IN THE SUPREME COURT OF OHIO

STATE EX REL PRETERM-CLEVELAND, *et al.*	)	
	)	**CASE NO. 2022-0803**
Relators,	)	
DAVID YOST, *et. al.*,	)	
Respondents.	)	

BRIEF OF *AMICI CURIAE* RABBI JONATHAN COHEN; RABBI RICHARD KELLNER; RABBI ROBERT NOSANCHUK, SENIOR RABBI OF ANSHE CHESED FAIRMOUNT TEMPLE; RABBI LENETTE HERZOG; RABBI MICHAEL UNGAR; RABBI MEREDITH KAHAN; RABBI EDWARD J. SUKOL; RABBI ALLISON VANN; RABBI SHOSHANA NYER; RABBI SHARON BARR-SKOLNIK; RABBI ROBERT BARR; RABBI CHASE FOSTER; RABBI KAREN THOMASHOW; CANTOR JEN ROHER; RABBI JONATHAN HECHT, PHD, DEAN, HUC-JIR CINCINNATI; RABBI DR. GARY P. ZOLA; RABBI JULIE SCHWARTZ; RABBI LEWIS KAMRASS; RABBI DAVID BURSTEIN; RABBI BENJAMIN AZRIEL; RABBI JOSH BROWN; RABBI KAREN BODNEY-HALASZ; CANTOR BAT AMI MOSES; RABBI SHARON MARS; RABBI SIMON STRATFORD; RABBI THALIA HALPERT RODIS; RABBI MELINDA MERSACK; RABBI BENJY BAR-LEV; RABBI ALEX BRAVER; RABBI TINA SOBO, RJE; CANTOR VLADIMIR LAPIN; TEMPLE BETH OR; NATIONAL COUNCIL OF JEWISH WOMEN/CLEVELAND; THE OHIO RELIGIOUS ACTION CENTER OF REFORM JUDAISM; GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST; FAITH CHOICE OHIO; REV. TERRY WILLIAMS; REV. ALLEN V. HARRIS; REV. DR. CHERYL A. LINDSAY; REV. DR. TIM AHRENS; REV. DR. JOHN C. DORHAUER; REV. DR. DAVID LONG-HIGGINS; EBONY SPEAKES-HALL; JANETTE BARNETT; ANN POSTON BARNETT; AND CAROLYN GILBERT IN SUPPORT OF RELATORS

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INTRODUCTION

Senate Bill 23 ("S.B. 23") denies Ohioans the freedom to practice their long-standing and sincerely held religious beliefs. It requires all Ohioans, regardless of their faith, to adhere to one religious view surrounding the decision to terminate a pregnancy and when life begins, even though that view often contradicts their own religious faith. Other faiths allow, and even require, abortions under certain circumstances that S.B. 23 prohibits. Ohio's Constitution protects the free exercise of those religious beliefs. Because S.B. 23 violates these protections, it is unconstitutional.

In passing S.B. 23, the General Assembly declared that "[a]t fertilization, a human being emerges as a whole, genetically distinct, living human organism" and that "[a] human being at an embryonic age and a human being at an adult age are naturally the same, with the only biological differences being due to the differences in maturity." 2019 Legis. Bill Hist. OH S.B. 23, Synopsis of Committee, January 1, 2019; S.B. 23, Section 3(J), (N). It then banned almost all abortions after six weeks, threatening Ohio abortion providers with felony convictions and civil penalties if they provide vital abortion care to Ohioans practicing their faith.

This is not a hypothetical denial of religious freedom. Many religions recognize the right of a pregnant person to make the deeply personal decision of whether to continue a pregnancy in accordance with their faith at any stage of the pregnancy.[1] For example, under Jewish law and the teachings of the General Synod of the United Church of Christ (the "UCC"), a pregnant

[1] This brief focuses on the teachings of the faiths practiced by the *amici*, primarily Judaism and the United Church of Christ. However, many denominations share the same belief that pregnant people have the agency to make the deeply personal decision to terminate a pregnancy, including Protestants and Catholics, and Buddhists. The Religious Coalition for Reproductive Choice has compiled resources showing the breadth of religious denominations whose teachings support reproductive choice. *See* Religious Coalition for Reproductive Choice, *https://rcrc.org* (accessed July 25, 2022).

person is given the agency to terminate a pregnancy for a variety of reasons including to protect the pregnant person's physical, mental, and socioeconomic health. S.B. 23 takes that agency away and denies Ohioans the right to act in accordance with their faith free of government intrusion.

Ohioans cannot be stripped of their right to freely exercise their religion simply because a majority of the General Assembly does not share their beliefs. Accordingly, S.B. 23 violates the Ohio Constitution because it both imposes one religious viewpoint on the people of Ohio and prevents Ohioans, including the *amici,* from freely exercising their religious beliefs.

INTEREST OF AMICI CURIAE

Amici represent a broad spectrum of religions and faiths, including Judaism and the General Synod of the United Church of Christ, that do not espouse the minority Christian belief embodied in S.B. 23 that life begins at fertilization and almost all abortions should be banned at six weeks.[2] *Amici* support a pregnant person's right to terminate a pregnancy as permitted, and in some instances, commanded, by their faith. S.B. 23 endorses a minority Christian viewpoint and directly impacts *amici's* ability to freely practice their religion.

In an effort to preserve their congregants' and communities' rights to make deeply personal decisions in accordance with their established religious teachings, *amici* file this Brief to provide support and context for Relators' argument that "[t]he decision to terminate a pregnancy is informed by a combination of diverse, complex, and interrelated factors that are intimately related to an individual's values and beliefs, culture and religion, health status and reproductive history, familial situation, and resources and economic stability," particularly regarding diverse religious views. Verified Complaint ¶ 62.

[2] A full list of the *amici* is attached as Exhibit A.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statement of Facts set out in the Relators' Verified Complaint and related filings.

ARGUMENT IN SUPPORT OF PETITIONERS

The Ohio Constitution is a document of independent force and, therefore, state courts "are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal Constitution." *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 41, 616 N.E.2d 163 (1993); *see also State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, ¶ 14, 74 N.E.3d 268 (2016) (reiterating that "the Ohio Constitution is a document of independent force"); *City of Norwood v. Horney*, 110 Ohio St.3d 353, 372, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Takings Clause in Ohio's Constitution offers different protections from the United States Constitution).

This Court has consistently recognized that the Free Exercise and Establishment Clauses in the Ohio and United States Constitutions (the "Religion Clauses") are not coextensive and that the Ohio Constitution offers broader protections:

> [T]here is no reason to conclude that the Religion Clauses of the Ohio Constitution are coextensive with those in the United States Constitution, though they have at times been discussed in tandem. The language in the Ohio provisions is quite different from the federal language. We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant reason.

Humphrey v. Lane, 89 Ohio St.3d 62, 68, 2000-Ohio-435, 728 N.E.2d 1039 (quoting *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 10, 711 N.E.2d 203 (1999); *Mole*, 2016-Ohio-5124 at ¶ 17 (noting that "Ohio's Free Exercise Clause grants broader protections to Ohio's citizens than the federal Constitution affords.").

S.B. 23 blatantly violates the Religion Clauses of the Ohio Constitution. It favors one religious viewpoint by codifying the belief espoused by some religious groups that life begins at fertilization and that abortion is immoral after approximately six-weeks from the first day of a patient's last menstrual period ("LMP"), except in extremely narrow circumstances. The State imposes this religious belief about conception and termination of pregnancy on all Ohioans, and criminalizes providing healthcare services that are consistent with the religious beliefs held by *amici*. S.B. 23 also impedes the relationship between religious leaders and their congregants — where a religious leader might otherwise counsel a congregant that, in their circumstances, their religious beliefs advise the congregant to seek an abortion, a religious leader now faces the dilemma of counseling a congregant that while their religious beliefs would advise the congregant to seek an abortion, the State has made such an abortion illegal.

I. SENATE BILL 23 VIOLATES OHIO'S BROAD FREE EXERCISE CLAUSE.

A. The Free Exercise Clause in Ohio Constitution, Article I, Section 7 Provides Broad Protection of Religious Freedom to All Ohioans.

S.B. 23 impermissibly inhibits the free exercise of religion under the Ohio Constitution.[3] The Free Exercise Clause of the Ohio Constitution, Article I, Section 7, provides broad protection of Ohioans' rights to practice their religions:

> All men have a natural and indefeasible right to worship Almighty God <u>according to the dictates of their own conscience</u>. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. . . . Religion, morality, and knowledge, however, being essential to good government, <u>it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination</u> in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

[3] By presenting the burdens on the free exercise of religion under the Ohio Free Exercise Clause, *amici* do not concede that S.B. 23 is allowed under the Free Exercise Clause of the U.S. Constitution.

Ohio Constitution, Article I, Section 7 (emphasis added).

The Ohio Constitution's free exercise protection "applies to direct and indirect encroachments upon religious freedom." *Humphrey*, 89 Ohio St.3d at 68. This Court has recognized that Ohio Constitution Article I, Section 7 is broader, more detailed and qualitatively different than the U.S. Constitution's Free Exercise Clause as it implicates laws that prohibit the free exercise of religion, like the First Amendment does, but goes further and prohibits laws that even interfere with the rights of conscience. *Id*.

Accordingly, Ohio requires the State to establish that "the regulation serves a compelling state interest and is the least restrictive means of furthering that interest." *Humphrey*, 89 Ohio St.3d at 66. The initial burden is on the party challenging the regulation to show that "his religious beliefs are truly held and that the governmental enactment has a coercive affect against him in the practice of his religion." *Id.* at 68. The burden then shifts to the State to show that the statute serves a compelling state interest and is the least restrictive alternative. *Id.*

B. S.B. 23 Prevents Ohioans From Freely Exercising Religious Tenets About Conception and Abortion That Differ From The Religious Beliefs Embodied in S.B. 23.

Under S.B. 23, termination of a pregnancy is not allowed after approximately six weeks LMP except to prevent the "death of the pregnant woman" or "serious risk of substantial and irreversible impairment of a major bodily function." S.B. 23 Section 1, amending R.C. 2919.195(B). There is no exception allowing a pregnant person to terminate a pregnancy consistent with their religious belief that the mental, physical and socioeconomic health of the living person deserves priority over the potential life of a fetus. S.B. 23, therefore, poses a real and significant restraint on the free exercise of religion guaranteed by the Ohio Constitution.

Amici include 46 religious leaders, individuals and organizations[4] throughout Ohio who are concerned about their and their communities' ability to practice and exercise their religious beliefs.[5] Jewish law commands the faithful to offer themselves the highest standard of care for their mental, spiritual and physical health to live the best Jewish lives they can. *See* Deuteronomy 4:9, 4:15. Physicians and others who care for pregnant people act as agents of God who facilitate life and enable the performance of the Commandments, and are obligated by Jewish law to do so. Bab. Talmud (BT) B.K. 85a and Shulkhan Arukh, Yoreh Deah (YD) 336.

Judaism focuses on the pregnant person's life. The focus of Jewish law is the saving of a soulful life (a person) defined by the word "*nefesh*." A fetus is not defined as a "*nefesh*." Rather, the Talmud recognizes that the fetus is a part of the pregnant person's soulful personhood, rather than its own soulful being. BT Chullin 58a; Responsa Torat Hesed (e.g. Rabbi Schneur Zalman Fradkin) Even ha-Ezer (EH) 42:7.[6] Therefore, under Jewish law, the pregnant person's life, health and well-being take precedence over the fetus. Shulkhan Arukh Hoshen Mishpat (HM) 423, glossators on 425. 3.

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[4] The National Council of Jewish Women/Cleveland ("NCJW/CLE"), founded in 1894, is a grassroots organization of volunteers and advocates who turn progressive ideals into action. Inspired by the Jewish values of *Tikkun Olam* (repair the world), and *Tzedek, Tzedek Tirdof* (justice, justice you shall pursue), NCJW/CLE strives for social justice by improving the quality of life for women, children and families and by safeguarding individual rights and freedoms.

[5] *Amici* acknowledge that within Judaism, as within most religions, there exist a range of beliefs regarding pregnancy termination. *See* Daves, Dena S. "Method in Jewish Bioethics: An Overview, 20 J. Contemp. L. 325 (1994) (discussing Jewish positions on bioethical issues, including a range of positions on abortion between the branches of Judaism). However, the views presented in this brief represent the majority view.

[6] Judaism generally recognizes that life begins at the moment of birth. Joseph G. Schenker, *The beginning of human life: status of embryo. Perspectives in Halakha (Jewish Religious Law)*, J Assist Reprod Genet., https://ncbi.nlm.nih.gov/pmc/articles/PMC2582082/ (accessed July 25, 2022).

Modern Halakhic authorities allow or even counsel abortion in multiple cases. Jewish law requires abortion where the pregnancy endangers the life or health of the pregnant person. Responsa Beit Yitzhak (Rabbi Isaac Schmelkes) YD 2:162. In addition to situations where the pregnant person's life is at risk, Judaism permits termination of a pregnancy in a broad range of circumstances, including (1) for familial reasons "of great need," including the case of a pregnancy out of wedlock;[7] (2) if there is a risk to a pregnant person's limb (as opposed to life);[8] (3) if there is a risk to the mental health of the pregnant person;[9] and (4) if there is a risk to another child or other socio-economic reasons that amount to "a great need" or "great suffering" on the part of the pregnant person.[10] Thus, under Jewish law, abortion is permitted — even required — for many reasons that do not fall within the two narrow exceptions to S.B. 23.

S.B. 23 directly impacts the ability of Jewish people to terminate their pregnancies and interferes with the abilities of religious leaders, such as *amici*, to counsel their congregants in accordance with their faith. For example, S.B. 23's exception for circumstances posing a "*serious* risk of *substantial* and *irreversible* impairment of a *major* bodily function" is too narrow and prohibits abortion even where allowed or required under Jewish law to protect the pregnant person's physical health. S.B. 23 Section 1, amending R.C. 2919.19, adopting R.C. 2919.16(K) (emphasis added).

S.B. 23 "does not include a condition related to the woman's mental health" either. S.B. 23 Section 1, amending R.C. 2919.19, adopting R.C. 2919.16(K). S.B. 23 requires Jewish

[7] *See* Responsa Rav Pe'alim (Rabbi Joseph Haim) 1:EH, 4.
[8] Mishpatei Uzziel 4, HM:46 (Israel's Chief Sephardi Rabbi Ben Zion Uzziel ruled that a woman who risked the loss of hearing if her pregnancy advanced was allowed to medically abort her fetus).
[9] Responsa Levushei Mordechai (Rabbi Mordecai Leib Winkler) HM:39.
[10] Responsa Tzitz Eliezer (Rabbi Eliezer Waldenberg) 6:48.

people to sacrifice their mental health through forced pregnancy and prevents them from exercising their religion except during the first six weeks LMP. After that time, S.B. 23 abrogates a Jewish person's sincerely held belief that Jewish law grants them agency over their body (including any fetus therein) and prohibits them from exercising the commandment to preserve their mental health. The removal of agency from pregnant people flies in the face of Jewish law.

S.B. 23 also requires members of the UCC to subvert their religious beliefs to those chosen by the State. The General Synod, the national representative body of the UCC, has issued statements and resolutions related to freedom of choice since 1971 that consistently affirm a person's right to choose with respect to abortion. United Church of Christ, *General Synod Statements and Resolutions Regarding Freedom of Choice*, https://www.uccfiles.com/pdf/GS-Resolutions-Freedom-of-Choice.pdf (accessed July 25, 2022).

The General Synod of the UCC does not take a position on when life begins, recognizing that "[t]he theological and scientific views on when human life begins are so numerous and varied that one particular view should not be forced on society through its legal system." 8th General Synod at p. 2, 1971. In reaffirming theological statements on the freedom of choice on abortion for its members, the 13th General Synod (1981) expressly provides that "[t]he question of when life (Personhood) begins is basic to the abortion debate. It is primarily a theological question, on which denominations or religious groups must be permitted to establish and follow their own teachings." *Id.*

Like Judaism, the General Synod of the UCC recognizes a spectrum of circumstances where abortion would be permitted according to a member's conscience and religious beliefs, but would be illegal under S.B. 23. Although the General Synod of the UCC is clear that abortion

should not be considered a primary method of birth control and that other alternatives should be fully and carefully considered, including adoption, it consistently states that "every woman must have the freedom of choice to follow her personal religions and moral convictions concerning the completion or termination of her pregnancy." *Id.* The 8th General Synod recognizes that different factors may be considered depending on the stage of the pregnancy given the potentiality of human personhood, including the physical or mental health of the pregnant person, diagnosis of a fetal anomaly, or incest or rape, but that medically safe abortions should be available to all pregnant people. 8th General Synod at p. 2-3, 1971.

Subsequent meetings of the General Synods repeatedly affirmed the stance that individuals should have the freedom to choose a safe abortion as an option:

- The 12th General Synod (1979) "reaffirms full freedom of choice for the persons concerned in making decisions regarding pregnancy. . .[and] affirms the fact that, since life is less than perfect and the choices that people have to make are difficult, abortion may sometimes be considered."
- The 16th General Synod (1987) resolves to "[u]phold the right of men and women to have access to adequately funded family planning services, and to safe, legal abortions as one option among others."
- The 17th General Synod (1989) and 18th General Synod (1991) note that the UCC has for decades supported the right to choose a safe, legal abortion.

Judaism and the General Synod of the UCC are not outlier religions in this respect. Indeed, many Catholics support access to safe, legal abortions based on Catholicism's respect for individual conscience. Catholics for Choice, *Abortion*, https://www.catholicsforchoice.org/issues/abortion/ (last accessed July 25, 2022). Although sometimes inconsistent with official Vatican positions on abortion, many Catholics believe that moral decisions, including those involving pregnancy, are a matter of individual conscience. For example, Catholics for Choice support reproductive freedom based on the belief that "[e]veryone

deserves equal access to the full range of reproductive healthcare services, including safe and legal abortion," noting that *a majority of Catholics believe that abortion should be legal*. *Id.*

Ohioans' diverse religious beliefs provide different instruction and guidance when faced with the potential termination of a pregnancy. Yet instead of allowing people to turn to the tenets of their faith and counsel of religious leaders when faced with the prospect of terminating a pregnancy, S.B. 23 prohibits pregnant people from following the teachings of their faith, puts physicians at risk of criminal and civil penalties for providing care to pregnant people that is consistent with the pregnant person's and/or physician's faith, and puts religious leaders in the unthinkable position of counseling congregants that the pathways prescribed by their religious tenets have been made practicably unfulfillable by the State. This is the exact type of religious restriction that the Free Exercise Clause was intended to prevent.

C. S.B. 23 Does Not Serve A Compelling State Interest And, Even If It Did, Is Not The Least Restrictive Means Of Furthering The State's Interests.

S.B. 23 interferes with the exercise of truly held religious beliefs, and so must both serve a compelling state interest and be the *least restrictive* means of furthering that interest. *See Humphrey*, 89 Ohio St.3d at 68. S.B. 23 fails in both respects. The State has no compelling interest in protecting fetuses upon detection of a "heartbeat," and, even if it had a compelling interest, S.B. 23 is far from the least restrictive means of furthering it.

Amici support Petitioner's position that the State "does not have a compelling interest in protecting fetal life as early as five or six weeks LMP" and that its compelling interest in protecting women's health is antithetical to the substance of S.B. 23. *See* Compl. ¶¶ 111-12; Mem. In Support of Writ of Mandamus at pp. 28-31. In the Free Exercise context, Ohio has recognized compelling state interests that protect the safety and welfare of *children*, but not before their birth and certainly not before viability. *See State v. Schmidt*, 29 Ohio St.3d 32, 33,

505 N.E.2d 627 (1987) ("[T]he state has a compelling interest in the education of its citizens"); *Pater v. Pater*, 63 Ohio St.3d 393, 398, 588 N.E.2d 794 (1992) (recognizing the "state's compelling interest in protecting children from physical or mental harm"); *see also In re Z.S.*, 3rd Dist. Defiance No. 4-09-20, 2010-Ohio-1929, ¶ 98 ("[T]he State has a compelling interest to educate its citizenry and prepare them for the world beyond the one crafted by their parents" and "the State also has a compelling interest in not allowing children to be imprisoned or caged in their home due to the irrational faults, habits, or fears of their parents").

Inherent in S.B. 23 is the idea that the detection of electrical pulses characterized by the bill as a "heartbeat" marks a point at which the State has a compelling interest in a fetus.[11] This idea draws from religious viewpoints which are not universally shared. *Many* religions do not share that belief, and associate the beginning of life with other markers. Judaism, for example, defines the beginning of life with breath and considers the fetus to be part of the body of the pregnant person, over which she has full agency. *See supra* at pp. 6-7. The UCC does not take a position on when life begins. Thus, the foundation of S.B. 23 is contrary to the tenets of other established religions,[12] including Judaism and the UCC.

Nor is S.B. 23 the least restrictive means of furthering the State's alleged interest in fetal and maternal health. Even if the State's interest in the welfare of children were to extend before their birth, and even if the state were to establish a compelling interest in protecting fetuses, S.B. 23 is not the "least restrictive" means of doing so. The State could protect potential life in myriad other ways, including by expanding social and economic support to children and

[11] There is an inherent contradiction between the declaration in S.B. 23 that life begins at fertilization and S.B. 23's allowance of abortions after that, up through six weeks.

[12] This is true of Catholicism as well. "[A]lthough the Vatican does not condone abortion, it has said definitively that it does not know when a developing life becomes a person." *See* https://www.catholicsforchoice.org/issues/abortion/.

expectant parents, providing contraception education and funding programs, supporting programs to reduce maternal and infant mortality and providing and promoting prenatal care.

II. S.B. 23 VIOLATES THE ESTABLISHMENT CLAUSE OF THE OHIO CONSTITUTION BECAUSE IT FORCES ONE RELIGIOUS BELIEF ON OTHER RELIGIONS.

A. Article I, Section 7 of the Ohio Constitution Provides Greater Protection than the Federal Establishment Clause.

The Establishment Clause of the Ohio Constitution (Article I, Section 7) prohibits the General Assembly from enacting laws that amount to an establishment of religion. Ohio's Establishment Clause is only an "approximate equivalent" of the federal Establishment Clause, and the language in the Ohio Constitution is "quite different." *Simmons-Harris*, 86 Ohio St.3d at 10.

A statute violates Ohio's Establishment Clause when: (1) its legislative purpose is religious rather than secular; (2) its primary effect either advances or inhibits religion; and (3) it excessively entangles government with religion. *Simmons-Harris*, 86 Ohio St.3d at 5, 10 (adopting the test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971)). In adopting the *Lemon* test, this Court maintained the distinction between the Ohio and United States Constitutions, explaining that it adopted the *Lemon* standard "not because it is the federal constitutional standard, but rather because the elements of the *Lemon* test are a logical and reasonable method by which to determine whether a statutory scheme establishes religion." *Id.* at 10.[13]

[13] The Supreme Court of the United States recently overruled *Lemon* in favor of the "historical practices and understandings" test from *Town of Greece v. Galloway*, 572 U.S. 565, 576, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). *See Kennedy v. Bremerton School Dist.*, ___ U.S. ___, 142 S.Ct. 2407 (2022). However, this Court interprets the Ohio Constitution independently from the United States Constitution and need not abandon the *Lemon* test in favor of one that no Ohio

S.B. 23 fails this test because it establishes the religion of its supporters regarding when life begins and the circumstances when a pregnant person is permitted to terminate a pregnancy as the law of Ohio to the detriment of other faiths that believe differently.

B. Ohio's Abortion Ban Is Grounded In Religious Beliefs and Imposes on All Ohioans One Religious View, Necessarily Entangling Church and State.

1. S.B. 23 Adopts The Christian Position That Human Life Begins at Fertilization.

A statute violates the first prong of the *Lemon* standard if it is enacted for a non-secular legislative purpose. *Simmons-Harris*, 86 Ohio St. 3d at 5. There can be no doubt that the purpose of S.B. 23 is to codify the religious tenet that human life begins at fertilization. 2019 Legis. Bill Hist. OH S.B. 23, Synopsis of Committee, January 1, 2019. This is reflected in the legislative history for S.B. 23, where the Committee specifically stated that S.B. 23 is premised on the Ohio General Assembly's findings that "[a]t fertilization, a human being emerges as a whole, genetically distinct, living human organism" and that "[a] human being at an embryonic age and a human being at an adult age are naturally the same, with the only biological differences being due to the differences in maturity." 2019 Legis. Bill Hist. OH S.B. 23, Synopsis of Committee, January 1, 2019; S.B. 23, Section 3(J), (N).

Although various legislators have tried to downplay the religious nature of S.B. 23, those efforts fail because the legislators themselves acknowledged that S.B. 23 is rooted in their faith. For example, at the time S.B. 23 was adopted in 2019, it was reported that several Republican lawmakers referenced their religion when advocating for the legislation:

> Several Republican representatives offered religious arguments in support of the bill. Rep. Tim Ginter, R-Salem, read Scripture that, he said, justified restricting abortion access. As he did, a woman in the gallery waved a flag and a cross. House

court has ever applied. *See Simmons-Harris*, 86 Ohio St.3d at 10; *Humphrey*, 89 Ohio St.3d at 68; *see also Mole*, 2016-Ohio-5124 at ¶ 83 (citing *Simmons-Harris* with approval).

> Health Committee Chairman Derek Merrin, R-Monclova — who said Tuesday in committee that abortion rights are not a religious issue — said his faith instructed him that abortion is wrong.

Maggie Prosser, *Ohio Legislature Passes Heartbeat Bill – Now Ready for Gov. DeWine's Signature*, https://www.ohio.edu/scripps-college/journalism/undergraduate/statehouse-news-bureau-fellowship/ohio-legislature-passes-heartbeat-bill (April 10, 2019) (emphasis added). Members of the UCC gave opposition testimony in public hearings before S.B. 23 was enacted. In response, House Health Committee Chairman Representative Derek Merrin indicated, at least implicitly, that the purpose for S.B. 23 was based on his interpretation of the Bible that life begins at conception. The Ohio Channel, *Ohio House Health Committee 4-2-2019*, https://www.ohiochannel.org/video/ohio-house-health-committee-4-2-2019 (at 2:01:53) (quoting Jeremiah 1:5 ("before I formed you in the womb I knew you") (accessed July 25, 2022).

Unlike certain areas where moral and religious views are parallel, such as "do not kill," when life begins is not a tenet on which religions agree — it is a tenet held by a minority of religions. Indeed, as explained in Section I.B., above, other religions, including Judaism and the General Synod of the UCC, do not recognize that life begins at fertilization[14] and do not treat a fetus as the equivalent of human life. Nor do they believe that abortion is immoral in all circumstances except for where the life of the pregnant person is immediately threatened. Practicing Jews, Protestants, and Catholics who support abortion access base their position on the teachings of their faith regarding agency and conscience. They recognize that whether to terminate a pregnancy is a deeply personal decision that is based on a number of factors

[14] The Union for Reform Judaism, for example, has declared opposition to laws like S.B. 23, that "would undermine a woman's constitutional right to choose abortion by declaring a fetus to be a person with rights, subject to equal protection under the constitution" stating that "[s]uch a definition of the origin of human life is incompatible with the teachings of Judaism." *See* Union for Reform Judaism, *Free Choice in Abortion*, https://www.urj.org/what-we-believe/resolutions/free-choice-abortion (accessed July 25, 2022).

including marital status, age, mental health, physical health, and economic status. *Supra* at pp. 6-9. Based on their religious beliefs and teachings, it is for the pregnant person to have the autonomy to decide, based on their circumstances and their conscience, whether an abortion is morally appropriate. Thus, S.B. 23 is not based on a universally accepted proposition and violates the religious freedom of all Ohioans whose faith adopts a contrary view of conception and abortion.

That efforts such as S.B. 23 are rooted in a religious purpose is not a new or particularly disputed concept. Justice Stevens acknowledged the lack of a secular purpose for legislative declarations that life begins at fertilization in his concurring opinion in *Webster v. Reproductive Health Servs.*:

> Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.

492 U.S. 490, 566-67, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Stevens, J., concurring) (internal citations omitted).

Accordingly, S.B. 23 violates the first prong of Ohio's test for determining whether a statute violates Ohio's Establishment Clause.

2. <u>S.B. 23 Both Advances The Beliefs of Some Religions and Precludes Others.</u>

S.B. 23 imposes the minority religious belief that life begins at fertilization, allegedly necessitating a ban on almost all abortions after the six-week mark, on all Ohioans, including those whose faiths teach otherwise. S.B. 23 ignores the diversity of religious beliefs regarding

when life begins and demeans and criminalizes the provision of abortion care by physicians even when it is sought in accordance with a pregnant person's religious beliefs.

As explained in Sections I.B. and II.B.1, above, the concept that life begins at fertilization is not uniformly accepted in all religious faiths. Further, S.B. 23's two narrow exceptions that allow a pregnant person to terminate her pregnancy after six weeks do not incorporate several additional exceptions that are recognized as part of other faiths. *Supra* at pp. 6-12. By banning almost all abortions after six weeks, S.B. 23 makes it impossible for Ohioans who hold religious beliefs that differ from those embodied in S.B. 23 to legally practice or adhere to their religion.[15]

For all these reasons, S.B. 23 violates Ohio's establishment clause and is, therefore, unconstitutional.

CONCLUSION

For all of the foregoing reasons, *amici* support Relators' Petition and are in favor of the Court issuing an Order to those tasked with enforcement of S.B. 23 to abide by prior law and not enforce S.B. 23.

Respectfully submitted,

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[15] The excessive entanglements prong asks whether the statute being challenged creates an excessive entanglement with religion. To the extent this prong is relevant here, S.B. 23 excessively entangles government with religion.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Amicus Brief* was sent by electronic mail upon all counsel of record this 25th day of July, 2022.

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