Supreme Court of Ohio Clerk of Court - Filed December 04, 2023 - Case No. 2023-0004

IN THE SUPREME COURT OF OHIO

Preterm-Cleveland, et al., Appellees, vs. David Yost, Attorney General of Ohio, et al., Appellants.	Case No. 2023-0004 On appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-220504

AMICUS CURIAE BRIEF OF PHYLLIS SCHLAFLY EAGLES, JANET FOLGER PORTER, FAITH2ACTION MINISTRIES, OHIO REPRESENTATIVE BETH LEAR, OHIO VALUE VOTERS, MISSION AMERICA, MARGIE CHRISTIE, DAYTON RIGHT TO LIFE SOCIETY, OHIO CHRISTIAN ALLIANCE, WARREN COUNTY RIGHT TO LIFE, LORI VIARS, EAGLE FORUM OF OHIO, COMMUNITY PREGNANCY CENTER, FORMER OHIO REPRESENTATIVE CANDICE KELLER, FORMER OHIO REPRESENTATIVE RON HOOD, AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPLEMENTAL BRIEFING ON ISSUE 1 AND IN SUPPORT OF APPELLANTS

Andrew L. Schlafly*
939 Old Chester Rd.
Far Hills, NJ 07931
Tel: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Robert T. Lynch, Esq. (0039944)
35253 Maplegrove, Suite 102
Willoughby Hills, OH 44094
Tel: (216) 401-2488
Fax: (216) 245-5978
Email: lynchlegalservices@juno.com

**pro hac vice pending*

Counsel for *Amici curiae* Phyllis Schlafly Eagles, Janet Folger Porter, Faith2Action Ministries, Ohio Representative Beth Lear, Ohio Value Voters, Mission America, Margie Christie, Dayton Right to Life Society, Ohio Christian Alliance, Warren County Right to Life, Lori Viars, Eagle Forum of Ohio, Community Pregnancy Center, former Ohio Representative Candice Keller, former Ohio Representative Ron Hood, and Eagle Forum Education & Legal Defense Fund

TABLE OF CONTENTS

Page(s)

Table of Contents i

Table of Authorities ii

Interests of *Amici Curiae* 1

Introduction and Summary of Argument 3

Argument 5

I. Issue 1 Authorizes the Equivalent of Infanticide and Implicitly Overturns Ohio's Partial-Birth Abortion Law, and Thus Cannot Possibly Be Enforceable. 6

II. Issue 1 Improperly Removes Authority from the Representative Government – the General Assembly – in Violation of U.S. Supreme Court Holdings and the Ohio Constitution. 9

III. Issue 1 Improperly Infringes on Inalienable Rights Guaranteed by the First Section of the Ohio Bill of Rights, without Repealing that Protection. 13

IV. The Issue 1 Terms of "Burden" and "Least Restrictive Means" Have Vastly Different Meanings for Judges and Even More So for Voters, Thereby Rendering Issue 1 Unclear and Unenforceable just as the Florida Supreme Court Invalidated a 73%-Supported Initiative. 15

V. Judges and Scholars Agree that Far-Reaching Ballot Initiatives Violate the Guarantee of a Republican Form of Government. 18

VI. As Multiple State Supreme Courts Have Held under Constitutional Provisions Similar to Ohio's, Sweeping Ballot Initiatives Like Issue 1 Are Invalid. 20

Conclusion 22

Certificate of Service 23

TABLE OF AUTHORITIES

Cases Page(s)

Adams v. Gunter, 238 So. 2d 824 (Fla. 1970) 21

Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) 19

Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000) 16

Bd. of Supervisors v. Lonergan, 27 Cal. 3d 855, 167 Cal. Rptr. 820, 616 P.2d 802 (1980) 13

Bess v. Ulmer, 985 P.2d 979 (Alaska 1999) 21

Citizens Protecting Mich.'s Constitution v. Sec'y of State, 761 N.W.2d 210 (Mich. Ct. App.) (per curiam), *aff'd without opinion*, 755 N.W.2d 157 (Mich. 2008) 21

City of Middletown v. Ferguson, No. CA84-04-049, 1985 Ohio App. LEXIS 6594 (Ct. App. Apr. 29, 1985) 9, 15

Democratic Party of Wis. v. Vos, 966 F.3d 581 (7th Cir. 2020) 19

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) 8, 13, 15

Doe v. Bolton, 410 U.S. 179 (1973) 4

Holmes v. Appling, 392 P.2d 636 (Or. 1964) 21

Hunter v. Erickson, 393 U.S. 385 (1969) 12

In re J.C. 246 Cal.App.4th 1462 (2016) 17

ITT World Communications, Inc. v. City and County of San Francisco, 37 Cal.3d 859, 210 Cal. Rptr. 226, 693 P.2d 811 (1985) 10

Kotkowski-Paul v. Paul, 2022-Ohio-4567, 204 N.E.3d 66 (Ct. App.) 13-14

Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1936) 10

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 16

Preterm Cleveland v. Voinovich, 89 Ohio App. 3d 684, 627 N.E.2d 570 (1993) .. 14, 16

Raven v. Deukmejian, 52 Cal. 3d 336, 352, 276 Cal. Rptr. 326, 801 P.2d 1077 (1990) 21

Reitman v. Mulkey, 387 U.S. 369 (1967) 11

Roe v. Wade, 410 U.S. 113 (1973) 8, 17

Romer v. Evans, 517 U.S. 620 (1996) 11

Shields v. Ohio, 95 U.S. 319 (1877) 10

Stenberg v. Carhart, 530 U.S. 914 (2000) 14

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 12
Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436 (6th Cir. 2003)..... 6, 7

Constitution and Legislation

OHIO CONST., Art. I, Sec. 1 ..... 3, 13
OHIO CONST., Art. I, Sec. 2 ..... 9, 10, 11
OHIO CONST., Art. XVI, Sec. 2 5
U.S. CONST., Amend. XXI..... 15
U.S. CONST., Art. IV, Sec. 4 ..... 18, 19
18 U.S.C. § 1531(b)(1)(B)..... 14
Ohio H.B. 351, § 3(A), (B), (D), 123rd Gen. Assem., Reg. Sess. (Ohio 2000) 7
Ohio Rev. Code § 2901.01(B)(1)(a)(ii) 14
Ohio Rev. Code § 2901.01(B)(1)(c)(i)..... 14
Ohio Rev. Code § 2901.01(B)(1)(c)(ii)..... 14
Ohio Rev. Code § 2919.15.1..... 6
Ohio Rev. Code § 2919.19(a)(15)..... 13

Articles and Internet Postings

Mark C. Alexander, "Campaign Finance Reform: Central Meaning and a New Approach," 60 Wash & Lee L. Rev. 767 (2003) 20

H. Bennett, "The Exposure of Infants in Ancient Rome," 18 Classical J. 341 (1923)..... 8-9

1 W. Blackstone, *Commentaries on the Laws of England* 129 (7th ed. 1775) 15

A. Cameron, "The Exposure of Children and Greek Ethics," 46 Classical Rev. 105 (1932) 8

Erwin Chemerinsky, "Challenging Direct Democracy," 2007 Mich. St. L. Rev. 293 (2007)..... 18

E. Coke, *Institutes of the Laws of England* 50 (1644)..... 15

Julian N. Eule, "Judicial Review of Direct Democracy," 99 Yale L.J. 1503 (1990) .. 19

W. Harris, "Child-Exposure in the Roman Empire," 84 J. Roman Studies 1 (1994) 9

Thomas J. Molony, "Fulfilling the Promise of *Roe*: A Pathway for Meaningful Pre-Abortion Consultation," 65 Cath. U.L. Rev. 713 (2016) 7

C. Patterson, "Not Worth the Rearing: The Causes of Infant Exposure in Ancient Greece," 115 Transactions Am. Philosophical Assn. 103 (1985) 8

P. Singer, *Rethinking Life & Death* (1994) 7

Julie Carr Smyth, "Ohio voters just passed abortion protections. When and how they take effect is before the courts," *Associated Press* (Nov. 24, 2023). https://apnews.com/article/abortion-ohio-constitutional-amendment-republicans-courts-fb1762537585350caeee589d68fe5a0d..... 6

Glen Staszewski, "Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy," 56 Vand. L. Rev. 395 (2003)..... 17

B. Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (1992) 7

Steven Steinglass, "Constitutional Revision: Ohio Style," 77 Ohio St. L.J. 281 (2016)..... 20-21

M. Tooley, Abortion & Infanticide, 2 Philosophy & Pub. Affairs 37 (Autumn 1972).. 8

M. Warren, "On the Moral and Legal Status of Abortion," 57 The Monist 1 (1973) . 8

Wikipedia, https://en.wikipedia.org/wiki/Partial-Birth_Abortion_Ban_Act#Clinical_response..... 7

On November 16, 2023, this Court requested new briefing by the parties on the effect, if any, of Issue 1 on this matter, which has been administratively added to the Ohio Constitution as its new Article I, Section 22 (abbreviated here as "Issue 1," as in this Court's order). *Amici curiae* Phyllis Schlafly Eagles, Janet Folger Porter, Faith2Action Ministries, Ohio Representative Beth Lear, Ohio Value Voters, Mission America, Margie Christie, Dayton Right to Life Society, Ohio Christian Alliance, Warren County Right to Life, Lori Viars, Eagle Forum of Ohio, Community Pregnancy Center, former Ohio Representative Candice Keller, former Ohio Representative Ron Hood, and Eagle Forum Education & Legal Defense Fund (collectively, the "*Amici*"), respectfully submit their interests and their following arguments against applying Issue 1 here.

INTERESTS OF *AMICI CURIAE*

Amicus curiae[1] Phyllis Schlafly Eagles is an association founded in 2016 to carry on the work of Phyllis Schlafly, who led the defeat of the Equal Rights Amendment to keep out of the U.S. Constitution abortion and other destructive new rights. Janet Folger Porter has been an advocate for the rights of the unborn, parents of minors misled to have abortions, and all victims of abortion for more than 30 years in Ohio, has authored many books on this topic, and is the chief architect of the Heartbeat bill in Ohio and nationwide. Faith2Action Ministries is a pro-life ministry based on North Royalton, Ohio, which has long been active on the abortion issue.

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amici curiae*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Ohio Representative Beth Lear is currently in the Ohio General Assembly, representing District 61. Ohio Value Voters is a nonprofit 501(c)(4) entity based in Cleveland, Ohio, and devoted since 2007 to educating, informing and influencing voters and elected officials in Ohio. Mission America is based in Columbus, Ohio, and since 1995 has advocated about cultural and social issues. Dayton Right to Life Society is based in Dayton, Ohio, and has been advocate here for the preborn since 1972, and Margie Christie is its Executive Director. Ohio Christian Alliance has advocated for life, faith, and freedom in the public square here in Ohio for 32 years. Warren County Right to Life has worked for the unborn for more than a decade in Warren County, Ohio, and Lori Viars is its Vice President and longtime leader for the unborn and other victims of abortion. Eagle Forum of Ohio has been active for decades in educating the public here. Community Pregnancy Center is a crisis pregnancy center located in Middletown, Ohio. Former Ohio Representatives Candice Keller and Ron Hood were co-sponsors of the Ohio Heartbeat bill. Eagle Forum Education & Legal Defense Fund was founded in 1981 by Phyllis Schlafly and has filed numerous briefs at all levels in federal and state court for more than two decades, including defense of the rights of the victims of abortion.

All of these *Amici* have interests in defending against misuse of the ballot initiative by abortion providers to insert special privileges for them into the Ohio Constitution, to the detriment of the many victims of abortion. *Amici* have defended the inalienable right to life for decades and thus have a strong interest in objecting to attempts to apply Issue 1 to undermine those rights as protected by Article I,

Section 1 of the Ohio Constitution and more than 30 existing state laws, including the Ohio Heartbeat bill. *Amici* have further interests in defending representative democracy against a bypass of the constitutional convention process by this far-reaching revision to the Ohio Constitution that would adversely impact multiple rights which have long been guaranteed by that document.

In light of their long record of defending the victims of abortion and for the foregoing additional reasons, *Amici* have direct and vital interests in objecting to any implementation of Issue 1 by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Issue 1 makes an abortionist the sole judge of his conduct as he performs abortions up until birth, and in some cases completes them after birth. This is contrary to long-established principles of Anglo-American law and the Ohio Constitution, in authorizing a man to be his own judge as he commits the equivalent of infanticide. Issue 1 strips authority from the General Assembly over objectionable conduct in a way that no other ballot initiative has ever done before. A ballot initiative that places a man beyond the reach of the General Assembly in order to commit the equivalent of infanticide is not legitimate in Ohio. By revising the authority of the General Assembly and by conflicting with numerous existing provisions of the Ohio Constitution, Issue 1 constitutes a "revision" to the Constitution that may be done only by a constitutional convention, not through a mere ballot initiative amendment process.

Issue 1 states that "***in no case*** may such an abortion [including after the viability of a fetus or unborn child] 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." (Emphasis added.) "Health" is the same term that was used by the U.S. Supreme Court in *Doe v. Bolton*, 410 U.S. 179 (1973), to mean virtually anything, including finances. "Health" means whatever the self-interested abortionist, who typically profits from the procedure (and highly profits from a late-term abortion), wants the term to mean. This provision of Issue 1 unambiguously authorizes abortion at any time during a pregnancy, including during birth. This will be worth many tens of millions of dollars annually to the abortion industry in Ohio alone.

Issue 1 contains language for which there is no common agreement as to its meaning among judges, and thus there could not possibly have been a common understanding of it by voters. Issue 1 prohibits the General Assembly from regulating abortion if it imposes a burden not by the "least restrictive means." For decades judges have widely and strongly disagreed about the meaning of an undue "burden" or "least restrictive means," including 5-4 decisions by the U.S. Supreme Court and similarly divided appellate court decisions. It is impossible that voters commonly agreed on the meaning of these terms when judges themselves have long widely disagreed about their meaning.

Studies show that the side which spends the most on a ballot initiative prevails virtually every time, as occurred for Issue 1 with a reported $58 million in spending

for it, mostly from out-of-state and even foreign contributors. The vote in support of Issue 1 was nearly identical to the vote in support of the very different Issue 2, which shows how manipulated the initiative process has become. That process cannot legitimize a ballot initiative which places someone above the law while engaging in highly repugnant conduct. Nor is a ballot initiative legitimate when the meaning of its central terminology is the subject of intense disagreement by judges. There is no "meeting of the minds" when a key term in a contract lacks a clear meaning, and no law is legitimately enacted by a ballot initiative whose central terminology has widely and sharply varying meanings among even judges.

Issue 1 may not be used legitimately to invalidate any laws or regulations, and is contrary to the Ohio Bill of Rights. Issue 1 also contravenes the republican form of government guaranteed by the U.S. Constitution. As a substantive revision to the Ohio Constitution rather than merely an amendment, Issue 1 is invalid for bypassing the convention requirements for revising the Constitution.

ARGUMENT

Ohio Constitution Article XVI, Section 2 limits attempts "to revise" the Ohio Constitution to use of the process of a convention, with which Issue 1 did not comply. The initiative process in Ohio was adopted during the same time period and with the same purpose as a similar process in many Western states, while a majority of states rejected this direct democracy. The supporters of Issue 1 candidly admit that they seek far-reaching changes to Ohio through Issue 1; in a post-election news story, a prominent supporter of Issue 1 stated the sponsors' intent to overturn "over 30

different restrictions [currently] in place."[2] In addition, Issue 1 conflicts with multiple long-established provisions in the Ohio Bill of Rights, and removes authority from the General Assembly in an unprecedented manner. To achieve this, the supporters of Issue 1 needed to comply with the convention process, which they have not done.

I. Issue 1 Authorizes the Equivalent of Infanticide and Implicitly Overturns Ohio's Partial-Birth Abortion Law, and Thus Cannot Possibly Be Enforceable.

The plain meaning of Issue 1 is to prohibit the General Assembly from limiting late-term abortions, which is the most profitable type for providers. If Issue 1 is embraced in any way by this Court, then courts will undoubtedly apply its following provision to fully allow all late-term abortions (emphasis added):

> ***in no case*** may such [a late-term or partial-birth or any] 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.

Enforcement of this would require overturning Ohio's Partial-Birth Abortion Law, Ohio Rev. Code Ann. § 2919.15.1, which was upheld after contentious litigation in *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 438 (6th Cir. 2003).

This central provision of Issue 1 is the equivalent of infanticide, as the U.S. Court of Appeals for the Sixth Circuit recognized. That court upheld Ohio's first-in-the-nation ban on partial-birth abortion based on Ohio's stated "'interest in maintaining a strong public policy against infanticide, regardless of the life

[2] Julie Carr Smyth, "Ohio voters just passed abortion protections. When and how they take effect is before the courts," *Associated Press* (Nov. 24, 2023). https://apnews.com/article/abortion-ohio-constitutional-amendment-republicans-courts-fb1762537585350caeee589d68fe5a0d (viewed Dec. 2, 2023).

expectancy or state of development of the child.'" *Id.* at 441-42 (quoting H.B. 351, § 3(A), (B), 123rd Gen. Assem., Reg. Sess. (Ohio 2000)). The Sixth Circuit further recognized the valid "state interest in preventing unnecessary cruelty." *Id.* at 442 (quoting H.B. 351 § 3(D)).

The struggle to rid Ohio of late-term and partial-birth abortion was hard-fought for decades. Dr. LeRoy Carhart, a physician who sued to overturn a federal partial-birth abortion ban, declared that "the profit margin is huge." Thomas J. Molony, "Fulfilling the Promise of *Roe*: A Pathway for Meaningful Pre-Abortion Consultation," 65 Cath. U.L. Rev. 713, 725 (2016). Ultimately upheld by the U.S. Supreme Court, the federal statute prohibits one particular type of partial-birth abortion, while allowing other forms of abortion at birth which are the legal equivalent of infanticide and which continue to be performed in some states.[3] Issue 1 would prevent the General Assembly from keeping these abortions out of Ohio.

Though repugnant, infanticide has been frequently discussed and even advocated by many supporters of legalized abortion. *See* P. Singer, Rethinking Life & Death 218 (1994) (defining a person as "a being with awareness of her or his own existence over time, and the capacity to have wants and plans for the future"); B. Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 9-13 (1992) (arguing that "the possession of interests is both necessary and sufficient

[3] "In response to this [federal] statute, many abortion providers have adopted the practice of inducing fetal demise before beginning late-term abortions," observes the often-visited, widely read https://en.wikipedia.org/wiki/Partial-Birth_Abortion_Ban_Act#Clinical_response (viewed Nov. 25, 2023).

for moral status" and that the "capacity for conscious awareness is a necessary condition for the possession of interests" (emphasis deleted)); M. Warren, "On the Moral and Legal Status of Abortion," 57 The Monist 1, 5 (1973) (arguing that, to qualify as a person, a being must have at least one of five traits that are "central to the concept of personhood," including "consciousness", "reasoning", "self-motivated activity," "the capacity to communicate," and "the presence of self-concepts, and self-awareness, either individual or racial, or both," which do not arise until long after birth) (emphasis deleted)); M. Tooley, Abortion & Infanticide, 2 Philosophy & Pub. Affairs 37, 49 (Autumn 1972) (insisting that "having a right to life presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states").

In overturning *Roe v. Wade*, the U.S. Supreme Court recently explained how *Roe* was fundamentally based on the Court majority's review of the ancient acceptance of infanticide:

> *Roe* featured a lengthy survey of history … and the Court made no effort to explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. See 410 U. S., at 130-132, 93 S. Ct. 705, 35 L. Ed. 2d 147 (discussing ancient Greek and Roman practices).

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2267 (2022). Infanticide was prevalent in ancient Greece and Rome as many scholars have observed. See C. Patterson, "Not Worth the Rearing: The Causes of Infant Exposure in Ancient Greece," 115 Transactions Am. Philosophical Assn. 103, 111-123 (1985); A. Cameron, "The Exposure of Children and Greek Ethics," 46 Classical Rev. 105-108 (1932); H.

Bennett, "The Exposure of Infants in Ancient Rome," 18 Classical J. 341-351 (1923); W. Harris, "Child-Exposure in the Roman Empire," 84 J. Roman Studies 1 (1994).

This is Issue 1, as required by one of its key provisions. There is no logical way to sever the equivalent of infanticide from the remainder of the amendment, and no basis for declaring the rest of Issue 1 to somehow be the "will of the people" without its central part. *See City of Middletown v. Ferguson*, No. CA84-04-049, 1985 Ohio App. LEXIS 6594, at *22 (Ct. App. Apr. 29, 1985) (rejecting severability with respect to a ballot initiative because its "unconstitutional objective could not be severed from" its remainder).

A ballot initiative that attempts to make infanticide a constitutional right, as Issue 1 does, is invalid and unenforceable. There are a dozen compelling legal reasons for striking a ballot initiative that is so repugnant to civilization and the values of Ohio. Several of these grounds are discussed in detail below, while many law review articles from all sides of the political spectrum identify additional grounds for invalidating a ballot initiative as wrongful as Issue 1.

II. Issue 1 Improperly Removes Authority from the Representative Government – the General Assembly – in Violation of U.S. Supreme Court Holdings and the Ohio Constitution.

No one credibly asserts that Issue 1 was a proper repeal or revision of the protection in the Ohio Constitution, Art. I, Section 2, for the General Assembly's "Right to alter, reform, or abolish government, and repeal special privileges":

> … no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

The above provision has been a foundation of the Ohio Constitution since 1851, and arguably limits the subject matter breadth of ballot initiatives which were not allowed until 1912. This 1851 provision is also in many other state constitutions, and has been applied numerous times by state courts nationwide to invalidate laws that grant special privileges. The addition of the initiative process did not repeal any of the existing constitutional provisions, which remain in full force and effect. *See, e.g.*, *ITT World Communications, Inc. v. City and County of San Francisco*, 37 Cal.3d 859, 210 Cal. Rptr. 226, 693 P.2d 811, 816 (1985) ("A constitutional amendment ... should not be construed to effect the implied repeal of another constitutional provision.").

Issue 1 creates special privileges for abortion providers far beyond any other health practitioner, and any professional of any kind. Issue 1 then prohibits the General Assembly from altering, revoking, or repealing those special privileges for abortionists. Issue 1 is a flagrant violation of Article I, Section 2 of the Ohio Constitution, which was even invoked by the U.S. Supreme Court to sustain an Ohio conviction for assault and battery by a railroad conductor, which is analogous to commonplace wrongdoing by abortion providers. *Shields v. Ohio*, 95 U.S. 319 (1877) (affirming the Ohio Supreme Court based on this provision of the Ohio Constitution).

The U.S. Supreme Court has emphasized that "the State may not surrender or bind itself not to exert its police power to guard the safety of workers." *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 635 (1936) (citing *Shields* and many additional precedents). Likewise, a ballot initiative cannot properly withdraw authority from the General Assembly to regulate abortion providers, and to fully

protect the most vulnerable in society against that for-profit activity. The attempt by Issue 1 to place abortion providers beyond the authority of the General Assembly, and thereby make abortionists the sole judge over their own conduct, is directly contrary to Article I, Section 2 of the Ohio Constitution.

In addition, multiple rulings by the U.S. Supreme Court and other courts have invalidated ballot initiatives that interfere with representative government as Issue 1 does. In *Romer v. Evans*, both the Colorado and United States Supreme Courts tossed out a voter-approved Colorado ballot initiative that had amended the Colorado Constitution to prohibit the Colorado legislature from granting preferences to a certain class of people, in that case homosexuals. The grounds of the *Romer* decision had nothing to do with any constitutional rights of homosexuals, which at the time were not recognized under the U.S. Constitution. Instead, it was the interference wrought by the ballot initiative with representative government that rendered the voter-enacted ballot initiative invalid.

As Justice Anthony Kennedy wrote for the Supreme Court:

> The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.

Romer v. Evans, 517 U.S. 620, 633 (1996). That same defect requires invalidating Issue 1. *See also Reitman v. Mulkey,* 387 U.S. 369 (1967) (after enactment by 65% of the popular vote and endorsement by the *Los Angeles Times*, the California Supreme Court invalidated this facially neutral ballot initiative and the U.S. Supreme Court affirmed).

Likewise, Issue 1 prohibits certain classes of people from seeking "specific protection" from predatory practices of the abortion industry. The most profitable type of abortion – late-term and partial-birth abortion – is placed entirely outside of the authority of General Assembly by Issue 1. That leaves parents, minors, spouses, partners, representatives of unborn children, and women entitled to informed consent unable to seek protection from the General Assembly against unethical practices by abortion providers. Under Issue 1 the victims cannot seek legislation to protect them, just as the class of persons in Colorado were disenfranchised by the defective ballot initiative there.

Romer is not unique. Many U.S. Supreme Court and other appellate courts have invoked "political-process doctrine" to invalidate ballot initiatives like Issue 1. One of the earliest in this line of cases arose from Akron, Ohio, where the voters passed a ballot initiative that amended the city charter. The trial court and Ohio Supreme Court upheld the enforceability of its voter-approved ballot initiative relating to housing, but then the 8-1 U.S. Supreme Court reversed by finding that the ballot initiative infringed on the political process. *Hunter v. Erickson*, 393 U.S. 385, 388 (1969). *See also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (invaliding a statewide ballot initiative that was enacted by nearly 66% of the public, based on the political-process doctrine).

Issue 1, like many other ballot initiatives enacted by voters but then stricken by appellate courts, infringes on the political process and is thus invalid.

III. Issue 1 Improperly Infringes on Inalienable Rights Guaranteed by the First Section of the Ohio Bill of Rights, without Repealing that Protection.

The very first section of the Ohio Constitution fully protects inalienable rights as well as the right to defend the life of others:

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety. (OHIO CONST., Art. I, Sec. 1)

Issue 1 does not purport to repeal or revise any of this, and cannot do so implicitly. *See, e.g.*, *Bd. of Supervisors v. Lonergan*, 27 Cal. 3d 855, 868, 167 Cal. Rptr. 820, 828, 616 P.2d 802, 810 (1980) ("So strong is the presumption against implied repeals" of a constitutional provision.). The term "men" is, of course, understood to apply to protect all human beings, as in the Declaration of Independence.

Issue 1 does not attempt to establish when life begins, or when the legal protection of life should begin. Accordingly, and consistent with the U.S. Supreme Court decision in *Dobbs*, the Court should look to the legislature for guidance on this fundamental question, just as legislatures define the scope of property. "It is time to heed the Constitution and return the issue of abortion to the people's ***elected representatives***." *Dobbs*, 142 S. Ct. at 2243 (emphasis added).

"'Unborn human individual' means an individual organism of the species homo sapiens from fertilization until live birth." Ohio Rev. Code Ann. § 2919.19(a)(15). Ohio statutes thereby establish that life begins at conception. "Ohio statutory law clearly favors the position that life begins at conception and that embryos are unborn humans." *Kotkowski-Paul v. Paul*, 2022-Ohio-4567, ¶ 123, 204 N.E.3d 66, 91 (Ct.

App.) (Lynch, J., dissenting). Specifically, "the criminal code recognizes the principle that life begins at conception (fertilization) and that an embryo represents human life. R.C. 2901.01(B)(1)(c)(i) (unborn human) …." *Id.*

Ohio appellate Judge Lynch explained further:

> [T]hese definitions are persuasive inasmuch as they are consistent with the current scientific understanding of when life begins and are not contradicted by or inconsistent with other provisions of the Revised Code. … Within the criminal code, a 'person' includes '[a]n unborn human who is viable,' i.e., 'the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.' R.C. 2901.01(B)(1)(a)(ii) and (c)(ii)."

Id.

Likewise, the U.S. Supreme Court has referred to the "living fetus," even when siding with abortionists in invalidating a partial-birth abortion law. *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000) ("Both procedures can involve the introduction of a 'substantial portion' of a still living fetus …."). Congress has likewise used the term "living fetus," in a statute that the U.S. Supreme Court upheld against challenge: 18 U.S.C. § 1531(b)(1)(B).

Even prior to the foregoing precedents and statutes, an Ohio appellate court recognized about the Inalienable Rights clause that:

> this provision guaranteeing the enjoyment of life and liberty confers upon the individual the right to do whatever he or she wishes to do so long as there is no valid law proscribing such conduct and so long as the conduct does not infringe upon rights of others recognized by the common law.

Preterm Cleveland v. Voinovich, 89 Ohio App. 3d 684, 691, 627 N.E.2d 570, 575 (1993). As to the common law, even supporters of abortion rights admit that the common law

treated abortion as a crime beginning with "quickening", which is analogous to initiation of the heartbeat at issue in the Heartbeat bill. *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (citing 1 W. Blackstone, *Commentaries on the Laws of England* 129-130 (7th ed. 1775); E. Coke, *Institutes of the Laws of England* 50 (1644)).

Yet Issue 1 has no mention of the rights of living fetus or unborn child, while purporting to grant an abortionist an unfettered right to terminate that life contrary to the "Inalienable Rights" provision of the Ohio Constitution. Issue 1 does not attempt to repeal that core right, as a constitutional amendment would declare a repeal if in fact that were its intent. *See, e.g.*, U.S. CONST., Amend XXI ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.")

Severability is not an option to salvage Issue 1, because there is no coherent way to separate its unconstitutional portion or to determine whether voters would have enacted it without that portion. *See City of Middletown*, *supra*, 1985 Ohio App. LEXIS 6594, at *7 (denying request to sever). Accordingly, Issue 1 is invalid.

IV. The Issue 1 Terms of "Burden" and "Least Restrictive Means" Have Vastly Different Meanings for Judges and Even More So for Voters, Thereby Rendering Issue 1 Unclear and Unenforceable just as the Florida Supreme Court Invalidated a 73%-Supported Initiative.

Judges have widely disagreed about the meaning of "burden" and "least restrictive means" in the context of abortion for more than 30 years, such that there has never been a consensus understanding of these legalistic terms. To perhaps half of judges, undue "burden" means that virtually any regulation of abortion is unlawful.

To the other roughly half of judges, the opposite is true. Given that judges have been unable to agree on a definition for this terminology, voters could not possibly have been in agreement as to the meaning of what they were voting on.

Under very similar circumstances, the Florida Supreme Court invalidated a high-profile ballot initiative in 2000 after its enactment by 73% of the popular vote. *Armstrong v. Harris*, 773 So. 2d 7, 22 (Fla. 2000) ("[V]oters were not told on the ballot that the amendment will nullify the Cruel or Unusual Punishment Clause, an integral part of the Declaration of Rights since our state's birth. Voters thus were not permitted to cast a ballot with eyes wide open on this issue."). There, as here, the Florida Supreme Court had denied pre-election challenges to the same ballot initiative, yet invalidated it after the election because the initiative failed to fully explain its effects on the fundamental right to life.

An Ohio appellate judge, who dissented in a 2-1 decision hinging on the term "burden", explained that not even five justices on the U.S. Supreme Court could agree on what an undue burden means in the landmark decision of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992):

> The plurality opinion characterized a "finding of an undue burden [as] a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." By contrast, Justice Stevens's idea was that "[a] burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification." ***Neither formulation received five votes*** so that there would be controlling constitutional doctrine.

Preterm Cleveland v. Voinovich, 89 Ohio App. 3d at 709 n.23, 627 N.E.2d at 587 (Petree, J., concurring and dissenting, citations omitted and emphasis added).

Courts can only enforce what voters intended to enact, not what the legal meaning of terms of art may be. Issue 1 was promoted to voters with a reported $58 million of mostly out-of-state (and foreign) donations, using ads that talked about contraception and miscarriages. The vote for Issue 1 was nearly identical to the vote for Issue 2, which was the vastly different issue of legalizing cannabis; they differed in their total votes by barely one-tenth of 1%. Legal scholars have already discredited the notion of "the will of the voters" on ballot initiatives, explaining why it is a myth. *See, e.g.*, Glen Staszewski, "Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy," 56 Vand. L. Rev. 395, 399 (2003) ("Rejecting the myth of popular sovereignty in direct democracy would resolve the primary difficulties that are currently associated with judicial review of successful ballot measures.") (footnote omitted). Divining any will of the people from a ballot initiative using so much controversial legal terminology is unjustified.

Legislators represent the "will of the people" as much as or more than any ballot initiative does, and there should be deference to legislators in filling in the gaps or ambiguities in a ballot initiative. *See In re J.C.* (2016) 246 Cal.App.4th 1462, 1479–1480 (2016) (in California, which has a ballot initiative process similar to Ohio, when a voter-adopted initiative was ambiguous with "solid arguments both for and against" an interpretation, the Legislature's enactment clarifying the ambiguity was a proper). The 30-plus current Ohio abortion laws were enacted under *Roe v. Wade*, and thus presumptively continue to be constitutional because Issue 1 does not even purport to depart from that framework.

The Court can and should uphold every existing Ohio abortion law without interference by Issue 1, which does not identify any law that it would repeal. It is plausible and even likely that those who voted for Issue 1 do not oppose regulation of abortion by the legislature which was determined by the elected representatives to be reasonable after hearing testimony in committee hearings. It would not be proper for the Court to infer that voters understood the debated legal terminology used in Issue 1 to mean what proponents of Issue 1 privately intended: to bring abortion-on-demand to Ohio. It is not the intent of the political and financial supporters of an initiative that matters, but the intent of the voters.

V. Judges and Scholars Agree that Far-Reaching Ballot Initiatives Violate the Guarantee of a Republican Form of Government.

The renowned left-of-center law Professor Erwin Chemerinsky has declared that "direct democracy is undesirable and unconstitutional … because it violates the Republican Form of Government Clause." Erwin Chemerinsky, "Challenging Direct Democracy," 2007 Mich. St. L. Rev. 293, 294, 301 (2007) (citing U.S. CONST., Art. IV, Sec. 4). Apparently in agreement are Judge Diane Wood, a preeminent federal judge having an illustrious career on the U.S. Court of Appeals for the Seventh Circuit, and future Supreme Court Justice Amy Coney Barrett. Together they ruled in 2020 that:

> We do not interpret *Rucho* or any other decision by the Supreme Court as having categorically foreclosed all Guarantee Clause claims as nonjusticiable, even though no such claim has yet survived Supreme Court review. ***The district court thus went too far in saying that no Guarantee Clause claim could proceed to adjudication on the merits***. Instead, it should have decided simply whether this particular Guarantee Clause claim is among the rare ones that can survive a motion to dismiss. We conclude that it is not.

Democratic Party of Wis. v. Vos, 966 F.3d 581, 589 (7th Cir. 2020) (emphasis added).

The most plausible inference from the foregoing federal appellate holding is that the unanimous court would use the Guarantee Clause to invalidate a ballot initiative that sought to establish sweeping new rights for or against abortion. Both judicial sides of the abortion debate thereby implicitly agreed that it is not proper subject matter for a ballot initiative, because of the Guarantee Clause of the U.S. Constitution. U.S. CONST., Art. I, Sec. 4.

Meanwhile, the U.S. Supreme Court Chief Justice Roberts came very close to invoking the Guarantee Clause against a ballot-initiative redistricting in his passionate dissent in *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015). Roberts lacked a majority for this position in 2015, but likely has a majority today on this. The 5-4 majority, in its footnote 3, further opened the door to use of the Guarantee Clause against a far-reaching ballot initiative, as Issue 1 is.

Many additional law professors and judges have spoken out against the direct democracy of ballot initiatives. Professor Julian Eule has urged heightened judicial review when a ballot initiative passes. *See* Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1539 (1990*)* ("a wariness of unfiltered electoral expressions protects our republican form"). Professor Eule noted that direct democracy conflicts with the U.S. Constitution. *See id.* at 1508 ("Despite the instinctive appeal of Hugo Black's view that the level of appropriate scrutiny ought to decline as democracy becomes more direct, I believe that a deeper consideration will reveal that he is 180 degrees off the mark."). As another law professor explained:

> In the republic, the people must have control of their choices – not simply by being able to vote, but by having the government act in their best interest. Toward that end, the representatives owe their best judgment to all members of the community. … The republican form of government is in jeopardy.

Mark C. Alexander, "Campaign Finance Reform: Central Meaning and a New Approach," 60 Wash & Lee L. Rev. 767, 838 (2003). Former Oregon Supreme Court and legal scholar Justice Hans Linde was also critical of ballot initiatives.

Abortion implicates complex issues of medicine, law, and ethics. Legislative committee hearings, informed debate, and enlightened decision-making are essential ingredients to enacting laws that are best for Ohioans and the future of this State. If the Guarantee Clause protects anything against mob rule as driven by misleading television ads, it is the abortion issue. The invitation by U.S. Court of Appeals Judge Diane Wood to apply the Guarantee Clause should be accepted here for Issue 1.

VI. As Multiple State Supreme Courts Have Held under Constitutional Provisions Similar to Ohio's, Sweeping Ballot Initiatives Like Issue 1 Are Invalid.

The ballot initiative process was adopted in Ohio within a year of its adoption in California, where there is an extensive body of legal precedents as to limits on this process consistent with its Progressive Era intentions. Many of the other states that use ballot initiatives have likewise invalidated far-reaching changes by amendment.

As explained by the Cleveland-Marshall College of Law Dean Emeritus Steven Steinglass, "There is a distinction in state constitutional law between constitutional amendments and constitutional revisions, and courts have used this distinction to limit the use of the initiative to amendments and to bar its use for constitutional revisions." Steinglass, "Constitutional Revision: Ohio Style," 77 Ohio St. L.J. 281, 323

(2016). Dean Steinglass observed that "there is a textual basis for" this distinction in Ohio, although the case law for it is more developed in California and other jurisdictions where there have been more ballot initiatives. *Id.* The numerous California precedents, for example, include its Supreme Court invalidating a portion of a voter-enacted ballot initiative because "fundamental constitutional rights are implicated." *Raven v. Deukmejian*, 52 Cal. 3d 336, 352, 276 Cal. Rptr. 326, 336, 801 P.2d 1077, 1087 (1990).

Many decisions in other states have likewise invalidated ballot initiatives for being substantive revisions rather than merely amendments. *See, e.g.*, *Citizens Protecting Mich.'s Constitution v. Sec'y of State*, 761 N.W.2d 210, 229 (Mich. Ct. App.) (per curiam) (incorporating California precedents to hold that an initiative affecting multiple articles of the Michigan Constitution was a constitutional revision, and thus an impermissible amendment by initiative), *aff'd without opinion*, 755 N.W.2d 157 (Mich. 2008); *Bess v. Ulmer*, 985 P.2d 979, 982 (Alaska 1999) (holding that "[t]he Framers of the Alaska Constitution distinguished between a revision and an amendment," and ruling that a ballot initiative to limit prisoner rights to federal protections constituted a "revision" that could not be adopted by a mere amendment); *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970) (holding that a proposed amendment by initiative was improper because it affected multiple sections of the constitution, as Issue 1 implicitly does); *Holmes v. Appling*, 392 P.2d 636, 639 (Or. 1964) (adopting the distinction between a revision and an amendment, and ruling that that a

proposed initiative was a revision improper to be done as an amendment). Likewise, the far-reaching Issue 1 constitutes a revision, not a proper amendment.

Conclusion

For the foregoing reasons, Issue 1 is invalid and unenforceable as a revision or amendment to the Ohio Constitution, and thus has no application to this case.

Dated: December 4, 2023

Respectfully submitted,

Andrew L. Schlafly*
939 Old Chester Rd.
Far Hills, NJ 07931
Tel: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

pro hac vice pending

s/ Robert T. Lynch
Robert T. Lynch
35253 Maplegrove, Suite 102
Willoughby Hills, OH 44094
Tel: (216) 401-2488
Fax: (216) 245-5978
Email: lynchlegalservices@juno.com

Counsel for Amici Curiae Phyllis Schlafly Eagles, Janet Folger Porter, Faith2Action Ministries, Ohio Representative Beth Lear, Ohio Value Voters, Mission America, Margie Christie, Dayton Right to Life Society, Ohio Christian Alliance, Warren County Right to Life, Lori Viars, Eagle Forum of Ohio, Community Pregnancy Center, former Ohio Representative Candice Keller, former Ohio Representative Ron Hood, and Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

I, Robert T. Lynch, hereby certify that on this 4th day of December, 2023, I caused a true and correct copy of the foregoing brief of *Amici Curiae* to be served by e-mail upon the counsel listed below.

ALAN E. SCHOENFELD
MICHELLE NICOLE DIAMOND
PETER NEIMAN
Wilmer Cutler Pickering Hale
and Dorr LLP
7 World Trade Center
New York, NY 10007
Alan.Schoenfeld@wilmerhale.com
Michelle.Diamond@wilmerhale.com
Peter.Neiman@wilmerhale.com

DAVINA PUJARI
CHRISTOPHER A. RHEINHEIMER
Wilmer Cutler Pickering Hale
and Dorr LLP
One Front Street
San Francisco, CA 94111
davina.pujari@wilmerhale.com
chris.rheinheimer@wilmerhale.com

ALLYSON SLATER
Wilmer Cutler Pickering Hale
and Dorr LLP
60 State Street
Boston, MA 02109
allyson.slater@wilmerhale.com

B. JESSIE HILL
FREDA J. LEVENSON
REBECCA KENDIS
RYAN MENDIAS
ACLU of Ohio Foundation
4506 Chester Ave.
Cleveland, OH 44103
bjh11@cwru.edu
flevenson@acluohio.org
rebecca.kendis@case.edu
rmendias@aclu.org

MATTHEW T. FITZSIMMONS
KELLI K. PERK
Assistant Prosecuting Attorney
8th Floor Justice Center
1200 Ontario Street
Cleveland, OH 44113
mfitzsimmons@prosecutor.cuyahogacounty.us
kperk@prosecutor.cuyahogacounty.us

Counsel for Defendant-Appellee Michael C. O'Malley, Cuyahoga County Prosecutor

MELISSA A. POWERS
Hamilton County Prosecutor
230 E. Ninth Street, Suite 4000
Cincinnati, OH 45202
JEANINE A. HUMMER
AMY L. HIERS
Assistant Prosecuting Attorneys
373 S. High Street, 14th Floor
Columbus, OH 43215
jhummer@franklincountyohio.gov
ahiers@franklincountyohio.gov

Counsel for Defendant-Appellee G. Gary Tyack, Franklin County Prosecutor

WARD C. BARRENTINE
Assistant Prosecuting Attorney
301 West Third Street
PO Box 972 Dayton, OH 45422
wardb@mcohio.org

Counsel for Defendant-Appellee Mat Heck, Jr., Montgomery County Prosecutor

MEGAN BURROWS
American Civil Liberties Union
125 Broad St., 18th Fl.
New York, NY 10004
mburrows@aclu.org

Counsel for Plaintiffs-Appellees Preterm-Cleveland, et al.

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS
Solicitor General

STEPHEN P. CARNEY
MATHURA J. SRIDHARAN
Deputy Solicitors General

AMANDA L. NAROG
ANDREW D. MCCARTNEY
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Amanda.Narog@OhioAGO.gov
Andrew.McCartney@OhioAGO.gov
Benjamin.Flowers@OhioAGO.gov
Stephen.Carney@OhioAGO.gov
Mathura.Sridharan@ohioago.gov

Counsel for Defendants-Appellants Attorney General Dave Yost, Director Bruce Vanderhoff, Kim Rothermel, and Bruce Saferin

JOHN A. BORELL
KEVIN A. PITUCH
EVY M. JARRETT
Assistant Prosecuting Attorney
Lucas County Courthouse, Suite 250
Toledo, OH 43624
jaborell@co.lucas.oh.us
kpituch@co.lucas.oh.us

Counsel for Defendant-Appellee Julia R. Bates, Lucas County Prosecutor

CARRIE HILL
Attorney for Summit County Prosecutor
Assistant Prosecuting Attorney
53 University Ave., 7th Floor
Akron, OH 44308-1680
chill@prosecutor.summitoh.net

Counsel for Defendant-Appellee Sherri Bevan Walsh, Summit County Prosecutor

Dated: December 4, 2023

s/ *Robert T. Lynch*
Counsel for *Amici Curiae*