NO. S25A0300

In the

Supreme Court of Georgia

State of Georgia,

Defendant-Appellant,

v.

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

Plaintiff-Appellees.

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

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INTEREST OF AMICI CURIAE

Amici curiae are university professors and historians with expertise concerning political, legal, and social history, particularly in Georgia and the American South, who seek to ensure that the Court has an accurate historical perspective available to it when considering whether Georgia 2019 House Bill 481 ("H.B. 481") is consistent with the Georgia Constitution's fundamental protections. This brief provides an account of Georgia's abortion regulation that is carefully corroborated by primary and contemporaneous sources. It recounts Georgia's approach to abortion regulation at the time of ratification, placed within the broader context of Georgia's constitutional evolution during the post-Civil War and Reconstruction era. Amici include:

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INTRODUCTION

A close analysis of primary historical sources reveals that Georgia took a unique approach to abortion as compared to other States like Alabama, Louisiana, Missouri, South Carolina, Tennessee, or Virginia. Beginning with its adoption of the common-law rule, and continuing through the mid-20th century, Georgia treated abortions that occurred before "quickening"—the point at which a pregnant woman first feels fetal movement—differently from those that occurred after quickening. It was not until 1968, when Georgia adopted an abortion law that provided exceptions for medical necessity, rape, and fetal defect, that Georgia's express reliance upon the quickening distinction waned. The quickening event, the occurrence of which could only be determined by the pregnant woman herself, remained a legal dividing line in Georgia for centuries.

In 1868, Georgia ratified its first formally sanctioned state constitution after the Civil War, proclaiming a host of individual protections for all Georgians. In the years that followed, certain white Southern Democrats viewed the new constitution's promise of freedom as an unwelcome change. They began proposing anti-abortion laws as part of a broader legislative effort to preserve the political and economic power of Southern whites. Those efforts—much of which originated from interest outside of Georgia—

ultimately led to Georgia's first ever statutory prohibition against abortion in 1876, nearly a decade after the 1868 Constitution was ratified. Even in adopting that legislation, however, the Georgia legislature (1) excluded abortions necessary to save the life of the mother; and (2) for the next 92 years retained quickening as the dividing line for fetal personhood, before which an abortion was punished merely as a malum prohibitum offense.

Importantly, the 1868 Constitution was Georgia's first operative constitution to guarantee that "[n]o person shall be deprived of life, liberty, or property, except by due process of law."[1] Ga. Const. 1868, art. I, § 3. This exact language was then readopted in four subsequent Georgia constitutions, between 1877 and 1983. If originalism matters to this Court in deciding the bounds of constitutional due process protections in the State of Georgia, then the history of what Georgians understood to be lawful in 1868 must be considered when reaching a decision here. *See Elliott v. State*, 305 Ga. 179, 181–182 (2019).

I. Georgians Understood That Early-Term Abortions Were Lawful When the State Constitution Was Ratified in 1868

From colonial days until nearly a century after the American Revolution, abortion rights were largely uncontentious in Georgia, with the

[1] A form of due process clause was included in two earlier Georgia constitutions, but those documents were invalidated. *See infra* Section I.B.

State leaving early elective abortions essentially unregulated until 1876. At the time the State constitution was ratified in 1868, Georgia had had a long history of adhering to the American common-law rule that distinguished between abortions occurring before fetal movement and those occurring after fetal movement. In 1852, for example, Georgians demonstrated support for the common-law rule—under which abortions before fetal movement were permissible—by refusing to pass legislation criminalizing abortions. Ga. S. Journal 317 (1852). The common law continued to have significant influence in 1868, when Georgia's new constitution was ratified, as illustrated by the 1868 codification of the quickening standard in the law on stays of execution for capital punishment. *See Spann v. State*, 47 Ga. 549 (1873). Georgia's long-standing use of the quickening standard set it apart from other States, and historically influenced how Georgians viewed abortion.

A. The Common Law Did Not Prohibit Pre-Quickening Abortions

Like other States, Georgia relied on the English common law during its earliest years. That reliance was formally codified in 1784. 2 Thomas R.R. Cobb, Cobb's Digest 721 (Athens, Ga., Christy, Kelsea & Burke 1851) (recording Act of 1784, which adopted the common law of England in force prior to May 14, 1776). Under the common law, life began at "quickening"—the moment when a woman felt a fetus stirring in her womb. 1 William O.

Russell et al., *A Treatise on Crimes and Misdemeanors* 672 (London, Saunders & Benning, 3d ed. 1843). As Sir William Blackstone explained in his seminal *Commentaries*, life "begins in contemplation of law a[s] soon as an infant is able to stir in the mother's womb."[2] 1 St. George Tucker, *Blackstone's Commentaries* 129 (William Y. Birch & Abraham Small eds., 1803). Abortions performed on women "quick with child" were considered "homicide or manslaughter" under ancient law, or "a heinous misdemeanor" under then-modern law. *Id.* at 129–130. But the law treated abortions before quickening differently.

1. Abortions Were Discretionary Before Quickening

Quickening was understood to start as early as 15 to 16 weeks of pregnancy, Russell, *supra*, at 672, although some medical scholars of the time believed that quickening occurred as late as 25 weeks. L.S. Joynes, *On Some of the Legal Relations of the Foetus in Utero*, 7 Va. Med. J. 179, 187 (1856). Accordingly, the window of early pregnancy during which a woman could lawfully procure an abortion under the common law was both significant in duration and determined by the pregnant woman. Neither the common law

[2] This language was published in Blackstone's first edition in 1765—*i.e.*, before May 14, 1776—and was therefore adopted by Georgia's Act of 1784. *See* Julia Epstein, *The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry*, 7 Yale J.L. & Human. 139, 140 & n.2 (1995).

nor Georgia statutory law imposed any restrictions on abortions performed before a child was quick—*i.e.*, determined to have fetal movement. Cobb's Digest, *supra*, at 721; *Winkler v. Scudder*, 1 Ga. 108, 132 (1846) ("By what is called our adopting statute, … the common law of England … [is] declared to be in full force, virtue, and effect[.]").

The threshold inquiry was thus whether quickening had occurred before an abortion was performed. *Commonwealth v. Bangs*, 9 Mass. 387, 387–388 (1812) (explaining that being quick with child is a "necessary ingredient" of the offense charged, and the indictment "must contain" an allegation of that element). Indeed, jurists in the mid-19th century considered it to be "perfectly certain, by the unanimous concurrence of all the authorities, that [homicide] could ***not*** be committed unless the child had quickened." *State v. Cooper*, 22 N.J.L. 52, 55 (1849) (emphasis added); *see also Taylor v. State*, 105 Ga. 846 (1899) (granting new trial for failure to instruct that an unborn child must be "quick" to support a conviction). This common-law rule was adopted not just in Georgia, but also by courts throughout the country. *See, e.g.*, *Commonwealth v. Parker*, 50 Mass. 263, 266 (1845) ("This distinction, between a woman being pregnant and being quick with child, whatever may be the physical theory upon which it was originally founded, is well known and recognized in the law."); *Smith v.*

Gaffard, 31 Ala. 45, 51 (1857) ("At common law, the production of a miscarriage was a punishable offense, provided the mother was at the time 'quick with child.'"); *Peoples v. Commonwealth*, 87 Ky. 487, 492 (1888) ("[T]he weight of authority is that it is no offense to procure an abortion, unless the woman be *quick* with child[.]"). Accordingly, as of 1868, Georgia (and other States) recognized that government interference with a pregnant woman's decision-making was simply not justified before fetal movement. *See Spann*, 47 Ga. at 550 (applying "the laws of England … so far as they are not altered by statute or by the nature of our government").

2. The Quickening Standard

Under the common-law framework, the standard for determining whether a child had "quickened" relied on the pregnant woman's assessment of the sensations in her own body. *See Sullivan v. State*, 121 Ga. 183, 186 (1904) ("To show knowledge of the fact of pregnancy and that the child was quick, it was also proper to show … that the young woman told the defendant she had felt the child move before the operation was performed."). Because the quickening standard depended upon a pregnant woman's own judgment, it provided her with a degree of autonomy and self-determination. *See* Alfred S. Taylor et al., *A Manual of Medical Jurisprudence* 421 (Phila., H.C. Lea, 6th Ed. 1866) ("No evidence but that of the female can satisfactorily establish

the fact of quickening."); 4 St. George Tucker, *Blackstone's Commentaries* 395 (William Y. Birch & Abraham Small eds., 1803) [hereinafter 4 Blackstone] (describing how a "jury of twelve matrons or discreet women" were sent "to enquire the fact" of whether the fetus was quick for purposes of staying an execution, and it "is not sufficient" to be "barely, *with child*, unless it be alive in the womb"); *Parker*, 50 Mass. at 266–267 ("[A] woman is not considered to be quick with child, till she has herself felt the child alive and quick within her." (citing *Rex v. Phillips*, 3 Campb. 73, 170 Eng. Rep. 1310 (1811))).

3. Other Crimes at Common Law Were Inapposite

It is also worth noting that, in the few circumstances when the common law imposed criminal penalties for the pre-quickening termination of a pregnancy, the law consistently sought to protect an expectant mother against third parties who acted against her will. For example, it was a crime to commit battery against a pregnant woman under the theory that ***the woman***, not the fetus, would be harmed by the termination of the pregnancy. Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 Wm. & Mary J. of Women & L. 107, 110 (2007) ("[T]hese cases resemble modern torts and are based on recognition of the injury done to the woman."). Indeed, as Sir Coke observed more than a century before Blackstone, "[i]f a woman [was] quick with childe"

and "a man beat her, whereby the childe dyeth in her body," it was considered "a great misprison" because the man overrode the pregnant woman's decision to carry her pregnancy to term. 3 Coke, *Institutes*, 50 (1648). Regardless of whether the fetus had quickened, the man would be liable for aggravated assault against the mother if he violated her choice to continue the pregnancy. *Parker*, 50 Mass. at 265.

Likewise, if a person killed a pregnant woman while performing an abortion, this was considered murder ***of the mother*** under the common law (not the fetus). Indeed, the rationale for this rule was ***not*** any form of transferred intent—*i.e.*, that an intent to kill the fetus was equivalent to an intent to kill the mother. Rather, in such a case, the law presumed that even if the pregnant woman had consented to the abortion, such consent could not shield against criminal liability for ***her*** death. *See Parker*, 50 Mass. at 265 ("[T]he consent of the woman cannot take away the imputation of malice, any more than in case of a duel."); *cf. Ward v. Drennon*, 201 Ga. 605, 605 (1946) (concluding that while prize fighting was "not a distinct offense at common law, the participants were nevertheless … punishable for assault or affray").

Thus, in those rare cases when ending a pregnancy before quickening could result in common-law penalties, those penalties were imposed because the pregnancy was terminated against the ***mother's*** will (not to "protect" the

fetus). As such, the common law reinforced, rather than undermined, fundamental notions of pregnant women's autonomy and self-determination.

B. Georgia's Constitutional History Demonstrates Individual Freedoms Within the State

It was within this historical context that, in December 1867, 169 delegates met at a constitutional convention in Atlanta.[3] Georgia's first operative due process and equal protection clauses were drafted against the background of this common-law framework, which imposed no restrictions on elective abortions before quickening. Ga. Const. 1868, art. I, §§ 2, 3. Although the 1861 and 1865 Georgia constitutions had earlier introduced a form of due process clause, *see* Ga. Const. 1861, art. I, § 4 (applying only to "citizen[s]"); Ga. Const. 1865, art. I, § 2 (amended to encompass "persons"), the 1861 Constitution was later deemed an illegitimate instrument of secession, and the initial post-war 1865 attempt failed to meet federal approval. Hough, *supra* n.3, at 248. Thus, it was only in 1868 that such a liberty right became the acknowledged law of the State.[4]

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[3] The State of Georgia ratified its first constitution in 1777. Amended versions were twice ratified in 1789 and 1798. Franklin B. Hough, *American Constitutions* 244–248 (1871).

[4] Regardless of whether Georgia's due process clause is considered to have originated in 1861, 1865, or 1868, the common-law framework permitting pre-quickening abortions was the law of the State at each juncture.

Nothing in the resulting 1868 Constitution disturbed the autonomy that pregnant women enjoyed under the common law. And the original meaning of the "liberty," "due process," and "equal protection" provisions that have been carried forward since 1868 cannot be divorced from Georgia's then-long-standing practice of treating pre-quickening abortions as lawful.

Indeed, in several respects, Georgia's 1868 Constitution marked a fundamental shift ***toward*** protecting individual freedoms. The U.S. Congress had tasked Georgia's delegates with drafting a new constitution that would permit the State to rejoin the Union. Hough, *supra* n.3, at 248. To that end, the 1868 Constitution confirmed the right of black men to vote. *Compare* Ga. Const. 1868, art. II, § 2, *with* Ga. Const. 1865, art. V, § 1. For the first time, it provided married women with a measure of autonomy by deeming a wife's property to be separate from that of her husband. Ga. Const. 1868, art. VII, § 2. And importantly, at the time of ratification in 1868, a pregnant woman in Georgia had the freedom under long-established common-law principles to decide whether to terminate her pregnancy without government interference up to the point of quickening.

C. Although Limited, Georgia Statutory Law Comported with the Common-Law Rule

Although legislative efforts in Georgia at the time of the 1868 ratification were limited, these too were in accord with the common-law quickening rule.

This was exemplified, for instance, by Georgia Senator Rufus McCune's unsuccessful attempt to criminalize abortion in 1852. That year, Senator McCune proposed a bill to criminalize all abortions except those to save the life of the mother. Ga. S. Journal 317 (1852). The bill passed in the Senate, but was then roundly defeated in the House of Representatives. John M. Cooper & William T. Thompson, *Georgia Legislature*, Daily News (Savannah), Jan. 5, 1852. Thus, just sixteen years before the 1868 Constitution was ratified, the legislature considered departing from the common-law quickening rule and affirmatively refused to do so. Ultimately, Georgia became one of this rule's most ardent adherents—retaining the quickening distinction well into the 20th century. *See* Brief for Am. Hist. Ass'n & Org. of Am. Historians as *Amici Curiae* Supporting Respondents at 17–18, n.6, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) [hereinafter AHA Brief].

Georgia's adherence to the quickening distinction in the post-Civil War era is further confirmed by its capital punishment laws. In 1868—the same

year Georgia's Reconstruction Constitution was ratified—Georgia enacted a law staying capital punishment for women who could "plead the belly."[5] O.C.G.A. § 4573 (Irwin's 1868). This law allowed female death row inmates to stay their sentence when "quick with child," and to be executed only once "no longer quick with child" (*e.g.*, after delivery). *Id.* This shows that, at the time Georgia ratified its 1868 Constitution, criminal law recognized quickening as the point at which fetal life began.[6] *See* 4 Blackstone, *supra*, at 394–395 (explaining that a woman could only "plead[] her pregnancy" after quickening; "before the child is quick in the womb" a stay of execution was unavailable); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012) ("A statute that uses a common-law term, without defining it, adopts its common-law meaning.").

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[5] Other States adopted similar laws. *See, e.g.*, *Cooper*, 22 N.J.L. at 57 ("It is only when the mother is found 'quick with child' that the sentence is respited[.]").

[6] Notably, criminal law diverged in this respect from certain areas of civil law, such as estates, guardianship, or torts. For example, Georgia's estate law considered a child to be "in being" from conception—but only for the limited purpose of determining a right to inheritance. *Morrow v. Scott*, 7 Ga. 535, 537 (1849); *but see Cooper*, 22 N.J.L. at 56–57 (distinguishing "in being" from "in life," and finding that the law "seems nowhere to … have respect [for a fetus's] preservation as a living being" before quickening).

II. Abortion Politics in 19th Century Georgia Were Inextricably Linked to Larger Movements Surrounding Race and Anti-Reconstruction

Following the 1868 ratification of Georgia's Reconstruction Constitution, public debate regarding abortion largely arose only within broader political clashes between the ideals of Reconstruction and those who sought to "redeem" Georgia's pre-war values. Georgia's first criminal penalties for abortion, enacted in 1876, arose from this significant political unrest. The stated objectives of anti-abortion advocates were, thus, inextricably intertwined with political battles over race relations and women's rights as (1) abortion newly became a political battlefront; and (2) a small cohort of physicians sought to change public views surrounding fetal life, largely for their own (non-medical) purposes.

A. Abortion Emerged as a Political Flashpoint Amidst Efforts to Redeem the South from Reconstruction

The Reconstruction Era in Georgia was a time of contradiction. This Era saw: (1) the ratification of the 1868 Constitution, which then catalyzed anti-Reconstruction backlash; (2) the rise of the "Redeemers," a group of Georgia elites hoping to restore the status quo ante; and (3) the emergence of an unprecedented anti-abortion movement, spurred on by external forces and propagated within Georgia by many of those same political elites.

First, the 1868 Constitution marked a clear shift toward protecting individual freedoms, and its ratification was a prerequisite for Georgia to rejoin the Union. Yet it was viewed by many holding political power within Georgia as a radical imposition. *See A State Constitutional Convention*, Union & Recorder (Milledgeville), Mar. 20, 1877, at 2 (arguing the 1868 Constitution "was not called for, nor framed by the representatives of the intelligence, patriotism and manhood, of the people of Georgia"); Henry H. Carlton, *The Constitutional Convention*, Athens Georgian, Mar. 27, 1877, at 4 (decrying "a Constitution put upon us by those who were not of us").

Just three years earlier, in 1865, Georgia had adopted a constitution that purported to give the State legislature broad powers to control newly freed black Georgians. Anti-Reconstruction legislators quickly leveraged that purported authority to enact the so-called "Black Codes," which restricted formerly enslaved black Georgians' basic freedoms and common-law property and contract rights. Ga. Const. 1865, art. II, § 5, cl. 5; O.C.G.A. §§ 4311, 4330, 4373, 4476 (Irwin's 1867); Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comm. 291, 326–327 (2007). This 1865 Constitution was ultimately voided, however, when the U.S. Congress took over Reconstruction and imposed new equality mandates on states—including the Fourteenth Amendment of the U.S. Constitution and the Civil Rights Act of 1866—much

to the dismay of many in Georgia's then-ruling elite. It was in the wake of this failed 1865 attempt that the 1868 Reconstruction Constitution was drafted and ultimately ratified. Anthony Michael Kreis, *Sex and Control in Redeemer Georgia*, 41 Ga. St. U. L. Rev. at 8–9, 16 (forthcoming 2025).

Second, from this political turmoil emerged the "Redeemers"—a coalition of ex-Confederates who campaigned during the 1870s to "redeem" the South from the "radicalism" of Reconstruction and to restore pre-Civil War era values. The Redeemers sought, among other priorities, to shore up Southern white political and economic power. Among their ranks were key players in Georgia's anti-abortion movement. Kreis, *supra*, at 11.

Writings from this time evince a palpable fear of a multi-racial society among Georgia's then-ruling class. Dr. Edmund Munroe Pendleton—a prominent Georgia doctor who was influential in elite political circles—publicly expressed his concerns that Reconstruction efforts could empower black majorities to govern over white Georgians, warning that "[t]hey will be able to vote more than two to one against us[,] … can hold all the offices and have two-thirds of any jury[,] … [and] [n]o white man will stay in such a country who can get away." Willis D. Boyd, *Negro Colonization in the Reconstruction Era 1865–1870*, 40 Ga. Hist. Q. 360, 379 (1956).

Similar fears were reflected in contemporary publications throughout the State. In March 1868, for example, *The Weekly Constitutionalist* published a strongly worded contribution opposing the 1868 Constitution and calling for a Constitutional convention. *The Situation*, Weekly Constitutionalist (Augusta), Mar. 11, 1868, at 4. The author wrote that failure to oppose the 1868 Constitution would render white men the "servants of servants," and urged readers to fall in line with Dr. Pendleton and others who shared his views. *Id*. White Georgians were called upon to "take up the charging shout, 'The Federal Union of white men!' by the eternal it must and shall be restored." *Id*. These public disseminations conveyed a sense of alarm within Georgia's ruling class regarding the threat of racial integration.

The Redeemers further sought to position themselves as a bulwark against the perceived moral failings of the North. To this end, Redeemers seized upon the issue of abortion as an opportunity to claim moral high ground. Anti-Reconstruction advocates framed the North as a haven for abortionists, a place of racial contagion and sexual immorality. *See, e.g.*, *Total Depravity*, Savannah Morning News, Apr. 26, 1869 ("Massachusetts, not satisfied with foeticide, is clamorous to have [former Union General and leading Republican Benjamin] Butler as Governor or Senator."). Rhetoric of this kind could be found throughout the South during this period, with a

central theme that Reconstruction governments were marred by "misrule." Kreis, *supra*, at 22.

The Redeemers also understood that the ability to control women's reproduction was central to their goal of restoring the objectives of the rejected 1865 Constitution—including those of white political and economic dominance. *See id.* at 27. Anti-abortion rhetoric was therefore useful to the Redeemers not only for its castigation of the North, but also for its potential to further the mission of keeping white society in power over newly freed black men and women. Regulating women's reproduction by requiring pregnancies to be carried to term was viewed as critical for increasing the white population and ensuring continued political dominance. *See, e.g.*, *Ante-Natal Murder in Massachusetts*, S. Watchman (Athens), May 5, 1869, at 1 (describing Massachusetts as "notorious for the frightful prevalence of the crime of foeticide," and opining "that the State has an assured Radical majority for many years to come, so that there is no need of increasing the population to swell that majority").

Third, it cannot be ignored that calls to ban abortion in Georgia developed alongside and as part of these broader anti-Reconstruction efforts. Indeed, just one year after Georgia enacted its first criminal abortion statute in 1876, anti-Reconstruction advocates spearheaded the ratification of the

State's "Redeemer" Constitution of 1877, including an assortment of codifications aimed at imbuing the practice of segregation with the power of law. *See, e.g.*, Ga. Const. 1877, art. VIII, § 1 ("[S]eparate schools shall be provided for the white and colored races."); *id.*, art. VII, § 2, ¶ 3 (imposing a poll tax of up to one dollar each year "for educational purposes").

The ruling elite's disappointment in the rejection of the 1865 Constitution, and their opposition to the 1868 Constitution and Reconstruction more broadly, provided the underpinnings for the Georgia Redeemers' advocacy efforts in the following decade. That advocacy, including in favor of criminalizing abortions, was motivated by a stated desire to regain power through segregation and disenfranchisement. *See, e.g.*, Kreis, *supra*, at 8–9, 11, 16.

B. Physician-Advocates for the 1876 Criminalization of Abortion Used the Veneer of Medical Authority to Cloak Prejudicial Beliefs

The 1876 Act criminalizing abortion in Georgia was enacted in large part based on the advocacy of a select group of physicians in the State. These physicians touted their superior medical expertise during their lobbying efforts, with some couching in scientific terms their moral belief that life began at conception. *See* Mary Ziegler, *Abortion and the Law in America: Roe v. Wade to the Present* 12–13 (2022) ("[Dr. Horatio] Storer and his allies

popularized the idea that only trained doctors understood the nature of fetal life."). But the physician-advocates' writings demonstrate that their message—first crafted by strategists outside of Georgia—was at odds with broader public sentiment, had little to no basis in medical science, and was instead undergirded by misconceptions and biases against women and black Georgians.

1. The 19th Century Anti-Abortion Campaign Contradicted Public Sentiment

The roots of the anti-abortion movement in the Georgia medical profession can be traced to the advocacy of Dr. Horatio Storer of Massachusetts, who began spearheading the all-male American Medical Association's ("AMA") early anti-abortion efforts in the 1850s. *See* James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* 148 (1978). At a meeting in 1857, Dr. Storer convinced the AMA to form a study committee for the purpose of advancing model legislation aimed at prohibiting reproductive choice. *Id.* at 155. Prominent Georgia physicians attended the meeting, including Dr. Joseph Payne "J.P." Logan, who almost two decades later played an instrumental role in the Medical Association of Georgia's endorsement of the successful 1876 Georgia abortion bill. Kreis, *supra*, at 12, 23. These physicians adopted Dr. Storer's message that there was a social decline regarding abortion—a "laxity of moral sentiment," as

stated by Dr. Jesse Boring of the Atlanta Medical School—and brought this message home to Georgia. Mohr*, supra*, at 155.

Notably, contemporaneous writings show that the AMA understood its physician-driven campaign did ***not*** reflect the then-prevalent views of broader society. *Id*. at 156. As demonstrated above, the general social consensus at that time was that, before quickening, women had the autonomy to choose whether to terminate a pregnancy. *See* AHA Brief, *supra*, at 20. The AMA thus "lamented the public's indifference to their moral arguments," reflecting a view among the physicians that the country was relatively apathetic to the issue. Mohr, *supra*, at 166. In 1870, for example, one doctor noted that "many individuals, otherwise learned, … do not look upon abortion as foeticide." AHA Brief, *supra*, at 28 (quoting Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 Med. Archives 193, 197 (1869)). The group also accepted that their position was ***not*** supported by existing legal precedent, including under the common law, and recognized that their campaign would require extensive lobbying. Mohr*, supra*, at 166.

In 1875, Dr. Henry Hull Carlton—a former slaveowner, retired Confederate major, and then-member of the Georgia House of Representatives—introduced a bill to ban abortion in Georgia after finding

support for the bill from other well-known physicians across the State.[7] Dr. Carlton's effort failed after the State Senate Judiciary Committee recommended against its passage. Kreis, *supra*, at 22–23; Ga. S. Journal 372 (1875). This failure frustrated proponents of a ban, causing Dr. J.P. Logan—a leader of the Atlanta Academy of Medicine—to seek the support of the Medical Association of Georgia. Kreis, *supra*, at 12, 23. Dr. Logan accurately predicted that the Association's support would "bring added heft to the cause." *Id.* at 23. And with the Association's endorsement, an abortion ban introduced by Dr. Logan's close professional associate, Representative James G. Thomas of Savannah, was then enacted into law in 1876.

2. The Physician-Advocates' Writings Reveal Prejudices Against Women and Black Georgians

Some physicians advocated for criminalizing abortion under the view that life began at conception, or that "quickening" was an unscientific legal designation that did not denote any uniquely special stage in gestation. *See* Mohr, *supra*, at 165. However, those physicians' public statements were belied by their published writings, which revealed nativist fears and prejudices against women and black Georgians. *See, e.g.*, Horatio R. Storer, *Why Not? A Book for Every Woman* (1871) [hereinafter Storer, *Woman*];

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[7] U.S. House of Representatives, *A Biographical Congressional Directory, 1774–1903* (1903).

Horatio R. Storer, *Is It I? A Book for Every Man* (1867) [hereinafter Storer, *Man*]; E.M. Pendleton, *Reports from Georgia*, *in* 1 Southern Medical Reports 315 (E.D. Fenner ed., 1849); E.M. Pendleton, *The Comparative Fecundity of the Black and White Races*, 44 Bos. Med. & Surgical J. 365 (1851) [hereinafter Pendleton, *Fecundity*].

For example, Dr. Storer, the architect of the national anti-abortion movement, argued that the abolition of slavery meant that white women must carry their pregnancies to term. He posited: "Shall [our country] be filled by our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation." Storer, *Woman*, *supra*, at 85. Dr. Pendleton, a high-profile member of the Medical Association of Georgia, observed in his writings that "blacks are much better breeders than the whites, and, by consequence, the natural increase of the one race is … much larger than that of the other." Pendleton, *Fecundity*, *supra*, at 365.

Drs. Storer's and Pendleton's writings echoed Protestant worries from the mid-19th century that Catholic immigrants were gaining a population majority, sparking concerns that Protestant women's abortion rate—which was higher than among Catholic women due to the Catholic church's prohibition on abortion—was putting "Puritanic" blood at risk of being

underrepresented. Mohr, *supra*, at 167. These concerns influenced the national physicians' anti-abortion movement and tracked later rhetoric in the South regarding white and black relations.

Anti-female beliefs were also prevalent among the (entirely male) physician-advocates of the time. Many believed that a woman's purpose was to produce children, and anything that interfered with that purpose was a threat to orderly society and its future. Mohr, *supra*, at 169; J. Boring, *Foeticide*, 2 Atlanta Med. & Surgical J. 257, 258 (1857) (expressing concern that "the virtuous and the intelligent wife and mother" might use abortion to "escape the pangs of parturition, and the seclusion of the season of nursing"). Dr. Storer opposed the ongoing suffragist movement, for example, and viewed laws that would expand women's rights to be contrary to "the very foundation of all society and civil government." Mohr, *supra*, at 169 (citing Storer, *Man*, *supra,* at 125.). Physicians of the era also frequently held the view that men bore partial responsibility for high abortion rates, because it was men who drove women, the "weaker" sex, to seek abortions. *Id.* at 170.

The arguments of the anti-abortion physician-advocates after the Civil War produced Georgia's first statutory abortion ban. However, questions of race, reproduction, and power were omnipresent in Reconstruction politics. The writings of the physicians at the forefront of the movement reflect the

same prejudices and power dynamics of the broader anti-Reconstruction era. Their role in the 1876 criminalization of abortion in Georgia casts doubt on, rather than reinforces, any notion that the Act represented a consensus among either jurists or the public about medical or moral considerations surrounding abortion access.

C. The 1876 Legislation Criminalizing Abortion Reflects Meaningful Penal and Philosophical Distinctions Between Pre- and Post-Quickening Terminations

Despite the efforts outlined in the previous section, and unlike abortion bans enacted by other States, the text of Georgia's 1876 Act continued to maintain a critical distinction between pre- and post-quickening abortions. In that way, the Georgia legislature declined to adopt wholesale the physician-advocates' argument that life begins at conception.

Specifically, the Act rendered it a felony punishable by death or life imprisonment to willfully terminate a quick fetus "by any injury to the mother … which would be murder if it resulted in the death of such mother." 1 *Acts and Resolutions of the General Assembly of the State of Georgia* 113 (Irwin 1876) [hereinafter Georgia 1876 Act]. The legislation also made it "assault with intent to murder" to administer any substance or use other means to intentionally terminate a quick fetus, unless two physicians found this to be necessary to save the woman's life. *Id.* However, for ***pre***-

quickening abortions (other than those necessary to save the life of the mother), the Act imposed only punishment "as prescribed in section 4310" of the Georgia Code—the section that addressed accessories after the fact. *Id.*

As a threshold matter, the 1876 Act's retention of the quickening distinction is notable in its own right, including because it represented a divergence from other States—like Alabama, Louisiana, Missouri, South Carolina, Tennessee, and Virginia—that eschewed the distinction altogether by enacting blanket prohibitions. *See* AHA Brief, *supra*, at 17–30. For nearly a century thereafter, quickening remained entrenched as the key dividing line in Georgia for when life began.[8] That principle was consistently applied by Georgia's courts. *Sullivan v. State*, 121 Ga. 183, 187 (1904) ("[T]he 'word "child" … means an unborn child so far developed as to be ordinarily quick—so far developed as to move or stir in the mother's womb[.]'"); *Taylor v. State*, 105 Ga. 846–847 (1899); *Barrow v. State*, 121 Ga. 187 (1904); *Summerlin v. State*, 150 Ga. 173 (1920) (declining to overrule *Sullivan*, *Taylor*, and *Barrow*); *Passley v. State*, 194 Ga. 327, 329–330 (1942).

The punishments for post-quickening abortions were among the most severe possible under the law: life imprisonment or death (for the felony) or

[8] The replacement law in 1968 expanded access to abortion by adding broad exceptions for medical necessity and cases of rape and fetal defect. *See infra* Section III.

imprisonment and labor in the penitentiary for between two and ten years (for assault with intent to murder). Georgia 1876 Act, *supra*, at 113; O.C.G.A. § 4359 (Irwin's 1873). By contrast, the penalties for pre-quickening abortions were lenient: fines of a thousand dollars or less, imprisonment of six months or less, or working on the public works for twelve months or less. O.C.G.A. § 4310 (Irwin's 1873).

The distinction in punishment between pre-quickening and post-quickening abortions was especially meaningful given that § 4310, the penal provision for accessories after the fact, addressed relatively minor crimes seen as violations against an orderly society—*i.e.*, *malum prohibitum* rather than *malum in se* offenses. *See* O.C.G.A. § 4529 (Irwin's 1873) (broadly including "other offenses against the public peace" as punishable under § 4310); *Atlanta & C. Air-Line Ry. Co. v. Gravitt*, 93 Ga. 369, 401 (1893) ("Disobedience of a criminal statute forbidding a thing *malum in se*, is a much more serious matter than the violation of a statute which simply makes a given act *malum prohibitum*; that is, forbids something innocent in itself, and renders it unlawful on the ground of public policy[.]"). For example, offenses punishable under § 4310 included:

- Intentional destruction of clothing, O.C.G.A. § 4362 (Irwin's 1873);
- Peddling without a license and cheating at cards, dice, or other games, O.C.G.A. §§ 4588, 4598 (Irwin's 1873);

- Causing minor physical injuries, O.C.G.A. §§ 4342, 4344, 4345 (Irwin's 1873);
- Swearing, if the language used was "obscene and vulgar" and uttered in the "presence of a female," or if it caused a breach of the peace, O.C.G.A. § 4372 (Irwin's 1873);
- Working, running freight trains, or hunting on the Sabbath, O.C.G.A. §§ 4578, 4579, 4580 (Irwin's 1873);
- Attempting to commit sodomy or "living together in a state of adultery or fornication," O.C.G.A. §§ 4534, 4356 (Irwin's 1873); and
- Marrying an inter-racial couple as an officer or minister, O.C.G.A. § 4567 (Irwin's 1873).

In other words, despite rhetoric from anti-abortion advocates urging for the protection of life from conception, the Georgia legislature opted ***not*** to punish pre-quickening abortions as a crime against the fetus as a ***person***. Rather, the legislature chose to classify early-term abortions as a *malum prohibitum* accessory after the fact offense, punishable under § 4310, in the same manner as destroying clothing, swearing, hunting on the Sabbath, and other minor infractions intended to perpetuate and protect social norms.

Moreover, even for post-quickening abortions, Georgia's abortion restriction framed those crimes as a nonconsensual battery against ***the mother***, with the implied assumption being that any pregnant woman would want to carry a post-quickening pregnancy to term. *See* Georgia 1876 Act, *supra*, at 113. Put differently, even where a post-quickening fetus was recognized as a legal person, the criminal law did not directly center the fetus

as the ***victim***. *Id*. This is a consequential distinction, confirming that Georgia's legislature declined to adopt wholesale the anti-abortion physician-advocates' narrative.

After having continued to adhere to the common-law framework, which imposed no restrictions on pre-quickening abortions, for longer than most other States, Georgia retained the pre- and post-quickening distinction even upon enacting its first statutory prohibition in 1876. The structure and text of the Act suggest that 19th-century Georgians were not convinced by Redeemer advocacy that life began at conception.

III. A More Protective Privacy Regime Guided the Original Public Meaning of the 1983 Constitution

Four additional constitutions were ratified in Georgia after 1868. The Georgia Constitution that the Court interprets today is the Constitution of 1983, as ratified in 1982. *Elliott v. State*, 305 Ga. 179, 181 (2019). To the extent that Georgia's understanding of abortion evolved over the intervening historical events between 1868 and 1982, that evolution was in favor of an increasingly protective view regarding abortion access and privacy rights.

First, the 1876 Act remained the controlling law on abortions in Georgia until an amended law took effect in 1969. The 1969 enactment, which was patterned after the Model Penal Code, was groundbreaking for its number of exceptions. O.C.G.A. §§ 26-1201–1203 (1969); Hugh P. Thompson,

Georgia's New Therapeutic Abortion Law, 20 Mercer L. Rev. 314, 315 (1969) (noting that "only a few states" at the time provided exceptions beyond saving the life of the mother); Ruth Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 Am. J. Pub. Health 500, 500 n.1 (1971). The Act legalized abortions (1) when a pregnancy "would endanger the life of the pregnant woman or would seriously and permanently injure her health," (2) when a fetus would "very likely be born with a grave, permanent, and irremediable mental or physical defect," and (3) when a pregnancy resulted from rape. *Doe v. Bolton*, 410 U.S. 179, 202 (1973).

Second, when Georgia's 1969 Act was challenged in federal court, a three-judge panel of the United States District Court for the Northern District of Georgia unanimously struck the Act's provisions limiting lawful abortions to those three specified circumstances, reasoning that the constitutional "right to privacy encompasses the decision to terminate an unwanted pregnancy," and that decision "is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained." *Doe v. Bolton*, 319 F. Supp. 1048, 1054–1055 (N.D. Ga. 1970). However, the court preserved other provisions of the statute directed to "the manner of performance as well as the quality of the final decision to abort," including requirements that abortions only be performed at an accredited

hospital, that abortions be approved by a hospital abortion committee, and that the performing physician's judgment be confirmed through independent examinations by two other physicians. *Id.* at 1056; *Doe*, 410 U.S. at 192. Those additional provisions were struck by the United States Supreme Court three years later. *Doe*, 410 U.S. at 194–200.

Third, in 1982, Georgia enacted another abortion law that reintroduced quickening as the prerequisite standard for criminalization. O.C.G.A. § 16-5-80(a) (1982) ("A person commits the offense of feticide if he willfully kills an unborn child so far developed as to be ordinarily called 'quick' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother."). It was at this moment in history—a decade after *Doe*'s placing of abortion within the context of a right to privacy, and on the heels of Georgia's statute readopting the quickening standard—that Georgians voted to approve a new constitution. The meaning of Georgia's 1983 Constitution therefore incorporates not only the State's long-standing recognition of quickening as a legal distinction, but also the principle that abortion restrictions implicate a constitutional right to privacy—a right greatly developed over the past 150 years.

CONCLUSION

For the foregoing reasons, *amici* ask that this Court fully consider the complex history of abortion regulation in Georgia in weighing its decision.

Respectfully submitted this 16th day of January, 2025.

This submission does not exceed the word count limit imposed by Rule 20.

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