IN THE SUPREME COURT OF OHIO

State ex rel. Preterm-Cleveland et al.	:	
	:	Case No. 2022-0803
Relators,	:	
	:	ORIIGNAL ACTION
v.	:	IN MANDAMUS
	:	
David Yost, Attorney General of Ohio, et al.	:	
	:	
Respondents.	:	
	:	

AMICUS CURIAE BRIEF OF THE ONE NATION UNDER GOD FOUNDATION

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AMICUS CURIAE BRIEF OF
THE ONE NATION UNDER GOD FOUNDATION

I. STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 2002, the One Nation Under God Foundation ("One Nation") is a 501 (c)(3) tax-exempt organization which promotes pastor education, voter education, and Christian voter registration and turnout. One Nation's success in influencing courts is extraordinary, having filed a series of amicus briefs with the U.S. Supreme Court in many leading cases, many of which the Court cited.

Since 2002, One Nation printed and distributed 501(c)(3) Christian voter guides at churches in Illinois, Arkansas, Oklahoma, North Carolina, and Ohio. It coordinated church registration efforts in 18 states. In 2016, One Nation focused its efforts in Illinois, North Carolina, Ohio, Florida, and Wisconsin, registering thousands of Christians to vote. It produced and placed nearly 9,000 radio ads with wonderful assistance from

David Barton of WallBuilders.

In 2022, our nation faces the most severe attacks in its history to ”cancel” our Christian values. One Nation recognizes the sanctity of life and religious liberty rights of all human beings. One Nation helps lead the fight to protect our rights, our families, and our Country.

II. STATEMENT OF THE CASE

In a gust of heavy irony, nearly every argument Relators offer for an Ohio Constitutional right to abortion actually mitigates in favor of a right to life for unborn children. Thus, Relators' arguments to enjoin enforcement of Senate Bill 23 of the 133rd Ohio General Assembly ("S.B. 23") known as the "Heartbeat Bill," must be denied.

The Ohio Constitution can, and does, expand upon U.S. Constitutional rights, allowing Ohio to recognize our children's right to life. Historically, Ohio recognized and protected right to life of unborn children. The text of the Ohio Constitution recognizes every person's the right to enjoy and defend life, without discriminating against the unborn. There is no conflict, as neither Ohio nor U.S. Constitutional law recognizes a "fundamental right" to abort unborn children. The former "viability standard" was unjustifiable as a matter of law and logic. This Brief proposes this Court should adopt a "life standard" instead.

For the reasons stated herein, this Court should formally recognize the fundamental right to life of unborn children.

III. ARGUMENT AND LAW

A. S.B. 23 IS PRESUMED CONSTITUTIONAL

Ohio law places a high burden on Relators to show that S.B. 23 is not constitutional. As an initial matter, "[i]n enacting a statute, it is presumed that . . . [c]ompliance with the constitutions of the state and of the United States is intended." R.C. 1.47(A). See also *State v. Carswell*, 114 Ohio St.3d 210, 2007–Ohio–3723, 871 N.E.2d 547, ¶ 6. Courts have a duty to liberally construe statutes "to save them from constitutional infirmities." *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 706 N.E.2d 323 (1999); *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd.*, 137 Ohio St.3d 257, 2013–Ohio–4654, 998 N.E.2d 1124, ¶ 13.

However, this presumption of constitutionality is rebuttable. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. The presumption of constitutionality is rebutted only when it appears beyond a reasonable doubt that the statute and the Constitution are clearly incompatible. *Id.*; *State v. Hayden*, 96 Ohio St.3d 211, 2002–Ohio–4169, 773 N.E.2d 502, ¶ 7. When incompatibility is clear, it is the duty of this court to declare the statute unconstitutional. *Cincinnati City School Dist. Bd. of Edn. v. Walter*, 158 Ohio St.2d 368, 383, 390 N.E.2d 813 (1979).

As demonstrated below, the Ohio Constitution and S.B. 23 are not only compatible, but S.B. 23 is a natural extension of the Ohio Constitution's history, text, and logic.

B. OHIO CONSTITUTION EXPANDS ON U.S. CONSTITUTIONAL RIGHTS

Relators' Memorandum lays out correctly the Ohio Constitution's authority to depart upward from the U.S. Constitution, providing additional protections for Ohioans. "[T]he Ohio Constitution is a document of independent force and this Court can (and routinely does) interpret the Ohio Constitution more broadly than its federal counterpart." Relators' Memorandum, at 34. Citing: *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). See also *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21. Id. For example, Relators say, "[t]he broad language of Ohio's Equal Protection and Benefit Clause reflects an intentional decision to offer citizens more protection against government overreach than contemporaneous constitutions of other states and is more protective of individual rights on its face than the federal Equal Protection Clause it predates." Id.

Despite Relators' correct analysis above, unfortunately, this Brief shows that Relators' argument goes off the rails when Relators attempt to cross the bridge from Ohio's Constitutional independence to an alleged right to abortion. To the contrary, the Ohio Constitution's text, history, and logic (especially Article I, Sections 1, 16, and 21) shine a guiding light to the path of unborn children's right to life. Thus, this Court should follow the light and grasp this opportunity to make the unborn's right to life explicitly recognized and stated.

C. HISTORICAL EVIDENCE SHOWS THE OHIO CONSTITUTION PROTECTS THE UNBORN'S RIGHT TO LIFE

Relators argue that language, history, and early understandings "all make clear that Ohio's expansive Equal Protection and Benefit Clause precludes S.B. 23's near total ban on abortion." Relators' Memorandum, at 35. Relators argue that Ohio's constitutional history "reinforces" Relators' textual arguments for an Ohio Constitutional right to an abortion. Relators' Memorandum, at 22.

Oddly, Relators' textual arguments lack reliance on the text (addressed below)—and Relators' historical arguments lack reliance on history.

> In discussing early American law pertaining to abortion, the Supreme Court stated that "most of [the] initial statutes dealt severely with abortion after quickening but were lenient with it before quickening."' *Roe v. Wade*, 410 U.S. 113, 139 (1974). The Court also emphasized the fact that the Connecticut Legislature did not amend its 1821 antiabortion statute to proscribe pre-quickening abortions until 1860. See *id.* at 138-39. These statements are quite misleading. At the end of 1868, twenty-seven of the thirty states with antiabortion statutes prohibited attempts to induce abortion before quickening.

James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985-1986). "At English common law, and in the American colonies, abortion after quickening was regarded as a serious crime." Thomas More Society as Amicus Curiae, p. 2, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ___ (2022) (laying out the history of abortion law in the United States and England).

This includes Ohio (including during Ohio's constitutional revisions of 1851). See:

Act of Feb. 27, 1834, §§ 1, 2, Ohio Laws, at 20-21 (1834), codified at Ohio Gen. Stat. ch. 35, §§ 111, 112, at 252 (1841), as amended by and Act of Apr. 13, 1867, Ohio Laws, at 135-36 (1867).

Relators argue correctly that "the 1851 Constitution was ultimately reordered to emphasize the importance of individual rights." Relators' Memorandum, at 23. Relators point out that the Ohio Bill of Rights was the final article in Ohio's 1802 Constitution, and that "the drafters of the 1851 Constitution moved the Bill of Rights to Article I, indicating that individual liberties stood at the forefront of Ohio's government." Id.

Then Relators Memorandum falls into the pit of logical fallacies, arguing that the Ohio Bill of Rights must protect a right to abortion because "The concept of liberty—which stood at the very core of the Bill of Rights and the Ohio Constitution itself—did not include a "carve out" excluding the right to abortion." Id. Here, Relators argue, not only that an Ohioan has a right to commit acts not listed in the Constitution, but that Ohioan's have a right to commit an act *because* it is not listed in the Constitution.

Relators then try to minimalize Ohio's statutory criminalization of abortion during the 19th century, arguing that abortion was prevalent and only a misdemeanor—thus Ohio's history demonstrates legislative recognition of the right to abortion. Imagine a defendant, arguing in court, "stop-sign running is prevalent; it's only a statutory misdemeanor; and the legislature carved out the right to run stop-signs by not including the right to run stop-signs in the Ohio Constitution. Thus, I have a *fundamental*

constitutional right to run stop signs."

To the contrary, by criminalizing abortion in 1834, 1841, and 1867, the several 19th century Ohio legislatures reaffirmed the view that any alleged "prevalence" of abortion was a societal malady to them.

Next, Relators endeavor another route to minimizing Ohio's criminalization of abortion in the 19th century. Throughout pages 24-25 of their brief, Relators look to legislative intent, arguing that the Ohio legislatures of the 19th century really, truly intended abortion restrictions as regulation of an unsafe medical procedure, which is now very safe (in fact, they argue it is safer than procreation itself). We would agree that abortion was an unsafe medical procedure for an unborn child and far more dangerous than being born. Nevertheless, even if Relators' argument is true, it hardly leads to the conclusion that these Ohio legislatures saw abortion as a right.

Despite Relators' many, highly unlikely assertions about the 19th century historical record, the historical record of the 133rd Ohio General Assembly is all that really matters. The 133rd General Assembly expressed its intent very clearly in S.B. 23—and it was not to regulate abortion as an unsafe medical procedure. The 133rd General Assembly passed legislation declaring the State's interest in protecting human life as beginning at the detection of a human heartbeat. The 133rd General Assembly commands as much right to make this determination, as any 19th century legislature had to make its determinations.

D. RELATORS ALSO FAIL IN THEIR ALLEGED TEXTUALIST APPROACH

1. Text of Due Course of Law Clause and Article I, Section 1

The text of the Ohio Constitution's Due Course of Law Clause provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Ohio Constitution, Article I, Section 16.

Ohio's Due Course of Law Clause is analogous to the Due Process Clause in the Fifth Amendment of the U.S. Constitution, which says, "No person shall . . . be deprived of life, liberty, or property, without due process of law." The text explicitly protects "life."

Also, Article I, Section 1 of the Ohio Constitution provides that "[a]ll men . . . have certain inalienable rights, among which are those of enjoying and defending life . . ."

Relators argue that "deprivation of reproductive autonomy falls squarely within the meaning of an injury done to one's person under the Ohio Constitution." Relators' Memorandum, at 17, quoting *Planned Parenthood Southwest Ohio I* at 10. Relators argued—in the beginning of that same paragraph—that Relators derive this from a textualist reading of Article I, Section 16. Unfortunately, Relators attempt to drop their alleged injury "squarely within" a circular hole.

First, let's examine the expression "reproductive autonomy" textually (even though nothing like this expression exists in the text of the Ohio or U.S. Constitutions). The word "reproductive" refers to the reproduction of human life by a human female.

How can reproduction then be autonomous when it necessarily, by definition, involves two people? We would more fairly label Relators' desire as "abortion autonomy."

Second, the Constitutional texts speak of protecting and defending innocent human life—and the idea that life cannot be deprived without due process. In the text, the people of Ohio adopted a duty to defend human life. The Court must read these clauses in harmony with other sections providing such principles as liberty, freedom, and independence. Thus, liberty halts at the point it deprives humans of life without due process.

Lastly, let's assume *arguendo* that "deprivation of reproductive autonomy" is an "injury." The Constitutions requires due process of law. Here, the Ohio General Assembly passed S.B. 23 pursuant to lawful process and it now undergoes this Court's process of review under law. To Relators' disappointment, the process may conclude that a child's right to life outweighs Relators' non sequitur right to "reproductive autonomy."

2. Text of Equal Protection Clauses

Article I, Section 2 of the Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit." The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

"Equal protection" is interpreted to mean that similarly situated persons must be treated similarly under the law. *State v. Lawson*, 10th Dist. No. 12AP-771, 2013-Ohio-2111,

¶ 18. "The comparison of only similarly situated entities is integral to an equal protection analysis." *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984, ¶ 22, 770 N.E.2d 65. "But the Equal Protection Clause 'does not require things which are different in fact . . . to be treated in law as though they were the same.' " *Id*., quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S. Ct. 879, 84 L. Ed. 1124 (1940). Thus, to state an equal protection claim, a party must claim that the government treated similarly situated persons differently. *State ex rel. Walgate v. Kasich*, 10th Dist. No. 16AP-737, 2017-Ohio-5528, ¶ 18, 93 N.E.3d 417.

Indisputably, a born human has a right to life and his/her mother has no right to choose to end a born-child's life. The State's interest in protecting unborn human life is recognized in *Roe v. Wade,* 410 U.S. 113, 139 (1974) and reaffirmed and expanded upon in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The State of Ohio must examine the process of human gestation and determine what stage of pregnancy the State's interest in protecting human life begins. *Dobbs, supra.* Ohio's determination must equally protect similarly situated persons.

Relators argue the Ohio Constitution requires the General Assembly to choose the lines drawn in R.C. 2919.201 (22 weeks into the pregnancy). This would allow abortion on one class of children and not another—drawing the line between children who are less than 22 weeks into pregnancy and children over 22 weeks.

If Ohio adopts Relators' theory, then the Equal Protections Clauses would require the State to show that those two classes are not similarly situated. Presumably, the State

would argue that the distinction between the two groups lies in viability, as that was the distinction made under *Roe* and *Casey*.

Roe and *Casey* resulted in the government treating two classes of persons differently. Before "viability" a child could be aborted. After "viability" the child could be protected from abortion by the State.

Through the "viability" analysis, *Casey* found that a child's rights are somehow a function of the child's lack of physical dependency on his/her mother's body for survival—to the point that the mother has a right to terminate the child's life, provided the child is dependent on the mother's body for survival. *Casey* failed grossly to explain this logic. Nothing in the *Casey* opinion even tries.

Perhaps the Court failed to explain this logic because the distinction—pre and post viability—is entirely arbitrary. Human children are born in the fetal stage and remain completely dependent on other humans for survival, throughout their infancy. Whether the child's dependency occurs inside the womb or outside, or that dependency takes one form or another, is completely irrelevant to the child's rights, "independent existence," or his/her "capability" to live a "meaningful life" as stated by *Casey*.

The Ohio General Assembly identified a far more logical distinction. S.B. 23 distinguishes between persons who do and do not manifest a key indication of human life—the heartbeat. With this distinction, the Court can find that the different treatment between the two classes of person—those with a heartbeat and those without—arises

from different situations. Born human and an unborn humans with a heartbeat are similarly situated—because both exhibit this fundamental marker of human life. Thus, unborn humans with a heartbeat are entitled to the equal protection of the law that is provided to born humans.

3. Text of Health Care Freedom Amendment

Relators then cite Article I, Sections 1 and 16 of the Ohio Constitution, known as the Health Care Freedom Amendment. Relators say, "The Amendment, enacted in 2011 with overwhelming two-to-one support from Ohio voters, '[p]reserve[es] [Ohioans] freedom to choose health care and health care coverage." Relators' Memorandum, at 21.

Relators argue that the effort of Ohioans to retain for themselves the right to choose their health insurance, means that Ohioans intended to strip healthcare rights away from unborn human children. One would be hard-pressed to argue that Ohioans had such intent when they voted for the Healthcare Freedom Amendment.

"Healthcare" is defined as "Collectively, the services provided . . . by medical professionals, to maintain and restore health." Black's Law Dictionary, 10th Edition. R.C. 1337.11 defines "Healthcare" as, "any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition or physical or mental health."

If abortion is "healthcare" then what malady does it treat? How does abortion maintain, diagnose, treat, and/or restore health for the child whose heart is beating?

Healthcare can only be defined as something protecting human life, not destroying it.

Lastly, Relators ask this Court to make a distinction between unborn and born humans as it pertains to the right to healthcare, pursuant to the Health Care Freedom Amendment. Relators suggest unborn humans are not entitled to healthcare, born humans are.

This distinction faces directly opposite the Health Care Freedom Amendment—contending that an amendment that forbids discrimination, actually mandates discrimination. Here, Relators' distinction is entirely arbitrary, capricious, and unconscionable. Also, it violates Due Process and Equal Protection Clauses in the Ohio and U.S. Constitutions.

E. THE SUBSTANTIVE DUE PROCESS APPROACH

1. There is no Fundamental Right to Abortion

Because Relators' position lacks historical and textual support, Relators must ask this Court to legislate a right to abortion under the principles of substantive due process, which protects "fundamental rights." This suggestion transports us back to pre-1992. *Casey* held that abortion is not a fundamental right, instead placing a "undue burden" test on abortion. *Casey*, at 837.

With a lack of support in the U.S. Constitutional law, the Relators argue the Ohio Constitution contains a "fundamental right" to an abortion, thus the Court should apply strict scrutiny to S.B. 23. However, there is no right to an abortion, of any kind, stated in

the text, material case law, or historical record of the Ohio Constitution. Despite a full page of citations from other states, Relators fail to offer a single, material citation. Thus, there is no legitimate argument that strict scrutiny applies, unless the Court chooses to legislate a fundamental right at this time.

The U.S. Supreme Court regards an asserted liberty interest as "fundamental" pursuant to substantive due process where the interest is "deeply rooted" in "the nation's history, legal traditions, and practices." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). For many years, this Court has exercised judicial restraint, looking to original intent, history, and the text of laws for guidance. Those factors cannot result in a fundamental right to abortion, as laid out in this Brief.

Next, the Court should not legislate a fundamental right to abortion. The Court encountered reasons to avoid legislating in cases such as *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750 and *League of Women Voters of Ohio v. Ohio Redistricting Comm*., Slip Opinion No. 2022-Ohio-1235. For this Court to find a right to an abortion without strong, historical, textual support, will cause an outcry throughout Ohio and erode confidence in the Court's political neutrality.

2. S.B. 23 Passes Intermediate Scrutiny

Relators argue, "S.B. 23 also discriminates against women by subordinating them to men based on antiquated notions and stereotypes regarding women's roles as child-bearers and caregivers." Relators' Memorandum, at 40.

It is somewhat awkward to argue to this Ohio Supreme Court panel—comprised of four female justices (a popularly-elected female majority) that women are in "a position of political powerlessness" in Ohio. Relators' Memorandum, at 38. S.B. 23 was sponsored by female Senator Kristina Roegner. It was co-sponsored by seven (7) female Representatives and two (2) female Senators. See: The Ohio Legislature, *GA 133, Senate Bill 23,* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-23 (accessed August 5, 2022). It was lobbied by many female-led organizations, such as the Ohio Right to Life Action Coalition. Also, as of at least 2020, a majority of Ohio voters are female: 48.3% of voters are male and 51.7% are female. See: Stacker, *8.9 million votes: See the demographics of Ohio's voting population*, November 3, 2021 (analyzing U.S. Census Bureau statistics and Pew Research Center Data).

Many women see that abortion autonomy is no benefit for women. Abortion can cause serious, long-term mental and physical anguish to women. For a detailed explanation, see, e.g., Brief of Amici Curiae 375 Women Injured by Second and Third Trimester Late Term Abortions and Melinda Thybault, Individually and Acting on Behalf of 336,214 Signers of the Moral Outcry Petition, in Support of Petitioners, *Dobbs, supra.*

Nonetheless, the U.S. Supreme Court applies "intermediate scrutiny" when a statute makes a distinction related to sex. *Craig v. Boren*, 429 U.S. 190 (1976). Under intermediate scrutiny, laws are constitutional where a sex-based distinction conforms to a real biological difference, rather than stereotypes or generalizations. Compare: *United*

States v. Virginia, 518 U.S. 515 (1996) to *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (finding a military college cannot justify excluding women based on generalizations about women, while a rape statute may conform to the ways in which men and women are not similarly situated).

Abortion law is not a female-only issue. First, Ohio law does not distinguish between males and females as it relates to the taking of the life of an unborn child. O.R.C. 2903.09 forbids "unlawful termination of another's pregnancy" regardless of sex. Secondly, the termination of a child's life profoundly affects a father's mental health—as much as it does a mother's. Lastly, abortion terminates the lives of both female and male babies.

Meanwhile, abortion procedures are only performed within the female body and thus abortion laws uniquely effect women. But even if intermediate scrutiny applies, S.B. 23 passes that test.

Any sex distinction in S.B. 23 arises not from legislative choice—but by human genetics. Because only females can be impregnated, laws affecting pregnancy and abortion will necessarily affect females uniquely. Certainly, nobody is arguing that Ohio should be devoid of laws pertaining to uniquely feminine health matters—or that any such law is necessarily and always a result of antiquated, oppressive views of women. For example, the 134th General Assembly passed Senate Bill 26, which eliminated Ohio sales taxes on menstrual hygiene products. Was this a misogynist Act because it only

affected females?

"Relators seek a writ of mandamus ordering Respondents to abide by the gestational age restriction in place in Ohio prior to S.B. 23—specifically, R.C. 2919.201, which restricts abortion beginning at 22 weeks LMP—and not enforce S.B. 23." Relators' Memorandum, at 9. Presumably, R.C. 2919.201 does not arise from legislators whose intent "discriminates against women by subordinating them to men based on antiquated notions and stereotypes regarding women's roles as child-bearers and caregivers." Relators' Memorandum, at 40. However, Relators' Memorandum fails to explain why S.B. 23 discriminates against women and R.C. 2919.201 does not.

Nonetheless, the sex distinctions in S.B. 23 exist only as a necessary function of a material, biological difference between males and females. It does nothing to relegate women to the lone role of childbearers. It merely makes a determination that the General Assembly must make—when the State's interest in protecting human life begins. The difference of opinion—between legislators who chose the heartbeat and those who prefer the 22 weeks in R.C. 2919.201—is not a function of those who are misogynist and those who are feminists.

F. WHERE DOES THE STATE'S INTEREST IN PROTECTING HUMAN LIFE BEGIN?

1. "Viability Standard" Was Unjustifiable Standard in Terms of Law and Logic

Relators ask this Court to wholly adopt the logic of *Roe* and *Casey*, which was

overruled by *Dobbs, supra.* However, even *Roe and Casey* mitigate in favor of finding a right to life in Ohio. The U.S. Supreme Court firmly established the State's interest in protecting unborn children in *Roe* itself. The Courts only expanded upon this state interest in subsequent cases, such as *Casey, supra*. At that point, it became necessary to define where that interest begins, as challenges arose to the government's work to protect that interest.

The *Roe* Court asserts that it chose not to define where human life begins. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe,* at 159.

Instead, of a life standard, the *Roe* Court chose a viability standard as the point where the government's interest in protecting life begins. The Court in *Roe* failed to fully explain its reasoning behind the viability standard, saying only, "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." *Roe,* at 163. The Court failed to provide any basis for this assertion.

The Court in *Casey* offered a similar explanation, saying viability is, "the time at

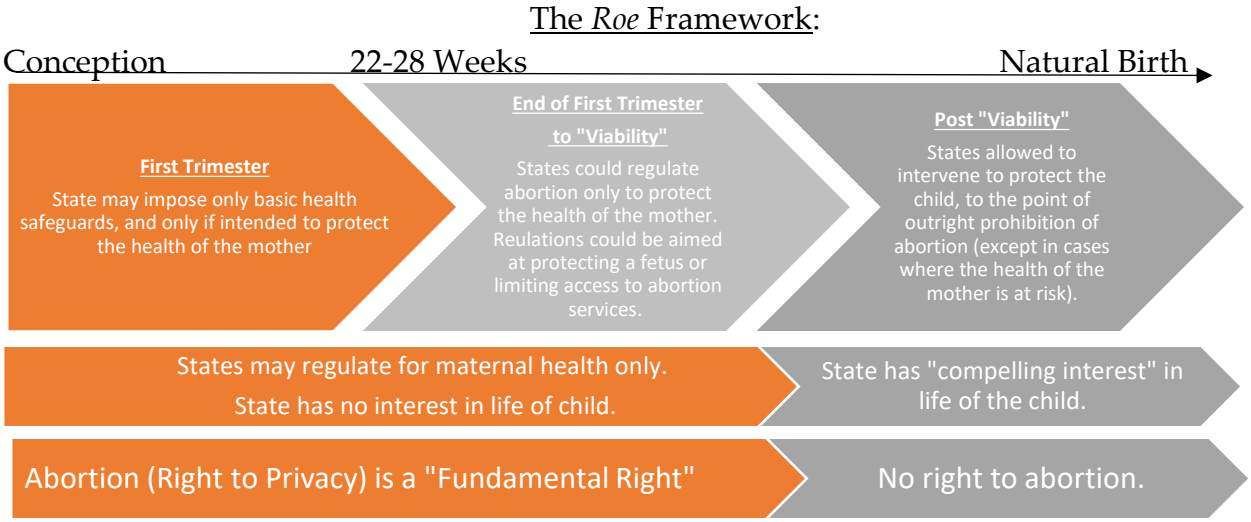
which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can, in reason and all fairness, be the object of state protection that now overrides the rights of the woman." *Casey*, at 870 (citing *Roe,* at 163).

The Courts in *Roe* and *Casey,* balanced—what the Court identified as—two competing interests. Without applying the established analytical rules, *Roe* established the precedent that expectant mothers have a "fundamental" constitutional right to privacy and that the right to privacy outweighs the State's interest in protecting the life of the child during the first trimester of gestation. However, the *Roe* Court also recognized that the state has an "important and legitimate interest" in protecting the health of the mother and "the potentiality of human life" inside of her. *Roe,* at 114.

The Court saw these two competing interests on a sliding scale, with the right to privacy being its strongest prior to "viability." Conversely, the states' interest in protecting life began after "viability."

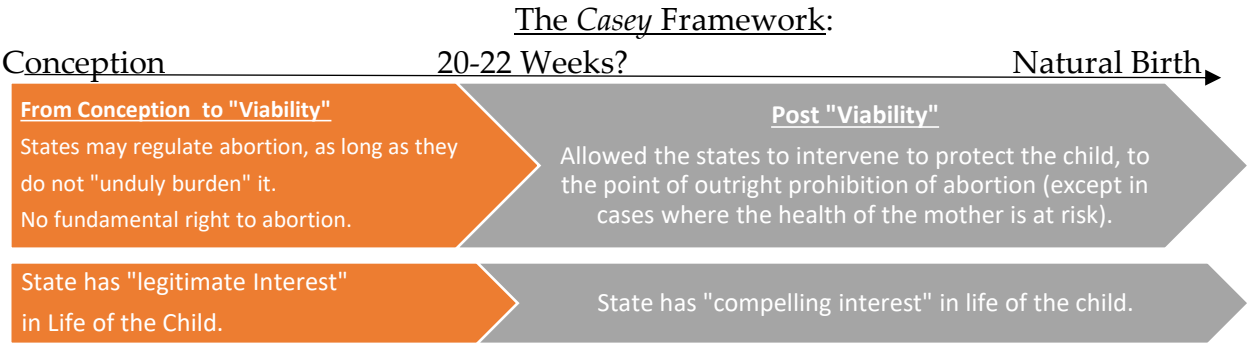
The first trimester allowed very little state intervention—only basic health safeguards, and only if intended to protect the health of the mother. First trimester safeguards for the child and efforts to dissuade abortion were not allowed under *Roe's* trimester system. The second period began at the end of the first trimester, to "viability." At viability, the state could only impose some state intervention. The third period, post viability, allowed the states to intervention to the point of outright prohibition of abortion

(except in cases where the health of the mother is at risk).



The trimester system was abandoned by the Court in *Casey*. The *Casey* Court chose to retain only the "essential holdings" of *Roe*: 1) Women have the right (although, not a fundamental right) to have an abortion prior to viability without "undue burdens" from the State, 2) the State can restrict the abortion procedure post viability, so long as the law contains exceptions for pregnancies which endanger the woman's life or health, and 3) the State has "legitimate interests" from the outset of the pregnancy in protecting the health of the woman and the life of the child.

Casey allowed states to: 1) regulate abortion prior to viability, and 2) regulate for the purpose of protecting the health of the child prior to viability. Essentially, after *Casey*, the states' interest in protecting the child existed throughout the pregnancy period—as opposed to *Roe's* approach of just slowly kicking in the state's interest at some indistinguishable point after viability.



Casey also eliminated the idea of abortion as a "fundamental" right. This distinction is key. Any regulations of rights deemed "fundamental" are almost never constitutional under the "strict scrutiny" standard they receive. So the *Casey* Court imposed a new "undue burden" standard, which is far easier for state restrictions to pass. Subsequently, over the following decades, numerous abortion restrictions passed constitutional muster that would have been unconstitutional under *Roe.*

We now understand the results of the expansive view taken in *Roe* and *Casey*. State legislatures across the country continuously enacted laws challenging the viability precedent, treating unborn children as human beings endowed with rights. See, e.g., National Council of State Legislatures (NCSL), *State Laws On Fetal Homicide And Penalty-Enhancement For Crimes Against Pregnant Women*, May 1, 2018, http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx (accessed August 5, 2022).

State governments increasingly monitor and dictate all kinds of private medical decisions, in all areas of medicine. Meanwhile, the federal courts were forced to

continuously reassert indefensible precedents based on *stare decisis* alone.

Finally, in 2022, the U.S. Supreme Court ruled that, "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division." *Dobbs, supra,* at 6.

Today, Relators ask that this Court wholly adopt the very analysis of *Roe* and *Casey* the U.S. Supreme Court treated so unfavorably in *Dobbs.*

2. A Better Standard: The Life Standard

S.B. 23, the so-called "Heartbeat Bill" is based on a workable and meaningful standard. Inanimate objects do not have rights—life is what gives humans rights. And it is entirely irrelevant whether that human is located in one place or another, or whether a human is dependent on others for survival in one way or another.

A human's heartbeat is an objective, easily detectable, biological marker of human life. The distinction between pre and post heartbeat is truly meaningful, as this is a key sign of life, and hence the endowment of human rights.

The Heartbeat Bill invites the Court to dispense with arbitrary and illogical analysis, and seriously engage the only question that matters: where does life begin? If it does so, it will find that signs of life (such as a heartbeat) are the only logical, biologically-based, intellectually-honest markers that it can consider.

G. CONCLUSION

For the reasons argued above, this Court should find that Ohio's Constitution protects unborn human life, at least at the point a heartbeat is detectable.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Brief in Support of Respondent was served on all counsel of record via the Court's electronic filing system and email this 8th day of August 2022.

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