IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Eva Lathrop, M.D., et al. Plaintiffs, vs. NATHAN DEAL, Governor of the State of Georgia, in his official capacity, et al. Defendants.	)	CIVIL ACTION FILE NO.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTIVE RELIEF AS TO PLAINTIFFS' FIRST, SECOND, AND THIRD CAUSES OF ACTION

TABLE OF CONTENTS

PRELIMINARY STATEMENT

At issue in this case are the health, wellbeing and fundamental state constitutional rights of Georgia women. Plaintiff physicians provide their patients with, among other services, pre-viability abortion care at and after 20 weeks of pregnancy. They seek injunctive relief against enforcement of Georgia House Bill 954 ("the Act" or "the ban"), which bans nearly all abortions after 20 weeks, as applied to pre-viability abortion care. Absent an injunction, Plaintiffs' patients will be forced to continue their pre-viability pregnancies to term against their will, even where doing so endangers their life and health; where the fetus has been diagnosed with a severe, even potentially lethal anomaly; or where the pregnancy is the result of rape or incest. Moreover, the Act appears to give district attorneys virtually unlimited access to the medical records of *all* abortion patients within their jurisdictions. Georgia's independent and expansive constitutional protections do not countenance such extreme government intrusion into the most intimate decisions and personal details of its citizens' lives. As demonstrated herein, more than a century of this state's constitutional jurisprudence mandates the relief Plaintiffs seek.

STATUTORY FRAMEWORK

The Act[1] criminalizes nearly all abortion care starting at 20 weeks of pregnancy, as measured from the time of fertilization. Absent injunctive relief from this Court, the Act will go into effect January 1, 2013.

The Act amends Titles 16 and 31 of the Official Code of Georgia Annotated. Under the Act,

> (c)(1) No abortion is authorized or shall be performed if the probable gestational age of the unborn child has been determined . . . to be 20 weeks or more unless the pregnancy is diagnosed as medically futile ... or in reasonable medical judgment the abortion is necessary to
>
> (A) Avert the death of the pregnant woman or avert serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman. No such condition shall be deemed to exist if it is based on a diagnosis or claim of a mental or emotional condition of the pregnant woman or that the pregnant woman will purposefully engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function; or
>
> (B) Preserve the life of an unborn child.

O.C.G.A. § 16-12-141 (Supp. 2012).[2] The Act requires every physician who performs any abortion starting at 20 weeks to file a report with the

[1] A copy of the Act is attached as Exhibit A to the Complaint.

Department of Health, detailing the probable gestational age (and the method and basis of that determination), whether the abortion was subject to any of the statutory exceptions, and the method used for the abortion. Id. § 31-9B-3. The Act also provides that "[h]ospital or other licensed health facility records shall be available to the district attorney of the judicial circuit in which the hospital or health facility is located." Id. § 16-12-141(d).

The Act defines a "medically futile" pregnancy as existing where, "in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth." Id. § 31-9B-1(a)(3). The Act defines the term "probable gestational age of the unborn child" to mean "what will, in reasonable medical judgment and with reasonable probability, be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced, as dated from the time of fertilization of the human ovum." Id. § 31-9B-1(a)(5).

A physician convicted of performing an abortion in violation of the Act is subject to imprisonment for not less than one year or more than ten. Id. § 16-12-140(b). Violation of any portion of the Act also constitutes

---

[2] Before performing any abortion, "the physician" must "determin[e] . . . the [fetus's] probable gestational age," except in the case of a medical emergency or a "medically futile pregnancy." Id. § 31-9B-2(a).

unprofessional conduct for purposes of imposing medical licensing sanctions, id. § 31-9B-2(b), such as fines, license suspension, and license revocation, id. § 43-34-8. In addition, any failure to comply with the reporting requirements must be reported (the Act does not say by whom) to the Georgia Composite Medical Board for disciplinary action. Id. § 31-9A-6.1(a). The Act also makes a physician liable for civil penalties if a plaintiff can prove by clear and convincing evidence that the physician was negligent in determining gestational age. Id. § 31-9A-6.1(b).

By prohibiting nearly all abortion care starting at 20 weeks, the Act deliberately bans pre-viability abortions, that is, abortions that take place before the fetus has a reasonable likelihood of sustained survival outside the uterus. See Affidavit of Eva Lathrop, M.D., ("Lathrop Aff.") ¶ 8;[3] AM 29 2051 (defeated proposed amendment under which the ban would have applied only where the fetus was viable), available at http://www.legis.ga.gov/Legislation/20112012/126541.pdf. The Act is the first law in Georgia to ban pre-viability abortions since 1973, when the U.S. Supreme Court struck Georgia's criminal abortion law in Doe v. Bolton, 410 U.S. 179 (1973) (decided the same day as Roe v. Wade, 410 U.S. 113

[3] "For a healthy woman with a healthy, singleton fetus, viability is generally at 22 weeks post-fertilization." Id. A copy of Dr. Lathrop's Affidavit is attached as Exhibit A to this Memorandum.

(1973)). The stated purpose of the Act is to prevent all abortions "from the stage at which substantial medical evidence indicates that" the fetus is "capable of feeling pain."[4]

ARGUMENT

This Court has broad authority to issue an injunction "'to prevent one [party] from hurting the other whilst their respective rights are under adjudication,'" Outdoor Adver. Ass'n v. Garden Club of Georgia, Inc., 272 Ga. 146, 147, 527 S.E.2d 856, 859 (2000) (quoting Chambers v. Peach City, 268 Ga. 672, 673, 492 S.E.2d 191, 192 (1997)), and to ensure "that one of the parties will not be damaged and left without adequate remedy" while litigation is pending, Hipster, Inc. v. Augusta Mall P'ship, 291 Ga. App. 273, 274-75, 661 S.E.2d 652, 654-55 (2008) (internal citation omitted). In effect, the "sole purpose for granting an interlocutory injunction is to maintain the status quo until a final adjudication of the case." Id. at 274, 661 S.E.2d at 655 (citations omitted). Accordingly "'[i]n an application for an interlocutory injunction there should be a balancing of conveniences and a consideration of whether greater harm might be done by refusing than by granting the injunction.'" Zant v. Dick, 249 Ga. 799, 799, 294 S.E.2d 508,

[4] The validity and weight of this evidence were highly contested during the legislative debates.

509 (1982) (quoting Maddox v. Willis, 205 Ga. 596, 597(5), 54 S.E.2d 632 (1947)) (citations omitted). Plaintiffs more than satisfy this standard.

Injunctive relief is essential to maintain the status quo—four decades of access to safe, legal pre-viability[5] abortion care in Georgia—while the serious constitutional concerns raised by the Act are adjudicated.[6] Starting at 20 weeks, the Act does not merely regulate abortion; the Act outright bans it. As shown below, see infra pp. 8-15, absent injunctive relief, women seeking pre-viability abortion care starting at 20 weeks will suffer serious and irreparable injury to their health, wellbeing, and state constitutional rights. Indeed, once the Act denies a woman the possibility of obtaining pre-viability abortion care, her right to do so is lost forever. See Dep't of Transp. v. City of Atlanta, 259 Ga. 305, 306, 380 S.E.2d 265, 267 (1989) (holding that the "trial court should consider whether a denial of the petition for injunctive relief would work an irreparable injury . . ." (internal quotations omitted)). Finally, although such a showing is not required to obtain injunctive relief, Zant, 249 Ga. at 799, 294 S.E.2d at 509, as Plaintiffs

---

[5] The Act bans abortion care starting at a pre-viability point in pregnancy, and thus bans abortions both before and after viability. Plaintiffs have challenged the ban only as applied to only pre-viability procedures, and have not challenged its application post-viability.

[6] Injunctive relief is also necessary to ensure long-standing protections for the privacy of medical records. See King v. State, 272 Ga. 788, 535 S.E.2d 492 (2000) [hereinafter King I] (holding that medical records are within the protection of the state right to privacy).

demonstrate below, they have a substantial likelihood of success on the merits. As a balancing of the equities favors Plaintiffs, this Court should exercise its discretion to grant injunctive relief.

I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF AND THE BALANCE OF EQUITIES FAVORS PLAINTIFFS.

Unless it is enjoined by this Court, the Act will cause irreparable and immediate injury to Plaintiffs and their patients.[7] First, by banning pre-viability abortion care starting at 20 weeks, the Act will force some women to carry their pregnancies to term against their will, even where the pregnancy jeopardizes their health or where the fetus has been diagnosed with a severe or potentially lethal anomaly.[8] Indeed, the Act presents

---

[7] Plaintiffs have standing to bring this challenge on behalf of themselves and their patients. The Georgia Supreme Court has joined virtually every other state court to address the question, as well as the U.S. Supreme Court, in holding that physicians have third-party standing to represent the interests of their patients seeking abortion care. See Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 436, 651 S.E.2d 36, 39 (2007) ("[W]e find that the relationship between the medical provider appellants and their patients makes them uniquely qualified to litigate the constitutionality of the State's action interfering with a woman's decision to terminate a pregnancy") (citing Singleton v. Wulff, 428 U.S. 106, 117-18 (1976)).

[8] The narrowness of the Act's exceptions for medical emergencies and "medically futile pregnancies" affects the contours of irreparable harm, but not Plaintiffs' likelihood of success on the merits of the three claims on which they have moved for preliminary injunctive relief. The First Cause of Action is that, in violation of the Georgia Constitution, the ban prohibits abortion care where the fetus is not viable; as to that claim, the breadth of any exception is irrelevant – the ban on pre-viability abortion care must fall, regardless of what exceptions it may contain. The Second and Third Causes of Action, pertaining to the privacy of medical records, are likewise unaffected by the scope of any exceptions.

physicians with an untenable choice: to face criminal prosecution, in addition to civil sanctions, for continuing to provide abortion care in accordance with their best medical judgment, or to stop providing the critical—constitutionally protected—care their patients seek. Second, by granting district attorneys seemingly unrestricted access to the medical records of abortion patients, the Act will cause irreparable and immediate harm to Plaintiffs' patients by allowing unparalleled state intrusion—without cause or due process—into the most intimate and private details of their personal lives. Finally, absent injunctive relief, the Act will harm all women it touches by violating their fundamental rights guaranteed by the Georgia Constitution.

Although only a small fraction of abortion care occurs at or after 20 weeks, women who seek this care at that point in pregnancy do so for a number of reasons. For some women, continuation of the pregnancy exacerbates a pre-existing medical condition; for others, the pregnancy itself generates medical risk. Lathrop Aff. ¶¶ 9-11. Yet, under the Act, a woman seeking to terminate a pre-viability pregnancy at or after 20 weeks due to a medical condition that poses a significant risk to her health may be either prohibited from doing so altogether, or forced to delay obtaining the care until her condition worsens to the point where it fits within the Act's narrow

definition of "medical emergency." Dr. Lathrop's patients, for example, include those

> with a history of peripartum cardiomyopathy, meaning that they developed cardiomyopathy after a previous pregnancy. Such a patient may "look good on paper"– her cardiac echo and vital signs may be quite normal at 20 weeks, but that is just a snapshot at one point in time; it is not the whole picture going forward. Pregnancy causes numerous physiological changes to a woman's system, and I cannot know before or even at 20 weeks what will happen at 22 weeks, 24 weeks, or several months or years after she delivers. If she chooses to continue the pregnancy, she may deteriorate to the point of a medical emergency, or not; she may deliver a child and then go on to live and parent, or, as happened to one of my patients – she may precariously carry to term but then die a year after giving birth, because her heart simply never recovered from the damage of another pregnancy. Yet even knowing that continued pregnancy may well accelerate the deterioration of such a patient's condition, I would fear prosecution under the ban for providing abortion care where her condition at the time of the abortion appears normal and does not reflect a "medical emergency."

Id. ¶ 15. The Act even threatens Plaintiffs' ability to provide the standard of care to a woman suffering from pregnancy loss (miscarriage), if the woman otherwise appears in stable condition. For instance,

> At 20 weeks, a woman may present with light bleeding and advanced dilatation (meaning her cervix has already started to dilate), and we can see that the placenta has separated from the uterine wall (called placental abruption). Some women in this situation may opt to go on bed rest for the rest of their pregnancies on the outside chance that by the time they go into labor, the fetus has

> reached viability. Again, other women may choose not to – or may simply be unable to – spend the last four to five months of pregnancy in bed. Under the Act, however, I would fear criminal prosecution if I agreed to do an abortion in such circumstances: the fact that another woman could remain pregnant for months and ultimately give birth makes it difficult to characterize the condition as a "medical emergency."

Id. ¶ 17. The Act thus endangers women by inhibiting Plaintiffs from providing medical treatment to protect their patients' health. Indeed, the ban may rush some ill women into abortions they would not otherwise undergo: Under the ban, such women may terminate their pregnancies before 20 weeks, simply to avoid losing the opportunity to terminate to protect their health after 20 weeks. Of those who do so, some would have succeeded in continuing their pregnancies long enough to give birth to a baby. Id. ¶ 16.

The Act will also inflict irreparable harm and suffering on Plaintiffs' patients whose fetuses have been diagnosed with severe, but not necessarily lethal, chromosomal or structural anomalies. As Dr. Lathrop has described,

> After receiving such a diagnosis, a woman and her family are faced with not only the terribly difficult decision of whether to terminate a wanted pregnancy. They must also weigh what it would mean to them to give birth to a child, only to watch him or her suffer extreme pain and then, in some cases, die; or whether, for instance, having a child with severe, life-long health problems would, in their judgment, too greatly compromise their ability to care for their existing children. Some women and their families decide to carry to term; others make the heartbreaking decision to terminate a wanted pregnancy.

> But that has to be the woman and her family's decision to make.

Id. ¶ 18. Yet starting at 20 weeks, the Act will force such a woman to carry to term, regardless of what is best for her and her family. This is the case, even though for some women, it is not possible to receive a definitive diagnosis until *after* 20 weeks. Id. ¶ 21. And even where a diagnosis can be made before 20 weeks, "some women may feel such pressure to terminate before they lose the opportunity to do so at 20 weeks that they end up deciding without all the facts and/or without the chance to really come to terms with the diagnosis." Id. If not for the Act, "[s]ome of these women would decide to continue the pregnancies." Id. The Act may thus rush some women and families into abortions they would otherwise decide against having.

The Act's exception for so-called "medically futile" pregnancies – defined in the Act as existing where the fetus has a "profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth" – will do nothing to mitigate the harm the Act would impose on many women and families who receive such diagnoses. O.C.G.A. § 31-9B-1(a)(3). As with the "medical emergency" exception above, when faced with the threat of criminal prosecution, Plaintiffs will feel hard-pressed to apply the exception in all but the most extreme cases of

certain lethality. Indeed, Dr. Lathrop provides numerous examples of how, notwithstanding the exception, the Act will inhibit Plaintiffs' ability to provide compassionate care for their patients.

> For example, . . . the vast majority of babies born with Trisomy 13 will die at birth or shortly thereafter. Yet a very small minority survives beyond that, though they may suffer with multiple, profound physical and mental impairments. However, given that a tiny minority of babies survive, I am unsure whether I can say that Trisomy 13 "is incompatible with sustaining life." Similarly, a baby born with severe hydrocephaly (accumulation of excessive fluid within the brain that almost completely destroys the brain), might survive, but spend his or her entire life in and out of surgery, with little brain development, and no ability to communicate. . . . Indeed, many of these babies may not live to leave the hospital. In all such cases, I would be unsure of whether the ban's exception allows me to provide abortion care for those women and families who seek it.

Lathrop Aff. ¶ 20. While some families who receive such diagnoses decide to continue, others decide to terminate; under the ban, they would be unable to make that choice, starting at 20 weeks, and so would be forced to give birth to babies only to watch them, in many cases, die before leaving the hospital.

What is more, the Act provides district attorneys with seemingly unrestricted access to the medical records of *any* patients who seek abortion care—not simply those seeking care at or after 20 weeks. O.C.G.A. § 16-12-141(d). This is not merely unconstitutional, see infra Part II.C.: As the

Georgia Supreme Court has recognized, to give "the State unlimited access to medical records . . . would have the highly oppressive effect of chilling the decision of any and all Georgians to seek medical treatment." King I 272 Ga. at 792, 535 S.E.2d at 496 (2000). Thus, the Act will cause significant and irreparable harm to all women seeking safe, legal abortion care by allowing unprecedented state access into some of the most intimate and personal details of their lives.

Finally, in view of the above, absent injunctive relief, the Act will violate Georgia citizens' constitutional right to privacy and reproductive choice, see infra point II, which itself constitutes grave and irreparable harm. See, e.g., Great Am. Dream, Inc. v. DeKalb County, 290 Ga. 749, 752, 727 S.E.2d 667, 670 (2012) (holding monetary damages inadequate remedy for even momentary loss of right to free speech under Georgia Constitution); see also, e.g., Women's Med. Ctr. of Nw. Houston v. Bell, 248 F.3d 411, 422 (5th Cir. 2001) (affirming district court's finding of irreparable harm based on threat to women's constitutional right to privacy).

Defendants, by contrast, will suffer no cognizable injury if injunctive relief is granted. They would only be delayed in their ability to enforce the Act while the serious constitutional issues raised by the ban are resolved – simply a preservation of the status quo. See Hampton Island Founders, LLC

v. Liberty Capital, LLC, 283 Ga. 289, 293-94, 658 S.E.2d 619, 624 (2008) (holding equities favor plaintiffs where "defendants would be inconvenienced only because they would have to await the outcome of the litigation"). That simply cannot outweigh the significant and irreparable injuries faced by Plaintiffs and their patients if the Act is allowed to go into effect. Accordingly, Plaintiffs are entitled to the injunctive relief they seek.

II. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs are entitled to injunctive relief for the additional reason that a ban on pre-viability abortion care violates the fundamental right to privacy guaranteed by the Georgia Constitution. See e.g., Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998). The Act's stripping of privacy protections for medical records must likewise fall under this state's stringent privacy protections.

For four decades, the U.S. Supreme Court has recognized the irreducible right of every woman to determine the course of her pregnancy before viability. The Court first announced this straightforward rule in Roe v. Wade, and subsequently reaffirmed it without alteration in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869-70 (1992). There, the Court stated that a "woman's right to terminate her

pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce." Casey, 505 U.S. at 871. Recognizing "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," the Court concluded that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." Id. at 869, 846. Thus, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Id. at 879.[9] As there is no disputing that the Act – explicitly and intentionally – prohibits pre-viability abortions, see supra pp. 5-6, it necessarily fails this straightforward rule of federal constitutional law.

---

[9] See also Gonzales v. Carhart, 550 U.S. 124, 146, (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'") (quoting Casey, 505 U.S. at 879); Stenberg v. Carhart, 530 U.S. 914, 920-21 (2000) (declining to "revisit" the legal principle reaffirmed in Casey that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'") (quoting Casey, 505 U.S. at 870); Isaacson v. Horne, 2012 WL 3126829 (9th Cir. 2012) (issuing emergency injunction pending appeal against Arizona ban on abortions at 20 weeks, after denial of permanent injunction by district court); Jane L. v. Bangerter, 102 F.3d 1112, 1114-18, 1114 n.3 (10th Cir. 1996) (striking down a ban on abortions at 20 weeks, with exceptions "to save the pregnant woman's life, to prevent grave damage to the pregnant woman's health, or to prevent the birth of a child with grave defects," as an unconstitutional pre-viability abortion ban) (citations omitted); Sojourner T. v. Edwards, 974 F.2d 27, 29 (5th Cir. 1992) (overturning a ban on abortions except "to save the life of the mother; … [or where the] pregnancy is the result of rape … [or] incest"); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1368 n.1, 1372-73 (9th Cir. 1992) (invalidating a ban on abortions except to treat ectopic pregnancy or where "there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother").

For the same reasons, the Act must fall under Georgia's constitutional right to privacy. It is a well settled tenet of the construction of the rights and protections guaranteed by the state Constitution that "[f]ederal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens." Fleming v. Zant, 259 Ga. 687, 690, 386 S.E.2d 339, 342 (1989) (citing Harris v. Duncan, 208 Ga. 561, 67 S.E.2d 692 (1951)); see, e.g., Cooper v. State, 277 Ga. 282, 287, 587 S.E.2d 605, 609 (2003) ("The reasonableness of a search under the Georgia Constitution cannot be measured under a lesser standard" than the federal Constitution guarantees) (citing Dawson v. State, 274 Ga. 327, 328(1), 554 S.E.2d 137, 139 (2001); Mosher v. State, 268 Ga. 555, 559 n.3, 491 S.E.2d 348, 352 n.3 (1997)); King I, 272 Ga. at 790, 535 S.E.2d at 495 ("Medical records are within the right of privacy afforded by the Federal Constitution . . . . Because Georgia recognizes an even broader concept of privacy, the personal medical records of this state's citizens clearly are protected by that right as guaranteed by our constitution."); Long v. Jones, 208 Ga. App. 798, 800, 432 S.E.2d 593, 595 (1993) ("Art. I., Sec. I, Par. XVII of the Ga. Const., which states that no person shall be abused while under arrest . . . provides at least as much protection to pre-trial detainees . . . as the 14th

Amendment due process clause.").[10] Because the Act bans abortion before viability, and is therefore *per se* unconstitutional under the federal standard, it necessarily violates the Georgia Constitution. To hold otherwise would be to hold that the Georgia Constitution provides *less* protection for the right to privacy than does the federal Constitution, which cannot be the case.

To allow the Act to take effect would thus break with decades of Georgia Supreme Court precedent, notwithstanding that that Court has yet to directly address the precise extent to which Georgia's privacy right protects a woman's right to make decisions about her reproductive health care. Nowhere is Georgia's independent and expansive protection of individual rights stronger than in the context of the right to privacy: the right to make intensely personal decisions about one's body, health, and intimate relationships, free from unwarranted government interference. A woman's right to decide whether and when to bear a child lies at the core of that right. As such, Plaintiffs are likely to succeed on the merits of their claim that by

[10] Indeed, the Georgia Constitution has "long granted *more* protection to its citizens than has the United States" Constitution. Creamer v. State, 229 Ga. 511, 515, 192 S.E.2d 350, 353 (1972) (emphasis added). See, e.g., Powell, 270 Ga. at 331 n.3, 510 S.E.2d at 22 n.3 (detailing cases in which the "Georgia Constitution has been construed as providing greater protection to its citizens tha[n] does the federal constitution"); id. at 330-31, 510 S.E.2d at 22 (right to privacy); State v. Miller, 260 Ga. 669, 671, 398 S.E.2d 547, 550 (1990) (right to free speech); Green v. State, 260 Ga. 625, 627, 398 S.E.2d 360, 362 (1990) (right to be free from self-incrimination); Fleming, 259 Ga. at 690, 386 S.E.2d at 342 (right to be free from cruel and unusual punishment); Hayes v. Howell, 251 Ga. 580, 584, 308 S.E.2d 170, 175 (1983) (right against retroactive laws); Crim v. McWhorter, 242 Ga. 863, 867, 252 S.E.2d 421, 424 (1979) (right to free education).

banning abortion before viability, the Act violates the Georgia Constitution and must be enjoined.

A. The Georgia Constitution Provides Independent and Broad Protection for the Right to Privacy and Reproductive Decision-Making

Georgia has a long history of providing expansive protection for individual rights under its Constitution. As the Georgia Supreme Court has proudly noted, "the right of privacy was birthed by [the Georgia Supreme Court]" more than half a century ahead of the United States Supreme Court's recognition of the right to privacy under federal law. Powell, 270 Ga. at 329, 570 S.E.2d at 21 (internal quotations omitted). In a groundbreaking opinion issued over a century ago, the Georgia Supreme Court became the nation's first court of last resort to recognize privacy as a fundamental right. Pavesich v. New England Life Ins., 122 Ga. 190, 197, 50 S.E. 68, 71 (1905); see also Powell, 270 Ga. at 329, 510 S.E.2d at 21 (noting that the Georgia Supreme Court was "a pioneer in the realm of the right of privacy"). In so holding, the Court recognized that every Georgian has a "legal right 'to be let alone'" when making personal decisions and is "entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty," Pavesich, 122 Ga. at 196-97, 50 S.E. at 70-71; see also id. at 195, 50 S.E. at 70 (finding that the right to privacy "embrace[s] a person's right

to a 'legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation'") (internal quotation omitted).

Since Pavesich, Georgia courts have remained true to this legacy, developing "a rich appellate jurisprudence . . . which recognizes the right of privacy as a fundamental constitutional right, 'having a value so essential to individual liberty in our society that [its] infringement merits careful scrutiny by the courts.'" Powell, 270 Ga. at 329, 510 S.E.2d at 21-22 (alteration in original) (quoting Ambles v. State, 259 Ga. 406, 408, 383 S.E.2d 555, 557 (1989)).[11] Continuing this tradition of providing Georgians with the utmost protection, Georgia courts have repeatedly reaffirmed that the state Constitution's expansive protection for privacy is not merely independent of, but is also broader than, the protection provided under the federal Constitution. As the Georgia Supreme Court explained in Powell, "[i]t is clear from the right of privacy appellate jurisprudence which emanates from Pavesich that the 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive than the right of privacy

[11] See, e.g., Harris v. Cox Enters., Inc., 256 Ga. 299, 302, 348 S.E.2d 448, 450-51 (1986) (observing that "[w]hile this state has a strong policy of open government, . . . protecting the right of the individual to personal privacy [overrides disclosure of] matters about which the public has . . . no legitimate concern"); Georgia Power Co. v. Busbin, 149 Ga. App. 274, 277, 254 S.E.2d 146, 149 (1979) (explaining that "the right of privacy is embraced within the absolute rights of personal security and personal liberty, 'to be let alone,' . . . or to be protected from any wrongful intrusion into an individual's private life").

protected by the U.S. Constitution . . . ." 270 Ga. at 330, 510 S.E.2d at 22.

The decision in Powell exemplifies Georgia's independent solicitude for the right of privacy. In that case, the Court invalidated the state's criminal sodomy ban, holding that it "'manifestly infringes upon a constitutional provision' which guarantees to the citizens of Georgia the right of privacy." Id. at 336, 510 S.E.2d at 26 (citation omitted). The Court reasoned: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity. We conclude that such activity is at the heart of the Georgia Constitution's protection of the right of privacy." Id. at 332, 510 S.E.2d at 24 (citations omitted).[12]

The broad constitutional right "to be let alone" and to "liberty of choice as to [one's] manner of life" recognized in Pavesich and reaffirmed in Powell also protects the right to make medical decisions free from unwarranted government interference. It encompasses, for example, the right to refuse medical treatment even where necessary to preserve life. See

[12] Respecting the independence and breadth of the state Constitution, the Court in Powell struck the statute despite the fact that the United States Supreme Court had rejected a challenge to the very same statute, and called the identical privacy claim under the federal Constitution "at best, facetious." Bowers v. Hardwick, 478 U.S. 186, 194 (1986). In 2003, the United States Supreme Court finally followed Georgia's lead, and held that the federal privacy right extends to consensual, private same-sex sexual intimacy. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers).

State v. McAfee, 259 Ga. 579, 580-81, 385 S.E.2d 651, 652 (1989) (patient's constitutional privacy right includes right to terminate life support); Zant v. Prevatte, 248 Ga. 832, 834, 286 S.E.2d 715, 717 (1982) (prisoner on hunger strike could not be forced to accept medical treatment; individual "by virtue of his right of privacy, can refuse to allow intrusions on his person, even though calculated to preserve his life"); see also King I, 272 Ga. at 790, 535 S.E.2d at 495 (recognizing individuals' privacy right in medical records); Karpowicz v. Hyles, 247 Ga. App. 292, 295, 543 S.E.2d 51, 54 (2000) (recognizing right to privacy of medical records extends to privileged psychiatric records).

As Georgia's staunch privacy right encompasses the right to be free from governmental interference in making personal decisions about one's body, the course of one's medical treatment, and one's sexuality, so too does it necessarily embrace a woman's right to decide whether or not to carry a pre-viability pregnancy to term. A woman's right to decide whether or not to bear a child is at the very core of the right to "liberty of choice as to [one's] manner of life" and the right to "legal and uninterrupted enjoyment of [one's] life, . . . limbs, . . . body, [and] health" identified by the Court in Pavesich, 122 Ga. at 195, 196, 50 S.E. at 70. If the right to control one's own body means anything, it is the right to decide, free from governmental

intrusion, whether to carry a pre-viability pregnancy to term and to and undergo childbirth. Likewise, the right to direct one's medical treatment is hollow if a woman is not free to end a pregnancy that threatens her health. And the right to make personal decisions about sexuality is inextricably linked to the right to choose whether and when to have a child.

Indeed, a woman's decision whether or not to continue a pregnancy is among the most intimate and life-defining choices that she will make in her lifetime. See, e.g., Women of the State of Minnesota v. Gomez, 542 N.W.2d 17, 27 (Minn. 1995) ("We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion."); Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 793 (Cal. 1981) (characterizing the right of reproductive choice as "clearly among the most intimate and fundamental of all constitutional rights"). This decision "is at the heart of the Georgia Constitution's protection of the right of privacy," Powell, 270 Ga. at 332, 510 S.E. 2d at 24, just as much as the right to engage in private, consensual sexual activity. As such, the right to make decisions about reproductive health care, including the right to decide whether or not to continue a pre-viability pregnancy, is entitled to the same resolute, heightened protection that this state has historically and unwaveringly offered its citizens.

In recognizing that the Georgia Constitution provides independent, broad protection for the right of reproductive privacy – protection that is, at the very least, co-extensive with federal constitutional protections – this Court will not stand alone. To date, the highest courts of at least eleven states have recognized that their state constitutions independently protect a woman's right to decide to end a pre-viability pregnancy. See State of Alaska, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001); Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.3d 1 (Tenn. 2000); Armstrong v. State, 989 P.2d 364 (Mont. 1999); Pro-Choice Mississippi v. Fordice, 716 So.2d 645 (Miss. 1998); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Women of Minnesota, 542 N.W.2d 17; Hope v. Perales, 634 N.E.2d 183 (N.Y. 1994); In re T.W., 551 So.2d 1186 (Fla. 1989); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Comm. to Defend Reprod. Rights, 625 P.2d 779; Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); see also Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993) (recognizing state constitutional protection for abortion), cert. denied, 624 N.E.2d 194 (Ohio 1993).[13] Most recently, trial

[13] Conversely, there is only one decision, from a state mid-level appellate court (in Michigan), that squarely holds there is no protection under a state constitution. Mahaffey v. Attorney Gen., 564 N.W.2d 104 (Mich. Ct. App. 1997). The Michigan Supreme Court

courts in North Dakota and Oklahoma have reached similar conclusions, faced with far less onerous restrictions on reproductive privacy than the Act. Enjoining a regulation that prohibited certain (but not all) non-surgical methods of abortion, the North Dakota court held that "the Constitution of North Dakota must be construed to protect a woman's right to choose to have an abortion" and that that state constitutional "right is fundamental." MKB Mgmt. v. Birch Burdick, 09-2011-CV-02205 at 41 (N. D. Dist. Ct. Feb 16, 2012); [14] see also Oklahoma Coal. for Reprod. Justice v. Cline, CV-2011-1722 at 2 (Okla. Dist. Ct. May 11, 2012)[15] (enjoining regulation similar to that in North Dakota, and holding that "[t]he Due Process Clause of the Oklahoma Constitution protects the right to terminate a pregnancy as a fundamental right").[16]

---

has not yet ruled on this issue.

[14] See attached Appendix to Memorandum. Also available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/MKB%20v%20Burdick%20Order%2021612%20(2).pdf.

[15] See attached Appendix to Memorandum. Also available at http://www.oscn.net/applications/oscn/GetCaseInformation.asp?viewtype=&submitted=true&casemasterID=2787672&db=Oklahoma.

[16] Notably, the principle that state constitutional protections cannot drop below the federal minimum was instrumental to the recent decisions in North Dakota and Oklahoma. See MKB Mgmt. Corp., 09-2011-CV-02205 at 21-22 ("The North Dakota Supreme Court has repeatedly recognized that 'our constitution can and has given our citizens greater protection than the federal constitution.' . . . However, the converse can never be true. Rights granted by the state constitution cannot be interpreted to be narrower or less expansive than corresponding rights guaranteed by the federal constitution . . . This rule

Moreover, nearly every state high court to recognize a distinct and independent state constitutional right to obtain abortion care has regarded that right as fundamental, and applied strict scrutiny.[17] Georgia's long, proud jurisprudence articulating a fundamental right to privacy compels a similar holding.

B. The Ban Cannot Stand Under the Georgia Constitution

Georgia's longstanding protection of its citizens' privacy rights thus dictates review of the Act under the most stringent standard, Powell, 270 Ga. at 333, 510 S.E.2d at 24 (holding that government interference with the "right to privacy will pass constitutional muster" only if it "is shown to serve a compelling state interest and to be narrowly tailored to effectuate only that compelling interest") – but the Act must fall under the Georgia Constitution

---

has been restated so many times that it is now deemed to be axiomatic") (internal citations omitted); Oklahoma Coal., CV-011-1722 at 2 ("Rights that are protected as fundamental by the U.S. Constitution are protected as fundamental rights by the Oklahoma Constitution to at least the same extent.") (internal citations omitted).

[17] While firmly recognizing the existence of the independent state constitutional right, the Mississippi Supreme Court adopted the federal minimum and did not provide broader protection under the state constitution. Pro-Choice Mississippi, 716 So.2d at 655. Similarly, the New York Court of Appeals (New York's highest court) noted that "it is undisputed by defendants that the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right." Hope, 634 N.E.2d at 186. In any event, while the choice of standard was relevant in those cases, it is not relevant here: those cases concerned abortion restrictions that met the lesser federal standard; the Act, in contrast, would fail the federal standard. For that reason, Plaintiffs here will prevail on the merits regardless of whether the Georgia Constitution provides protection that is broader than, or merely co-extensive with, federal constitutional protection. See infra Pt. II.B.

whether or not its independent protection for the right to obtain pre-viability abortion care is broader than the protection afforded under the federal Constitution. That is because a ban on abortion care at any point before viability is *per se* unconstitutional under the federal standard, which is the minimum protection the Georgia Constitution provides. See supra pp. 15-19; see, e.g., Gonzales, 550 U.S. at 146 ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'") (quoting Casey, 505 U.S. at 879); Casey, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion."); Fleming, 259 Ga. at 690, 386 S.E.2d at 342 ("Federal constitutional standards represent the minimum . . . protection that this state must afford its citizens."). Because the Georgia Constitution cannot be "measured under a lesser standard," Cooper, 277 Ga. at 287, 587 S.E.2d at 609, the Act is *per se* unconstitutional under state law as well. For that reason, this Court need not decide exactly what level of protection the Georgia Constitution affords the privacy right at issue to rule for Plaintiffs here: regardless of whether the Georgia Constitution provides more expansive protection for the right to abortion than the federal Constitution, or merely co-extensive protection, the Act must fall as a matter of Georgia law.

As such, the State cannot save the ban from constitutional invalidation by asserting, as it does here, a compelling interest in protecting fetal life before viability. See HB 954, § 1(5) ("It is the purpose of the State of Georgia to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."). As an initial matter, Plaintiffs strongly disagree with the factual assertions underlying this purported interest.[18] But even if there were credible evidence to support it, it would still be insufficient to justify an outright prohibition on pre-viability abortions. Even under the lesser federal standard, which does not apply strict scrutiny, *no* state interest—even the state's weightiest interest, its interest in fetal life—is sufficient to justify a ban on pre-viability abortion care. See Casey 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."). An interest that is insufficient to meet the federal minimum necessarily fails the more

[18] Although it is unnecessary in the context of this motion to assess the factual underpinnings of the Legislature's findings, there is in fact no consensus in the relevant fields that fetal pain perception is possible at 20 weeks. In fact, the weight of the evidence—and the most up-to-date evidence—concludes otherwise. See, e.g., Fetal Awareness, Review of Research and Recommendations, Royal College of Obstetricians and Gynaecologists at 11 (March 2010), available at http://www.rcog.org.uk/files/rcog-corp/RCOGFetalAwarenessWPR0610.pdf ("The lack of cortical connections before 24 weeks . . . implies that pain is not possible before 24 weeks.").

stringent standard that the Georgia Constitution should apply to this right.

Indeed, Georgia's proud tradition dictates that the Act may be upheld only if the State shows that it is narrowly tailored to serve a compelling state interest. See, e.g., Powell, 270 Ga. at 333, 510 S.E.2d at 24; Ambles, 259 Ga. at 407, 383 S.E.2d at 557 (to survive a privacy challenge, a statute that interferes with the exercise of a fundamental right must "be narrowly tailored to serve a compelling state interest"). This the state cannot do, as the Act plainly fails the exacting scrutiny that the Georgia Supreme Court has historically applied to violations of the state constitutional right to privacy. See, e.g., In re J.M., 276 Ga. 88, 90, 575 S.E.2d 441, 444 (2003) (examining whether "State had a compelling interest that it vindicated through means that were narrowly tailored to accomplish only that compelling interest" by prosecuting a minor for private and consensual sexual activity); Powell, 270 Ga. at 333, 510 S.E.2d at 24.

While protecting fetal life is a legitimate state interest, see e.g., Jefferson v. Griffin Spalding Cnty. Hosp. Auth.,[19] 247 Ga. 86, 89, 274

[19] Jefferson involved a woman in her final (39th) week of pregnancy who, because of her medical condition, faced extraordinarily high risks from delivering vaginally: she would have had less than a fifty percent chance of surviving, and her viable fetus would have had almost no chance at all. 247 Ga. at 86, 88, 274 S.E.2d at 458-59. Delivery by caesarean section, however, would result in an almost 100 percent chance of survival for *both*. Id. Given those exceptional facts, the Court held that the state's interest in preserving life outweighed the woman's religious interests in refusing the surgery. As Justice Hill noted, Jefferson presented exceptional circumstances; it has not been

S.E.2d 457, 460 (1981), prior to viability, it cannot outweigh a woman's fundamental right to determine whether and when to bear a child by deciding whether to continue a pre-viability pregnancy. As the California Supreme Court has explained:

> There is no question, of course, that phrased in general terms the state has a legitimate interest in protecting the potential life of a fetus. . . . In the instant case, however, the state is not merely proposing to protect a fetus from general harm, but rather is asserting an interest in protecting a fetus vis-a-vis the woman of whom the fetus is an integral part. Such a claimed interest, of course, clashes head-on with the woman's own fundamental right of procreative choice. . . . the state may not subordinate [this right] to the state's interest in protecting a nonviable fetus.

Comm. to Defend Reprod. Rights, 625 P.2d at 795.

Thus, the question under the Georgia Constitution is not merely whether the state has a valid interest in potential life, which it clearly does, but whether and when that interest entitles the State to force a woman to continue a pregnancy against her will. Given the significance of the woman's privacy right, the answer is not until viability.[20]

---

extended beyond its facts. See id. at 89-90, 274 S.E.2d at 460 (Hill, Presiding J., concurring). It certainly has no application to pre-viability abortions in general or to abortions necessary to preserve a woman's health.

[20] Cf. Brinkley v. State, 253 Ga. 541, 544-45, 322 S.E. 2d 49, 53 (1984) (upholding state feticide statute applying before viability and noting "[n]othing in Roe v. Wade . . . nor Doe v. Bolton . . . is in conflict with our holding here. There the court dealt with a balance between a woman's right of privacy . . . as against the state's interest in

C. Section 16-12-141(d) Likewise Violates Georgia's Privacy and Equal Protection Guarantees.

For the reasons set forth above, the Act's ban is unconstitutional as applied to pre-viability abortion care. However, as to any abortion care, Section 16-12-141(d) of the Act – which mandates that "[h]ospital or other licensed health facility records shall be available to the district attorney of the judicial circuit in which the hospital or health facility is located" – is unconstitutional in at least two independent respects. First, by providing a district attorney with seemingly unfettered access to the private medical records of any woman who obtains abortion care within his or her jurisdiction, Section 16-12-141(d) blatantly violates the state constitutional rights to privacy and due process.[21] See King I, 272 Ga. 788, 535 S.E.2d 492. Second, by singling out patients who seek abortion care for such unparalleled intrusion into intimate medical information, and stripping their medical records—and only their medical records—of virtually any privacy

---

safeguarding health, maintaining medical standards, and in protecting fetal life . . . . [H]ere we deal with the interest of the state in protecting both the mother and the fetus from the intentional wrongdoing of a third party who can claim no right for his actions.").

[21] To be sure, Section 16 -12-141(d) is so broadly written that it could be construed to apply to any and all patients' medical records maintained at any hospital or other licensed health facility within the district attorney's jurisdiction—regardless of whether the patient sought abortion care, or of whether the facility even offers it. However, as the provision falls within the criminal abortion statute, Plaintiffs assume for the purposes of this motion that Section 16-12-141(d) is limited to the records of abortion patients maintained at facilities that provide abortion care. Even if so limited, the provision still appears to cover all such patients' medical records—not simply those related to abortion care.

protections, Section 16-12-141(d) violates Georgia's guarantee of equal protection. See, e.g., Rodriguez v. State, 275 Ga. 283, 284, 565 S.E.2d 458, 460 (2002) ("'The Georgia . . . Constitution[] require[s] government to treat similarly situated individuals in a similar manner.'") (quoting Old S. Duck Tours v. Mayor & Alderman of Savannah, 272 Ga. 869, 873, 535 S.E.2d 751, 755 (2000)); see also Hughes v. Reynolds, 223 Ga. 727, 730, 157 S.E.2d 746, 749 (1967) ("Where laws are applied differently to different persons under the same or similar circumstances, equal protection of law is denied.") (citation omitted). Given that abortion is a lawful—indeed, constitutionally protected—medical procedure, the State has no legitimate, let alone compelling, reason to treat the medical records of women who seek abortion care differently from the records of patients who seek other lawful medical treatment.

As the Georgia Supreme Court has held, "the personal medical records of this state's citizens . . . are protected by [the right to privacy] as guaranteed by our constitution." King I, 272 Ga. at 790, 535 S.E.2d at 495; see also id. ("[A] patient's medical information, as reflected in the records maintained by his or her medical providers, is certainly a matter which a reasonable person would consider to be private"); King v. State, 276 Ga. 126, 577 S.E.2d 764 (2003) [hereinafter King II] (affirming King I). This

right protects against the unauthorized disclosure of a patient's medical records to "anyone, *including [a] prosecutor*." King I, 272 Ga. at 792, 535 S.E.2d at 496 (emphasis added). Thus, any law that allows the state to access medical records without the patient's permission must serve a compelling state interest and be narrowly tailored to effectuate "*only* that compelling interest." Powell, 270 Ga. at 333, 510 S.E.2d at 24 (1998) (emphasis added). There is no question that Section 16-12-141(d) fails such stringent constitutional review.

In King I, a case that directly controls the outcome here, the State subpoenaed a criminal defendant's hospital records to support a charge of driving under the influence.[22] Addressing the defendant's motion to exclude the records obtained by the subpoena, the Supreme Court held that the State was "not entitled to exercise indiscriminate subpoena power as an investigative substitute for procedural devices otherwise available to it in the criminal context, such as a search warrant." King I, 272 Ga. at 791, 535

[22] The state relied on O.C.G.A. § 24-9-40, which stated that "[n]o physician ... and no hospital or health care facility ... shall be required to release any medical information concerning a patient except ... on appropriate court order or subpoena." Notwithstanding that it harbored "some doubt" as to whether the statute could "even be construed as affirmative authority for a litigant to subpoena the medical reports of an opposing party who has not waived the privilege otherwise attaching to those records," King I, 272 Ga. 788, 791, 535 S.E.2d 492, 495, the Supreme Court ruled on the underlying constitutional question.

S.E.2d at 495.[23] The Court acknowledged that while "such unlimited use of the subpoena power in a criminal case might well serve the State interest of law enforcement, it cannot be said to do so in a 'reasonable' manner if it violates the accused's constitutional right of privacy." Id. at 792, 535 S.E.2d at 496. "Not only must the State's interference with [the right to privacy] be reasonably necessary for law enforcement purposes, such an interference must also avoid subjecting Georgia citizens to undue oppressiveness." Id. (citing Powell, 270 Ga. at 334, 510 S.E.2d at 18). Because "[p]ermitting the State unlimited access to medical records for the purposes of prosecuting the patient would have the highly oppressive effect of chilling the decision of any and all Georgians to seek medical treatment," the Court held such access violated the state constitutional right to privacy. Id.

The privacy claim here – on behalf of patients who have not been charged with or even suspected of any crime – is even more compelling than in King I. Section 16-12-141(d) grants district attorneys virtually limitless access to patient medical records, without any due process. Indeed, to

[23] The King II court reaffirmed that "statutory authority for the subpoena [in King I] had no defined limits and, therefore, was not narrowly drawn to effectuate the State's compelling interest in enforcing criminal laws." King II, 276 Ga. at 128, 577 S.E.2d at 766. In contrast, the search warrant at issue in King II was held an appropriate means of accessing private medical records because the limitations on the State's ability to obtain a search warrant are narrowly tailored to the compelling interests in law enforcement and public safety. Id.

Plaintiffs' knowledge, the only other context in which district attorneys are granted such unrestricted access to medical records concerns records maintained by the Board for the Distribution of Cadavers. O.C.G.A. § 31-21-20 ("[R]ecords shall be open at all times to the inspection of members of this board, any district attorney, or prosecuting attorney of any city or state court.").

Furthermore, singling out women who seek abortion care violates the guaranty of "impartial and complete" equal protection of the laws of Georgia. Ga. Const. art I, § 1, ¶ II. Section 16-12-141(d) unconstitutionally discriminates against these women by forcing them to surrender the inherent right to privacy that attaches to their medical records simply because the State disapproves of the (constitutionally protected) medical care they seek. Indeed, there is no rational, let alone legitimate or compelling, reason for singling out patients who seek abortion care other than to punish these patients by stripping their medical records of all protection. However, as demonstrated above, supra pp. 26-29, the state may only interfere with the exercise of a fundamental right when the statute is "narrowly tailored to serve a compelling state interest." Ambles, 259 Ga. at 407, 383 S.E.2d at 557. Given that Section 16-12-141(d) bestows on district attorneys an even

broader power than the subpoena power struck down in King I, it cannot possibly be narrowly tailored to serve the State's interests.

In sum, the State may have a legitimate interest in seeing that its laws are enforced, but neither this interest, nor the Georgia Constitution, permits the District Attorney to access the most intimate details of its citizens' lives in an unconstrained search for unlawful activity. Hence, Section 16-12-141(d) violates the state constitutional guarantees of privacy and equal protection, and must be enjoined on its face.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for an interlocutory injunction.

Dated: November 30, 2012

Respectfully submitted,

Chara F. Jackson
Georgia Bar No. 386101
Chad M. Brock
Georgia Bar No. 357719
ACLU Foundation of Georgia
1900 The Exchange, Suite 425
Atlanta, GA 30339
Telephone: (770) 303-8111

Alexa Kolbi-Molinas *
Susan Talcott Camp *

American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
akolbi-molinas@aclu.org
tcamp@aclu.org
(212) 549-2633

* - motion for admission *pro hac vice* pending