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# Under Kemp's Eye: Analyzing the Constitutionality of the Heartbeat Restriction in Georgia's LIFE Act and its Potential Impact on Abortion Law\*

## I. INTRODUCTION

The current state of women's right to bodily autonomy in the United States has eerily begun to resemble that of the dystopian society depicted in *The Handmaid's Tale*.<sup>1</sup> While abortion rates have steadily declined over the last decade, the attempts by state legislatures to restrict or completely take away women's right to abortion have exponentially increased.<sup>2</sup> In the first six months of 2019 alone, five states passed laws placing restrictions on abortion.<sup>3</sup> These restrictions range from limiting the time frame in which a woman may obtain an abortion to when a fetal heartbeat has been detected—normally around

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1. A novel by Margaret Atwood in which the United States is a totalitarian society ruled by a fundamentalist regime that treats women as property of the state and forces them to procreate.

2. Rebecca Wind, *Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates> (last visited Nov. 16, 2019).

3. Elizabeth Nash, *A Surge in Bans on Abortion as Early as Six Weeks, Before Most People Know They are Pregnant*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/article/2019/03/surge-bans-abortion-early-six-weeks-most-people-know-they-are-pregnant> (last visited Nov. 11, 2019).

six weeks—to a complete ban and criminalization of the procedure.<sup>4</sup> In addition to the states that have successfully enacted restrictions, another ten states have either introduced or moved to enact restrictions on abortion.<sup>5</sup>

So how is it that all of these new laws are constitutional? The short answer is that they are not.<sup>6</sup> The Supreme Court of the United States has stated that “[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.”<sup>7</sup> However, the country seems to have moved far beyond the ability to agree to disagree and is now demanding with each new restriction that the Court yet again reevaluate its stance on abortion.

On May 7, 2019, Georgia Governor Brian Kemp signed the Living Infants Fairness and Equality (LIFE) Act<sup>8</sup> into law.<sup>9</sup> The LIFE Act is among the most restrictive abortion laws that have been introduced this year.<sup>10</sup> While the United States District Court for the Northern District of Georgia has granted a preliminary injunction that prohibits the LIFE Act from initially taking effect, the fate of Georgia’s abortion law still remains in question.<sup>11</sup>

This Comment analyzes the constitutionality of the heartbeat restriction in the LIFE Act.<sup>12</sup> Part II outlines the history of abortion laws in the United States and the current precedent set by the Supreme

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4. *Id.* Georgia, Louisiana, Ohio, Kentucky, and Mississippi have all passed a six-week ban on abortion. Missouri has enacted an eight-week ban, and Alabama has managed to ban abortion completely and criminalize the performance of the procedure. *Id.*

5. *Id.*

6. *Id.* In fact, most states are deliberately enacting these radical bans knowing that they are in violation of current precedent in an effort to advance the cases up to the Supreme Court.

7. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

8. Ga. H.R. Bill 481, Reg. Sess., 2019 Ga. Laws 234.

9. Kelly Krause, *Georgia Governor Signs Almost Total Ban on Abortion*, CENTER FOR REPRODUCTIVE RIGHTS, [https://reproductiverights.org/press-room/georgia-governor-signs-almost-total-ban-on-abortion?s\\_src=19GAUSCASES&s\\_src=19GA&gclid=EAIaIQobChMI177e9pSu5AIV0pFbCh0DKwAXEAAAYASAAEgL\\_fd\\_BwE](https://reproductiverights.org/press-room/georgia-governor-signs-almost-total-ban-on-abortion?s_src=19GAUSCASES&s_src=19GA&gclid=EAIaIQobChMI177e9pSu5AIV0pFbCh0DKwAXEAAAYASAAEgL_fd_BwE) (last visited Aug. 27, 2019).

10. Elizabeth Chuck, *Georgia’s law that blocks most abortions is unconstitutional, lawsuit says*, NBC NEWS, <https://www.nbcnews.com/news/us-news/georgia-s-law-blocks-most-abortions-unconstitutional-lawsuit-says-n1024471> (last visited Nov. 14, 2019).

11. Order, *SisterSong Women of Color Reproductive Justice Collective v. Kemp*, No. 1:19-CV-02973 (N.D. Ga. Oct. 1, 2019).

12. While the LIFE Act includes several changes to Georgia’s abortion law, this Comment will focus only on the provision of the law that prohibits abortion once a fetal heartbeat has been detected.

Court. Part III addresses the current abortion law in Georgia, the changes the LIFE Act will make if it is eventually permitted to take effect, and discusses the pending case that challenges the constitutionality of the law. Part IV discusses the constitutionality of the new law and what it would mean for the future of both Georgia and abortion laws across the United States if the law were to be held constitutional.

## II. THE CURRENT SUPREME COURT PRECEDENT REGARDING ABORTION LAW

The Supreme Court of the United States first announced its stance on abortion forty-five years ago in *Roe v. Wade*,<sup>13</sup> but as time would tell, this would not be the last and definitive decision on the matter.<sup>14</sup> While it is beginning to feel like the ongoing struggle to balance women's right to choose with states' interest in protecting potential human life has been going on for centuries, abortion regulation has only been a relevant topic on the national stage since the late nineteenth century.<sup>15</sup> In order to better understand the evolution of the new restrictions, it is important to first consider the rationale behind the precedent currently in place.

### A. *Laying Down the Law*

In 1973, the Supreme Court reviewed a case challenging the constitutionality of a Texas statute that made it a crime to obtain or to attempt to obtain an abortion other than out of necessity to save a woman's life.<sup>16</sup> To begin its analysis, the Court listed three main reasons behind historic abortion restrictions: (1) they were the product of a Victorian social concern to discourage sexual conduct; (2) to protect pregnant women from submitting to a procedure that placed their lives in serious jeopardy; and (3) to protect prenatal life.<sup>17</sup> Since the Court reasoned that the first reason was an outdated notion from a different era, and that the second reason was obsolete due to the advances of

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13. 410 U.S. 113 (1973).

14. *Id.* at 164–65.

15. *Id.* at 129.

[T]he restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin.

*Id.*

16. *Id.* at 117–18.

17. *Id.* at 147–52.

modern medicine making abortion procedures virtually risk-free, the only reason the Court seemed to put merit in was the state's interest in protecting prenatal life.<sup>18</sup>

### 1. The Right to Privacy

The Supreme Court has long recognized that the Due Process Clause of the Fourteenth Amendment<sup>19</sup> creates an individual right to privacy.<sup>20</sup> However, this right to privacy extends only to those rights that can be deemed fundamental to and implicit in the definition of liberty.<sup>21</sup> These rights tend to include the guarantee of personal privacy in activities such as marriage, procreation, contraception, family relationships, and child rearing and education.<sup>22</sup> It follows that the right to bodily autonomy is also based in the Due Process Clause.<sup>23</sup> In recognizing this right of privacy, the Court determined that denying a woman the right to choose for herself whether or not to obtain an abortion would be an invasion of her right to privacy and detrimental to her physical and emotional well-being.<sup>24</sup>

However, the Court held that the right to abortion is not absolute.<sup>25</sup> At a certain point in the pregnancy, the state has a compelling interest in regulating abortion.<sup>26</sup> Where an individual's fundamental rights are involved, state legislation meant to regulate these rights may be justified only if there is a compelling state interest and the regulation is narrowly tailored so as only to protect that specific interest.<sup>27</sup> Such

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18. *Id.* at 154.

19. U.S. CONST. amend. XIV, § 1.

20. *Roe*, 410 U.S. at 152–53.

21. *Id.* at 152.

22. *Id.* at 152–53.

23. Jared H. Jones, Annotation, *Women's Reproductive Rights Concerning Abortion, and Governmental Regulation Thereof—Supreme Court Cases*, 20 A.L.R. Fed. 2d Art. 1, § 2 (2007). The Due Process Clause of the Fourteenth Amendment provides that

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

24. *Roe*, 410 U.S. at 153. Denying a woman an abortion could potentially cause her mental and physical harm, as well as distress associated with having an unwanted child and the inability to care for the child. *Id.*

25. *Id.* at 155.

26. *Id.*

27. *Id.*

state interests include protecting the health of state citizens, maintaining medical standards, and protecting prenatal life.<sup>28</sup>

In order to ensure that the interest of the state and the fundamental rights of the individual remained balanced, the Court held that abortion laws should be based on a trimester framework.<sup>29</sup> Under this framework, the Court held that during the first trimester of pregnancy, a state does not have a compelling interest, and therefore may not place any regulation on abortion.<sup>30</sup> The decision to end a pregnancy remains with the individual and her attendant physician pre-viability.<sup>31</sup> During the second trimester, the state has a sufficiently compelling interest in the health of the mother and is permitted to regulate abortion in ways that reasonably relate to maternal health.<sup>32</sup> Finally, during the third trimester when the fetus is considered viable, the state's interest in potential human life becomes compelling enough to justify strict regulations or bans on abortion.<sup>33</sup> The Court defined viability as the point when a fetus has the capability to survive outside the womb.<sup>34</sup>

The Court concluded that the Texas statute was unconstitutional because it made no distinction between abortions performed in early stages of pregnancy and those in later stages, it only allowed abortions to be performed in order to save a woman's life, and it did not adequately consider the compelling interest of a woman's right to privacy in making decisions regarding her body.<sup>35</sup>

## 2. Defining Who is a Person Under the Constitution

While the Court in *Roe* refused to make a ruling on exactly when life begins, the Court stated that the privacy protection of the Fourteenth Amendment does not extend to an unborn fetus.<sup>36</sup> The Constitution of the United States does not explicitly define the term "person;" however, the term is used in several different provisions.<sup>37</sup> None of the provisions

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28. Jones, *supra* note 23, at § 2.

29. *Roe*, 410 U.S. at 162–63.

30. *Id.* at 163.

31. *Id.*

32. *Id.* at 164.

33. *Id.* at 164–65.

34. *Id.* at 164.

35. *Id.* at 164.

36. *Id.* at 158.

37. *Id.* at 157. There are multiple provisions that use the term "person" to describe to whom the provision is meant to apply: U.S. CONST. art. I, § 2, cl. 2 (Qualifications for Members of the House of Representatives); U.S. CONST. art. I, § 2, cl. 3 (Appointment of Representatives and Taxes); U.S. CONST. art. I, § 3, cl. 3 (Qualifications of Senators); U.S.

seem to indicate that they could possibly ever have a prenatal application. Therefore, a state may not legislate in a manner that would protect a fetus's potential rights as though they were recognized under the Fourteenth Amendment.<sup>38</sup>

### *B. Modification to the Law Announced in Roe*

Nineteen years after the Supreme Court declared that "the Constitution protects a woman's right to terminate her pregnancy in its early stages, [the] definition of liberty" was again at issue.<sup>39</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>40</sup> physicians and abortion clinics in Pennsylvania brought a suit seeking injunctive relief in an attempt to keep five provisions of a new state abortion law from taking effect.<sup>41</sup> The plaintiffs claimed that the provisions violated the standard set out in *Roe* and were therefore unconstitutional.<sup>42</sup> A plurality of the Court began by stating that the opinion reaffirms the stance that was taken in *Roe* and maintains its essential propositions.<sup>43</sup> Specifically, the Court reaffirmed its recognition of (1) a woman's right to choose to have an abortion pre-viability without undue interference from the state; (2) the state's interest in regulating abortions after the point of viability; and (3) the state's compelling interest from the outset

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CONST. art. I, § 9, cl. 1 (Powers Prohibited to United States; Migration or Importation of Persons; Head Tax); U.S. CONST. art. I, § 9, cl. 8 (Titles of Nobility; Presents and Emoluments From Foreign States to Officers of United States); U.S. CONST. art. II, § 1, cl. 2 (Presidential Electors); U.S. CONST. art. II, § 1, cl. 3 (Meeting of Electors); U.S. CONST. art. II, § 1, cl. 5 (Qualifications, Office of President); U.S. CONST. art. IV, § 2, cl. 2 (Extradition); U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slaves); U.S. CONST. amend. V (Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings); U.S. CONST. amend. XII (Presidential Electors); U.S. CONST. amend. XIV, §§ 1-3 (Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement); U.S. CONST. amend. XXII (Limitation on Presidential Terms).

38. *Roe*, 410 U.S. at 158; Jones, *supra* note 23, at § 2.

39. *Casey*, 505 U.S. at 844.

40. *Id.* at 833.

41. *Id.* at 844.

42. *Id.* The five provisions in question required (1) a woman seeking an abortion to give her informed consent prior to the abortion procedure, and specified that she be given certain information at least 24 hours before the abortion was performed; (2) informed consent from one of the parents of a minor, but provided for a judicial bypass option if the minor did not wish to or could not obtain a parent's consent; (3) a married woman who was seeking an abortion was required to sign a statement indicating that she had notified her husband of her intended abortion; and (4) imposed certain reporting requirements on facilities that provided abortion services. The fifth provision was an exception for abortions due to medical emergency. *Id.*

43. *Id.* at 845-46.

of the pregnancy in protecting the health of the woman and potential human life.<sup>44</sup> The Court again recognized the liberty it first announced in *Roe*, that a woman has a fundamental right to be free from intrusion of intimate and personal life decisions, such as having a child.<sup>45</sup> However, the Court held that the rigid trimester framework in *Roe* was unworkable, therefore rejecting it, and instead announced a new framework under which the constitutionality of an abortion law should be analyzed.<sup>46</sup>

### 1. The New Undue Burden Test

The Court decided that, instead of a trimester framework, the line should be drawn at viability, which was defined as the “time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”<sup>47</sup> By drawing the line at viability, the Court was better able to balance a woman’s liberty and right to bodily autonomy with that of the state’s interest in potential human life.<sup>48</sup>

In order to clarify the new viability standard, the Court declared that “[o]nly where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the state reach into the heart of the liberty protected by the Due Process Clause.”<sup>49</sup> Under the undue burden standard, a state regulation should be found unconstitutional when it places a substantial obstacle in the way of a woman who is attempting to obtain an abortion pre-viability.<sup>50</sup> The purpose of the state regulation must be to further the interest in potential human life and the health of the mother, not to hinder a woman’s right to choose.<sup>51</sup> If a court finds that the means a regulation uses to protect the state’s interest places a substantial obstacle in the

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44. *Id.* at 846.

45. *Id.* at 851.

46. *Id.* at 873.

47. *Id.* at 870.

48. *Id.* at 871.

49. *Id.* at 874.

50. *Id.* at 877.

51. *Id.*

path of a woman's right to choose pre-viability, the regulation is unconstitutional despite the compelling purpose.<sup>52</sup>

Placing a regulation on abortion pre-viability does not necessarily guarantee that the regulation will be found unconstitutional. The Court has held that a state may place regulations on abortion during the pre-viability period with the purpose of ensuring that a woman is thoroughly informed and may encourage her to consider all options when making her decision.<sup>53</sup> The Court has also upheld regulations that place a required waiting period between an informational meeting and the performance of the procedure for the purpose of ensuring that a woman has fully contemplated her decision.<sup>54</sup> Regulations requiring a physician to determine if a fetus is viable prior to the performance of the procedure have been upheld, so long as the regulation leaves the determination of viability to the discretion of the examining physician.<sup>55</sup>

The Court concluded that, when analyzing the Pennsylvania statute under the new undue burden standard, the provisions that required a married woman to notify her husband and get consent from him prior to obtaining an abortion placed a substantial obstacle in the way of her exercising her right to choose and was therefore unconstitutional.<sup>56</sup> The other provisions of the statute were upheld as being constitutional.<sup>57</sup>

## 2. Concurring and Dissenting Opinions

The majority opinion in *Casey* consists of a plurality opinion, which was discussed above, written by Justice O'Connor, Justice Kennedy, and Justice Souter.<sup>58</sup> The other two votes that make up the majority for this decision came from Justice Stevens and Justice Blackmun, both of whom concur in part, concur in the judgment in part, and dissent in part.<sup>59</sup>

Justice Stevens began his opinion by stating that he agreed with the portion of the plurality opinion that reaffirmed the central holding in

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52. *Id.* Regulations that merely create a structural mechanism by which the state can express its interest for potential life are permitted, if the mechanism is not a substantial obstacle to the woman's right to choose. *Id.* at 877–78.

53. *Id.* at 872.

54. Jones, *supra* note 23, at § 2.

55. *Id.*

56. *Casey*, 505 U.S. at 898.

57. *Id.* at 900–01. The case was remanded to consider the severability of the statutory provisions in order to determine if the statute could still be upheld after removing the provisions that were found unconstitutional. *Id.*

58. *Id.* at 843.

59. *Id.* at 911; *id.* at 922.

*Roe*, because it is an “integral part of a correct understanding of both the concept of liberty and basic equality of men and women.”<sup>60</sup> Justice Stevens also concurred with the plurality opinion’s conclusion that the Constitution does not recognize any rights provided to an unborn fetus under the Fourteenth Amendment.<sup>61</sup> Justice Stevens’s dissent stemmed from the fact that the plurality opinion rejected the trimester framework announced in *Roe* and how that framework applies to a state’s interest.<sup>62</sup> Justice Stevens argued that it is not a contradiction to allow a state to have a compelling interest in potential human life and to also conclude that the interest does not justify the regulation of abortion pre-viability.<sup>63</sup>

Justice Blackmun concurred in the reaffirmation of the central holding of *Roe*, and that the Due Process Clause of the Fourteenth Amendment established a fundamental liberty that protects a woman’s right to have an abortion.<sup>64</sup> Justice Blackmun’s dissent stemmed from his belief that the trimester framework in *Roe* had not been undermined in the nineteen years since the case was decided, and that the framework was far more workable and not as easily manipulated as the new undue burden standard adopted by the plurality opinion.<sup>65</sup>

Chief Justice Rehnquist and Justice Scalia both concurred in the judgment in part and dissented in part, and were joined by Justice White and Justice Thomas.<sup>66</sup> In his dissent, Chief Justice Rehnquist stated that he and the three other dissenting Justices believed that *Roe* was incorrectly decided and should be overruled.<sup>67</sup> Chief Justice Rehnquist rejected the argument that abortion is a fundamental right under the Constitution and would instead apply a rational basis review

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60. *Id.* at 912 (Stevens, J., dissenting).

61. *Id.* at 912–14 (Stevens, J., dissenting).

[A]n abortion is not the “termination of life entitled to fourteenth amendment protection.” From this holding, there was no dissent . . . indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a “person” does not have what is sometimes described as a “right to life.”

*Id.* at 913 (Stevens, J., dissenting).

62. *Id.* at 914 (Stevens, J., dissenting).

63. *Id.* (Stevens, J., dissenting).

64. *Id.* at 923–24 (Blackmun, J., dissenting).

65. *Id.* at 930–31 (Blackmun, J., dissenting).

66. *Id.* at 944 (Rehnquist, C.J., dissenting); *id.* at 979 (Scalia, J., dissenting).

67. *Id.* at 944 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated that while the plurality opinion claimed that it was upholding the central holding of *Roe* based on *stare decisis*, the opinion revised the standard in *Roe* until it existed “only in the way a storefront on a western movie set exists: a mere façade to give the illusion of reality.” *Id.* at 954 (Rehnquist, C.J., dissenting).

when analyzing the constitutionality of abortion laws.<sup>68</sup> Justice Scalia also rejected abortion as a fundamental right and took his opinion a step further, stating that the decision to regulate or prohibit abortion should be left entirely up to the states.<sup>69</sup>

### 3. Determining if Precedent Should be Overturned

The main argument continuously made by the opponents of *Roe* and its progeny is that the decisions upholding the right to abortion should be overturned. Precedent is not overturned due to the change in popularity of a particular viewpoint or even due to the shifting of political regimes.<sup>70</sup> It is vital to the function of the judicial system that the obligation to follow precedent be of the utmost importance, because “[t]he very concept of the rule of law underlying [the] . . . Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”<sup>71</sup>

When deciding whether a rule of law should or even could be overturned, the Court takes a variety of factors into account.<sup>72</sup> The Court weighs (1) “whether the rule has proven to be intolerable simply in defying practical workability;” (2) “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;” (3) “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;” and (4) “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>73</sup> When applying these factors to *Roe*, the Court determined that the

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68. *Id.* at 953 (Rehnquist, C.J., dissenting).

69. *Id.* at 979–80 (Scalia, J., dissenting).

70. *Id.* at 854 (plurality opinion).

71. *Id.*

72. *Id.* at 854.

73. *Id.* at 854–55.

[I]n this case, [the Court] may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

*Id.* at 855.

underpinnings of *Roe* were not weakened in any way affecting the central holding.<sup>74</sup>

While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.<sup>75</sup>

If the case filed against the state of Georgia makes it to the Supreme Court of the United States and certiorari is granted, the Court will again weigh these factors when analyzing the central holding of *Casey* and deciding whether or not to continue to uphold forty-five years of precedent.

### C. Continuing to Reaffirm Its Stance

Since the original decision in *Roe* and the subsequent decision in *Casey*, the Court has continued to uphold its stance on the right to abortion. In *Whole Women's Health v. Hellerstedt*,<sup>76</sup> the Court analyzed the constitutionality of two provisions of a proposed abortion regulation in Texas.<sup>77</sup> The proposed regulation added an admitting-privileges requirement, which required that the performing physician have active admitting privileges at a hospital and be located within thirty miles of the hospital where privileges are held on the date of the procedure, and a surgical-center requirement, which required that the minimum standard for an abortion facility be equivalent to the minimum standards of an ambulatory surgical center.<sup>78</sup>

States have a compelling interest in ensuring the safety of all persons undergoing medical procedures.<sup>79</sup> However, if the means of

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74. *Id.* at 860.

75. *Id.* at 860–61.

76. 136 S. Ct. 2292 (2016).

77. *Id.* at 2300.

78. *Id.*

79. *Id.* at 2309.

protecting a state's interest place a substantial burden on a woman's right to choose pre-viability, then the regulation is unconstitutional.<sup>80</sup> A law that mandates unnecessary health regulations on abortion clinics and consequentially places a substantial obstacle in the path of a woman seeking an abortion constitutes an undue burden, even if its purpose is an attempt to ensure the safety of the women undergoing the procedure.<sup>81</sup> The Court upheld the law announced in *Casey* and concluded that neither provision of the Texas law contributed enough medical benefit to justify the burden that the law placed on a woman's access to abortion.<sup>82</sup>

### III. LIVING INFANTS FAIRNESS AND EQUALITY (LIFE) ACT

Women's right to bodily autonomy and the right to terminate a pregnancy pre-viability is a "rule of law and a component of liberty we cannot renounce."<sup>83</sup> Yet that is exactly what the state of Georgia is attempting to do by passing the new abortion law that was previously set to take effect in January 2020. However, the constitutionality of the law and whether it will eventually be permitted to take effect are still to be determined. Before discussing the changes that the new law makes, it is important to understand the current abortion law that is in effect in Georgia.

#### A. *The Law in Georgia as it Currently Stands*

The current abortion law in effect in Georgia provides that "[n]o abortion is authorized or shall be performed if the probable gestational age of the unborn child has been determined in accordance with Code Section 31-9B-2 to be 20 weeks or more."<sup>84</sup> Section 31-9B-2(a) provides that "no abortion shall be performed or attempted to be performed unless the physician performing it has first made a determination of the probable gestational age of the unborn child or relied upon such a determination made by another physician."<sup>85</sup> This section also provides

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80. *Id.*

81. *Id.* The Court must weigh the burden the law imposes on a woman's access to abortion with the benefit that the law could confer on the woman. *Id.*

82. *Id.* at 2300.

83. *Casey*, 505 U.S. at 871.

84. O.C.G.A. § 16-12-141(c)(1) (2019) (to be superseded by O.C.G.A. § 16-12-141(b)). The new law was originally set to go into effect and supersede the current code sections on January 1, 2020. However, the preliminary injunction that was granted on October 1, 2019 will prevent to law from taking effect until the case on the merits can be heard. Order, *supra* note 11.

85. O.C.G.A. § 31-9B-2(a) (2019) (to be superseded by O.C.G.A. § 31-9B-2(a)).

an exception for the case of medical emergencies.<sup>86</sup> There are several other restrictions and regulations placed on the procedure, such as requiring all abortions after the first trimester to be performed in a hospital, ambulatory surgical center, or health facility licensed as an abortion facility by the Department of Public Health.<sup>87</sup>

While not the most liberal abortion law that can be found in the United States, the Georgia law, as it currently stands, conforms to current Supreme Court precedent. The law does not prohibit a woman from freely being able to choose whether to have an abortion pre-viability, because it allows the procedure to be performed so long as the gestational age has been determined to be 20 weeks or less by a physician.<sup>88</sup> The law also does not place an undue burden on a woman's right to choose, because it does not place any substantial obstacles in her path pre-viability.<sup>89</sup>

Although the law is compliant with the constitutional standard set by the Supreme Court, it still places some barriers on a woman's ability to easily obtain an abortion. Before receiving an abortion, a woman must receive counseling that tends to deter her from making the decision to have the abortion.<sup>90</sup> There is also a mandatory twenty-four hour waiting period between the counseling session and the performance of the procedure.<sup>91</sup> While these barriers could be considered a substantial obstacle in the way of a woman easily obtaining an abortion, they have not been found to place an undue burden on the woman and therefore remain constitutional.

### *B. The Changes the LIFE Act Will Make to Georgia's Abortion Law*

As it was passed, the LIFE Act makes several significant changes to the current abortion law. The most significant change is to the time period when a woman may obtain an abortion. The LIFE Act proposes to change the period when a woman may freely obtain an abortion from twenty weeks to roughly six weeks.<sup>92</sup> The LIFE Act provides that "[n]o abortion is authorized or shall be performed if an unborn child has been determined in accordance with Code Section 31-9B-2 to have a

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86. *Id.*

87. 20 GA. JUR. *Abortion* § 44.4 *Restrictions and requirements for performance of an abortion* (2019).

88. 20 GA. JUR. *Abortion* § 44:3 *Right to an abortion; state interest* (2019).

89. *Id.*

90. Krause, *supra* note 9.

91. *Id.*

92. Ga. H.R. Bill 481, § 4, Reg. Sess., 2019 Ga. Laws 234 (amending O.C.G.A. § 16-12-141(c)(1)).

detectable human heartbeat.”<sup>93</sup> Section 31-9B-2 has been amended to provide that “[n]o abortion shall be performed or attempted to be performed unless the physician performing such procedure has first made a determination of the presence of a detectable human heartbeat, as such term is defined in Code Section 1-2-1, of an unborn child.”<sup>94</sup> This section still provides an exception for medical emergencies.<sup>95</sup>

Section 1-2-1 adds two new definitions, including a new class of people that is now recognized by the state. A “detectable human heartbeat” is now defined as an “embryotic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac.”<sup>96</sup> The Act also now recognizes an “unborn child” as a class of people and defines it as “a member of the species *Homo sapiens* at any stage of development who is carried in the womb.”<sup>97</sup> The current version of section 1-2-1 does not recognize an unborn child as a class of people.<sup>98</sup> In essence, these changes will make it so that no abortion will be performed once a fetus has reached roughly six weeks in gestational age, before most women realize that they are even pregnant. These changes are the main basis for the argument that the new law will be found to be an intrusion of a woman’s liberty, because it places an undue burden on a woman’s right to choose when to terminate a pregnancy pre-viability and is therefore unconstitutional.

### *C. Floor Statements, Press Releases, and Signing Statements*

The Bill has been controversial since the day it was first introduced on the House floor. The Bill received a large amount of news coverage throughout the legislative process, and many people spoke out both in agreement and in vehement opposition with the Bill.

A video of Democratic Senator Jen Jordan’s floor speech opposing the Bill and critiquing the legal implications for women and their physicians went viral prior to the passing of the Bill.<sup>99</sup> In her speech,

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93. *Id.*

94. Ga. H.R. Bill 481, § 10, Reg. Sess., 2019 Ga. Laws 234 (amending O.C.G.A. § 31-9B-2(a)).

95. *Id.*

96. Ga. H.R. Bill 481, § 3, Reg. Sess., 2019 Ga. Laws 234 (creating new O.C.G.A. § 1-2-1(e)(1)).

97. Ga. H.R. Bill 481, § 3, Reg. Sess., 2019 Ga. Laws 234 (creating new O.C.G.A. § 1-2-1(e)(2)).

98. O.C.G.A. § 1-2-1 (2019) (to be superseded by O.C.G.A. § 1-2-1).

99. Jennifer Rainey Marquez, *Georgia Senator Jen Jordan on her HB 481 speech: “The least that women should be given is the ability to control our bodies,”* ATLANTA MAGAZINE, <https://www.atlantamagazine.com/news-culture-articles/georgia-senator-jen->

Senator Jordan discussed the eight miscarriages she had during the time when she and her husband were attempting to have a baby and the physical and mental turmoil she and her husband underwent.<sup>100</sup> Jordan stated that the reason she decided to talk openly about this incredibly personal experience was in an attempt to start a real conversation about the toll pregnancy takes on a woman's body, relationships, ability to get and keep a job, and access to healthcare.<sup>101</sup>

On May 7, 2019, while signing the Bill into law, Governor Kemp acknowledged that the law would more than likely face an immediate legal challenge.<sup>102</sup> He went on to claim that his administration was prepared for the impending legal battle over the constitutionality of the law.<sup>103</sup> Kemp stated that it was his higher calling to protect life at all stages.<sup>104</sup> He thanked his fellow Republicans for rejecting the status quo and pushing to impose new limits on abortion.<sup>105</sup>

In a press release shortly following the signing of the Bill, Elizabeth Smith, the Chief Counsel for the Center For Reproductive Rights, stated that the intention of the Georgia Legislature when enacting the LIFE Act was to hopefully cause enough of a split in the circuit courts that the Supreme Court would grant certiorari and overturn the current precedent.<sup>106</sup> Smith went on to say that the Georgia law is bafflingly unconstitutional, because even if a woman is able to find out she is pregnant within the roughly six week timeframe during which the procedure remains legal, it would be nearly impossible for her to obtain an abortion before the six-week cutoff.<sup>107</sup>

Several other organizations that are actively fighting to keep the law from taking effect have spoken out about the negative effects the law will have in Georgia. Sean Young, the legal director of the American Civil Liberties Union of Georgia (ACLU) called the law "blatantly unconstitutional" when analyzed under nearly fifty years of Supreme

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jordan-on-her-hb-481-speech-the-least-that-women-should-be-given-is-the-ability-to-control-our-bodies/ (last visited Nov. 14, 2019).

100. *Id.*

101. *Id.*

102. Chuck, *supra* note 10.

103. Patricia Mazzei & Alan Blinder, *Georgia Governor Signs 'Fetal Heartbeat' Abortion Law*, THE NEW YORK TIMES, <https://www.nytimes.com/2019/05/07/us/heartbeat-bill-georgia.html> (last visited Nov. 16, 2019).

104. Bill Chappell, *Georgia Abortion Providers File Federal Suit Against State's 'Fetal Heartbeat' Law*, NPR, <https://www.npr.org/2019/06/28/736946045/georgia-abortion-providers-file-federal-suit-against-states-fetal-heartbeat-law> (last visited Aug. 27, 2019).

105. *Id.*

106. Krause, *supra* note 9.

107. *Id.*

Court precedent.<sup>108</sup> He also stated that politicians should never be permitted to second guess a woman's health care decisions, nor tell a woman or couple "when to start or expand a family."<sup>109</sup> Monica Simpson, the executive director of SisterSong Women of Color Reproductive Justice Collective (SisterSong), stated that her group intended to bring the suit against the state of Georgia "to protect maternal health and reproductive rights so that every person—especially persons of color—can thrive in their families and communities as well as maintain their human right to make their own decisions about their reproductive lives."<sup>110</sup> The main theme of all these statements, whether they were made by people advocating for restriction of abortion or advocating for women's reproductive rights and liberty, seems to be that the law on its face is unconstitutional.

#### *D. The Fight Begins in Georgia*

On June 28, 2019, SisterSong, along with eleven other plaintiffs, filed suit in the United States District Court for the Northern District of Georgia against Governor Kemp and twelve other defendants, requesting declaratory and injunctive relief.<sup>111</sup> The suit is a

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108. Chuck, *supra* note 10.

109. *Id.*

110. *Id.*

111. Complaint, SisterSong Women of Color Reproductive Justice Collective et. al. v. Kemp et. al., No. 1:19-CV-02973 (N.D. Ga. June 28, 2019). The Plaintiffs for the case include: SisterSong Women of Color Reproductive Justice Collective, on behalf of itself and its members; Feminist Women's Health Center; Planned Parenthood Southeast, Inc.; Atlanta Comprehensive Wellness Clinic; Atlanta Women's Medical Center; Femhealth USA d/b/a Carafem; Columbus Women's Health Organization, P.C.; Summit Medical Associates, P.C., on behalf of themselves, their physicians and other staff, and their patients; Carrie Cwiak, M.D., M.P.H.; Lisa Haddad, M.D., M.S., M.P.H.; and Eva Lathrop, M.D., M.P.H., on behalf of themselves and their patients. The Defendants include: Brian Kemp, Governor of the State of Georgia, in his official capacity; Christopher M. Carr, Georgia Attorney General, in his official capacity; Kathleen Toomey, Georgia Commissioner for Department of Public Health, in her official capacity; John S. Antalis, M.D., Gretchen Collins, M.D., Debi Dalton, M.D., E. Daniel DeLoach, M.D., Charmaine Faucher, PA-C, Michael Fowler, Sr., C.F.S.P., Alexander S. Gross, M.D., Thomas Hardin Jr., M.D., Rob Law, C.F.A., Matthew W. Norman, M.D., David W. Retterbush, M.D., Andrew Reisman, M.D., Joe Sam Robinson, M.D., Barby J. Simmons, D.O., and Richard L. Weil, M.D., Members of the Georgia Composite Medical Board, in their official capacities; LaSharn Hughes, M.B.A., Executive Director of Georgia Composite Medical Board, in her official capacity; Paul L. Howard, Jr., District Attorney for Fulton County, in his official capacity; Sherry Boston, District Attorney for DeKalb County, in her official capacity; Julia Slater, District Attorney for the Chattahoochee Judicial Circuit, in her official capacity; John Melvin, Acting District Attorney for the Cobb Judicial Circuit, in his official capacity; Danny Porter, District Attorney for the

constitutional challenge to Georgia House Bill 481, the LIFE Act.<sup>112</sup> The complaint rests on the grounds that the law is in direct conflict with *Roe v. Wade* and the forty-five years of precedent that continues to reaffirm the Court's central holding in *Roe*.<sup>113</sup> The plaintiffs allege that the law will prevent people in the state from freely exercising their fundamental right to choose when to have an abortion and that taking away that right will cause irreparable harm.<sup>114</sup> The plaintiffs also allege that the law violates a woman's right to privacy and liberty as guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>115</sup>

### 1. Factual and Statistical Basis of the Complaint

The complaint lists and discusses a variety of factual and statistical arguments for why the law should not be permitted to take effect. Around one in four women nationally will have an abortion by age forty-five. Sixty-one percent of those women already have at least one child, and sixty-six percent also plan to have a child or additional children in the future.<sup>116</sup> The decision to terminate a pregnancy is deeply personal and goes to a person's core moral values, religious beliefs, and individual familial, medical, educational, and financial circumstances.<sup>117</sup> This law would force a woman to continue a pregnancy against her will, which can pose a detrimental risk to her mental and emotional health and even her life.<sup>118</sup> The law also poses a risk to a woman's physical health, which would only increase Georgia's already exceedingly high maternal mortality rate.<sup>119</sup> The greatest

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Gwinnett Judicial Circuit, in his official capacity; and Meg Heap, District Attorney for the Eastern Judicial Circuit, in her official capacity. *Id.*

112. *Id.* at para. 1.

113. *Id.* at para. 2.

114. *Id.* at para. 6.

115. *Id.* at para. 73.

116. *Id.* at para. 47.

117. *Id.* at para. 46. Some of the reasons women seek abortions include being able to leave an abusive partner, preserving their life or health by reducing their risk of injury or death, because they have become pregnant as a result of rape or incest, and because they do not want to have children at all. *Id.*

118. *Id.* at para. 61.

119. Chuck, *supra* note 10. In fact, Georgia already has one of the highest maternal mortality rates in the nation. The increased risk this law imposes on maternal mortality would likely push Georgia to the top of the list. *Id.*

impact will be felt in rural areas, where low-income residents are already the least able to access proper medical care.<sup>120</sup>

## 2. The Defendants' Answer

The defendants filed their answer on August 19, 2019.<sup>121</sup> As expected, the defendants denied almost all allegations made in the complaint.<sup>122</sup> In the first paragraph, the defendants make a special note to “deny all allegations in the complaint that killing a living unborn child constitutes ‘medical care’ or ‘health care.’”<sup>123</sup> The defendants were unable to respond to the allegation that a heartbeat is generally detectable around six weeks using an ultrasound, due to the ambiguity of the term “ultrasound.”<sup>124</sup> The defendants go on to deny this allegation, stating that a heartbeat may not be detectable until nine or twelve weeks depending on which type of ultrasound is used.<sup>125</sup> In their affirmative defenses, the defendants claim that the constitutionality of the LIFE Act is based on the “State’s interests in protecting the life of the unborn; promoting respect for life at all stages of pregnancy; protecting maternal health and safety; and safeguarding the ethics and integrity of the medical profession.”<sup>126</sup> The constitutionality of these claims as well as the claims alleged in the complaint will be determined when the court hears the case on the merits sometime in 2020.

## 3. Round One in Court

On September 23, 2019, the first hearing was held before Judge Steve Jones of the United States District Court for the Northern District of Georgia.<sup>127</sup> The plaintiffs asked the court to grant a

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120. Chappell, *supra* note 104.

121. Answer, SisterSong Women of Color Reproductive Justice Collective et. al. v. Kemp et. al., No. 1:19-CV-02973 (N.D. Ga. Aug. 19, 2019).

122. *Id.*

123. *Id.* at para. 1. It is interesting to note that the plaintiffs make no mention of this allegation anywhere in their complaint. See Complaint, *supra* note 111.

124. Answer, *supra* note 121, at para. 50. The defendants were also unable to respond to the allegation that some women seek abortions for a variety of deeply personal reasons due to the term “some women” being too ambiguous or vague. *Id.* at para. 46.

125. *Id.* at para. 50. The defendants do not make an attempt to differentiate between the various types of ultrasounds, nor do they provide examples of when or what type of ultrasound would cause a heartbeat to be undetectable until nine or twelve weeks.

126. *Id.* at para. 2 (affirmative defenses).

127. Ross Terrell, *First Hearing Held on Injunction Against Georgia's 'Heartbeat' Abortion Law*, GPB NEWS, <https://www.gpbnews.org/post/first-hearing-held-injunction-against-georgias-heartbeat-abortion-law> (last visited Nov. 16, 2019).

temporary injunction to keep the law from taking effect on January 1, 2020 until the underlying constitutional issues have been decided.<sup>128</sup> Susan Talcott Camp, one of the attorneys representing the plaintiffs in the case, argued that the law violates a woman's constitutional right to abortion as defined in *Roe* and *Casey*, and that no state interest was strong enough to justify a ban on abortion pre-viability.<sup>129</sup> Camp reasoned that the main purpose behind the law was to ban abortion entirely.<sup>130</sup>

Patrick Strawbridge, a lawyer representing the State, argued that the law does not violate a woman's constitutional right to abortion because it still allows access to abortion up to the detection of a fetal heartbeat.<sup>131</sup> Strawbridge also argued that the Supreme Court has not answered the specific constitutional questions raised by the heartbeat restriction.<sup>132</sup>

On October 1, 2019, Judge Jones granted the temporary injunction, which will keep the Act from taking effect on January 1, 2020.<sup>133</sup> In the order, Judge Jones stated that neither the Supreme Court nor the United States Court of Appeals for the Eleventh Circuit has overruled *Roe* or *Casey*, and therefore the district court is bound by the current precedent.<sup>134</sup> Jones also stated that the plaintiffs are likely to succeed on the merits of the case, because the restriction the LIFE Act places on abortion once a heartbeat is detected, months before viability, is a direct violation of current precedent that prohibits states from placing an undue burden on a woman's right to abortion pre-viability.<sup>135</sup>

This ruling likely did not come as a surprise to either the plaintiffs or the defendants in the case. Both sides have already announced that they are preparing for the pending appeal. It is unclear how the court of appeals will rule on the case, but it will likely also determine that it is

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128. *Id.*

129. Maya T. Prabhu, *Federal Judge Hears Arguments to Halt Georgia's New Anti-Abortion Law*, THE ATLANTA JOURNAL-CONSTITUTION, <https://www.ajc.com/news/state-regional-govt-politics/federal-judge-hears-arguments-halt-georgia-new-anti-abortion-law/fzQvFaCqx7T0YAnVW1i4ZP/#> (last visited Nov. 14, 2019).

130. Kate Brumback, *Judge Hears Arguments in Challenge to Georgia Abortion Law*, AP NEWS, <https://www.apnews.com/70cdf3014fc448e2bf0266c93af26f86> (last visited Nov. 14, 2019).

131. *Id.* The LIFE Act makes exceptions in the case of rape and incest, as long as the woman has filed a police report prior to attempting to obtain an abortion, when the life of the woman is at risk, or when the fetus is determined not to be viable by a physician. *Id.*

132. Prabhu, *supra* note 129.

133. Order, *supra* note 11.

134. *Id.* at 12.

135. *Id.* at 30–32.

bound by the current Supreme Court precedent. Even if the court of appeals rules in favor of the LIFE Act being constitutional, this ruling would likely create a circuit split, which would almost certainly clear the path up to the Supreme Court. The LIFE Act was passed as an attempt to reach the Supreme Court, and the granting of the preliminary injunction is the first step in a long journey that both parties are eagerly awaiting.

#### IV. ANALYSIS OF THE CONSTITUTIONALITY OF THE LIFE ACT AND POSSIBLE RAMIFICATIONS IF THE CURRENT PRECEDENT IS OVERTURNED

##### *A. Analyzing the Constitutionality of the LIFE Act*

The current precedent regarding abortion law was decided over twenty-five years ago when the Supreme Court decided *Casey*. That decision has remained untouched for decades and has continuously been reaffirmed, including most recently in 2016. Since the precedent for abortion law seems to be solidified, the proper analysis for whether or not an abortion statute is constitutional is the undue burden standard that the Court announced in its decision in *Casey*.

When analyzed using the undue burden test, the Georgia LIFE Act should be held unconstitutional. The bill prohibits abortions from being performed once a fetal heartbeat has been detected. This detection normally occurs around the sixth gestational week. Since a fetal heartbeat is first detected during the pre-viability period of a pregnancy, the proper analysis for the constitutionality of the restriction is the undue burden standard. The advocates of the law argue that this roughly six-week window is enough time for a woman who wishes to obtain an abortion to do so without a substantial obstacle in her way. However, most women do not even know they are pregnant at the six-week mark, particularly women who have irregular menstrual cycles, women who have certain medical conditions such as endometriosis, women on certain birth controls that do not allow them to menstruate, and women who are breastfeeding. For many women, the six-week window will have come and gone long before they realize they are pregnant. The fetal heartbeat restriction places a substantial obstacle in the way of most, if not all, women's right to choose to obtain an abortion, and all but forces them to carry the fetus to term.

The Supreme Court has recognized for over forty-five years that states have a compelling interest in protecting potential life once the fetus has reached the point of viability. However, the compelling interest argument for the LIFE Act fails, because the LIFE Act restricts abortion far before the point of viability. Many advocates for the LIFE Act argue that the point of viability has changed since the time period

when *Casey* was decided due to advances in medicine and technology. However, in most cases, viability is still roughly twenty-four weeks, or when a fetus is far enough along in development so as to allow it to survive outside of the womb with medical assistance.<sup>136</sup> If a state's interest is grounded in wanting to protect potential life, the interest does not attach until there is potential life, which does not become apparent until the twenty-four week viability mark when the fetus is capable of life outside of the womb. The state of Georgia does not have enough of a compelling interest, if any interest at all, to abrogate a woman's right to an abortion prior to the viability period when the fetus has no chance of surviving outside the womb, even with the use of medical assistance.

One of the main points in both *Roe* and *Casey* is that a woman's right to obtain an abortion is a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment. Even though the dissent in *Casey* attempted to renounce abortion as being a fundamental right, the Court has since reaffirmed that the right to abortion is a right grounded in the Constitution.<sup>137</sup> Georgia is encroaching on women's fundamental right to bodily autonomy by passing a law that restricts the time period when an abortion can be obtained so much that it all but eliminates the right completely.

The LIFE Act places a substantial burden on women attempting to obtain an abortion pre-viability by placing a restriction on the procedure once a fetal heartbeat has been detected. The interest the state claims to have in the fetus pre-viability is not compelling enough to allow it to override a woman's fundamental rights. The LIFE Act as it is currently written places an undue burden on women's right to choose and is therefore unconstitutional.

### *B. Determining if Casey Should be Overturned*

If the case challenging the LIFE Act, or any case against one of the many other statutes attempting to outlaw abortion, makes it up to the Supreme Court, the Court will likely use the same factors it used to analyze *Roe* to determine if *Casey* should now be overturned.<sup>138</sup> As it did

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136. *When is it Safe to Deliver Your Baby*, UNIVERSITY OF UTAH HEALTH, <https://healthcare.utah.edu/womenshealth/pregnancy-birth/preterm-birth/when-is-it-safe-to-deliver.php> (last visited Nov. 14, 2019).

137. See *Whole Woman's Health*, 136 S. Ct. at 2292, 2300.

138. The factors used to analyze *Roe* include: (1) "whether the rule has proven to be intolerable simply in defying practical workability;" (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequality to the cost of repudiation;" (3) "whether related principles of law have so

for *Roe*, the Court will consider (1) if the central holding of *Casey* could be found unworkable; (2) if the rule's limitation on state power could be removed without serious inequity to those who have relied on it or would cause significant damage to the society that has been governed by it; (3) if the rule's growth in the intervening years has left the central holding of *Casey* a doctrinal anachronism; (4) and if the underlying facts upon which *Casey* is based have changed so much in the last twenty-seven years so as to render the central holding irrelevant or unjustifiable in dealing with the issues it addressed.<sup>139</sup>

The undue burden standard of analysis announced in *Casey*, while not favored by some, has not been found to be unworkable in the last twenty-seven years. The Court has continued using the undue burden standard when analyzing abortion laws, including in the most recent case decided in 2016.<sup>140</sup> Removing the pre-viability limitation on a state being permitted to regulate abortion would cause serious inequity to the women who are relying on the right to choose to end a pregnancy pre-viability, because it would permit a state to all but ban abortion outside of the small window of time prior to a heartbeat being detected. It would also cause significant damage to the society that has been relying on the rights guaranteed in *Roe* and reaffirmed in *Casey* for the last forty-five years. Since *Casey* was decided, multiple generations have come of age assuming that there is a guaranteed right to privacy and bodily autonomy when defining the capacity of women to act in society and in making reproductive decisions. The principals of privacy, liberty, and bodily autonomy have not changed or developed in the last forty-five years in a way that would cause the central holding of *Casey* to be inappropriate in the current time period. The facts upon which *Casey* is based have not changed so much as to render the central holding irrelevant or unjustifiable in dealing with abortion. Women still seek abortions for the same reasons as they did when *Casey* was decided, and the need to protect women's right to obtain abortions free from interference by the state pre-viability is more relevant than ever before. The viability threshold that was announced in *Casey* remains relevant, because technology has not advanced so much in the intervening years that would cause the pre-viability limitation on a state's interest to be unjustifiable. While there is still some argument for modification or

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far developed as to have left the old rule no more than a remnant of abandoned doctrine;" (4) "or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854–55.

139. See *Casey*, 505 U.S. at 855.

140. See *Whole Woman's Health*, 136 S. Ct. 2292.

clarification of the rule announced in *Casey*, the stronger argument is for reaffirming *Casey* instead of overruling it.

*C. A Hypothetical: If Roe and Casey Are Overturned*

The LIFE Act is an apparent attempt by the opponents of abortion to have the Supreme Court reevaluate the rules announced first in *Roe* and reaffirmed in *Casey*. However, if the Supreme Court did choose to hear a new case regarding abortion law, the outcome would not be a total ban and criminalization of abortion as some advocates for the LIFE Act would have people believe. Just as *Casey* was a reaffirmation but modification to *Roe*, the new rule would be a reaffirmation but modification of *Casey*. No matter the political structure of the Supreme Court, there will not be a time where the Court announces that women do not have a fundamental right over their own bodily autonomy. Retracting rights from a class of people would digress society back hundreds of years and cause civil unrest. Instead, the Court would reaffirm that a woman does have a fundamental right to privacy that is guaranteed by the Due Process Clause of the Fourteenth Amendment just as they have done for almost half a century.

The change would be to when a state's compelling interest would be permitted to override a woman's fundamental rights. Currently a state generally does not have a compelling interest in the preservation of potential life and cannot place an undue burden on a woman's right to choose pre-viability. However, the Court would likely severely reduce or completely eliminate the viability threshold. One of the major arguments for why abortions should be prohibited after a fetal heartbeat is detected is that advances in technology have radically reduced the time frame for when a fetus is considered viable. If the Court finds merit in this argument, then it may allow a state to regulate or ban abortion at earlier stages in a woman's pregnancy and claim that it is due to the compelling interest in protecting potential human life. The undue burden standard would likely continue to survive since the Court would not renounce a woman's fundamental right to privacy, and it would not revert back to using the trimester framework. So long as abortion is permitted without any substantial obstacles in the way of a woman attempting to obtain an abortion prior to a fetal heartbeat being detected, the Court would hold that there is no undue burden and would uphold restrictions such as the heartbeat regulation in the LIFE Act.

*D. The Impact on Georgia if the LIFE Act Takes Effect*

There are many speculative effects that the LIFE Act could have on Georgia, including plummeting maternal mortality rates, which are already alarmingly high, and an immeasurably negative impact on women's mental health, jobs, economic stability, education, and relationships. However, one effect that is not quite as speculative is what the LIFE Act could mean for the Georgia film industry.

Georgia's entertainment tax incentives have brought more than 92,000 jobs and nearly \$4.6 billion in wages to the state since 2008.<sup>141</sup> The state has been home to many lucrative productions such as *Black Panther* and *The Walking Dead*.<sup>142</sup> However, major production companies such as Netflix, NBC Universal, Warner Media, AMC, CBS, Showtime, Sony Pictures, and Disney have all voiced concerns about the bill and threatened to reevaluate their investment in the state.<sup>143</sup> On May 28, 2019, Netflix released a statement saying that it would withdraw all of its business from the state if the law went into effect.<sup>144</sup> JJ Abrams and Jordan Peele announced that they would continue to shoot their HBO series, *Lovecraft Country*, in the state, but plan to donate one hundred percent of the profits from this season to the organizations fighting to keep the LIFE Act from taking effect.<sup>145</sup> The potential impact to Georgia would be devastating if the LIFE Act is eventually permitted to take effect.

#### V. CONCLUSION

While the future of abortion law in the state of Georgia and in the United States is unnervingly uncertain, it is evident that there is a long road ahead for advocates on both sides of the argument. The LIFE Act is unconstitutional under current precedent and will not be taking effect in the immediate future. However, the fight is just beginning. There is a high likelihood that the case against the LIFE Act could make it up to the Supreme Court and the constitutional right to abortion will yet again come into question. While the stronger argument is for reaffirming the central holding in *Casey*, the political climate of

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141. Amanda Mull, *What Hollywood Boycotts Would Really do to Georgia*, THE ATLANTIC, <https://www.theatlantic.com/health/archive/2019/06/georgia-abortion-hollywood-boycotts/591106/> (last visited Nov. 14, 2019).

142. Robyn Curnow, *Battle lines are drawn between the film industry and Georgia over controversial 'heartbeat bill'*, CNN, <https://www.cnn.com/2019/08/21/us/georgia-heartbeat-law-film-industry/index.html> (last visited Nov. 14, 2019).

143. Mull, *supra* note 141.

144. *Id.*

145. Curnow, *supra* note 142.

both the Supreme Court and the country makes it more uncertain than ever how the Court will actually rule. If the Court chooses to modify *Casey* or to overrule it entirely, the impact the change will have on the women in this country will be catastrophic.

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