

Was the LIFE Act void ab initio?

State of Georgia v. Sistersong Women of Color Reproductive Justice Collective et al., 317 Ga. 528 (Ga. 2023).¹

Decided by the Supreme Court of Georgia on October 24, 2023.²

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¹ State of Ga. v. Sistersong Women of Color Reproductive Justice Collective et al., 317 Ga. 528 (Ga. 2023).

² *Id.*

³ *Id.*

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Before Supreme Court of Georgia. Opinion authored by Justice Colvin.⁵

KEY ISSUES PRESENTED

Does the Constitution of the United States of America or the Constitution of the State of Georgia void the LIFE Act, which was enacted in 2019 before the Supreme Court of the United States' decision in *Dobbs v. Jackson Women's Health Organization*?

PROCEDURAL HISTORY & POSTURE

In May 2019, the Georgia legislature enacted the Living Infants and Fairness and Equality Act (hereinafter LIFE Act).⁶ This act prohibits physicians from performing abortions if a fetal heartbeat is detected unless an exception applies.⁷ Further, if a physician performs an abortion under an exception, they must "report to the Department of Public Health which exception ... justified the procedure."⁸ In response, Sistersong sought an injunction against the state in federal court to delay the act from being implemented.⁹ The federal court granted the injunction reasoning that the law violated the constitutional right to privacy.¹⁰ Further, the federal court opined that the Supreme Court of the United States made it clear that a state cannot ban abortion before a fetus is viable, and this act did that.¹¹ The state appealed

⁴ *Id.*

⁵ *Id.*

⁶ H.B. 481 (Public Health Committee), 155th Gen. Assemb., 1st Reg. Sess. (Ga. 2019), available at <https://www.legis.ga.gov/api/legislation/document/20192020/18701363980> (last visited on Apr. 21, 2024).

⁷ *Id.*

⁸ *Supra* note 1.

⁹ *What's at Stake*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/cases/sistersong-v-kemp>, (Oct. 22, 2021).

¹⁰ Caroline Kelly, *Federal Judge Blocks Georgia's Controversial Abortion Ban*, CNN, (Oct. 1, 2019), <https://www.cnn.com/2019/10/01/politics/georgia-abortion-ban-judge-blocks/index.html>

¹¹ *Id.*

to the Eleventh Circuit Court of Appeals. The appellate court stayed the case pending the Supreme Court's ruling in *Dobbs*.¹²

On June 24, 2022, the Supreme Court of the United States issued its decision in *Dobbs v. Jackson Women's Health Organization*, overruling *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹³ The Court held that the constitutional right to abortion has never existed.¹⁴ Accordingly, the Eleventh Circuit Court of Appeals vacated the federal district court's enjoinder of the LIFE Act.¹⁵ This permitted the LIFE Act to begin on July 20, 2022.¹⁶

However, Sistersong and other reproductive healthcare activists continued to fight the LIFE Act's restrictions. After the appellate court's ruling, they filed a new suit in the Superior Court of Fulton County, challenging the law as void *ab initio* and Georgia's Constitution's due-process, equal-protection, and inherent-rights provisions.¹⁷ The trial court held that the Sections 4 and 11 of the Act were void *ab initio*.¹⁸ Specifically, the court held that the sections which ban an abortion upon fetal heart detection and require a physician to publicly justify the abortion after the detection were void *ab initio*, or void at its inception. Further, because the legislation was enacted when *Roe* and *Casey* were controlling, it made the Act unconstitutional. The court further reasoned that Georgia precedent required them to "assess [the] constitutionality based on the legal environment that existed when [it] was enacted."¹⁹ The state appealed, then filed an Emergency Petition for Supersedeas, "seeking a stay of the...order pending appeal."²⁰ This would allow for the LIFE Act to continue until the

¹² *Supra* note 9.

¹³ *Dobbs v. Jackson Women's Health Organization* (2022), NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/the-constitution/supreme-court-case-library/dobbs-v-jackson-womens-health-organization> (last visited Apr. 21, 2024).

¹⁴ *Id.*

¹⁵ *Supra* Note 1.

¹⁶ *Roe v. Wade Ruling: Guidance, Support and Resources for Physicians*, MAGMUTUAL, (Aug. 22, 2022), <https://www.magmutual.com/learning/toolkit/roe-v-wade-ruling-guidance-support-resources-physicians/georgia-heartbeat-act-life-act/>.

¹⁷ *Supra* note 1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

court could make a decision. The Supreme Court of Georgia granted the emergency petition.²¹

SUBSTANTIVE FACTS

Georgia's LIFE Act is one of many restrictive abortion regulations that have been enacted across the country. Although Representative Ed Setzler sponsored the LIFE Act as "an effort to protect fetuses," the bill narrowly passed – demonstrating its divisiveness in the state legislature.²²

Sistersong Women of Color Reproductive Justice Collective is a non-profit organization dedicated to advocating for women's reproductive justice.²³ The members of the organization define this as a "human right to maintain personal bodily autonomy," emphasizing the choice in choosing whether to have children.²⁴ Although national, they are based in the southern United States – specifically headquartered in Atlanta, Georgia.²⁵

LEGAL ANALYSIS LEADING TO THE COURT'S DISPOSITION

A. *Prior Relevant Law*

In *Roe v. Wade*, the Supreme Court of the United States recognized that the federal Constitution guaranteed a right to an abortion.²⁶ Although the Court was vague about the constitutional authority for abortion, it referenced the Fourteenth Amendment's Due Process Clause and emphasized the

²¹ *Id.*

²² Emily Wax-Thibodeaux and Reis Thebault, *Georgia Legislators Pass 'Heartbeat Bill' That Would Ban Most Abortions*, THE WASHINGTON POST, (Mar. 29, 2019), https://www.washingtonpost.com/national/georgia-legislators-pass-heartbeat-bill-banning-most-abortions/2019/03/29/1cc3ec58-516c-11e9-8d28-f5149e5a2fda_story.html.

²³ *About Us*, SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, <https://www.sistersong.net/about-x2>, (last visited Apr. 21, 2024).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Roe v. Wade*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/roe-v-wade/>, (last visited Apr. 21, 2024).

protection of a person's privacy.²⁷ Further, the Court implemented a trimester framework.²⁸

The Court reaffirmed its core holding in *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁹ Here, the Court replaced the trimester framework with the viability standard, which prohibited an abortion when a fetus was viable outside the mother's womb.³⁰ Since 1973, abortion was a Constitutional right. For nearly five decades, it was the law of the land. As mentioned, *Dobbs* held that *Roe* and *Casey* were never correctly decided.³¹

B. Changes, Modifications, Clarifications, & Extensions to Georgia Law Made in State of Georgia v. Sistersong Women of Color Reproductive Justice Collective et al.

In *Building Authority of Fulton County v. State of Georgia*, the Supreme Court of Georgia held that an unconstitutional statute is void if it violates the Constitution when it was enacted or there's a subsequent constitutional amendment which makes the statute unconstitutional.³² The Court stated that the trial court's conclusion rested on a faulty premise. They opined that the Constitution has an established meaning, which "courts interpret and apply to particular cases."³³ They further reason that the Constitution "means today what it meant when the LIFE Act was enacted in 2019."³⁴ Thus, the Court must consider how the Constitution is interpreted today because that reflects its original meaning. To support this opinion, the Court further reasoned that Georgia courts must apply "now-controlling United States Supreme Court precedent,"³⁵ meaning they must apply *Dobbs* when determining if the LIFE Act is void *ab initio*. Therefore, the LIFE Act was not unconstitutional when it was enacted because it complies with the now-controlling *Dobbs* ruling.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Planned Parenthood v. Casey* (1992): *Three Judicial Views on Abortion Restrictions*, CENTER FOR REPRODUCTIVE RIGHTS, (July 9, 2009), <https://reproductiverights.org/planned-parenthood-v-casey-1992-three-judicial-views-on-abortion-restrictions/>.

³¹ H.B. 481, *supra* note 15.

³² *Supra* note 1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

IMPACT UPON GEORGIA'S ABORTION LAWS

Although the Court ruled that the LIFE Act's controversial provisions were not void, the suit was remanded to determine the remaining state constitutional challenges. These challenges include Georgia's Constitutional due-process, equal-protection, and inherent-rights provisions. This is especially important because the Supreme Court of the United States made it clear that abortion would be left for states, or democracy, to make their determination on abortion regulations. This will force the Georgia courts to analyze whether the state constitution offers more protection.

Currently, Georgia physicians can perform abortions until a fetal heartbeat is detected, which is generally around six weeks of gestation.³⁶ However, there are exceptions that allow for an abortion procedure to take place after the ban, but physicians must disclose it to the Department of Health.³⁷ Thus, a woman seeking an abortion after this must travel out of state or continue their pregnancy. Since the *Dobbs* ruling, fourteen states have completely outlawed abortion.³⁸ Of those fourteen, nine are in the southern United States.³⁹ Currently, Georgia citizens may elect to travel to Florida, which has a fifteen-week abortion restriction, but this option may prove temporary if Florida voters approve a constitutional amendment providing for a six-week ban.⁴⁰ They also have the option to travel to North Carolina, which has a twelve-week ban.⁴¹ Additionally, North Carolina requires women to go through counseling and a waiting period, making it a multiple day process.⁴² This causes a burden on poor women due to the travel and possibility of taking off work for multiple days, not including time for recovery.

³⁶ Ana Smith Haghighi, *When Does a Fetus Have a Heartbeat?*, MEDICAL NEWS TODAY, <https://www.medicalnewstoday.com/articles/when-does-a-fetus-have-a-heartbeat#timeline>, (Dec. 8, 2022).

³⁷ *Id.*

³⁸ *After Roe Fell: Abortion Laws by State*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state/>, (last visited Apr. 21, 2024).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *After Roe Fell: Abortion Laws by State, North Carolina*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state/?state=NC>, (last visited Apr. 21, 2024).

Although Georgia's abortion restriction is burdensome on women seeking to exercise their choice, the law also allows expecting parents to claim their unborn fetus as a dependent on their state tax return.⁴³ Additionally, Georgia has modified their welfare assistance program, known as Temporary Assistance for Needy Families (TANF), to assist pregnant women.⁴⁴ Previously, Georgia families needed to have a child and meet income requirements to qualify for TANF.⁴⁵ This now allows newly expecting, low-income citizens to receive this assistance. Additionally, the state has expanded Medicaid coverage; previously, pregnant women with Medicaid coverage were able to continue getting Medicaid six month postpartum.⁴⁶ Now, Medicaid eligible women can get postpartum care for twelve months.⁴⁷ Finally, the state lowered the age in which a person can legally adopt a child from 25 to 21.⁴⁸ This has been done in an effort to "promote life."

Recently, Alabama's Supreme Court has issued a ruling that declared that embryos created through in vitro fertilization (IVF) are children.⁴⁹ When someone goes through the IVF procedure, they typically produce multiple embryos.⁵⁰ The ones that are not used are stored until the patient chooses to use them or destroy them.⁵¹ In this case, another patient entered the storage area and accidentally destroyed the plaintiffs' embryos.⁵² As a result, one of the plaintiff's brought a suit under the state's Wrongful Death of a Minor statute.⁵³ The initial suit was dismissed because an embryo is not a child.⁵⁴

⁴³ *Life Act Guidance*, DEPARTMENT OF REVENUE, <https://dor.georgia.gov/life-act-guidance>, (last visited Apr. 21, 2024).

⁴⁴ Davis Giangulio and Katherine Landergan, *Georgia Expands Some Benefits in Shadow of Abortion Restrictions*, ATLANTA JOURNAL-CONSTITUTION, (July 21, 2024), <https://www.ajc.com/news/atlanta-news/georgia-expands-some-benefits-in-shadow-of-abortion-restrictions/HBPBD7LNRJEN3DYSUVOPWGRXGU/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Joshua Sharfstein, *The Alabama Supreme Court's Ruling on Frozen Embryos*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH, (Feb. 27, 2024), <https://publichealth.jhu.edu/2024/the-alabama-supreme-courts-ruling-on-frozen-embryos>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

However, on appeal, the Supreme Court of Alabama granted embryos personhood.⁵⁵ As a result of this decision, two fertility clinics seized their operations, but they have resumed treating patients.⁵⁶ However, this decision resulted in national debate.

In response to Alabama's ruling, Georgia Democrats introduced a Senate bill denying embryos personhood.⁵⁷ Representative Teri Anulewicz argued that women's reproductive rights are fragile.⁵⁸ With the ruling in *Dobbs*, Rep. Anulewicz believes that Alabama's IVF ruling is just the beginning.⁵⁹ She fears that contraceptives will be under attack next.⁶⁰ However, Georgia Republicans stated that Alabama's ruling only affects Alabama and IVF is protected under the LIFE act, meaning there is no need for this bill.⁶¹

Prepared by: Gloria Garcia

⁵⁵ *Sharfstein*, supra note 49.

⁵⁶ *Id.*

⁵⁷ *S.B. 565 (Health and Human Services Committee)*, 158th Gen. Assemb., 1st Reg. Sess. (Ga. 2024), available at <https://www.legis.ga.gov/legislation/67525> (last visited Apr. 21, 2024).

⁵⁸ Jill Nolin, *Georgia Democrats Push for State Laws Protecting Reproductive Rights Following Alabama Court Ruling*, GEORGIA RECORDER, (Feb. 24, 2024), <https://georgiarecorder.com/2024/02/29/georgia-democrats-push-for-state-laws-protecting-reproductive-rights-following-alabama-court-ruling/>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*