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Blog Post

Important Update: Georgia Abortion Law Remains in Effect Until Judicial Review

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Ruling on the State of Georgia's November 18, 2022, Emergency Petition for Supersedeas, this past Wednesday (November 23, 2022) the Georgia Supreme Court enjoined the lower court's decision thereby reinstating the prohibitions on abortion in Georgia codified by the LIFE Act. Briefly, the LIFE Act prohibits abortive care once cardiac activity is detectable in an embryo (typically at approximately six weeks). The Georgia Supreme Court's ruling is procedural only. A substantive appeal remains pending. Nevertheless, this action by the Georgia Supreme Court, taken within eight days after the lower court's decision, highlights for the public how rapidly state abortion laws can change. It is crucial for providers and patients to stay up-to-date on the developments of abortion laws in their respective state.

Breaking News: Georgia Court Overturns State Abortion Law

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The *Dobbs* decision unsurprisingly had seismic 'on the ground' repercussions. Prior to *Dobbs*, thirteen states had enacted "trigger laws" that, upon the issuance of the *Dobbs* decision, immediately sprung restrictions on abortion. Under *Roe*, these restrictions would unquestionably have been unconstitutional. Although not immediately

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triggered after *Dobbs* due to then-pending legal proceedings, Georgia's abortion law, known as the Living Infants Fairness and Equality (LIFE) Act, was passed in 2019 and became effective as of July 2022. This law banned abortions after cardiac activity was detected in an embryo (typically as the pregnancy approaches six weeks) and was widely considered as being among the most restrictive anti-choice statutes that existed in the United States.

On Tuesday, November 15, 2022, the Superior Court of Fulton County (J. McBurney, presiding) found that the LIFE Act violated Georgia's Constitution. In *Sistersong Women of Color Reproductive Justice Collective v. State of Georgia (Sistersong)*, the Plaintiffs consisted of a coalition of Georgia-based obstetrician-gynecologists (and its members), reproductive health centers, and membership groups who describe themselves as committed to reproductive freedom and justice. Plaintiffs argued that the LIFE Act was void *ab initio*, or having no legal effect from inception, because the LIFE Act was enacted when *Roe* precluded restrictions on abortion access like those the LIFE Act imposed. Plaintiffs posited that the LIFE Act therefore violated Georgia's constitutional right to liberty, privacy, and/or equal protection.

Ultimately, the Superior Court found that two sections of the LIFE Act were invalid. The first provision (O.C.G.A. § 16-12-141(b)) prohibited any abortion from taking place after a fetus had a detectable heartbeat. The second provision (O.C.G.A. § 31-9B-3(a)) mandated physician reporting of abortive procedures to the Department of Public Health with a clear indication of the applicable statutory exception (e.g., medical emergency, etc.) to the near abortion ban. The Superior Court Judge ruled that the Georgia Constitution declares to be **void** any law passed by the Georgia legislature that would, at the time of its enactment, violate the United States Constitution. When the Georgia General Assembly enacted the LIFE Act in 2019, among other things, it was unconstitutional for

governments to ban abortions before viability or for local governments to mandate the sort of reporting requirement set forth in the LIFE Act. Therefore, according to the Superior Court, the LIFE Act "did not become the law of Georgia when it was enacted and it is not the law of Georgia now." Procedurally, the State of Georgia has appealed the decision of the Superior Court. That appeal remains pending.

Regardless of whether the Georgia Supreme Court resurrects the LIFE Act or if the Georgia legislature passes similar legislation post-*Dobbs*, the legal strategies that the plaintiffs employed in this particular case may travel well across state lines. Although this decision was issued pursuant to Georgia law, the argument relied upon by *Sistersong* and credited by the Superior Court is inherently grounded in common law principles. The Superior Court relied upon a 1886 decision of the United States Supreme Court stating in pertinent part that "[a]n unconstitutional act is not a law... it is... as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). Unless the Supreme Court were to revisit this more than a century-old decision, its logic may be used throughout the United States to challenge trigger laws, entrenching the theories advanced in *Sistersong* as valuable and replicable tools to be used by other litigants (and other courts) in other states as the post-*Dobbs* legal landscape continues to be defined.
