No. _____

In the

Supreme Court of Georgia

State of Georgia,

Defendant-Petitioner,

v.

SisterSong Women of Color Reproductive Justice Collective, et al.,

Plaintiff-Respondents.

On Application for Writ of Supersedeas to the Superior Court of Fulton County
Case No. 2022CV367796

EMERGENCY PETITION FOR SUPERSEDEAS

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INTRODUCTION

In 2019, Georgia's elected representatives passed the Living Infants Fairness and Equality (LIFE) Act to protect unborn children, a "class of living, distinct persons." 2019 Ga. Laws 234, § 2. The LIFE Act reflects the view that both mothers and their unborn children should be supported and that abortion, a lethal operation that ends the life of an unborn human, is only rarely appropriate. Accordingly, the LIFE Act prohibits post-fetal-heartbeat abortions, subject to exceptions such as medical emergencies, medical futility, rape, or incest. O.C.G.A. § 16-12-141(a), (b).

In a remarkable decision, the superior court below enjoined the LIFE Act's prohibition of post-fetal-heartbeat abortions, not because there is anything wrong with the LIFE Act *today*, but because it was supposedly unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973), when it was *enacted*. Relying on overruled judicial decisions to enjoin the LIFE Act is a wholly unsupported theory that has no basis in law, precedent, or common sense. And because the superior court's injunction causes the State irreparable harm every moment it stands, this Court should stay the injunction while it considers the issue on appeal. Each of the factors this Court examines before issuing a stay supports the State. *Green Bull Georgia Partners, LLC v. Register*, 301 Ga. 472, 474 (2017).

First, the State is likely to succeed on the merits. *Id.* The LIFE Act is plainly valid under the federal constitution, and the superior court's attempt to rely on *Roe* to nevertheless enjoin the law is fundamentally flawed. In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022), the U.S. Supreme Court overruled the "egregiously wrong" decision of *Roe v. Wade*.

Not surprisingly, the Eleventh Circuit then upheld the LIFE Act against a federal challenge. *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320 (11th Cir. 2022).

If it seems odd that the superior court would nevertheless rely on the *overruled Roe* decision to invalidate the LIFE Act, that is because it is. No other court has ever held that an overruled judicial opinion can, like a zombie rising from the grave, invalidate otherwise perfectly valid laws. Prior judicial precedents, when they are overruled, are no law at all. When the Supreme Court overruled *Roe*, "the effect [was] not that the former decision was bad law, but that it was *never the law*." *State v. King*, 164 Ga. App. 834, 834 (1982) (emphasis added). This is hardly a new concept: "[I]f it be found that [a] former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." 1 William Blackstone, *Commentaries* *70.

The superior court's contrary theory is unsupported and irrational. In the superior court's view, the LIFE Act was "void *ab initio*"—that is, void from the beginning—because *Roe* had not yet been overruled when it was enacted in 2019. In the superior court's telling, the "the proper legal milieu in which to assess the LIFE Act's constitutionality" is the law as it existed in 2019. Doc. 87, Nov. 15 Order at 6 (Ex. B). Because federal courts would have supposedly enjoined the LIFE Act in 2019, the superior court leapt to the conclusion that the LIFE Act was "void" all along. *Id.*

None of this makes sense. Even assuming that a court should look to the state of the law in 2019, the federal constitution was the same then that it is

now; it has not been amended in the interim. *Dobbs* makes clear, and the superior court did not dispute, that the LIFE Act is perfectly valid under the federal constitution *today*. So the LIFE Act must have been constitutionally valid in *2019*, because the very same federal constitution applied.

To circumvent that obvious point, the superior court crafted a theory that can best be described as judicial supremacy on steroids. In the superior court's view, when the Supreme Court overruled *Roe*, it was not merely *interpreting* the constitution, it was effectively *amending* the constitution. That is because, in the lower court's view, courts not only interpret the law in individual cases, but they "define the law," such that legislatures "are not at liberty" to disagree or "pass laws contrary to such pronouncements." Ex. B at 11. The superior court's view is simple: judges do not interpret the law, judges *are* the law.

This theory, which would exalt the judiciary above its coordinate branches, conflates two separate concepts: "law" and "judicial doctrine." *Lester v. United States*, 921 F.3d 1306, 1312–13 (11th Cir. 2019) (W. Pryor, J., concurring in denial of reh'g *en banc*). The federal constitution is the relevant law. *Roe* and its progeny were merely the prevailing *judicial doctrine* at the time of the LIFE Act's passage, and were later overruled in *Dobbs*. Courts have "no legitimate authority" to "amend" the constitution by "judicial opinion." *Barrow v. Raffensperger*, 308 Ga. 660, 673 n.11 (2020). A constitution "is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *Olevik v. State*, 302 Ga. 228, 236 (2017) (citation omitted). So while judicial doctrine changed in

Dobbs, the federal constitution did not. And because no one contests that the LIFE Act is consistent with the federal constitution, it necessarily was in 2019, too.

At bottom, the superior court's decision was an "exercise of raw judicial power." *Dobbs*, 142 S. Ct. at 2241 (citation omitted). The superior court did not hide its distaste for *Dobbs* or the General Assembly's decision to challenge *Roe*. In the superior court's view, "*Dobbs'* authority flows not from some mystical higher wisdom but instead basic math." Ex. B at 4 n.5. "Despite its frothy language," the "*Dobbs* majority is not somehow 'more correct' than the majority that birthed *Roe*." *Id.* The *Dobbs* decision was the result of "simply numbers," that is, more Justices voted for the result than against it. *Id.*

As the superior court explains it, the federal constitution has no inherent meaning; the law is just whatever Supreme Court Justices declare it to be. *Id.* But that is no truer of the federal constitution than it is of our state constitution. Assuredly, Members of this Court would be surprised to learn that they do not actually interpret the state constitution, but instead simply exercise majority power to *create* law. That erroneous view is the basis for the superior court's decision to enjoin the LIFE Act, and it cannot stand.

Second, the balance of equities strongly favors a stay. *See Green Bull*, 301 Ga. at 473. The State suffers significant and irreparable harm every moment that the LIFE Act is enjoined. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303

(2012) (Roberts, C.J., in chambers) (citation omitted). And, of course, aborted children do not spring back to life if an injunction is overturned. No potential or even perceived harm to Plaintiffs is comparable to that interest.

Third, the public interest strongly favors a stay. *See Green Bull*, 301 Ga. at 473. The LIFE Act was duly enacted by the representatives of the people of Georgia, and although the superior court might believe that this decision was just a "symbolic vote," without "real consequences," Ex. B at 7 & n.9, the superior court does not get to decide which legislation matters and which does not. This decision would make legislatures subservient to, not co-equal with, courts, and that is most certainly not in the public interest.

This Court should stay the lower court's decision now, without waiting to overrule it months down the line, while untold numbers of unborn children suffer the permanent consequences.

Likewise, the Court should issue an administrative stay while it considers this petition.

JURISDICTION

The superior court issued a declaratory judgment and permanent injunction against the LIFE Act's enforcement on November 15, 2022. Ex. B at 13–14. That decision was immediately appealable under O.C.G.A. § 5-6-34(a)(4), and this Court has exclusive appellate jurisdiction because the case calls into question the constitutionality of a statute, Ga. Const. art. VI, § VI, ¶ II.

STATEMENT

A. The LIFE Act

In 2019, Georgia enacted the Living Infants Fairness and Equality (LIFE) Act, 2019 Georgia Laws 234. The General Assembly found that "[m]odern medical science, not available decades ago, demonstrates that unborn children are a class of living, distinct persons." LIFE Act, § 2. Accordingly, the LIFE Act broadly protects the unborn and supports pregnant mothers and families.

The law limits the practice of elective abortion. Section 4 of the LIFE Act prohibits "using, prescribing, or administering any instrument, substance, device, or other means with the purpose to terminate a pregnancy with knowledge that termination will, with reasonable likelihood, cause the death of an unborn child" who possesses a "detectable human heartbeat." *Id.* § 4 (codified at O.C.G.A. § 16-12-141(a), (b)). The LIFE Act has a number of exceptions, including situations of "medical emergency," "[m]edical[] futil[ity]," the "naturally occurring death of an unborn child," and where the "pregnancy is the result of rape or incest." O.C.G.A. § 16-12-141(a), (b). Likewise, operations to remove "ectopic pregnanc[ies]" or the remains of a "spontaneous abortion" are not "considered … abortion[s]" at all. *Id.* § 16-12-141(a)(1).

The LIFE Act also provides a number of exceptions where the intention is *not* to produce the death of the unborn child. It is an affirmative defense if, for instance, a "physician provides medical treatment to a pregnant woman which results in the accidental or unintentional injury to or death of an

unborn child." *Id.* § 16-12-141(h)(1). The same goes for nurses, pharmacists, and physician assistants. *Id.* § 16-12-141(h)(2)–(4).

The rest of the LIFE Act promotes the dignity and well-being of unborn children and ensures support for their families. For instance, Section 3 defines an unborn human being as a "[n]atural person" under Georgia law. O.C.G.A. § 1-2-1. It requires counting unborn persons for "population based determinations." *Id.* Section 12 allows parents to claim tax benefits by counting unborn children with detectable heartbeats as "dependent[s]." O.C.G.A. § 48-7-26(a). Section 5 expands the child-support obligations of absent fathers to include the "direct medical and pregnancy related expenses" of the mother of an unborn child. O.C.G.A. § 19-6-15(a.1).

B. The Federal Litigation

Plaintiffs here (a group of abortion providers and activists) immediately challenged the LIFE Act in federal court, six months before the Act's effective date. *SisterSong*, 40 F.4th at 1324. Relying on *Roe* and its progeny, Plaintiffs asserted that the LIFE Act's prohibitions on abortion post-fetal-heartbeat were invalid under the federal constitution. *Id*. At the same time, Plaintiffs asserted that the definition of "natural person" in the LIFE Act was unconstitutionally vague. *Id.* The federal district court agreed, accepting both the *Roe*-based, substantive-due-process argument, as well as the vagueness challenge to the definition of "natural person." *Id*. at 1325. The district court enjoined the entire LIFE Act. *Id*.

The various State Defendants appealed that judgment, and after oral argument at the Eleventh Circuit, that court stayed the appeal pending a

decision in *Dobbs*. *Id*. The Supreme Court then issued *Dobbs* on June 24, 2022, holding that the federal "[c]onstitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." *Dobbs*, 142 S. Ct. at 2242. It overruled *Roe* and its progeny. *See generally id.*

Almost a month later, the Eleventh Circuit issued its opinion in the challenge to Georgia's LIFE Act, reversing the district court across the board. *SisterSong*, 40 F.4th at 1328. The Eleventh Circuit explained that, because the federal constitution does not provide a right to an abortion, the LIFE Act's regulation of abortion was plainly permissible. *Id.* at 1325–27. Likewise, the definition of "natural person" (to include unborn children) was not unconstitutionally vague. *Id.* at 1327–28. The LIFE Act thus went into effect.

C. Proceedings Below

A week after the Eleventh Circuit issued its opinion, Plaintiffs filed suit in Fulton County Superior Court, seeking to invalidate Sections 4, 10, and 11 of the LIFE Act, as well as O.C.G.A. § 16-12-141(f), under Georgia law. The complaint attacked the LIFE Act on four grounds. First, Plaintiffs argued that the LIFE Act was void *ab initio*—from the beginning—because it supposedly conflicted with federal precedent when enacted. Second, Plaintiffs insisted that the Georgia constitution's includes a "privacy"-based right to abortion. Third, they argued that the LIFE Act violates Georgia's equal protection clause (without offering a theory as to how). Finally, Plaintiffs challenged O.C.G.A. § 16-12-141(f)—which provides that abortion-related "[h]ealth records shall be available to the district attorney"—as also violative

of the Georgia constitution's privacy right. *See generally* Doc. 3, Verified Complaint.[1]

Soon thereafter, the State moved to dismiss the suit in its entirety, and Plaintiffs moved for partial judgment on the pleadings, relying on their theory that the LIFE Act was void *ab initio*.[2] On November 15, 2022, the superior court permanently enjoined the LIFE Act, granting Plaintiffs' motion and denying as moot most of the State's motion. *See* Ex. B.

In ruling that the LIFE Act is "void *ab initio*," the superior court held that if a law is unconstitutional when enacted, it is always unconstitutional. *Id*. But it then declared that the "law" at the time of the LIFE Act's passage was not the federal constitution as properly understood in *Dobbs* but the federal constitution as the *Roe* court understood it. *See generally id*. Thus, because the superior court believed *Roe* was "the law" in 2019, the LIFE Act's

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[1] Plaintiffs also moved for an interlocutory injunction, which the superior court denied because the State has not waived sovereign immunity with respect to injunctive relief prior to the issuance of a declaratory judgment. *See* Doc. 4, Inj. Mot.; Doc. 39, Order Dismissing Inj. Mot. (Ex. D); *see also* Ga. Const. art. I, § II, ¶ V.

[2] Although dueling dispositive motions were outstanding, the superior court nevertheless held a two-day "trial" on the LIFE Act, without ever telling the parties what the trial was supposed to be about (much less allowing time for discovery, summary judgment practice, etc.). The court declared that abortion makes this case "different" and that it would hold a trial because "I can." Doc. 57 at 2, 5, Order Denying Mot. to Cancel Trial (Ex. C). In responding to the State's argument that it could not even know what facts were at issue, the court bizarrely pointed the State to "similar litigation occurring across the country," *id.* at 3, as if litigation in other states would somehow reveal the factual issues supposedly relevant under Georgia law. Remarkably, the superior court then issued its judgment and injunction on the basis of the dispositive motions, thus proving that, much as the State had argued, the entire trial process was unnecessary. *See* Ex. B at 1–2 n.2.

prohibition of abortion was invalid. *Id.* at 3–4, 6 & n.5. The superior court declared Section 4 (the prohibition of post-fetal-heartbeat abortions) and Section 11 (a related records-keeping provision) invalid and permanently enjoined their enforcement. *Id.* at 13–14.

The State immediately appealed.

REASONS FOR STAYING THE INJUNCTION

The "most important" consideration in deciding whether to stay an injunction pending appeal is the "likelihood that the appellant will prevail." *Green Bull*, 301 Ga. at 474. But even if the appellant presents only a "substantial case on the merits," a stay is still warranted when the "other equities weigh strongly in favor of a stay" pending appeal. *Id.* This Court considers "the extent to which the applicant will suffer irreparable harm in the absence of a stay or injunction, the extent to which a stay or injunction would harm the other parties with an interest in the proceedings, and the public interest." *Id.* at 473 (citation omitted).

Here, each consideration supports a stay. The State has every chance of success because this Court is unlikely to affirm the superior court's theory of judicial supremacy. The harm to the State is significant and irreparable. Unborn children are at risk every day that the injunction continues. And the public interest strongly supports the continued enforcement of important public laws.

For the same reasons, the State also requests that the Court issue an administrative stay while considering this petition.

I. The LIFE Act does not violate the federal constitution, so it is not invalid and thus not void *ab initio*.

The LIFE Act is plainly valid under federal law. Indeed, neither Plaintiffs nor the superior court asserted otherwise. The superior court's attempt to nevertheless hold the LIFE Act "void *ab initio*" misunderstands that doctrine, the authority of judicial precedent, and fundamental aspects of judicial power. Void *ab initio* is a minor doctrine that enforces a commonsense point: a law that is unconstitutional *now* was also unconstitutional when *enacted*, assuming the constitution has not been amended in the interim. But the LIFE Act is plainly constitutional *now*, so it was not "void" when enacted in 2019, under the same federal constitution in force today.

Yet the superior court enjoined the LIFE Act anyway, on the theory that the shift from *Roe* to *Dobbs* was, *effectively*, an amendment to the federal constitution. But that makes no sense, because overruled judicial decisions have no authority at all. The superior court fundamentally misunderstood the role of courts, which merely *interpret* law in the course of issuing judgments in individual cases. *See, e.g.*, U.S. Const. art. III, § 2. Courts do not amend the constitution, and the constitution does not change simply because a court's view of it changes. A judicial decision that is later overruled is no law at all, and it cannot invalidate the LIFE Act.

A. A currently valid law can never be "*void ab initio*" when the constitution has not been amended since its enactment.

The void *ab initio* doctrine is a commonsense declaration that an unconstitutional law was *always* unconstitutional (barring some constitutional amendment), because the meaning of the constitution is fixed.

Conversely, if a law is valid *today*, it must have been valid when enacted, barring some constitutional amendment in the interim. Plaintiffs' contrary view—that the void *ab initio* doctrine depends not on a fixed constitution but on overruled judicial opinions—has no support in law.

1. In Georgia, "[l]egislative acts in violation of this Constitution or the Constitution of the United States are void." Ga. Const. art. I, § II, ¶ V. And void laws are in effect no law at all. They "confer[] no rights," "impose[] no duties," and "afford[] no protection." *Sherman v. Atlanta Indep. Sch. Sys.*, 293 Ga. 268, 276 (2013) (quoting *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886)).

The void *ab initio* doctrine is simply a restatement of the rule that *if* a statute is invalid, it was *always* invalid. In other words, if a court declares a law invalid in 2020, it was also invalid in 2010. *See generally Am. Mfrs. Mut. Ins. Co. v. Ingram*, 271 S.E.2d 46, 52 (N.C. 1980). Sometimes, to protect vested rights and reliance interests, Georgia courts will allow exceptions to this rule. *Sherman*, 293 Ga. at 276 (that a statute declared void is considered void from enactment is "a general legal principle, not an existential one"). So even if a law is, in fact, void, rights previously obtained under the statute are, in some instances, still enforceable. *See Walker v. Walker*, 247 Ga. 502, 503 (1981). In other words, sometimes courts err on the side of *enforcing* statutes. But either way, the doctrine is about making clear that a law invalid now was *always* invalid because the meaning of the constitution does not change (absent amendment).

So the key point for this case is that a law is just as valid (or invalid) today as it was when enacted. The doctrine depends on the notion that the constitution's meaning is fixed—that is the entire basis for a court's authority to declare that a law, currently invalid, was *always* invalid. Properly understood, the void *ab initio* doctrine is a limitation on judicial power: it clarifies that courts only declare what already is. They do not, by their opinions, invalidate a previously valid law, they declare that it was always invalid. Likewise, if an otherwise valid law has unconstitutional *applications*, those applications were just as unconstitutional yesterday as they are today.

Now a result of this rule is that, if a law is *void* when enacted, the legislature cannot *fix* that void law through later legislative amendment. And that makes sense: because the General Assembly lacked the power to enact the law in the first place, it is no law at all, and so there is nothing to *amend* down the road. For instance, if the General Assembly were to try to enact a law abolishing the office of the governor, that law would be "void" from the beginning, because the General Assembly simply lacks that authority. The legislature could not "amend" that law down the road to try to make it constitutional.

This Court's cases illustrate this idea in action. For instance, in *Jones v. McCaskill*, 112 Ga. 453, 456 (1900), the Court examined a provision of the Georgia constitution stating that "no special law shall be enacted in any case for which provision has been made by an existing general law." Ga. Const. art. I, § IV, ¶ I (1877). The General Assembly created a new charter for the city of Albany, which included a board of utilities commissioners filled, in

part, by two city councilmen. *Jones*, 112 Ga. at 454. That new charter conflicted with a *general* Georgia statute prohibiting councilmen from filling other city positions. *Id.* Therefore, the "general assembly had no power to enact" the new charter. *Id.* When the legislature attempted to save the charter by amending it down the road, the Court rejected that attempt, because the General Assembly had simply lacked the power to enact the law in the first place. It could not amend a law that was never a law. *Id*. at 455. Likewise, in *Jamison v. City of Atlanta*, the legislature's attempt to "delegate its exclusive power to alter the corporate limits of the City of Atlanta" was "void when passed," and could not suddenly be given "vitality" though the constitution was later amended. 225 Ga. 51, 51 (1969) (citations omitted); *see also, e.g.*, *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 617 (1953) (holding a law void *ab initio* where it was preempted by the Sherman Act at the time of enactment).[3]

Thus, a statute is invalid where it has *always* been invalid. But again, statutes do not *become* void because a court declares them so—they were always void, which is what *allowed* the court to declare them so. Thus, if the constitution has not changed, there should be no distinction between a court's analysis of a law *today* versus the time of *enactment*.

2. Plaintiffs below erroneously contended otherwise. In their view, laws can be void *ab initio* even if the they are valid now and even if the

[3] Ironically, *Grayson* itself misunderstands federal law. Federal laws operate on *individuals*; they do not directly attack state legislation. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). The Supremacy Clause is simply a "rule of decision," and it does not grant Congress the power to void or erase state laws. *Id.* (citation omitted).

constitution has not been amended. In Plaintiffs' view, if a law is merely in tension with judicial opinions from the time of enactment (even *overruled* opinions), it is nevertheless invalid.

This makes no sense and is not the law. When a previous judicial decision is overruled, "the effect is not that the former decision was bad law, but that it was *never the law*." *King*, 164 Ga. App. at 834 (citation omitted) (emphasis added). Blackstone commented, for instance, that "if it be found that [a] former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." 1 William Blackstone, *Commentaries* *70. Thus, if a court holds "an act of the legislature unconstitutional," but then concludes that "its former ruling was erroneous," "the statute must be regarded for all purposes as having been constitutional and in force from the beginning." *Pierce v. Pierce*, 46 Ind. 86, 95 (1874); *see also, e.g.*, *Christopher v. Mungen*, 55 So. 273, 280–81 (Fla. 1911) (citations omitted) (same); *Falconer v. Simmons*, 41 S.E. 193, 196 (W. Va. 1902) (similar); Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 Mich. L. Rev. 645, 651–52 (1951), https://perma.cc/SC8H-BECF (collecting further cases).

Plaintiffs have no authority to the contrary because their theory is bunk. Below, Plaintiffs relied almost exclusively on a half-line of dicta from *Adams v. Adams*, 249 Ga. 477 (1982), but that case does not help them. In *Adams*, this Court examined a statute challenged under the equal protection clause. *Id.* The relevant statute had been in place since before the equal protection clause even existed. *Id.* at 479. In the course of its ruling, the Court

uncontroversially declared that, in some cases, it had held statutes "void from their inception [because] they were contrary to the Constitution at the time of enactment." *Id.* Plaintiffs seized on the Court's follow-on statement that none of those past cases were relevant in *Adams* because the statute at issue, "when adopted, was not violative of the Constitution under court interpretations of that period." *Id.* In Plaintiffs' view, this somehow means that if a "court interpretation" *did* conflict with a statute at the time of enactment, that law is necessarily void.

Notably, the superior court ignored this argument, and for good reason. To start, this phrase was pure dicta, as the *Adams* Court did not even *apply* the void *ab initio* doctrine. There was no basis for believing that the statute was unconstitutional (and indeed, the *Adams* Court upheld the law at issue). The decision specifically states that past void *ab initio* cases were "not applicable." *Id.* Thus, this throwaway line is dicta at most. By way of analogy, suppose a court in a free speech case distinguished past decisions on the basis that, in the current case, there was no religious aspect to the claim, even though the court had accepted religious claims in past cases. That would not mean that, *had* there been a religious claim, the claimant would necessarily succeed. Likewise here. The Court's explanation for why certain cases do not apply does not create a substantive standard for the void *ab initio* analysis where such cases *might* apply.

Regardless, even if *Adams* could be read to declare that laws might be void where court interpretations of the enactment period would have held as much, *Adams* does not even hint that *overruled* judicial opinions can

somehow invalidate otherwise valid laws. Past judicial decision are, of course, relevant to the extent they continue to control *courts*. If the General Assembly enacts a law that facially conflicts with this Court's precedent, a lower court would hold that law unconstitutional, because that "court" would be "b[ound]" by the controlling "precedent[]." Ga. Const. art. VI, § VI, ¶ VI. But if that authority has been overruled, it would be plainly *erroneous* to rely on it.

If Plaintiffs were correct that a previous, overruled judicial opinion is sufficient to invoke the void *ab initio* doctrine, it would diminish the power of not only legislatures, but also the power of courts to correct themselves. This Court, for instance, would be *bound* by its past decision—it could not overrule an erroneous opinion and uphold a valid law. It would have to say that it does not matter whether the previous decision was correct, because either way, the law was "invalid" at the time of enactment. That is plainly not the law. The void *ab initio* doctrine recognizes that courts say what the law *is*, and always has been, they do not *create* law that somehow invalidates otherwise valid laws.

B. The federal constitution was not amended by the Supreme Court's decision in *Dobbs*, so the LIFE Act is valid.

Given the foregoing, this question is easy. No one asserts that the LIFE Act is invalid under the federal constitution, so unless the federal constitution was *amended* since 2019, the LIFE Act is valid. The same federal constitution that allows the LIFE Act now was in place then.

Not to be deterred, the superior court enjoined the LIFE Act anyway. The court explicitly did *not* hold that the LIFE Act conflicts with the federal

constitution—just that it supposedly *used to do so*. Ex. B at 3–6 & n.5. But to reach that incredible conclusion in the wake of *Dobbs*, the superior court had to espouse a theory of judicial supremacy unknown to this Court or any other. In essence, the lower court's view is that *Roe was*, in fact, the constitution, not merely a judicial interpretation of it, and that *Dobbs* therefore amended the constitution. That theory cannot stand; it is not only wrong, it is incoherent, and it would be impossible to implement.

1. In the lower court's view, in "the spring of 2019," "everywhere in America, including Georgia, it was unequivocally unconstitutional for governments—federal, state, or local—to ban abortions before viability." Ex. B at 6. That is because, supposedly, "courts – not legislatures – define the law." *Id.* at 11. Indeed, legislatures must act within the "bounds of the constitution that the courts have established." *Id.*

The superior court could not put forward any authority for these propositions, all of which are wrong. Start with the notion that it was unconstitutional *everywhere* in 2019 to prohibit all pre-viability abortions. Not so: judicial opinions are not themselves the constitution: they are interpretations of the law, binding on "other courts." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994). But courts do not promulgate "theoretical law," like a super-legislature handing down new constitutional amendments from on high. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, __ Ga. __, __, 2022 WL 14147669, at *8 (2022). Indeed, Georgia's constitution recognizes that even decisions of this Court "shall bind all other *courts* as precedents," not other *branches of government*. Ga. Const. art. VI, § VI, ¶ VI

(emphasis added). "The province of the court is, *solely*, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (emphasis added).

Although the superior court tried to wrap itself in the language of *Marbury*, Ex. B at 11, it conveniently neglected that Chief Justice Marshall made clear that it is "the province and duty of the judicial department to say what the law is" only because a court "must of necessity expound and interpret" the law in order to "apply the [law] to *particular cases*." *Marbury*, 5 U.S. at 177 (emphasis added). That is, courts "'say what the law is' only as needed to resolve an actual controversy," they do not *create* generally binding law. *Sons of Confederate Veterans*, 2022 WL 14147669, at *1.

Put another way, there is a "difference between a change in *judicial doctrine* and a change in *law*. This distinction, although sometimes easy to overlook, is fundamental." *Lester*, 921 F.3d at 1312–13 (W. Pryor, J., concurring in denial of reh'g *en banc*) (emphasis added). For instance, *Dobbs* changed Supreme Court doctrine but it did not amend the constitution. The constitution's "meaning is fixed." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). Judicial opinions declare the judiciary's understanding, but they do not "amend" the constitution. *Barrow*, 308 Ga. at 673 n.11. And when a court issues its judgment, it is a judgment for *that case*. Courts—especially federal courts—decide actual disputes between actual parties, they do not "define the law" for all. Ex. B at 11.

To be sure, we might colloquially speak of "law" changing when judicial decisions are issued, but "we must be careful not to let the imprecision of our

language control our reasoning." *Lester*, 921 F.3d at 1312 (W. Pryor, J., concurring in denial of reh'g *en banc*). A judicial decision is "a determination of what the existing law is in relation to some existing thing already done or happened," not a "predetermination of what the law shall be for the regulation of all future cases." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (citation omitted). So while judicial doctrine (*Roe*) might have, in practice, ensured that most abortions restrictions were enjoined by federal courts in 2019, the *law itself*, the federal constitution, did not.[4]

To hold a legislative act as invalid from the start, it has to be invalid under the constitution as it existed at the time (the actual *law*), not overruled judicial opinions that existed at the time. If the federal constitution bars the LIFE Act, the superior court would have simply held as much, but of course it could not, because the federal constitution *does not* bar the LIFE Act, which federal courts have already affirmed.

In a similar vein, the superior court's notion that courts, rather than the legislature, "define the law," is about as backwards a holding as one could concoct. Ex. B at 11. It is legislatures, *not* courts, that make law. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and

[4] To be sure, one can plausibly refer to judicial decisions as "law" in the sense that they bind the parties before them and lower courts. The point is that they are not "law" in the relevant sense of generally applicable rules binding on all, like a constitution or a statute.

applying them in cases properly brought before the courts."). Courts only apply the law, as they best understand it, to particular facts in particular cases. *Id.* But courts "have no power per se to review and annul acts of [the legislature] on the ground that they are unconstitutional. … [T]he power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." *Id.*

Because courts have the *final* say in disputes over constitutionality, some (like the superior court here) mistake them for having the power to actually *determine* the constitution as opposed to *interpret* the constitution. But that is wrong. All governmental actors, from the President to a state legislature, have an independent duty to interpret and comply with the constitution.

The legislature has a "duty to interpret the Constitution in the performance of its official functions." Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979, 986 (1987). The same is true for the executive, as where President Lincoln "propose[d] so resisting [the *Dred Scott* decision] as to have it reversed if we can, and a new judicial rule established upon this subject." Sixth Joint Debate between Abraham Lincoln and Stephen A. Douglas, in Quincy, Ill. (Oct. 13, 1858) (transcript available at https://tinyurl.com/bddts2uf). In the superior court's view, President Lincoln was wrong to resist *Dred Scott*, and a state can never pass a law with the intent of challenging wrongly decided precedent. Yet it is hardly uncommon

for states to do so, successfully. *See, e.g.*, *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2088 (2018).

Most egregious is the court's admonition that legislatures must act within the "bounds of the constitution that the *courts have established*." Ex. B. at 11 (emphasis added). It reveals much that the superior court believes that *courts* establish the bounds of the constitution. They do not. The *people* establish the constitution and its bounds. "[I]t is indeed an essential aspect of our republican form of government, in which the people, not the judges, have ultimate control over the law under which they live." *Sherman*, 293 Ga. at 275–76 (citation omitted).

If this Court were to accept the superior court's rule, erroneous judicial decisions could *never* be challenged by elected officials. If a judicial opinion *is* "the constitution," rather than a (possibly important) judicial *interpretation* of the constitution, it would mean that a legislator violates her oath to uphold the constitution if she enacts a law in conflict with that precedent. But legislators and executive officials swear an oath to uphold the constitution, *not* an oath to uphold the judiciary's *understanding* of the constitution. Under the superior court's rule, the separation of powers would be a humorless joke, not a fundamental tenet of our constitutional order.

On top of everything else, the superior court's theory appears to deny any objective basis for law at all. The superior court chides the Supreme Court for being no more "correct" about a constitutional right to abortion than the *Roe* Court, revealing that, in the superior court's view, the constitution is an empty vessel, with no content until the Supreme Court declares it so. Ex.

B at 4 n.5. Under this view, the U.S. Supreme Court (and this Court) do not apply the law, a majority of Justices simply creates the law.

The irony is that, even as the superior court declares that *Dobbs* is now the law, it ignores that *Dobbs* held that *Roe* and its progeny were, in fact, *always* wrong, *always* unworkable, and *never* the constitution. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2243 ("*Roe* was egregiously wrong from the start."). So although the superior court declares that *Dobbs* is "now the law of the land," Ex. B at 4 n.5, the court does not actually follow through, because it rejects *Dobbs*' own understanding of the constitution. That is, the superior court believes *Roe* was "the law," but it does not *really* believe that *Dobbs* is "the law"—if it did, it would have followed the decision.

2. If not already apparent, just thinking the superior court's theory through is enough to establish it cannot be right. For instance, how "unconstitutional" does a statute have to be before it is void? The court here declares, for example, that it was obvious that states could not prohibit *any* pre-viability abortion under *Roe*'s understanding of the constitution, but that has two problems. Section 4 of the LIFE Act also prohibits *post*-viability abortions (so many of its applications would be valid), plus, some pre-viability abortions *were* subject to state bans even under *Roe*. *See, e.g.*, *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 526 (6th Cir. 2021) (upholding prohibition on certain ableist, pre-viability abortions). Why, then, is the LIFE Act's prohibition of abortion "void" when it has numerous valid applications?

Indeed, this problem highlights a fundamental problem in the court's theory: when federal courts issue injunctions, they do not "erase [those] duly

enacted law[s] from the statute books." *Jacobson v. Florida Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (citation omitted). They simply prohibit *enforcement* to the extent that enforcement conflicts with federal law. So whether or not the LIFE Act would have been *enforceable* in 2019, it clearly would have been an effective law, with some applications that would be enjoined and some not. But here, the superior court held Section 4 of the LIFE Act entirely void simply because *some* of its applications *would have* likely been enjoined under *overruled* judicial precedents. To state this theory aloud is to refute it.

Moreover, to implement the superior court's rule, courts would have to consistently apply *overruled* decisions—decisions that were likely overruled in part, as in *Dobbs*, because they were not "workable" to begin with. *Dobbs*, 142 S. Ct. at 2272. That makes no sense. Using this case as an example, the superior court claims that federal courts had spoken "clearly and directly" on abortion, Ex. B at 11, but that is far from obvious. Indeed, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), overruled much of *Roe* itself. *Dobbs*, 142 S. Ct. at 2242 ("Paradoxically, the judgment in *Casey* did a fair amount of overruling."). And numerous Supreme Court abortion precedents either had split opinions, *e.g.*, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020), or are nearly impossible to reconcile with one another, *compare, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding a state ban on partial-birth abortion invalid), *with Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding a federal ban on partial-birth abortion). How,

exactly, is one supposed to apply these decisions when the Supreme Court said no one should try?

The cherry on top of the lower court's deeply flawed theory is that the Mississippi statute that the Supreme Court upheld in *Dobbs* would *itself* be void *ab initio*. After all, when Mississippi passed the statute, it was allegedly unconstitutional (at least in part) under *Roe* and its progeny. The superior court's rule would deprive states of standing to even appeal rulings that a statute is unconstitutional. *See Hollingsworth v. Perry*, 570 U.S. 693, 704–05 (2013). Legislatures could never contest disputed court opinions by enacting new laws, because any statute that conflicts with a prior ruling is "void" one way or the other, so there is no possible remedy, no actual controversy, and so no court could ever reach the question whether its prior judicial holdings were incorrect. This Catch-22 is not the law.

* * *

The LIFE Act was enacted under the same constitution that governs us now. Because it is valid now, it was valid at the time of enactment. At the very least, the State has "a substantial case on the merits." *Green Bull*, 301 Ga. at 474 (citation omitted). And that is enough to warrant a stay pending appeal when "the other equities weigh strongly in favor of a stay," which they do. *Id.*

II. A stay would prevent significant, irreparable harm to the State, while causing minimal injury to Plaintiffs.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers); *see also Abbott v.*

Perez, 138 S. Ct. 2305, 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted [statutes] clearly inflicts irreparable harm on the State."). But the State's interest is especially strong here where it seeks to protect its most vulnerable population.

Every day that illegal abortions continue is another day that the lives of tiny, unique individuals are ended. In a year's time, many of these children would be moving to solid foods, starting to crawl, and learning to babble, depending on whether this Court issues a stay. Whether one agrees with the General Assembly's legislative judgments or not, those are the stakes for the State.

Plaintiffs, on the other hand, cannot identify any meaningful harm. They are activists and medical professionals, not patients (much less patients who happen to be pregnant, past the point of a fetal heartbeat, who want an abortion, but would not be able to obtain one under the LIFE Act's exceptions). Plus, Plaintiffs repeatedly delayed in seeking relief, undermining any notion that they would suffer serious harm should the LIFE Act go back into effect (as it was for months prior). All courts agree that "delay … militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Here, Plaintiffs had years to file state-law challenges and never did so. Plaintiffs even waited a full month after *Dobbs* to file suit in superior court. *See* Compl. at 39 (filed on July 26, 2022).

In short, the scales are not remotely balanced. If the State is correct, every day unborn humans are being killed, in violation of the law, because

the superior court misunderstands the role of the judiciary. If Plaintiffs are correct, a stay will only harm their operations to an uncertain degree until the stay is lifted. As in "most cases," a short stay pending resolution of this appeal is plainly appropriate. *Green Bull*, 301 Ga. at 475.

III. A stay is in the public interest.

Finally, the public interest strongly supports a stay while this Court considers this appeal. "[F]rustration of … statutes and prerogatives are not in the public interest." *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013) (citation omitted). And that is all the more obvious here, where the basis for the superior court's order is a theory that disenfranchises the people and sets the judiciary up as a "super-legislature" presiding over the people's elected representatives. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (citations omitted). The superior court substituted its own vision of legislation—calling the LIFE Act a "symbolic vote," without "real consequences," Ex. B at 7, n.9—for the General Assembly's, and it is emphatically in the public interest to undo that act of usurpation.

* * *

The superior court's decision was an act of "Force" and "Will," not "judgment," The Federalist No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed. 1961), and it cannot stand. The Court should stay this deeply flawed decision, and it should issue an administrative stay immediately.

CONCLUSION

The Court should grant this emergency petition for supersedeas and issue an administrative stay while it considers the petition.

Respectfully submitted.

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