IN THE SUPREME COURT OF OHIO

PRETERM-CLEVELAND, INC., et al.,	§	Case No. 2023-0004
	§	
Appellees,	§	On appeal from the Hamilton
	§	County Court of Appeals,
v.	§	First Appellate District
	§	
DAVID YOST, et al.,	§	Court of Appeals
	§	Case No. C-220504
Appellants.		

***AMICUS CURIAE* BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE REGARDING THE SCOPE OF ISSUE ONE AND IN SUPPORT OF APPELLANTS**

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Amicus American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have appeared frequently before numerous state and federal courts as counsel for parties, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amici, *e.g.*, *Preterm-Cleveland,* No. 1:19-cv-00360 (S.D. Ohio filed May 6, 2020) (amicus on behalf of Ohio legislative supporters of SB 23, the Human Rights and Heartbeat Protection Act). ACLJ attorneys have advised on the language of pro-life legislation in Ohio, including the Heartbeat Act at issue in this case.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts and Case of the Merit Brief of Appellants Yost et al. Notably, the Court of Common Pleas's order "enjoins the enforcement of SB 23 *in its entirety*" (with limited exceptions regarding adoption, foster care, and internal state processes regarding informed consent), Preliminary Injunction Order at 41 (emphasis added), *not* just the section prohibiting abortions after detection of a prenatal heartbeat. Hence, analysis of the compatibility of Issue 1 with the Heartbeat Protection Act entails review of a host of different provisions.[1]

ARGUMENT

The principles that govern the interpretation of voter-approved constitutional amendments provide that such amendments be interpreted in light of the ordinary meaning of the text. Issue 1, if read in that fashion and not given a hyper-literal, push-to-the-extreme reading is consistent with a host of sensible abortion regulations and restrictions, including the Heartbeat Protection Act, which

[1]The specific provisions of SB 23 are listed in the Amicus Curiae Brief of Legislative Supporters of SB 23 Regarding the Scope of Relief, filed in the federal court case of *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360 (S.D. Ohio May 6, 2020). The brief is available at http://media.aclj.org/pdf/Preterm-v.-Yost-Motion,-Memo,-and-Brief-of-Legislative-Supporters-(Doc.-80)_Redacted.pdf, and the list of the bill's provisions appears at pp. 2-4 of the amicus brief.

does not "ban" abortions but simply provides basic protection to human beings possessing heartbeats. Therefore, the adoption of Issue 1 does not moot this case.

I. ISSUE ONE SHOULD BE CONSTRUED REASONABLY AND DOES NOT REQUIRE THE INVALIDATION OF EVERY EXISTING LAW RELATING TO ABORTION.

A. Amendment Language Should Be Given its Ordinary Meaning.

This Court has called for briefing on "the effect on this case, if any, of the passage of Issue 1. *Preterm-Cleveland v. Yost*, 2023-Ohio-4540. To answer that question, the meaning of Issue 1 must be determined, at least enough to ascertain what effect it may have on the present case. As explained in this amicus brief, the nonspecific language of Issue 1cannot sensibly be construed to reach its literal scope or be taken to illogical conclusions. This Court should therefore adopt a reasonable interpretation of Issue 1 that harmonizes with this Court's approach to interpretation of the state constitution.

As this Court explained in *State v. Yerkey*, 2022-Ohio-4298, when an amendment is "approved by direct vote of Ohio's electors, . . . it is well established how we construe such provisions[.]"

> In construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters who adopted the amendment. *Castleberry v. Evatt*, 147 Ohio St. 30, 33, 67 N.E.2d 861 (1946); *see also State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 294, 114 N.E. 263, 14 Ohio L. Rep. 266 (1916) (when interpreting the Ohio Constitution, "[i]t is the duty of the court to ascertain and give effect to the intent of the people"). The court generally applies the same rules when construing the Constitution as it does when it construes a statutory provision, beginning with the plain language of the text, *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14, and considering how the words and phrases would be understood by the voters in their normal and ordinary usage, *District of Columbia v. Heller*, 554 U.S. 570, 576-577 (2008).

Yerkey at ¶9 (quoting *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22). The *Yerkey* Court continued:

> In cases in which the language of the provision is unclear or ambiguous, our analysis may also include a review of the "history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide." *Id*. Also, we presume that the voters were aware of the laws in existence at the time they voted to adopt the constitutional amendment. *See id.* at ¶ 28; *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 6. It is also axiomatic that the words of the provision passed, except when otherwise indicated, are to be given their ordinary meaning. *Knab* at ¶ 22.

Yerkey at ¶9.[2] *Yerkey* points to the bottom line in this case: "So the question is, what would a voter who knew the then-existing law [on abortion an other pertinent matters] have understood [Issue 1] to mean?" *Id.* at ¶9.

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[2]The various ads promoting Issue 1 have little to no interpretive value. The ads naturally consist primarily of sound bites and slogans. Many of the slogans cannot be taken literally, such as the recurrent theme of keeping the government out of medical and health care decisions, which would logically mean the abolition of all government-imposed childhood vaccine requirements, medical licensing requirements, drug approval regimens, etc. *See, e.g.,* "Kathyrn Hahn wants you to vote YES," https://www.youtube.com/watch?v Ge-evku6GFE ("we need to make sure that government stays out of our personal health care decisions"). Many ads emphasize "women's" rights, *e.g.,* "Voters from across Ohio are Voting YES on Issue 1," https://www.youtube.com/shorts/K2D4aRc4DUI, even though the amendment language refers to "every individual" and contains no sex-based limit. (Some ads do acknowledge this broader application. *E.g.,* "Vote Yes on Issue 1 to keep women alive," https://www.youtube.com/shorts/vNsMgRxv-Pw ("every woman and every human in Ohio," "our rights as humans mostly as women just general public") Ads refer to situations of rape or incest, or emergency medical situations, *e.g.,* "What Happens," https://www.youtube.com/watch?v Sd1a42w4rYQ, which would imply Issue 1 was designed to accommodate such exceptional cases; but no applicable references appear in the text. A number of ads refer to Ohio's "extreme abortion ban," which apparently refers to the Heartbeat Act. *E.g.,* "Future #VoteYesOnIssue1 #Ohio," https://www.youtube.com/shorts/WVsxlksiNZ4. But none of the ads mention "heartbeat" or even "cardiac activity." One ad, "The Facts #VoteYesOnIssue1 #Ohio," https://www.youtube.com/shorts/Co-MheKUNzc, explicitly states that "Voting yes on Issue 1 doesn't end restrictions on later abortion. It stops Ohio's abortion ban with no exceptions for rape or incest." This could mean *either* that Issue 1 overrides abortion limits *as applied to* cases of rape or incest, *or* that the Heartbeat Act's prohibition section would be invalid *in toto* while bans on "later abortion" would not be. Again and again, the ads decry "extreme" abortion bans, implying that Issue 1 itself would not be "extreme." *See, e.g.,* "Counting On," https://www.youtube.com/watch?v 7cjjyIMqc94. And, of course, none of the ads articulate a right to kill the child, fetus, or embryo. In short, the promotional ads were plainly designed to influence voters, not to interpret Issue 1.

B. Amendment Language Which Does Not Specify Laws which Conflict Need Not Be Read to Require Invalidation of Such Laws

Importantly, in *Yerkey* this Court *rejected* the argument that amendment language "vastly expand[s]" the rights at issue (there, the right to restitution for crime victims), *id.* at ¶14, and instead concluded that "no portion of [the amendment] 'conflicts' with the [pertinent] statutes," *id.* at ¶12, Thus, it is plainly the case that an amendment adopted by direct vote, depending on the language, does *not* necessarily require the invalidation of any particular existing statute, especially where the new amendment, as in *Yerkey*, "does not specify, explicitly or even by implication," *id.* at ¶12, that such a result must follow.

II. ISSUE ONE SHOULD NOT BE READ IN A LITERAL, EXTREME MANNER.

In *State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Board*, 2023-Ohio-3325, this Court expressed some initial understandings of the meaning of Issue 1. The Court did not, however, engage in detailed parsing of the text. This brief aims to help continue the interpretive process. Importantly, Issue 1 cannot be interpreted in a literal fashion, as that would render the amendment both self-contradictory and, frankly, monstrous. Amicus identifies, with reasoning from example, four essential interpretive guidelines for Issue 1.

1. No self-contradiction An amendment obviously should not be read to create contradictions. Issue 1 refers to the "right to make and carry out one's own reproductive decisions," Art. I, Sec. 22 (A), and provides that the state "shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against . . . [a]n individual's voluntary exercise of this right," *id.* Sec. 22(B)(1).. This right distinguishes the United States, not just Ohio, from nations where the government imposes limits on how many children are allowed to be born to a particular family. A sensible, reasonable

reading of that language in Issue 1 precludes forcible sterilization, forced birth control, and forced abortions. But a literal reading of the "right to make and carry out one's own reproductive decisions" would include the "right" to impregnate, or be impregnated by, the person of one's choice or, more precisely, to bar any government interference with that "right." Yet that reading cannot be correct, as one person's command over the another person's procreation would conflict with the other person's control over the same procreative decision. (The amendment refers to "every individual," so there is no textual basis to elevate a woman's choice over a man's , or vice-versa.) Likewise, since the text expressly includes "abortion" as an example of a "reproductive decision[]," a literal reading would empower every person with the right to veto continuation of a pregnancy that entails one's own reproduction. In other words, *both* the father *and* the mother would have a right to terminate the pregnancy, and any law preventing coercion by one parent over the other would represent unconstitutional "interference." But again, that cannot be so, as such a "right" necessarily conflicts with the other partner's reproductive right to continue the pregnancy, and hence in a case of disagreement, one parent or the other would *not* be making and carrying out a "voluntary" decision to abort.[3] That would read the amendment as self-contradictory. It follows that Issue 1 cannot be read to entail a reproductive right of one parent to abort when that conflicts with the reproductive right of the other parent.[4]

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[3]It is certainly the case that the mother and father can and will disagree over whether the pregnancy is desirable and should be continued. *E.g.*, Kaitlynn Alanis, "Husband secretly drugged pregnant wife's drinks to cause abortion, Texas officials say," *Fort Worth Star-Telegram* (Nov, 11, 2022).

[4]On the other hand, Issue 1, as this Court has already held, does not "prohibit individual citizens i.e., private actors from taking actions to burden, penalize, or prohibit abortion," *Ohioans United*, ¶26. In other words, private citizens can try to save a child from abortion, but they have no right to coerce a woman to abort. "The language does not imply that the pregnant woman would be required to obtain an abortion." *Id.* ¶32.

2. No authorization of harm to other human beings Nor should Issue I be read to authorize the fulfillment of one's own reproductive desires by whatever means necessary, regardless of the risk of harm to third parties. Thus, Issue 1 should not be read to authorize infanticide (or more precisely, to bar government prohibition of infanticide). True, under Issue 1, the government cannot set family size by imposing a minimum or maximum number of required pregnancies or childbirths. Issue 1leaves that decision in the hands of the parents. But that does not mean a couple who wanted, say, one child, but gave birth surprisingly to twins,[5] would have the right to kill one of the infants to maintain their desired family size. This is so for at least two reasons: First, infanticide was illegal before Issue 1 passed, and the supporters of Issue 1 made no claim that there amendment would legalize the practice. And second, infanticide involves killing another, innocent human being, which is by no means a "normal and ordinary" (*Yerkey*, ¶ 9) concomitant of a right. Furthermore, killing another human necessarily entails the absolute nullification of *that* slain individual's "reproductive rights," which would make the amendment self-contradictory as well as anti-human. For the same reasons, Issue 1's "right to make and carry out one's own reproductive decisions" cannot include the right to kidnap another woman's child born or preborn[6] and claim that child as one's own.

To say that such acts were *illegal* prior to Issue 1, and thus outside the scope of Issue 1, does not distinguish these cases from *abortion*, as any abortion that was unlawful under Ohio law prior

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[5]*E.g.,* Jessica Green, "Double trouble! Incredible moment mother who has just given birth is handed her daughter's TWIN after having no idea she was pregnant with two babies," *Daily Mail* (Apr. 15, 2020) (Wisconsin); "'Oh Lord, there's Another!': Parents Expecting Baby's Delivery Surprised By 2nd Bundle Of Joy," *WCCO News* (Sept. 7, 2020) (Minnesota).

[6]Caryn Rousseau & Don Babwin, "Pregnant Chicago woman slain, baby cut from her womb," *AP* (May 16, 2019); Laura Barcella, "Woman, 8 Months Pregnant, Dies After Couple Cuts Unborn Baby from Womb, Pretends Infant Is Theirs: Authorities," *People* (Dec. 6, 2022)

to Issue 1 was likewise, by definition, illegal. The question, rather, is whether Issue 1 renders that illegality unconstitutional and if not, why not. The principle of preventing harm to other human beings supplies a answer. The status of pre-Issue 1 illegality also would provide an answer. Both of these explanations apply to infanticide as well as abortion (and other third-party harms) , at least insofar as abortion kills or injures a human being.[7]

3. No carte blanche exemption from regulations Nor should Issue 1 be construed to confer a blanket exemption from regulations for anything having to do with reproductive choices. Plainly, one can have a "right to property" yet still have one's business or property subject to a host of taxes, zoning restrictions, health regulations, etc. The same goes for the right to bear arms. In the same way, a right to make and carry out reproductive decisions is not the same as a right to be free of any and all regulation. Consider the pregnant mother who lives in a rural area of Ohio.[8] There may be a profound shortage of medical facilities available, a shortage which jeopardizes the health of both mother and baby. That shortage could be blamed on the state's requirements for professional licensing of providers and facilities, building code regulations for hospitals and birthing facilities, environmental requirements for entities dealing with human tissue, and a host of other regulations and requirements which create barriers of time and expense for the establishment of facilities for OB/GYN services and perinatal care. Abolishing all those regulations would certainly make it easier

[7]A D&C procedure to remove a complete molar pregnancy, by contrast, would not kill a tiny human but rather would protect the woman from potentially serious harm. "Molar Pregnancy," Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/17889-molar-pregnancy (last reviewed Dec. 26, 2022).

[8]*See, e.g.,* Danae King, "Babies delivered in cars: Rural Ohio's lack of maternity care affects nearly 100,000 women," *The Columbus Dispatch* (May 11, 2023) (decrying lack of pre- or post-natal care in Vinton County, "where there is no access to maternity care, an obstetric provider, a hospital with obstetric care or a birth center").

for anyone to set up shop, provide, and charge for the currently missing services. But such an outlandish result in no way "would have been understood by the voters who adopted the amendment," *Yerkey*, ¶ 9, as following from the adoption of Issue 1.[9] That amendment thus cannot sensibly be construed to require the discarding of the host of medical protocols designed to assure the *proper* delivery of reproductive services such as childbirth.

4. No disregard of the special needs and vulnerabilities of minors As the U.S. Supreme Court has explained, minors warrant special care under the law:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality). The term "any individual" therefore cannot be read to negate any and all limitations on the conduct of minors. While the term "any individual" would include human beings of all ages, it would be stunningly counterintuitive to say that it would be "understood by the voters ," *Yerkey*, ¶ 9, that thirteen-year-olds now have a state constitutional right to have sexual relations with an older paramour, or that the older person has the constitutional right to pursue such relations with a minor.[10] The obvious reason is that youths generally lack the mental and emotional maturity of adults, and so it makes perfect sense to protect minors from exploitation by disallowing, at certain ages, behaviors like smoking, drinking, marrying, entering into contracts, and engaging in sexual acts.

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[9]This Court has already held, in *State ex rel. Ohioans United*, ¶18, that Issue 1 does not affirmatively require "state-provided medical treatment."

[10]*E.g.,* Andrew Mark Miller, "Ohio softball coach pleads guilty after sleeping with student, begged student not to tell," *Fox News* (Oct. 18, 2022).

In sum, Issue 1 should not be interpreted in some hyper-literal fashion that would produce insane and destructive results, as "a voter who knew the then-existing law," *Yerkey*, ¶ 9 , would not have understood the "ordinary meaning" of the language in Issue 1 to effectuate such a radical transformation of the law under the guise of such gauzy terms as appear in Issue 1.

* * *

A proper interpretation of Issue 1 should reflect the principles illustrated above: First, the construction should not be one that produces mutually contradictory claims of "rights." Second, the construction should not set aside the duty of a civilized people to protect vulnerable human life from harm. Third, the amendment should not be read to nullify reasonable health, safety, and other related regulations. And fourth, Issue 1 should not be read to obliterate the distinctions between adults and minors.

With these principles in mind, amicus now turns to the specific interpretation of Issue 1 as it bears on laws touching upon abortion, including the Heartbeat Protection Act.

III. ISSUE ONE DOES NOT SET HARD-AND-FAST LIMITS ON ABORTION RESTRICTIONS OR REGULATIONS.

The text of Issue 1 does not identify any particular existing statute, or statutory approach, as being subject to invalidation. Rather, Issue 1 employs broad generalities which, as explained above, simply cannot be interpreted in a literal fashion. Indeed, the promotional rhetoric using "extreme" as a key pejorative, *see supra* note 1, counsels, if anything, that Issue 1 itself not be construed in an "extreme" manner.

In light of the governing principles of constitutional interpretation of voter-adopted amendments, *supra* § I, and the interpretive norms derived therefrom, *supra* § II, it follows that:

First, Issue 1 flatly prohibits government-forced abortions as well as "indirect[] . . . interfere[nce] with . . . voluntary exercise" of reproductive rights. Hence, statutory bans on coerced abortions are permissible. The "right" identified in Issue 1, moreover, does not entail the right to veto another person's continuing pregnancy. Hence, laws requiring, for example, spousal consent before carrying out any abortion are constitutional.[11] To hold otherwise would be to make Issue 1 self-contradictory, as one person could veto another person's "reproductive decision."

Second, the state retains a valid interest in protecting third-party human beings, including those not yet born, from harm that would flow from another person's "reproductive choice." To flesh this point out, it helps to step back a moment.

Abortion typically has two conceptually distinct consequences: the termination of pregnancy and the death of the prenatal human. That these are quite different things follows from simple logic. First, childbirth terminates a pregnancy, but normally does not result in the death of the child. Second, a child can die from an accident, attack, or natural causes, while the pregnancy continues.

[11]In light of modern artificial reproductive technologies, it is possible that more than two individuals will have been involved in the reproductive process. *See* "Gestational Surrogacy," *Cleveland Clinic*, https://my.clevelandclinic.org/health/articles/23186-gestational-surrogacy (woman carrying child distinct from sperm donor and egg donor, who may be the "intended parents"). Under Issue 1, contracting "intended parents" should have no enforceable right to compel a surrogate mother to abort, say, because the child is the "wrong" sex or has been diagnosed with a disability, or because the surrogate is pregnant with "too many" children. *E.g.,* Wesley J. Smith, "Two Fathers Sue Because Surrogate Gave Birth to a Daughter," *Nat'l Rev. Online* (July 7, 2022) ("they wanted two boys"); Elizabeth Cohen, "Surrogate offered $10,000 to abort baby," CNN (Mar. 6, 2013) (baby diagnosed prenatally with cleft lip and other medical issues; contracting couple insisted on abortion); "Surrogate mom carrying triplets fights biological parents on abortion," *CBS News* (Dec. 17, 2015) (contracting couple wanted number of babies reduced).

Third, in light of in vitro fertilization (IVF), surrogacy, and perhaps in the future artificial wombs,[12] a woman need not actually be herself pregnant with her biological prenatal child.

To be sure, there have been some who insist that a right to abortion includes "'a right to a dead fetus.'" *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 484 n.7 (1983) (quoting abortionist). The U.S. Supreme Court, however, rightly rejected that notion in *Ashcroft* when, while the Court still regarded abortion as a federal constitutional right, it nonetheless upheld the requirement that a second physician be present to care for the life of any child that should survive the abortion procedure.

Consequently, abortion, understood as the termination of a pregnancy, does not necessarily include the right to the death of the intrauterine child. It follows that the state can take measures to protect that child from the harm that would result from another person's "reproductive decisions." Indeed, to leave the child unprotected would be to enable the complete abrogation of that child's capacity for reproductive decisions in perpetuity, making Issue 1 self-contradictory.

In short, medical procedures that inevitably would kill another human being are not essential parts of "reproductive rights." Therefore, the state can insist upon a "life of the child" exception to such rights. Indeed, the state may be *obligated*, under the federal Constitution, to enact laws providing equal protection to human beings both before and after birth. *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970) (three-judge court) ("Once human life has commenced, the

[12]Jen Christensen, "FDA advisers discuss future of 'artificial womb' for human infants," *CNN* (Sept. 19, 2023).

constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it").[13]

To be sure, Issue 1 "largely concerns when an abortion may or may not be prohibited," *Ohioans United,* ¶ 21, and this Court stated that the language "would always *allow* an abortion when a physician decides that an abortion is necessary to protect the life or health of the pregnant woman, even after viability," *id.* ¶ 32. There are three important caveats, however. First, as noted above, "abortion" does not necessarily entail a "right to a dead fetus." Second, if Issue 1 were read to allow abortion *to take the life* of the tiny human before birth, it would run afoul of *Steinberg* and the Equal Protection norms *Steinberg* embraced. Third, Issue 1 does not define the "life or health" exception, but does specify that the abortion must be "necessary" in the "professional judgment" of the "treating physician." Sec. 22(B). In light of the norms enunciated above, that exception should be read narrowly. For example, the Missouri Court of Appeals, facing an interpretive question involving similar language in a ballot initiative there, held as follows:

> The argument that the life-and-health exception would swallow the rule . . . ignores the rules of statutory construction and is not an accurate reading of the initiatives. It would render meaningless the rest of the subsection permitting the General Assembly to regulate abortion after fetal viability . . . . Furthermore, . . . the initiatives require that abortion be "needed" to protect the life or health of the pregnant person. "Needed" means to "be necessary." . . . It also ignores that the health care professional's assessment of need must be made in good faith. Indeed, the good-faith-judgment requirement in the life-and-health exception of the initiatives is a comparable safeguard to the existing standard for determining whether a *medical emergency* necessitates an immediate abortion in section 188.015(7), RSMo Cum. Supp. 2020.

[13]The U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), was inconsistent with *Steinberg*, and thus eclipsed *Steinberg* on this question. However, *Roe* has subsequently been overruled. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

Fitz-James v. Ashcroft, 2023 Mo. App. LEXIS 814, 2023 WL 7141416 at *23-*24 (Oct. 31, 2023) (emphasis added).[14] The Ohio "medical emergency" definition is as follows:

> (F) "Medical emergency" means a condition that in the physician's good faith medical judgment, based upon the facts known to the physician at that time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.

Ohio Rev. Code Ann. §2919.16(F). This Court should follow *Fitz-James* on this point and construe the "life or health" exception in Issue 1 to mean the same as the "medical emergency" definition in existing Ohio law, §2919.16(F), which is substantively indistinguishable from the life-or-health exception contained in the Heartbeat Protection Act, Ohio Rev. Code Ann. 2919.195(B) ("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").

The Heartbeat Protection Act, which operates after the prenatal child has progressed sufficiently along the developmental route to manifest a heartbeat, and which contains a life-or-health exception as quoted above, comports with Issue 1. The Act extends protection to innocent third parties namely, defenseless, tiny humans. Moreover, the Heartbeat Act prevents the intentional destruction of the "reproductive rights" of such children as much as, and even more than, a ban on sterilizing

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[14]The U.S. Supreme Court, again in a pre-*Dobbs* legal world, upheld a virtually identical exception:

> "that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."

Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (joint opinion) (quoting Pennsylvania statute). Hence, such a reading of Issue 1 is consistent with the existence of a "right to abortion."

infants would. The Heartbeat Act, ORC § 2919.195, therefore is not invalid under a reasonable, humane construction of Issue 1.[15]

Third, the state can adopt, or retain, reasonable regulations on procedures, practitioners, and facilities involved with reproductive matters. Issue 1 does not require a state to jettison the various measures designed to safeguard patients and the public just because abortion is involved. Hence, the various reporting, recordkeeping, testing and informed consent measures in the Heartbeat Act, such as those parts of SB 23 amending ORC §§ 2919.171(A) & (D) (reporting), 2919.19 (severability), as well as new §§ 2919.192 (heartbeat testing), 2919.191 (law only covers intrauterine pregnancies, not ectopic), 2919.193 (heartbeat testing and recordkeeping), 2919.194 (informed consent), 2919.196 (reporting), 2919.197 (excluding contraceptives), are constitutional under Issue 1.

Fourth, the state can adopt, or retain, measures aimed at protecting minors because of their immaturity. Issue 1 is not a legal wrecking ball that forces the state to pretend there are no relevant differences between someone who is 2, 12, or 22, when it comes to matters of reproduction.

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[15]Defendant Yost took a more pessimistic view of the impact of Issue 1 on abortion laws in Ohio. "Issue 1 on the November 2023 Ballot: A legal analysis by the Ohio Attorney General," https://s3.documentcloud.org/documents/24016437/final-issue-1-analysis.pdf. However, as AG Yost acknowledges, his analysis entailed a "degree of conjecture and speculation," *id.* at 1. Moreover, he explains, "Some terms found in the Amendment . . . have debatable meanings, rendering their interpretation much less certain. It is this uncertainty that makes it difficult to forecast precisely how courts will apply the Amendment to certain statutes and hypothetical scenarios if it were to pass." *Id.* at 2.

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CONCLUSION

WHEREFORE, if this Court should reach the question of the scope of Issue 1 or its impact on this case, this Court should reverse the judgment of the trial court and either remand for further consideration in light of Issue 1 and this Court's interpretive guidance, incorporating the four principles identified above, or itself reach the merits and allow the various provisions of the Heartbeat Protection Act go into effect.

Dated: December 7, 2023

Respectfully submitted,

/s/ Patrick J. Perotti
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APPENDIX

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.

https://www.ohiosos.gov/globalassets/elections/2023/gen/issuesreport.pdf

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amicus Brief of the American Center for Law and Justice was served by e-mail this 7th day of December, 2023 upon the following:

Dave Yost
Ohio Attorney General
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Additionally, the foregoing Brief of Appellants was served by U.S. mail this 7th day of December, 2023, upon the following:

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/s/ Patrick J. Perotti