

Case No. 2023-0946

Supreme Court of the State of Ohio

JENNIFER GIROUX, *et al.*,

Relators,

v.

COMMITTEE REPRESENTING THE PETITIONERS WITH RESPECT TO
THE INITIATIVE PETITION PROPOSING AN AMENDMENT TO
THE OHIO CONSTITUTION ENTITLED THE RIGHT TO REPRODUCTIVE FREEDOM
WITH PROTECTIONS FOR HEALTH AND SAFETY, *et al.*,

Respondents.

Original Action Under Article II, Section 1g of the Ohio Constitution

RELATORS' MERIT BRIEF

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INTRODUCTION

This case calls upon the Court to apply a simple, well-established, and fundamental principle: “[t]he function and duty of a court is to apply the law as written.” *State v. Beasley*, 14 Ohio St. 3d 74, 75, 471 N.E.2d 774 (1984). Stated otherwise, “[t]he duty of the court is not to legislate but to have the courage to interpret the law as written in spite of advocates to the contrary.” *Thompson v. Industrial Comm’n of Ohio*, 1 Ohio St. 3d 244, 255, 438 N.E.2d 1167 (1982)(Krupansky, J., dissenting).

The law this Court is now called upon to apply is clear and unequivocal: any statewide initiative petition proposing a constitutional amendment must include “the text of any existing statute...that would be amended or repealed if the proposed...constitutional amendment is adopted.” R.C. 3519.01(A). Equally clear and undisputed is the fact that the statewide initiative petition at issue herein did not identify or include the text of any existing statute whatsoever. Yet, the proposed constitutional amendment seeks to radically and fundamentally alter the whole subject-matter relating to reproductive rights (and abortion, in particular), including establishing a new and expansive definition on fetal viability, as well as establishing more liberal standards on abortion. In so doing, the proposed constitutional amendment will create irreconcilable conflicts or repugnancies with innumerable provisions of existing statute, resulting in such statutes being amended or repealed.

Because the statewide initiative petition at issue herein failed to comply with the law, *i.e.*, R.C. 3519.01(A), by including the text of any existing statute that would be amended or repealed if the proposed constitutional amendment is adopted, the petition failed to comply with all requirements of law and, accordingly, the petition must be declared to be invalid and the proposed constitutional amendment not placed on the ballot at the forthcoming general election.

STATEMENT OF FACTS

On July 5, 2023, the COMMITTEE REPRESENTING THE PETITIONERS filed an *Initiative Petition* with the Ohio Secretary of State, seeking to propose an amendment to the Ohio Constitution entitled as “The Right to Reproductive Freedom with Protections for Health and Safety Amendment”. *Verified Challenge* ¶31; *Petitioners’ Answer* ¶31; *SOS Answer* ¶5. Each part-petition forming the *Initiative Petition* consisted of a total of 10 pages. *Verified Challenge* ¶¶32, 33 & *Exhibit D*; *Petitioners’ Answer* ¶32 (“Exhibit D is a Part-Petition submitted to the Office of the Secretary of State”); *SOS Answer* ¶33 (admitting all part-petitions submitted to Secretary of State contained the same content as Exhibit D).

On the first page of the part-petitions were: (i) a heading with the appellation of “Initiative Petition” and the indication it was proposing a constitutional amendment; (ii) the “Title” of the proposed constitutional amendment; (iii) a “Summary” of the proposed constitutional amendment; (iv) the “Certification of Attorney General” indicating that the Summary was a fair and truthful statement of the proposed constitutional amendment; and (v) the “Committee to Represent the Petitioners” wherein five individuals, *i.e.*, the individual members of the COMMITTEE REPRESENTING THE PETITIONERS, were designated to represent the petitioners in all matter relating to the petition. *Verified Challenge, Exhibit D*. The second through eighth pages of each part-petition contained spaces for elector’s signatures, addresses, *etc.*, with each page containing a header with a “Notice”, containing a warning about potential prosecution for certain illegal actions relating to the signing of the part-petition. *Verified Challenge, Exhibit D*.

On the ninth page of each part-petition, the “Full Text of Proposed Amendment” was set forth. *Verified Challenge, Exhibit D*. In its entirety, this page read:

Be it Resolved by the People of the State of Ohio that Article I of the Ohio Constitution is amended to add the following Section:

Article I, Section 22. The Right to Reproductive Freedom with Protections for Health and Safety

A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:

1. contraception;
2. fertility treatment;
3. continuing one's own pregnancy;
4. miscarriage care; and
5. abortion.

B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:

1. An individual's voluntary exercise of this right or
2. A person or entity that assists an individual exercising this right,

unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.

However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.

C. As used in this Section:

1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
2. "State" includes any governmental entity and any political subdivision.

D. This Section is self-executing.

Verified Challenge, Exhibit D. And, finally, the last page of each part-petition contained the "Statement of Circulator", followed by an election-falsification warning. *Verified Challenge, Exhibit D.*

Noteworthy for purposes of this case, the COMMITTEE REPRESENTING THE PETITIONERS admits that "the Initiative Petition does not identify or contain the text of any existing statute." *Petitioners' Answer* ¶40. In particular, the COMMITTEE expressly admits

that: (i) “the Initiative Petition does not contain the text of any provisions of *The Human Rights and Heartbeat Protection Act*,” *Petitioners’ Answer* ¶54; (ii) “the Initiative Petition does not contain the text of R.C. 2919.12,” *Petitioners’ Answer* ¶60; and (iii) “the Initiative Petition does not contain the text of R.C. 2919.10,” *Petitioners’ Answer* ¶66.

Nonetheless, on July 25, 2023, FRANK LAROSE, as the Ohio Secretary of State, issued a *Certification Letter* to legal counsel for the COMMITTEE REPRESENTING THE PETITIONERS concerning the signature verification that was undertaken with respect to the *Initiative Petition*. *Verified Challenge* ¶¶35 & 36, and *Exhibit E*; *Petitioners’ Answer* ¶¶35 & 36; *SOS Answer* ¶¶35 & 36. After reviewing only the constitutional requirements relating to the number and distribution of signatures, Secretary LAROSE informed the COMMITTEE’s legal counsel that the *Initiative Petition* contained “a sufficient number of valid signatures and satisfied the requirements prescribed by Article II, Section 1a and 1g of the Ohio Constitution and Section 3519.16 of the Ohio Revised Code.” *Id.* As a result of that determination, Secretary LAROSE declared that, “*in the absence of judicial direction to the contrary*, I will direct the boards of elections to place the proposed amendment on the November 7, 2023 General Election ballot.” *Verified Challenge* ¶¶35-37, and *Exhibit E* (emphasis added); *Petitioners’ Answer* ¶¶35-37; *SOS Answer* ¶¶35-37.

Three days later, *i.e.*, on July 28, 2023, and invoking the original and exclusive jurisdiction of this Court, Relators JENNIFER GIROUX and THOMAS E. BRINKMAN, JR., registered voters in Hamilton County, commenced this action through the filing of a *Verified Challenge*, wherein they contest the legal validity of the *Initiative Petition* and, in turn, the placement on the ballot at the forthcoming general election the constitutional amendment being proposed therein. Generally speaking, the premise of the challenge is that the *Initiative Petition*

does not comply with the explicit legal requirement within R.C. 3519.01(A) which mandates that a statewide initiative petition “include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted,” and, as a result thereof, the *Initiative Petition* is invalid and the proposed constitutional amendment cannot be placed on the ballot at the forthcoming general election.

LAW AND ARGUMENT

PROPOSITION OF LAW No. 1:

The Ohio Supreme Court has original and exclusive jurisdiction over challenges to initiative petitions seeking to propose constitutional amendments.

Article II, Section 1g of the Ohio Constitution provides that “[t]he Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to [statewide] [initiative, supplementary, or referendum] petitions and signatures upon such petitions under this section.” Such language is “broad and unequivocal” in conferring upon this Court original and exclusive jurisdiction to consider, *inter alia*, all challenges to statewide initiative petitions. *See Ohio Manufacturers’ Ass’n v. Ohioans for Drug Price Relief Act*, 147 Ohio St. 3d 42, 59 N.E.3d 1274, 2016-Ohio-3038 ¶12.

PROPOSITION OF LAW No. 2:

Election laws are mandatory and strict compliance is required; substantial compliance with such laws is allowed only when a statute expressly allows so.

“[I]t is well-settled that ‘election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.’” *State ex rel. Maras v. LaRose*, 167 Ohio St. 3d 144, 189 N.E.3d 777, 2022-Ohio-866 ¶23 (quoting *State ex rel. Comm. for the Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elec.*, 96 Ohio St.3d 308, 774 N.E.2d 239, 2002-Ohio-4194 ¶49); accord *State ex rel.*

Husted v. Brunner, 123 Ohio St.3d 288, 915 N.E.2d 1215, 2009-Ohio-5327 ¶15 (“the general rule is that, unless there is language allowing substantial compliance, election statutes are mandatory and must be strictly complied with”).

With respect to the legal mandate within R.C. 3519.01(A) that a statewide initiative petition proposing a constitutional amendment “shall include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed...constitutional amendment is adopted,” the language is mandatory, *i.e.*, “shall include”, and does not allow for substantial compliance. As R.C. 3519.01(A) does not expressly permit substantial compliance, it requires strict compliance. *See State ex rel. Barletta v. Fersch*, 99 Ohio St. 3d 295, 791 N.E.2d 452, 2003-Ohio-3629 ¶17 (“R.C. 731.32 does not expressly permit substantial compliance, so it requires strict compliance”).

Furthermore, even if *arguendo* substantial compliance was all that was required with respect to the foregoing legal mandate in R.C. 3519.01(A) – whatever substantial compliance would even look like in this context – “[s]ubstantial compliance does not contemplate complete omission.” *State ex rel. Allen v. Lake Cty. Bd. of Elec.*, 170 Ohio St. 19, 20, 161 N.E.2d 896 (1959). But even the COMMITTEE REPRESENTING THE PETITIONERS admits that “the Initiative Petition does not identify or contain the text of any existing statute.” *Petitioners’ Answer* ¶40. Stated otherwise, the *Initiative Petition* does not strictly comply nor does it substantially comply with the legal mandate in R.C. 3519.01(A); the *Initiative Petition* simply failed to comply with the explicit legal requirement for a statewide initiative petition.

PROPOSITION OF LAW No. 3:

A statute is repealed or amended by implication by a constitutional amendment when the constitutional amendment purports to revise the whole subject-matter of the existing statutory provision and thereby evidences the fact that it is intended as a substitute for the former; although it contains no express words to that effect, it operates as a repeal of the former law.

PROPOSITION OF LAW No. 4:

A statute is repealed by implication by a constitutional amendment when the statute and constitutional provision, on the same subject, contain irreconcilable or incompatible provisions so that the constitutional provision, by its necessary operation, abrogates or repeals the statute.

“States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process.” *In re Protest of Brooks*, 155 Ohio App. 3d 370, 801 N.E.2d 503, 2003-Ohio-6348 ¶3 (3d Dist.)(quoting *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999)). “By ensuring integrity and reliability in the initiative petition process, the law facilitates the exercise of the initiative power by the people.” *Id.* And, thus, pursuant to its constitutional authority to pass laws to facilitate the statewide initiative petition process, see Ohio. Const., art. II, sec. 1g, the General Assembly enacted R.C. 3519.01(A).

As amended in 2006 through enactment of H.B. 3 by the 126th General Assembly, 151 *Ohio Laws* 5551, R.C. 3519.01(A) now imposes a requirement as to what must be included as part of a statewide initiative petition proposing either a law or constitutional amendment:

A petition shall include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted.

R.C. 3519.01(A). By requiring an initiative petition include the “the text of any existing statute or constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted,” R.C. 3519.01(A) ensures that the legal ramifications upon existing statutory law are presented to those considering whether to sign the initiative petition. Stated otherwise, in light of the foregoing requirement in R.C. 3519.01(A), those seeking to

propose a constitutional amendment through an initiative petition, *i.e.*, the COMMITTEE REPRESENTING PETITIONERS in the present case, were required to provide full and complete disclosure to those to whom the *Initiative Petition* was presented for possible signature.

With respect to the *Initiative Petition* at issue herein, the COMMITTEE undisputedly did not identify or provide the text within the *Initiative Petition* of any existing statute that will be amended or repealed if the proposed constitutional amendment is adopted. Simply stated, the *Initiative Petition* does not comply with the explicit legal mandate that it “include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed...constitutional amendment is adopted”, even though existing statutes will be amended or repealed if the proposed constitutional amendment is adopted.

While existing statutes may be amended or repealed by explicit enactment, the law also recognizes the concept of amendment or repeal by implication. While “[a]mendments and repeals by implication are not favored in the law,” *In re Estate of Friedman*, 154 Ohio St. 1, 10, 93 N.E.2d 273 (1950), the principle is still well-founded in law. In fact, this Court set forth the applicable standard as follows:

To determine whether a constitutional provision implicitly repeal[s] a statutory provision, this court considers whether there is a clear ‘repugnancy between the provisions’ and whether they are ‘so contrary to each other that they cannot be reconciled.’ If the General Assembly could have enacted the same law even after the adoption of the later constitutional language, then the law ‘must be held constitutional.’ ... If not, then the law ‘must be held unconstitutional and void.’”

Schwartz v. Cuyahoga Cty. Bd. of Revision, 143 Ohio St.3d 496, 39 N.E.3d 1223, 2015-Ohio-3431 ¶23 (quoting *State ex rel. Evans v. Dudley*, 1 Ohio St. 437, 441 (1853), and *State v. Medbery*, 7 Ohio St. 522, 528 (1857)). This Court also posited as follows:

a statute is in clear conflict with existing legislation upon the same subject-matter, effect must be given to the later act, even if the result is to repeal by implication the older statute. It is also a well-known rule of construction that where a statute

purports to revise the whole subject-matter of a former act and thereby evidences the fact that it is intended as a substitute for the former, although it contains no express words to that effect, it operates as a repeal of the former law.

Goff v. Gates, 87 Ohio St. 142, 149, 100 N.E. 329 (1912). Simply stated, “[i]f the acts may well subsist together, the prior act is not repealed.” *State ex rel. Drake v. Roosa*, 11 Ohio St. 16, 27 (1860). But “where two statutes, on the same subject, contain irreconcilably repugnant provisions, the later statute, by its necessary operation, abrogates the former.” *Taylor v. Taylor*, 25 Ohio St. 71, 76 (1874). And, thus, *a fortiori*, when a statute and a constitutional provision, on the same subject, contain irreconcilably repugnant provisions, it is the constitutional provision, by its necessary operation, that abrogates or repeals the statute (or, at a minimum, amends the statute).

With respect to the constitutional amendment proposed by the *Initiative Petition*, both standards for repeal (or amendment) by implication are met vis-à-vis existing laws, viz.: (i) there are irreconcilable conflicts or repugnancies between the two such that the two cannot co-exist; and (ii) the proposed constitutional amendment purports to revise the whole subject-matter concerning reproductive rights, including, explicitly, matters relating to abortion or continuing one’s pregnancy. As such, and consistent with the mandate of R.C. 3519.01(A), the text of any existing statute that will be amended or repealed if the proposed constitutional amendment is adopted was required to be included on the *Initiative Petition*.

Before undertaking the requisite analysis between existing statutes and the proposed constitutional amendment, the context in which the *Initiative Petition* arises must be recognized and appreciation. “When [courts] construe constitutional provisions, ‘the intent of the framers is controlling. If the meaning of a provision cannot be ascertained by its plain language, a court may look to the purpose of the provision to determine its meaning.’” *State v. Carswell*, 114 Ohio

St. 3d 210, 871 N.E.2d 547, 2007-Ohio-3723 ¶14 (quoting *State v. Jackson*, 102 Ohio St.3d 380, 811 N.E.2d 68, 2004-Ohio-3206 ¶14). The present effort behind the *Initiative Petition* is not being done in a vacuum. It clearly seeks “to revise the whole subject-matter” relating to reproductive rights (and, in particular, abortion) in light of the Supreme Court’s decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, ___, 142 S. Ct. 2228, 2258 (2022). The proposed constitutional amendment does not seek to clarify or elucidate vagueness in existing law but, instead, is unabashedly designed to create an entirely new legal framework under the extremely broad and undefined concept of making and carrying out one’s own reproductive decisions. Certainly, the constitutional amendment proposed by the *Initiative Petition* seeks to effectuate a wholesale replacement, *i.e.*, amendment or repeal, of existing statutory laws concerning abortion. See *Goff*, 87 Ohio St. at 149 (“where a statute purports to revise the whole subject-matter of a former act and thereby evidences the fact that it is intended as a substitute for the former, although it contains no express words to that effect, it operates as a repeal of the former law”). For that reason alone, the Court can and should find existing statutes relating to abortion would be amended or repealed by adoption of the proposed constitutional amendment and, pursuant to R.C. 3519.01(A), the text of such statutes was required to be included in the *Initiative Petition* and the failure to do so results in the invalidation of the *Initiative Petition*.

Nonetheless, even if consideration is given to specific, existing statutes vis-à-vis the constitutional amendment proposed by the *Initiative Petition*, it is readily apparent that certain statutes will become irreconcilable or incompatible with the proposed constitutional amendment. “In determining whether a statute and a constitutional provision are clearly incompatible, [this Court] use[s] the plain and ordinary meaning of the words in question and attempt[s] to reconcile the words of the statute with the terms of the constitution whenever possible.” *Carswell*, 114

Ohio St. 3d 210, 871 N.E.2d 547, 2007-Ohio-3723 ¶10. At least four statutory provisions will be amended or repealed if the constitutional amendment proposed by the *Initiative Petition* is adopted. Consideration of each *ad seriatim* will be undertaken, though, if this Court finds any one of these statutory provisions will be amended or repealed if the proposed constitutional amendment is adopted, then the invalidity of the *Initiative Petition* is established (as the *Initiative Petition* does not contain the text of any statutory provisions in direct violation of the mandate of R.C. 3519.01(A)).

In undertaking an assessment of whether an amendment or repeal by implication will arise with respect to these existing statutes, consideration will first be given as to the provision of existing law. With that foundation, an assessment will be undertaken of the proposed constitutional amendment and whether it will continue to allow the full effect of the existing statute or, instead, whether it clearly conflicts with the existing statute such that an irreconcilable difference arises such that the existing statute would be amended or repealed.

**STATUTES RELATING TO ABORTION
WHEN THERE EXISTS A DETECTABLE FETAL HEARTBEAT**

Enacted in 2019 as Sub. S.B. 23 by the 133rd General Assembly, *The Human Rights and Heartbeat Protection Act* imposes various restriction and regulations upon a “fetal heartbeat” being detected in an unborn child. As part of *The Human Rights and Heartbeat Protection Act*, R.C. 2919.195(A) provides that:

no person shall knowingly and purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected....

See R.C. 2919.19(A)(4)(defining “fetal heartbeat” to mean “cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac”). Notwithstanding

the foregoing, an abortion may still be performed even after detection of a fetal heartbeat if the abortion is necessary: (i) to prevent the death of the pregnant woman; or (ii) to prevent “a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.” R.C. 2919.195(B).¹ Criminal liability exists for performing or inducing an abortion after there exists a detectable fetal heartbeat, unless one of the exceptions applies. R.C. 2919.195(A). And as a compliment thereto, criminal liability also exists for those who knowingly and purposefully perform or induce an abortion before determining if there is a fetal heartbeat. R.C. 2919.193.

Thus, generally speaking, pursuant to existing R.C. 2919.195, an abortion is prohibited once a fetal heartbeat is detectable unless one of the enumerated exceptions apply. Even medical doctors who are proponents of abortion have testified that a fetal heartbeat “is generally detectible beginning at approximately six weeks, zero days [last menstrual period].” *Preterm SB 23 Federal Lawsuit, Verified Complaint* ¶¶3 & 32, at *RelEvid 006 & 013*;² see also *Day Affidavit* ¶5, at *RelEvid 026*.

¹ R.C. 2919.19(A)(12) cross-references R.C. 2919.16 for the applicable definition of “serious risk of the substantial and irreversible impairment of a major bodily function”. In turn, R.C. 2919.16(K) defines this phrase as “any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function. A medically diagnosed condition that constitutes a ‘serious risk of the substantial and irreversible impairment of a major bodily function’ includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman’s mental health.”

² Included as part of *Relators’ Evidence* is a certified copy of the *Verified Complaint* filed in the U.S. District Court for the Southern District of Ohio in the case styled *Preterm-Cleveland v. David Yost*, Case No. 1:19-CV-360 which involved a federal constitutional challenge to *The Human Rights and Heartbeat Protection Act*. Through their testimony given by verification of the *Verified Complaint* under penalty of perjury, medical doctors intimately involved the abortion industry, i.e., Dr. Sharon Liner with Planned Parenthood of Southwest Ohio and Dr. Martin Haskel of the Women’s Med Group Professional Corp., establish the approximate timing at which a fetal heartbeat is detectable, i.e., at approximately 6 weeks.

Yet, under the specific language of the constitutional amendment proposed by *Initiative Petition*, the temporal point as to when abortion could be prohibited (with broadly written exceptions) would become fetal viability (as explicitly defined in the proposed constitutional amendment). Fetal viability – regardless of whether the phrase is considered in a general medical perspective or as more broadly defined in the proposed constitutional amendment – is significantly later than the period associated with a detectable “fetal heartbeat” as presently used in R.C. 2919.195. See *Day Affidavit* ¶¶6 & 7, at *RelEvid 026- RelEvid 027*. Similarly, the medical doctors who are proponents of abortion have expressly confirmed this: “Six weeks [last menstrual period] is a pre-viability point in pregnancy.... Thus, [*The Human Rights and Heartbeat Protection Act*] prohibits abortion well before viability.” *Pre-Term Federal Lawsuit, Verified Complaint* ¶34, at *RelEvid 013*.

Thus, should the constitutional amendment proposed by the *Initiative Petition* be adopted, the presently existing law (R.C. 2919.195) that prohibits abortion after approximately six weeks will no longer be effective; instead, under the proposed constitutional amendment, any effort to potentially prohibit abortion would not occur until “fetal viability” which is indisputably significantly longer than the six weeks under current law.

* * * * *

As set forth above, the General Assembly could not legally and consistent with the Constitution enact the presently-existing R.C. 2919.193 and/or 2919.195 if the constitutional amendment proposed by the *Initiative Petition* is adopted. See *Schwartz*, 143 Ohio St.3d 496, 39 N.E.3d 1223, 2015-Ohio-3431 ¶23 (if the General Assembly could not have enacted the same law even after the adoption of the later constitutional language, “then the law ‘must be held unconstitutional and void’”). As such, R.C. 2919.193 and 2919.195 would clearly be amended

or repealed by the proposed amendment and, thus, the text of R.C. 2919.193 and/or 2919.195 were required to have been included in the *Initiative Petition* pursuant to the mandate of R.C. 3519.01(A).

STATUTES RELATING TO ABORTION FOR PREGNANT, UNEMANCIPATED MINORS

In *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1989), the U.S. Supreme Court summarized the parental notification provisions contained within R.C. 2919.12 and related statutes concerning unemancipated, unmarried minors seeking an abortion:

The Ohio Legislature, in November 1985, enacted Amended Substitute House Bill 319 (H. B. 319), which amended Ohio Rev. Code Ann. § 2919.12 (1987), and created Ohio Rev. Code Ann. §§ 2151.85 and 2505.073 (Supp. 1988). Section 2919.12(B), the cornerstone of this legislation, makes it a criminal offense, except in four specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age....

The first and second circumstances in which a physician may perform an abortion relate to parental notice and consent. First, a physician may perform an abortion if he provides “at least twenty-four hours actual notice, in person or by telephone,” to one of the woman’s parents (or her guardian or custodian) of his intention to perform the abortion. The physician, as an alternative, may notify a minor’s adult brother, sister, stepparent, or grand-parent, if the minor and the other relative each file an affidavit in the juvenile court stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents. If the physician cannot give the notice “after a reasonable effort,” he may perform the abortion after “at least forty-eight hours constructive notice” by both ordinary and certified mail. Second, a physician may perform an abortion on the minor if one of her parents (or her guardian or custodian) has consented to the abortion in writing.

The third and fourth circumstances depend on a judicial procedure that allows a minor to bypass the notice and consent provisions just described. The statute allows a physician to perform an abortion without notifying one of the minor’s parents or receiving the parent’s consent if a juvenile court issues an order authorizing the minor to consent [pursuant to R.C. 2151.85], or if a juvenile court or court of appeals, by its inaction, provides constructive authorization for the minor to consent....

Id. at 507-08.³

Thus, under the present statutory scheme in R.C. 2919.12, certain conditions precedent and some potential, inherent delays are naturally imposed upon an unemancipated, unmarried minor who desires an abortion. Firstly, some form of consent must be obtained for the abortion, either from an adult family member or by authority issued through the judicial bypass process within R.C. 2151.85. Secondly, absent written consent from the minor's parents, guardian, or custodian for the abortion, there is a period of delay inherent in the other processes for consent – from 24 hours of “actual notice”, *see* R.C. 2919.12(B)(1)(a)(i), to upwards of five business days through the judicial bypass process, *see* R.C. 2919.12(B)(1)(a)(iii) & R.C. 2151.85(B)(1).

Yet, should the constitutional amendment proposed by the *Initiative Petition* be adopted, the entire structure and process relating to abortions for unemancipated, unmarried minors would completely dissipate, *i.e.*, be repealed. The newly granted constitutional right “to make and carry out one’s own reproductive decisions” is afforded to “every individual” without limitation to age. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (“[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights”). And because any governmental interest in requiring parental notification does not relate “to advance[ing] the individual’s health”, *see Ayotte v. Planned Parenthood*, 546 U.S. 320, 326 (2005)(governmental interest supporting parental consent laws is welfare of children “whose immaturity, inexperience, and lack of judgment may sometimes

³ In 1995, the General Assembly amended R.C. 2919.12. *See* 146 *Ohio Laws* 7136, 7317 - 7320 (1995). However, the only change to R.C. 2919.12 made by that amendment was to division (D) which addresses the level of criminal liability. The 1995 amendment made no changes to the substantive provisions of R.C. 2919.12 and, thus, the summary set forth by the U.S. Supreme Court is still accurate.

impair their ability to exercise their rights wisely” (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444-445 (1990)(opinion of Stevens, J.)), the prohibition in Division B of the proposed constitutional amendment would preclude statutes such as R.C. 2919.12 and/or R.C. 2151.85, as such statutes would, directly or indirectly, burden, prohibit, interfere with, *etc.*, the newly-established constitutional right of minors “to make and carry out one’s own reproductive decisions” and, in particular, decisions relating to continuing one’s pregnancy or procuring an abortion. Thus, if the proposed constitutional amendment is adopted, R.C. 2919.12 and/or R.C. 2151.85 would become irreconcilable or incompatible with the amendment and, accordingly, the statutes must give way, *i.e.*, are amended or repealed.

* * * * *

As set forth above, the General Assembly could not legally and consistent with the Constitution enact the presently-existing R.C. 2919.12 and/or R.C. 2151.85 if the constitutional amendment proposed by the *Initiative Petition* is adopted. See *Schwartz*, 143 Ohio St.3d 496, 39 N.E.3d 1223, 2015-Ohio-3431 ¶23 (if the General Assembly could not have enacted the same law even after the adoption of the later constitutional language, “then the law ‘must be held unconstitutional and void’”). As such, R.C. 2919.12 and R.C. 2151.85 would clearly be amended or repealed by the proposed amendment and, thus, the text of R.C. 2919.12 and R.C. 2151.85 were required to have been included in the *Initiative Petition* pursuant to the mandate of R.C. 3519.01(A).

**STATUTE RELATING TO ABORTION OF
AN UNBORN CHILD WITH DOWN SYNDROME**

Enacted in 2017 as H.B. 214 by the 132nd General Assembly, R.C. 2919.10 addresses situations arising when an unborn child has or is believed to have Down syndrome. The substantive provision of the statute provides that:

No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any of the following:

- (1) A test result indicating Down syndrome in an unborn child;
- (2) A prenatal diagnosis of Down syndrome in an unborn child;
- (3) Any other reason to believe that an unborn child has Down syndrome.

R.C. 2919.10(B).

“In plain terms, [R.C. 2919.10] prohibits a doctor from performing an abortion if that doctor knows that the woman’s reason for having the abortion is that she does not want a child with Down syndrome.” *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 517 (6th Cir. 2021)(*en banc*). But “[e]ven under the full force of [R.C. 2919.10], a woman in Ohio who does not want a child with Down syndrome may lawfully obtain an abortion solely for that reason. [R.C. 2919.10] does not prohibit her from choosing or obtaining an abortion for that, or any other, reason. It bars a doctor from aborting a pregnancy when that doctor knows the woman’s specific reason and that her reason is: the forthcoming child will have Down syndrome and, because of that, she does not want it.” *Id.* at 521-22. Thus, simply stated, R.C. 2919.10 prohibits a doctor from performing an abortion at any stage of a pregnancy if he or she knows the reason(s) the woman is seeking an abortion and the reasons include the fact that the unborn child has or is believed to have Down syndrome.

With that overview as to the existing provisions of R.C. 2919.10, the next, and dispositive question, is whether that statute and the proposed constitutional amendment are compatible or whether they are in such conflict so as to be irreconcilable with each other. In undertaking this analysis, two aspects of R.C. 2919.10 must be considered vis-à-vis the impact of the proposed constitutional amendment: (i) the limitation placed on the physician who would perform or induce or attempt to perform or induce an abortion on a pregnant woman; and (ii) the effect of R.C. 2919.10 so as to deny a pregnant woman the doctor of her choosing when, and only when, that doctor knows the reason for the abortion.

- 1. Because R.C. 2919.10 presently imposes a direct limitation on a physician, not the woman, the provisions of the proposed constitutional amendment relating to “a person or entity that assists an individual” must be considered and, in so doing, the proposed constitutional amendment would repeal the present limitation imposed upon a physician by R.C. 2919.10.**

Division B of the proposed amendment declares that “[t]he State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against...a person or entity that assists an individual exercising [such] right, unless the State demonstrates that it is using the least restrictive means to advance the individual’s health in accordance with widely accepted and evidence-based standards of care.” Thus, under the proposed amendment, restrictions upon a physician performing an abortion may only be imposed if it “advances the [pregnant woman’s] health” and, then, only in the “least restrictive means to advance” such health.

But, as the Sixth Circuit recognized, the purpose and interest of R.C. 2919.10 do not relate to, let alone advance, the interest of the pregnant woman’s health:

“Ohio [has] assert[ed] that [R.C. 2919.10] furthers three valid and legitimate interests by protecting: (1) the Down syndrome community from the practice of Down-syndrome-selective abortions and the stigma associated with it; (2) pregnant women and their families from coercion by doctors who advocate the abortion of Down-syndrome-afflicted fetuses; and (3) the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in Down-syndrome-selective abortions.”

Preterm-Cleveland v. McCloud, 994 F.3d 512, 525 (6th Cir. 2021)(*en banc*).

Thus, the State’s interest of prohibiting a physician from performing an abortion when he or she knows the reason relates to the unborn child having or suspected of having Down syndrome is not tied or related, directly or indirectly, to the pregnant woman’s health, let alone advancing it in the least restrictive means. Stated otherwise, the basis and justification for the restriction contained within R.C 2919.10 will not meet the standard set forth in Division B of the proposed constitutional amendment, *i.e.*, “to advance the [pregnant woman’s] health” and, then, only in the “least restrictive means to advance” such health.

Additionally, as recognized by Dr. Justin Lappen, an abortionist associated with Preterm-Cleveland, “there is no exception [in R.C 2919.10] allowing an abortion to proceed when it is necessary to preserve the life or health of the woman, if Down syndrome diagnosis is also a reason for terminating the pregnancy.” *Pre-Term HB 214 Federal Lawsuit, Declaration of Justin Lappen* ¶43, at *RelEvid 038*.⁴ And, Dr. Lappen then declare unequivocally that, when R.C. 2919.10 went into effect, *see* note 4, *supra*, then “[he] will be unable to provide an abortion necessary to preserve [his] patient’s health if fetal Down syndrome is also a reason for her abortion.” *Id.* Yet, as the proposed constitutional amendment in the *Initiative Petition* clearly indicates, such an impediment disappears because, in the express language of the proposal, “in no case may such an abortion be prohibited if in the professional judgment of the pregnant

⁴ Included as part of *Relators’ Evidence* is a certified copy of the *Lappen Declaration* filed in the U.S. District Court for the Southern District of Ohio in the case styled *Preterm-Cleveland v. Lance Himes*, Case No. 1:18-CV-109 which involved a federal constitutional challenge to H.B. 214, *i.e.*, R.C. 2919.10. Through his testimony given under penalty of perjury, Dr. Lappen addressed the restriction that would result upon him due to R.C. 2919.10. The subject lawsuit was brought as a pre-enforcement challenge to R.C. 2919.10. Ultimately, in *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 517 (6th Cir. 2021)(*en banc*), the Sixth Circuit upheld its constitutionality and, thus, R.C. 2919.10 went into effect.

patient's treating physician it is necessary to protect the pregnant patient's life or health." Clearly, the requirements in the existing statute, *i.e.*, R.C. 2919.10, cannot survive if the proposed constitutional amendment is adopted.

Simply stated, if the proposed amendment is adopted, R.C. 2919.10 cannot withstand constitutional muster under the proposed amendment. Accordingly, R.C. 2919.10 will be amended or repealed by the proposed amendment and, thus, the text of R.C. 2919.10 should have been included in the *Initiative Petition* pursuant to the mandate of R.C. 3519.01(A).

2. **Because "the effect of [R.C. 2919.10] on [the pregnant] woman is to deny her the doctor of her choosing when, and only when, that doctor of her choosing is a doctor who knows that her reason for the abortion is because she does not want a child with Down syndrome," *Preterm-Cleveland*, 994 F.3d at 522, the proposed constitutional amendment would remove such limitation upon the pregnant woman's ability to choose her doctor.**

The Sixth Circuit recognized that, even though R.C. 2919.10 is not directed at "a woman's ability to obtain an abortion nor the method of abortion," *Preterm-Cleveland*, 994 F.3d at 523, the statute does operate to burden, interfere with, or discriminate against a pregnant woman's exercise of her decision relating to continuing her pregnancy or obtaining an abortion.

R.C. 2919.10 "is relevant to any woman who knows that her fetus likely has Down syndrome, wants to abort the pregnancy because she does not want that child with Down syndrome, and wants the abortion performed by a doctor who knows that is her reason for having the abortion." *Preterm-Cleveland*, 994 F.3d at 535. Thus, from the perspective of the woman seeking an abortion, R.C. 2919.10 presently operates "to deny [the pregnant woman] the doctor of her choosing when, and only when, that doctor of her choosing is a doctor who knows that her reason for the abortion is because she does not want a child with Down syndrome." *Preterm-Cleveland*, 994 F.3d at 522.

But Division B of the proposed amendment declares that “[t]he State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against...an individual’s voluntary exercise of [the] right” “to make and carry out one’s own reproductive decisions, including ...decisions on...continuing one’s own pregnancy...and abortion.” Through such broad language (which prohibits direct or indirect burdens, prohibitions, interference, *etc.*, on the exercise of a the newly-created right), as well as the indefinite scope of “mak[ing] and carry[ing] out one’s own reproductive decisions” (which would include the physician of one’s own choice in any aspect thereof), the proposed constitutional amendment within the *Initiative Petition* directly implicates the current restriction or prohibition as described by the Sixth Circuit, *i.e.*, the proposed constitutional amendment would remove any impediment to a pregnant woman having the doctor of her choosing by which she would exercise the new right created in Division A of the proposed constitutional amendment.

As noted above, the current restriction or prohibition in R.C. 2919.10 on the doctor of a pregnant woman’s choosing is not tied or related, directly or indirectly, to the pregnant woman’s health, let alone advancing it in the least restrictive means. *See Preterm-Cleveland*, 994 F.3d at 525. And because R.C. 2919.10 is not tied to advancing the pregnant woman’s health, Division B of the proposed amendment would preclude any direct or indirect burden, prohibition, interference with, *etc.* upon a pregnant woman having the doctor of her choosing to perform an abortion, including the situation when the doctor knows that the woman’s reason for having the abortion is that she does not want a child with Down syndrome. Thus, if the proposed constitutional amendment is adopted, R.C. 2919.10 would become irreconcilable or incompatible with the amendment and, accordingly, the statute must give way, *i.e.*, is repealed.

* * * * *

As set forth above, the General Assembly could not legally and consistent with the Constitution enact the presently-existing R.C. 2919.10 if the constitutional amendment proposed by the *Initiative Petition* is adopted. See *Schwartz*, 143 Ohio St.3d 496, 39 N.E.3d 1223, 2015-Ohio-3431 ¶23 (if the General Assembly could not have enacted the same law even after the adoption of the later constitutional language, “then the law ‘must be held unconstitutional and void’”). As such, R.C. 2919.10 would clearly be amended or repealed by the proposed amendment and, thus, the text of R.C. 2919.10 was required to have been included in the *Initiative Petition* pursuant to the mandate of R.C. 3519.01(A).

STATUTES RELATING TO ABORTION AFTER “VIABILITY”

Certain existing statutes specifically address post-viability abortions. See R.C. 2919.16 to 2919.18. Most noteworthy is the current statutory provision relating to termination of a pregnancy after viability. As presently existing, R.C. 2919.17(A) provides that:

No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman when the unborn child is viable.

And there are two exceptions to this prohibition:

that the abortion was performed or induced or attempted to be performed or induced by a physician and that the physician determined, in the physician’s good faith medical judgment, based on the facts known to the physician at that time, that either of the following applied:

- (a) The unborn child was not viable.
- (b) The abortion was necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

R.C. 2919.17(A)

Foundational to the foregoing statutory provision relating to abortions after viability, is the applicable statutory definition of “viable” which is currently defined as meaning:

the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman’s pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.

R.C. 2919.16(M). Yet, should the constitutional amendment proposed by the *Initiative Petition* be adopted, there would be significant and material changes to the foregoing statutes, *i.e.*, the existing statute defining “viable” and the associated statutes relating to post-viability abortions will, at a minimum, be amended.

While it does declare that “abortion may be prohibited after fetal viability,” the proposed amendment, however, provides a new and more-expansive definition of “fetal viability” and a more liberal standard as to when an abortion may be performed after fetal viability (based upon the new definition). Both this definition and the new standard, at a minimum, substantively changes, *i.e.*, amends or repeals, existing statute relating to post-viability abortions, *i.e.*, R.C. 2919.17.

Consider a comparison of the existing statutory definition and the definition that will applicable to establish viability in the context of post-viability abortions:

Existing Statute (R.C. 2919.16(M)) “viable”	Proposed Constitutional Amendment (Division C) “fetal viability”
“the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman’s pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a <u>realistic possibility of the maintaining and nourishing of a life</u> outside of the womb <u>with or without temporary artificial life-sustaining support</u> .”	the point in a pregnancy when, in the professional judgment of the pregnant patient’s treating physician, the fetus has <u>a significant likelihood of survival</u> outside the uterus <u>with reasonable measures</u> . This is determined on a case-by-case basis.

Thus, while existing statute pegs fetus viability to a “realistic possibility” of the life continuing outside of the womb, the proposed constitutional amendment raises the standard to a more stringent threshold of “significant likelihood” before viability is determined to exist.

Additionally, while the existing statute allows, in two narrow circumstances, for an abortion even after the unborn child is viable (as presently defined in statute), the proposed constitutional amendment broadly expands the circumstances under which a post-viability abortion may be performed. While the proposed constitutional amendment prohibits any restriction upon abortion if, in the opinion of the treating physician, the abortion is necessary to protect the life of the woman (which is akin to the “preventing the death of the pregnant woman” under existing statute), the proposed constitutional amendment does not similarly limit the second exception found presently in R.C. 2919.17(A).

Under the proposed constitutional amendment, a post-viability abortion may be conducted (after taking into account the change wrought by the new definition of “fetal viability”) if, in the sole opinion of the treating physician, the abortion is necessary to protect the pregnant woman’s “life or health”. But the proposed constitutional amendment imposes no restrictions on the nature of or scope of the woman’s “health” that need be implicated. Whereas R.C. 2919.16(K) clearly excludes “the woman’s mental health” from the exception within R.C. 2919.17(A), those doctors who actually provide abortions have clearly testified that they justify abortions based upon a pregnant woman’s mental and emotional health. *See Preterm SB 23 Federal Lawsuit, Verified Complaint ¶¶49 &53, at RelEvid 015 & RelEvid 016* (“[i]f a woman is forced to continue a pregnancy against her will, it can pose a risk to her physical, mental, and emotional health”). Simply stated, existing statute precludes consideration of a woman’s mental health on whether an exception exists to allow for a post-viability abortion; on

the other hand, the proposed constitutional amendment in the *Initiative Petition* would negate existing law and allow any “health” issue, including mental or emotional health, to provide justification for an abortion even after viability.

* * * * *

As set forth above, the General Assembly could not legally and consistent with the Constitution enact the presently-existing R.C. 2919.17 (or the associated definitions in R.C. 2919.16) if the constitutional amendment proposed by the *Initiative Petition* is adopted. See *Schwartz*, 143 Ohio St.3d 496, 39 N.E.3d 1223, 2015-Ohio-3431 ¶23 (if the General Assembly could not have enacted the same law even after the adoption of the later constitutional language, “then the law ‘must be held unconstitutional and void’”). As such, R.C. 2919.17 and R.C. 2919.16 would clearly be amended or repealed by the proposed amendment and, thus, the text of R.C. 2919.17 and R.C. 2919.16 were required to have been included in the *Initiative Petition* pursuant to the mandate of R.C. 3519.01(A).

PROPOSITION OF LAW No. 5:

When state law mandates specific matters be included as part of an initiative petition, the failure to include such matters within the petition results in the invalidation of the petition and preclusion of the issue being placed on the ballot.

“To be considered valid, a petition must conform to the requirements of R.C. 3519.01 *et seq.*” *Brooks*, 155 Ohio App. 3d 370, 801 N.E.2d 503, 2003-Ohio-6348 ¶3; *accord State ex rel. Van Aken v. Duffy*, 176 Ohio St. 105, 107, 198 N.E.2d 76 (1964)(in order for a petition to be valid, the form and the content of the petition “must comply with the requirements of [] statute”). And, with respect to statewide initiative petitions, R.C. 3519.01(A) sets forth an explicit requirement as to what must be included as part of such petition: “[an] [initiative] petition [proposing a law or constitutional amendment] shall include the text of any existing statute or

constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted.” As developed above, the *Initiative Petition* failed to comply with such statutory mandate in multiple instances. When when state law mandates specific matters be included as part of a petition, the failure to include such matters within the petition results in its invalidation and preclusion of the issue or candidate from being placed on the ballot.

In *State ex rel. Abrams v. Bachrach*, 175 Ohio St. 257, 193 N.E.2d 517 (1963), this Court addressed the effect of the failure of an initiative petition to include the correct circulator statement mandated by state law. As posited by this Court, “[t]he dispositive question in [the] case [was] whether the failure to include the statement that the signers of an initiative petition ‘signed such petition with knowledge of the contents thereof,’ in the affidavit of the circulator of the petition, as provided for in Section 731.31, Revised Code, invalidates the petition.” *Id.* at 258. Ultimately, this Court concluded that such failure did result in the petition being deemed invalid and, thus, the matter was not placed on the ballot. *Id.* at 261; see *Van Aken v. Duffy*, 176 Ohio St. at 107-08 (candidate not entitled to have name on ballot when “[s]ince the relator’s petition did not comply with the requirements of the statute”).

In *State ex rel. Wilson v. Hisrich*, 69 Ohio St. 3d 13, 630 N.E.2d 319 (1994), a candidate filed one part-petition that contained a declaration of candidacy and had attached to it three additional part-petitions that contained only signatures, but which did not contain the declaration of candidacy on those additional part-petitions. *Id.* at 15. Because state law mandated that the signed declaration of candidacy “shall be copied on each other separate petition paper,” this Court concluded that the board of elections properly rejected or invalidated those part-petitions for the failure to contain information mandated by state law.

In yet another case that involved the omission of certain matters from a petition, this Court considered, in *State ex rel. Finkbeiner v. Lucas Cty. Bd. of Elec.*, 122 Ohio St.3d 462, 2009-Ohio-3657, the ramifications of a mayoral recall petition that failed to contain the election-falsification statement mandated by R.C. 3501.38(J). Recognizing that the language of the statute was “phrased in mandatory language and requires strict compliance,” *id.* ¶28, the failure of the recall petition to contain the statutory language for the election-falsification statement was fatal to the validity of the petition and, thus, precluded the placement of the recall question on the ballot. *Id.* ¶¶1 & 39-40.

Even though R.C. 3519.01(A) mandates any statewide initiative petition contains the text of any existing statute that would be repealed if the proposed constitutional amendment is adopted, the *Initiative Petition* in this case clearly failed to do so. With the *Initiative Petition* failing to comply – either strictly or substantially – with the pertinent mandate of state law concerning the content of statewide initiative petition, the Court must find the *Initiative Petition* to be invalid (for the failure to include content mandated by law) and, accordingly, preclude the placement of the constitutional amendment proposed therein on the ballot.

CONCLUSION

Based upon the foregoing, the *Initiative Petition* failed to comply with the legal mandate as set forth in R.C. 3519.01(A). Accordingly, the *Initiative Petition* is invalid and this Court should issue an order to that effect and, due to such invalidity, preclude the placement on the ballot at the forthcoming general election the constitutional amendment proposed by the *Initiative Petition*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing will be served upon the following via e-mail on the 1st day of August 2023:

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APPENDIX

R.C. 3519.01(A)

R.C. 2919.10

R.C. 2919.12

R.C. 2919.193

R.C. 2919.195

R.C. 2919.16

R.C. 2919.17

R.C. 3519.01(A):

(A) Only one proposal of law or constitutional amendment to be proposed by initiative petition shall be contained in an initiative petition to enable the voters to vote on that proposal separately. A petition shall include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted.

Whoever seeks to propose a law or constitutional amendment by initiative petition shall, by a written petition signed by one thousand qualified electors, submit the proposed law or constitutional amendment and a summary of it to the attorney general for examination. Within ten days after the receipt of the written petition and the summary of it, the attorney general shall conduct an examination of the summary. If, in the opinion of the attorney general, the summary is a fair and truthful statement of the proposed law or constitutional amendment, the attorney general shall so certify and then forward the submitted petition to the Ohio ballot board for its approval under division (A) of section 3505.062 of the Revised Code. If the Ohio ballot board returns the submitted petition to the attorney general with its certification as described in that division, the attorney general shall then file with the secretary of state a verified copy of the proposed law or constitutional amendment together with its summary and the attorney general's certification.

Whenever the Ohio ballot board divides an initiative petition into individual petitions containing only proposed law or constitutional amendment under division (A) of section 3505.062 of the Revised Code resulting in the need for the petitioners to resubmit to the attorney general appropriate summaries for each of the individual petitions arising from the board's division of the initiative petition, the attorney general shall review the resubmitted summaries, within ten days after their receipt, to determine if they are a fair and truthful statement of the respective proposed laws or constitutional amendments and, if so, certify them. These resubmissions shall contain no new explanations or arguments. Then, the attorney general shall file with the secretary of state a verified copy of each of the proposed laws or constitutional amendments together with their respective summaries and the attorney general's certification of each.

R.C. 2919.10:

(A) As used in this section:

(1) "Down syndrome" means a chromosome disorder associated either with an extra chromosome twenty-one, in whole or in part, or an effective trisomy for chromosome twenty-one.

(2) "Physician," "pregnant," and "unborn child" have the same meanings as in section 2919.16 of the Revised Code.

(B) No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any of the following:

(1) A test result indicating Down syndrome in an unborn child;

(2) A prenatal diagnosis of Down syndrome in an unborn child;

(3) Any other reason to believe that an unborn child has Down syndrome.

(C) Whoever violates division (B) of this section is guilty of performing or attempting to perform an abortion that was being sought because of Down syndrome, a felony of the fourth degree.

(D) The state medical board shall revoke a physician's license to practice medicine in this state if the physician violates division (B) of this section.

(E) Any physician who violates division (B) of this section is liable in a civil action for compensatory and exemplary damages and reasonable attorney's fees to any person, or the representative of the estate of any person, who sustains injury, death, or loss to person or property as the result of the performance or inducement or the attempted performance or inducement of the abortion. In any action under this division, the court also may award any injunctive or other equitable relief that the court considers appropriate.

(F) A pregnant woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of division (B) of this section is not guilty of violating division (B) of this section or of attempting to commit, conspiring to commit, or complicity in committing a violation of division (B) of this section.

(G) If any provision of this section is held invalid, or if the application of any provision of this section to any person or circumstance is held invalid, the invalidity of that provision does not affect any other provisions or applications of this section and sections 2919.11 to 2919.193 of the Revised Code that can be given effect without the invalid provision or application, and to this end the provisions of this section and sections 2919.11 to 2919.193 of the Revised Code are severable as provided in section 1.50 of the Revised Code. In particular, it is the intent of the general assembly that any invalidity or potential invalidity of a provision of this section is not to

impair the immediate and continuing enforceability of any other provisions of this section and sections 2919.11 to 2919.193 of the Revised Code. It is furthermore the intent of the general assembly that the provisions of this section are not to have the effect of repealing or limiting any other laws of this state.

(H) The general assembly may, by joint resolution, appoint one or more of its members who sponsored or cosponsored ___B___ of the 132nd general assembly to intervene as a matter of right in any case in which the constitutionality of this section is challenged.

R.C. 2919.12:

(A) No person shall perform or induce an abortion without the informed consent of the pregnant woman.

(B)(1)(a) No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated unless at least one of the following applies:

(i) Subject to division (B)(2) of this section, the person has given at least twenty-four hours actual notice, in person or by telephone, to one of the woman's parents, her guardian, or her custodian as to the intention to perform or induce the abortion, provided that if the woman has requested, in accordance with division (B)(1)(b) of this section, that notice be given to a specified brother or sister of the woman who is twenty-one years of age or older or to a specified stepparent or grandparent of the woman instead of to one of her parents, her guardian, or her custodian, and if the person is notified by a juvenile court that affidavits of the type described in that division have been filed with that court, the twenty-four hours actual notice described in this division as to the intention to perform or induce the abortion shall be given, in person or by telephone, to the specified brother, sister, stepparent, or grandparent instead of to the parent, guardian, or custodian;

(ii) One of the woman's parents, her guardian, or her custodian has consented in writing to the performance or inducement of the abortion;

(iii) A juvenile court pursuant to section 2151.85 of the Revised Code issues an order authorizing the woman to consent to the abortion without notification of one of her parents, her guardian, or her custodian;

(iv) A juvenile court or a court of appeals, by its inaction, constructively has authorized the woman to consent to the abortion without notification of one of her parents, her guardian, or her custodian under division (B)(1) of section 2151.85 or division (A) of section 2505.073 of the Revised Code.

(b) If a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated desires notification as to a person's intention to perform or induce an abortion on the woman to be given to a specified brother or sister of the woman who is twenty-one years of age or older or to a specified stepparent or grandparent of the woman instead of to one of her parents, her guardian, or her custodian, the person who intends to perform or induce the abortion shall notify the specified brother, sister, stepparent, or grandparent instead of the parent, guardian, or custodian for purposes of division (B)(1)(a)(i) of this section if all of the following apply:

(i) The woman has requested the person to provide the notification to the specified brother, sister, stepparent, or grandparent, clearly has identified the specified brother, sister, stepparent, or grandparent and her relation to that person, and, if the specified relative is a brother or sister, has indicated the age of the brother or sister;

(ii) The woman has executed an affidavit stating that she is in fear of physical, sexual, or severe emotional abuse from the parent, guardian, or custodian who otherwise would be notified under division (B)(1)(a)(i) of this section, and that the fear is based on a pattern of physical, sexual, or severe emotional abuse of her exhibited by that parent, guardian, or custodian, has filed the affidavit with the juvenile court of the county in which the woman has a residence or legal settlement, the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located, and has given the court written notice of the name and address of the person who intends to perform or induce the abortion;

(iii) The specified brother, sister, stepparent, or grandparent has executed an affidavit stating that the woman has reason to fear physical, sexual, or severe emotional abuse from the parent, guardian, or custodian who otherwise would be notified under division (B)(1)(a)(i) of this section, based on a pattern of physical, sexual, or severe emotional abuse of her by that parent, guardian, or custodian, and the woman or the specified brother, sister, stepparent, or grandparent has filed the affidavit with the juvenile court in which the affidavit described in division (B)(1)(b)(ii) of this section was filed;

(iv) The juvenile court in which the affidavits described in divisions (B)(1)(b)(ii) and (iii) of this section were filed has notified the person that both of those affidavits have been filed with the court.

(c) If an affidavit of the type described in division (B)(1)(b)(ii) of this section and an affidavit of the type described in division (B)(1)(b)(iii) of this section are filed with a juvenile court and the court has been provided with written notice of the name and address of the person who intends to perform or induce an abortion upon the woman to whom the affidavits pertain, the court promptly shall notify the person who intends to perform or induce the abortion that the affidavits have been filed. If possible, the notice to the person shall be given in person or by telephone.

(2) If division (B)(1)(a)(ii), (iii), or (iv) of this section does not apply, and if no parent, guardian, or custodian can be reached for purposes of division (B)(1)(a)(i) of this section after a reasonable effort, or if notification is to be given to a specified brother, sister, stepparent, or grandparent under that division and the specified brother, sister, stepparent, or grandparent cannot be reached for purposes of that division after a reasonable effort, no person shall perform or induce such an abortion without giving at least forty-eight hours constructive notice to one of the woman's parents, her guardian, or her custodian, by both certified and ordinary mail sent to the last known address of the parent, guardian, or custodian, or if notification for purposes of division (B)(1)(a)(i) of this section is to be given to a specified brother, sister, stepparent, or grandparent, without giving at least forty-eight hours constructive notice to that specified brother, sister, stepparent, or grandparent by both certified and ordinary mail sent to the last known address of that specified brother, sister, stepparent, or grandparent. The forty-eight-hour period under this division begins when the certified mail notice is mailed. If a parent, guardian, or custodian of the woman, or if notification under division (B)(1)(a)(i) of this section is to be given to a specified brother, sister, stepparent, or grandparent, the specified brother, sister, stepparent, or

grandparent, is not reached within the forty-eight-hour period, the abortion may proceed even if the certified mail notice is not received.

(3) If a parent, guardian, custodian, or specified brother, sister, stepparent, or grandparent who has been notified in accordance with division (B)(1) or (2) of this section clearly and unequivocally expresses that he or she does not wish to consult with a pregnant woman prior to her abortion, then the abortion may proceed without any further waiting period.

(4) For purposes of prosecutions for a violation of division (B)(1) or (2) of this section, it shall be a rebuttable presumption that a woman who is unmarried and under eighteen years of age is unemancipated.

(C)(1) It is an affirmative defense to a charge under division (B)(1) or (2) of this section that the pregnant woman provided the person who performed or induced the abortion with false, misleading, or incorrect information about her age, marital status, or emancipation, about the age of a brother or sister to whom she requested notice be given as a specified relative instead of to one of her parents, her guardian, or her custodian, or about the last known address of either of her parents, her guardian, her custodian, or a specified brother, sister, stepparent, or grandparent to whom she requested notice be given and the person who performed or induced the abortion did not otherwise have reasonable cause to believe the pregnant woman was under eighteen years of age, unmarried, or unemancipated, to believe that the age of a brother or sister to whom she requested notice be given as a specified relative instead of to one of her parents, her guardian, or her custodian was not twenty-one years of age, or to believe that the last known address of either of her parents, her guardian, her custodian, or a specified brother, sister, stepparent, or grandparent to whom she requested notice be given was incorrect.

(2) It is an affirmative defense to a charge under this section that compliance with the requirements of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant woman from the continuation of her pregnancy created an emergency necessitating the immediate performance or inducement of an abortion.

(D) Whoever violates this section is guilty of unlawful abortion. A violation of division (A) of this section is a misdemeanor of the first degree on the first offense and a felony of the fourth degree on each subsequent offense. A violation of division (B) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense.

(E) Whoever violates this section is liable to the pregnant woman and her parents, guardian, or custodian for civil compensatory and exemplary damages.

(F) As used in this section "unemancipated" means that a woman who is unmarried and under eighteen years of age has not entered the armed services of the United States, has not become employed and self-subsisting, or has not otherwise become independent from the care and control of her parent, guardian, or custodian.

R.C. 2919.193:

(A) Except as provided in division (B) of this section, no person shall knowingly and purposefully perform or induce an abortion on a pregnant woman before determining in accordance with division (A) of section 2919.192 of the Revised Code whether the unborn human individual the pregnant woman is carrying has a detectable heartbeat.

Whoever violates this division is guilty of performing or inducing an abortion before determining whether there is a detectable fetal heartbeat, a felony of the fifth degree. A violation of this division may also be the basis of either of the following:

- (1) A civil action for compensatory and exemplary damages;
- (2) Disciplinary action under section 4731.22 of the Revised Code.

(B) Division (A) of this section does not apply to a physician who performs or induces the abortion if the physician believes that a medical emergency, as defined in section 2919.16 of the Revised Code, exists that prevents compliance with that division.

(C) A physician who performs or induces an abortion on a pregnant woman based on the exception in division (B) of this section shall make written notations in the pregnant woman's medical records of both of the following:

- (1) The physician's belief that a medical emergency necessitating the abortion existed;
- (2) The medical condition of the pregnant woman that assertedly prevented compliance with division (A) of this section.

For at least seven years from the date the notations are made, the physician shall maintain in the physician's own records a copy of the notations.

(D) A person is not in violation of division (A) of this section if the person acts in accordance with division (A) of section 2919.192 of the Revised Code and the method used to determine the presence of a fetal heartbeat does not reveal a fetal heartbeat.

R.C. 2919.195:

(A) Except as provided in division (B) of this section, no person shall knowingly and purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected in accordance with division (A) of section 2919.192 of the Revised Code.

Whoever violates this division is guilty of performing or inducing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree.

(B) Division (A) of this section does not apply to a physician who performs a medical procedure that, in the physician's reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

A physician who performs a medical procedure as described in this division shall declare, in a written document, that the medical procedure is necessary, to the best of the physician's reasonable medical judgment, to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman. In the document, the physician shall specify the pregnant woman's medical condition that the medical procedure is asserted to address and the medical rationale for the physician's conclusion that the medical procedure is necessary to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

A physician who performs a medical procedure as described in this division shall place the written document required by this division in the pregnant woman's medical records. The physician shall maintain a copy of the document in the physician's own records for at least seven years from the date the document is created.

(C) A person is not in violation of division (A) of this section if the person acts in accordance with division (A) of section 2919.192 of the Revised Code and the method used to determine the presence of a fetal heartbeat does not reveal a fetal heartbeat.

(D) Division (A) of this section does not have the effect of repealing or limiting any other provision of the Revised Code that restricts or regulates the performance or inducement of an abortion by a particular method or during a particular stage of a pregnancy.

R.C. 2919.16:

As used in sections 2919.16 to 2919.18 of the Revised Code:

...

(K) "Serious risk of the substantial and irreversible impairment of a major bodily function" means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function. A medically diagnosed condition that constitutes a "serious risk of the substantial and irreversible impairment of a major bodily function" includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman's mental health.

...

(M) "Viable" means the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.

R.C. 2919.17:

(A) No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman when the unborn child is viable.

(B)(1) It is an affirmative defense to a charge under division (A) of this section that the abortion was performed or induced or attempted to be performed or induced by a physician and that the physician determined, in the physician's good faith medical judgment, based on the facts known to the physician at that time, that either of the following applied:

(a) The unborn child was not viable.

(b) The abortion was necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(2) No abortion shall be considered necessary under division (B)(1)(b) of this section on the basis of a claim or diagnosis that the pregnant woman will engage in conduct that would result in the pregnant woman's death or a substantial and irreversible impairment of a major bodily function of the pregnant woman or based on any reason related to the woman's mental health.

(C) Except when a medical emergency exists that prevents compliance with section 2919.18 of the Revised Code, the affirmative defense set forth in division (B)(1)(a) of this section does not apply unless the physician who performs or induces or attempts to perform or induce the abortion performs the viability testing required by division (A) of section 2919.18 of the Revised Code and certifies in writing, based on the results of the tests performed, that in the physician's good faith medical judgment the unborn child is not viable.

(D) Except when a medical emergency exists that prevents compliance with one or more of the following conditions, the affirmative defense set forth in division (B)(1)(b) of this section does not apply unless the physician who performs or induces or attempts to perform or induce the abortion complies with all of the following conditions:

(1) The physician who performs or induces or attempts to perform or induce the abortion certifies in writing that, in the physician's good faith medical judgment, based on the facts known to the physician at that time, the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(2) Another physician who is not professionally related to the physician who intends to perform or induce the abortion certifies in writing that, in that physician's good faith medical judgment, based on the facts known to that physician at that time, the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(3) The physician performs or induces or attempts to perform or induce the abortion in a hospital or other health care facility that has appropriate neonatal services for premature infants.

(4) The physician who performs or induces or attempts to perform or induce the abortion terminates or attempts to terminate the pregnancy in the manner that provides the best opportunity for the unborn child to survive, unless that physician determines, in the physician's good faith medical judgment, based on the facts known to the physician at that time, that the termination of the pregnancy in that manner poses a greater risk of the death of the pregnant woman or a greater risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion.

(5) The physician certifies in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

(6) The physician who performs or induces or attempts to perform or induce the abortion has arranged for the attendance in the same room in which the abortion is to be performed or induced or attempted to be performed or induced at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn child immediately upon the child's complete expulsion or extraction from the pregnant woman.

(E) For purposes of this section, there is a rebuttable presumption that an unborn child of at least twenty-four weeks gestational age is viable.

(F) Whoever violates this section is guilty of terminating or attempting to terminate a human pregnancy after viability, a felony of the fourth degree.

(G) The state medical board shall revoke a physician's license to practice medicine in this state if the physician violates this section.

(H) Any physician who performs or induces an abortion or attempts to perform or induce an abortion with actual knowledge that neither of the affirmative defenses set forth in division (B)(1) of this section applies, or with a heedless indifference as to whether either affirmative defense applies, is liable in a civil action for compensatory and exemplary damages and reasonable attorney's fees to any person, or the representative of the estate of any person, who sustains injury, death, or loss to person or property as the result of the performance or inducement or the attempted performance or inducement of the abortion. In any action under this division, the court also may award any injunctive or other equitable relief that the court considers appropriate.

(I) A pregnant woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of division (A) of this section is not guilty of violating division (A) of this section or of attempting to commit, conspiring to commit, or complicity in committing a violation of division (A) of this section.