. But the Studios Are Standing Pat*, WASH. POST (May 10, 2019, 7:18 PM), <https://www.washingtonpost.com/business/2019/05/10/hollywood-filmmakers-are-boycotting-georgia-over-heartbeat-abortion-bill/> [<https://perma.cc/NV3H-XPEM>]. Georgia has a tax credit that allows productions to collect a tax credit of up to thirty percent of its budget, making total withdrawal from the state a significant financial decision for any movie studio. *Id.*

232. *Id.* These statements came in the form of tweets by company executives such as Mark and Jay Duplass, Christine Vachon, and David Simon. *Id.*

corporations—such as the movie industry trade group Motion Picture Association of America (MPAA)—felt differently.<sup>233</sup> The MPAA cited the vast economic impact that such a withdrawal would have on individuals and families tied to the movie industry in Georgia.<sup>234</sup> However, the MPAA also noted that it would continue to monitor developments in the legislation’s progress through the court system and suggested reliance on the legal process’ determination of an outcome.<sup>235</sup>

*Potential Implications for Georgia’s Medical Community and Georgia’s Healthcare Systems*

Throughout the committee hearings and floor debates in the Georgia legislature about the LIFE Act, legislators hotly contested the Act’s potential impact on Georgia’s medical community and on Georgia’s healthcare system. Both proponents and opponents of the Act presented physicians to speak at the House Health and Human Services Committee Hearing on March 6, 2019.<sup>236</sup> Dr. Kathy Altman spoke in favor of the Act, discussing the complications for women who receive abortions.<sup>237</sup> Dr. Altman also testified in support of using the heartbeat as “the very best indicator” of the pregnancy’s viability because the heartbeat is a “concrete sign of life that people can identify with to determine when the fetus should be protected.”<sup>238</sup> Dr. Altman also supported the use of a transvaginal ultrasound to detect the heartbeat in the six to seven week gestational age range, as opposed to the use of transabdominal ultrasound, which detects a heartbeat around seven to eight weeks.<sup>239</sup>

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233. *Id.*

234. *Id.* (“Film and television production supports more than 92,000 jobs and brings significant economic benefits to communities and families.”).

235. Zeitchik, *supra* note 231.

236. HHS Committee Hearing, *supra* note 95, at 1 hr., 34 min., 13 sec. (remarks by Dr. Al Scott); *id.* at 1 hr., 41 min., 45 sec. (remarks by Dr. Kathy Altman); *id.* at 1 hr., 47 min., 52 sec. (remarks by Dr. Melissa Kottke).

237. *Id.* at 1 hr., 44 min., 39 sec. (remarks by Dr. Kathy Altman) (“A woman cannot remain unscathed after killing her child at some point, usually after childbirth or the inability to get pregnant.”).

238. *Id.* at 1 hr., 45 min., 24 sec. (remarks by Dr. Kathy Altman) (testifying that the heartbeat is a better indicator of a fetus’ viability than “the viability of a fetus outside the womb, which is dependent on the technology available and the willingness of medical personnel to treat”).

239. HHS Committee Hearing, *supra* note 95, at 1 hr., 46 min., 35 sec. (remarks by Dr. Kathy

Physicians also testified in opposition to the Act, voicing concerns about the negative impact the law would have on pregnant mothers and the difficulties the Act imposes on the practice of medicine in the state.<sup>240</sup> Specifically, Dr. Al Scott asserted that legal abortions are “safe” and constitute “a necessary component of women’s healthcare” that will be removed when the law goes into effect.<sup>241</sup> Dr. Scott also mentioned that decreased access to safe, legal abortions will likely produce negative health outcomes and complications, which include maternal and infant mortality.<sup>242</sup> The physicians in opposition to the Act, although concerned about the pregnant mothers’ health care, primarily testified to the interference the Act causes in their practice of medicine.<sup>243</sup> For example, Dr. Scott announced his concern that the Act would put doctors in an indefensible position of requiring patients to “wait and see if a condition deteriorates” before medically indicated treatment would be permitted.<sup>244</sup> Dr. Melissa Kottke stated that the Act’s provisions leave out “innumerable situations that happen in real life,” but are not presented in the Act.<sup>245</sup> Dr. Kottke also stated that the restrictions placed on the medical practice because of the Act will function as “deterrent[s] for OB-GYNs to practice in the State of Georgia.”<sup>246</sup>

The Medical Association of Georgia (MAG) also sent a letter to Senate sponsor Senator Unterman publicizing the Association’s opposition to the Act.<sup>247</sup> The letter reasons that the Act “both

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Altman).

240. *Id.* at 1 hr., 53 min., 16 sec. (remarks by Dr. Melissa Kottke); *id.* at 2 hr., 1 min., 13 sec. (remarks by Dr. Roachat).

241. *Id.* at 1 hr., 37 min., 23 sec. (remarks by Dr. Al Scott).

242. *Id.*

243. *See id.*

244. HHS Committee Hearing, *supra* note 95, at 1 hr., 39 min., 28 sec. (remarks by Dr. Al Scott). *See id.* at 1 hr., 50 min., 58 sec., (remarks by Dr. Melissa Kottke) (The Act “indefensibly jeopardizes patients or patients’ health by requiring physicians to wait and see if a condition deteriorates.”).

245. *Id.* at 1 hr., 50 min., 10 sec. (remarks by Dr. Melissa Kottke).

246. *Id.* At 1 hr., 53 min., 18 sec. (remarks by Dr. Melissa Kottke).

247. Letter from Rutledge Forney, M.D., President, Medical Association of Georgia, to Sen. Renee Unterman (R-45th), Chairperson, Senate Science and Technology Committee (Mar. 17, 2019) (on file with the Georgia State University Law Review) [hereinafter MAG Letter to Unterman]; Jill Nolin, *Doctors Group Opposes Georgia “Heartbeat Bill,”* VALDOSTA DAILY TIMES (Mar. 21, 2019), [https://www.valdostadailytimes.com/news/local\\_news/doctors-group-opposes-georgia-heartbeat-bill/article\\_7c196935-c44a-5437-b83b-22e28e0003ee.html](https://www.valdostadailytimes.com/news/local_news/doctors-group-opposes-georgia-heartbeat-bill/article_7c196935-c44a-5437-b83b-22e28e0003ee.html) [https://perma.cc/6SRJ-TK6X]. The letter was penned by MAG president Dr. Rutledge Forney. *Id.*

criminalizes physicians and creates a private right of action against physicians when physicians care for their patients within their scope of practice.”<sup>248</sup> MAG stated that it found the legislation to stand in conflict with MAG’s policies, warranting MAG’s stance in opposition.<sup>249</sup> Specifically, MAG stated in its letter that it opposes the legislation because “[the Act] would criminalize physicians practicing within their standard of care, creates a new civil cause of action against physicians, could undermine efforts to recruit and retain OB-GYNs in Georgia, and could further restrict access to health care in rural Georgia.”<sup>250</sup>

Opponents also assert that Georgia’s rural healthcare crisis and the state’s lack of OB-GYNs in the poorest areas of Georgia will only worsen under the Act.<sup>251</sup> In fact, healthcare providers have voiced concerns that the Act will make it impossible for Georgia medical schools to maintain accreditation for OB-GYN programs and for hospitals to keep OB-GYN residency programs.<sup>252</sup>

However, Senator Renee Unterman (R-45th) presented the LIFE Act on the Senate floor and addressed the letter she received from MAG, including its opposition to the legislation.<sup>253</sup> Senator Unterman stated that the LIFE Act would not be the cause of the lack of OB-GYN care in rural Georgia counties because those physicians follow their “insurance reimbursement[s].”<sup>254</sup> Senator Unterman also stated that the State of Georgia is not lacking in nurse

248. MAG Letter to Unterman, *supra* note 247.

249. *Id.*

MAG opposes any legislation that violates the doctor/patient relationship and opposes legislation that threatens criminal prosecution against physicians who diagnose, prescribe and perform medical treatment within their scope of practice. MAG supports policies and legislation that allow women and families to maintain access to quality health care in Georgia. MAG’s policy also states that physicians must have the right to refuse to perform abortions for any reason.

*Id.*

250. *Id.*

251. *Hearing on S. 160 Before the H. Comm. on the Judiciary*, 116th Cong. 5 (2019) (testimony of Jen Jordan, Georgia State Senator).

252. *Id.*

253. Senate Proceedings Video, *supra* note 87, at 48 min., 25 sec. (remarks by Sen. Renee Unterman (R-45th)).

254. *Id.* (stating that “OBs aren’t going to rural Georgia. They’re not going to rural Georgia . . . They go where there’s a reimbursement string. They go to Roswell, Alpharetta. They go to Marietta. They go to Lawrenceville. And they go to Fayetteville because that’s where they get an insurance reimbursement.”).

practitioners.<sup>255</sup> Senator Unterman claims that the MAG is the reason why these nurses are “held back” from practicing in rural areas of Georgia because MAG does not want to expand the scope of its practice.<sup>256</sup> Senator Unterman argues that the access to healthcare problem is not a product of the shortage of medical providers in Georgia, and the LIFE Act will not exacerbate those issues.<sup>257</sup> Senator Unterman also argues that funding will still be provided for the women’s reproductive health sector.<sup>258</sup>

### *Conclusion*

The LIFE Act is one of many abortion laws passed throughout the country this year. The Act emerges out of a complex framework of abortion law in the United States. The law’s proposed policy changes within Georgia present challenges to longstanding abortion law precedent. Therefore, Georgia’s bill, along with those similar bills passed in other states, faces several legal hurdles before becoming the law of the State. It is clear that regardless of the outcome, the result of any pending litigation will impact millions of women across the state and across the country.

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255. *Id.* (“There is [sic] over 170,000 nurses in the state of Georgia.”).

256. *Id.*

257. *Id.*

258. *Id.* at 44 min., 51 sec. (remarks by Sen. Renee Unterman (R-45th)) (noting the 2019 budget alone allocated \$90,896,944 to women’s healthcare).