

IN THE SUPREME COURT OF PENNSYLVANIA

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73 MM 2022

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TOM WOLF, GOVERNOR OF THE COMMONWEALTH OF  
PENNSYLVANIA, LEIGH M. CHAPMAN, ACTING SECRETARY OF THE  
COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

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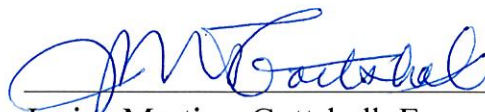
**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*  
PENNSYLVANIA FAMILY INSTITUTE IN SUPPORT OF RESPONDENT**

1. Pursuant to Pa. R.A.P. 531(b)(iii), Pennsylvania Family Institute requests leave to file the attached brief as *amicus curiae* in this matter.
2. Pennsylvania Family Institute is a leading voice for unborn children in Pennsylvania and, therefore, supportive of the proposed amendment concerning abortion and can speak to the need for such an amendment.
3. In the accompanying proposed brief, Pennsylvania Family Institute addresses issues raised by the Governor, specifically those involving the proposed amendment concerning abortion.

4. The proposed brief will aid this Court's consideration of the issues.
5. This Court's August 18, 2022 Orders denying intervention provided for *amicus curiae* submissions on or before August 24, 2022.
6. Because the timing of the proposed submission is within the time provided for the proposed intervenors, no parties would be prejudiced by this submission.
7. Proposed *amicus curiae* respectfully requests that this Court grant leave to file the proposed *amicus* brief, included here as Exhibit A.

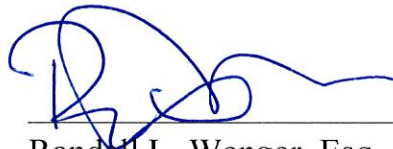
Respectfully submitted,

Dated: August 24, 2022



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# EXHIBIT A

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PENNSYLVANIA, LEIGH M. CHAPMAN, ACTING SECRETARY OF THE  
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Respondent.

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**Brief of *Amicus Curiae* Pennsylvania Family Institute  
in Support of Respondent**

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pennsylvania Family Institute is a leading voice for unborn children in Pennsylvania. It has long worked with legislators, civil rights leaders, and citizens to advocate for human rights for unborn children. Its lawyers and staff have witnessed firsthand the benefits of certain limitations on abortion, such as the 24-hour waiting period, which has provided a needed opportunity for teens and young women to get the help they need in situations where they are being pressured by the child's father to have an abortion. Limitations in existing law have been extremely helpful to the interest of both women and their unborn children.

Aspects of our established law are currently in jeopardy as the abortion industry is suing the Commonwealth in a case now pending before this Court. In that case, *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, No. 26 MAP 2021 (Pa. filed Apr. 26, 2021), seven abortion providers specifically seek to create a right to abortion under the Pennsylvania Constitution and seek to secure taxpayer funding for abortions by enjoining enforcement of the Pennsylvania Medicaid coverage ban. (*Id.*, Reproduced R., Volume I, 113a, 143a).

The proposed amendment concerning abortion addresses the issue raised in that case. Pennsylvania Family Institute can provide insight that helps to understand the value of the proposed amendment and how the amendment complies with existing constitutional requirements for such an amendment. No person or entity



other than *amicus curiae* or its counsel paid in whole or in part for the preparation of this brief or authored this brief in whole or in part.

## ARGUMENT

The proposed amendment concerning abortion contains only one issue, in that it establishes who gets to determine the policy concerning abortion—the General Assembly and the Governor rather than the courts. Besides, abortion itself is a single topic. Petitioners’ contention that the proposed amendment concerning abortion addresses an untold myriad of non-abortion related issues is incorrect both in light of the actual language of the proposed amendment as well as the context of its passage. Abortion is not an indefeasible right enshrined in the Commonwealth’s Constitution. The right to abortion is statutory, and has never been protected by Pennsylvania’s Constitution.

### **I. The Proposed Amendment Concerning Abortion Pertains to Only One Issue—Abortion.**

Petitioners repeatedly refer to the abortion amendment as the “proposed amendment concerning abortion,” which explicitly acknowledges the unity of the subject matter of the amendment—who gets to set abortion policy. Under Pennsylvania law, a proposed constitutional amendment must satisfy the “subject matter test” set forth by this Court in *Grimaud v. Commonwealth*, 865 A.3d 835, 841 (Pa. 2005). In *Grimaud*, the Court considered whether the proposed changes to the

Constitution were sufficiently interrelated to justify inclusion into a single ballot question. The Court determined that the proposed changes “were related to a single subject, bail,” and were, therefore, properly included in a single question. *Id.* at 841. This proposed amendment, likewise, affects one subject, abortion.

If a “proposed amendment makes multiple changes to the Constitution” the Court must determine “whether those changes ‘are sufficiently interrelated to justify their presentation to the electorate in a single question’” or, in other words, whether the changes are “functionally interrelated.” *League of Women Voters v. Degraffenreid*, 265 A.3d 207, 236-37 (Pa. 2021). The proposed amendment concerning abortion does only one thing—it preserves the right of the General Assembly and the Governor rather than the courts to determine all rights relating to abortion. In other words, it is the General Assembly that will pass bills granting all statutory rights relating to abortion, and it is the Governor who will sign those bills into law.

Because abortion is not mentioned at all in the Pennsylvania Constitution, the proposed amendment encompasses the topic of all abortion related rights in their entirety. The language of the proposed amendment concerning abortion makes it clear that there is only one topic when it says, “This constitution does not grant the right to taxpayer-funded abortion *or any other right relating to abortion.*” (emphasis added). At issue are all rights relating to abortion. Taxpayer-funded abortion is only

one such possible right. There are many other possible rights, such as the right to late-term abortions, the right to be free from a waiting period, and the right to access abortion unencumbered by health and safety regulations, just to name a few.<sup>1</sup>

The use of the word “or” within the proposed amendment does not in itself indicate the assertion of a compound proposition. This can be seen more clearly by analyzing its presence in an analogous construction: “This book does not provide information about tropical fruit or any other information relating to fruit.” Obviously, this use of “or” is not to provide contrast for two independent assertions;

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<sup>1</sup> Both federal and state courts have found various rights relating to abortion: *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 284-85 (Cal. 1981) (finding that the right to abortion includes taxpayer funding of abortion); *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 988 (Alaska 2019) (finding that the right to abortion includes Medicaid funding of abortion); *Doe v. Maher*, 40 Conn. Supp. 394, 443 (Conn. 1986) (same); *Moe v. Secretary of Administration & Finance*, 382 Mass. 629, 660 (Mass. 1981) (same); *Right to Choose v. Byrne*, 91 N.J. 287, 308 (N.J. 1982) (same); *Women’s Health Ctr. v. Panepinto*, 191 W. Va. 436, 445 (W. Va. 1993) (same); *Planned Parenthood of the Heartland v. Reynolds ex re. State*, 915 N.W.2d 206, 245-46 (Iowa 2018) (finding that the right to abortion includes a right to be free of a waiting period); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 24 (Tenn. 2000) (same); *Whole Women’s Health v. Hellerstedt*, 579 U.S. 582, 614, 624 (2016) (finding that the right of abortion forecloses application of health and safety standards); *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2132 (2020) (same); *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000) (finding that the right of abortion includes a right to partial birth abortion). Likewise, statutes have created abortion-related rights: N.J. Stat. Ann. § 10:7-1 (West 2022) (providing for a right to abortion during all nine months of pregnancy); Colo. Rev. Stat. §§ 25-6-401-406 (2022) (same); 18 Vt. Stat. Ann. § 9493 (2019) (same).

it is enumerative, relating one specific instantiation to the broader and all-inclusive category—it indicates specificity, not multiplicity.

To suggest that the right to taxpayer-funded abortion should be voted on separately from all other abortion-related rights defies the singular point of the amendment—to reserve to the democratic process the prerogative to set abortion-related policy. Besides, if taxpayer-funded abortions are to be voted on as a separate constitutional amendment, must the issues of late-term abortions, waiting periods, and health and safety standards be voted on separately as well? This approach, if applied consistently, would require a separate constitutional amendment for every possible application of a given right. This amendment, however, involves only one issue: abortion. All abortion-related rights are covered by and necessarily contained within this single general topic.

Moreover, the context in which the Legislature offered the amendment shows that taxpayer-funded abortion and other abortion-related rights constitute a single topic. The abortion industry sued the state, arguing that Pennsylvania's Medicaid prohibition on abortion funding is unconstitutional *because*, according to the abortion industry, there is a right to abortion arising out of either the Equal Protection Clause or the Equal Rights Amendment in the Pennsylvania Constitution. *See Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 249 A.3d 598, 603 (Pa. Commw. Ct. 2021). The abortion industry's lawsuit is premised on their claim that

a general right to abortion implies a corollary right to funding for abortions. By arguing that the second right stems out of the first, the industry acknowledges the fundamental unity of the issue: abortion. And it is in response to the abortion industry's request—a request linking abortion funding to abortion rights generally—that the proposed amendment concerning abortion was conceived and passed through the Legislature.

The proposed amendment concerning abortion, therefore, seeks to clarify that the Constitution confers no abortion-related rights, including (among others) taxpayer funding of abortion, so that it is the Legislature in conjunction with the Governor that will determine all abortion-related policy. In stating, “This constitution does not grant the right to taxpayer-funded abortion or any other right relating to abortion,” the amendment makes clear that it encompasses all abortion-related rights, including abortion funding, the very issue raised by *Allegheny Reproductive Health Center*. Therefore, the proposed amendment concerning abortion survives the requirement that separate amendments be voted on separately.

## **II. The Proposed Amendment Concerning Abortion is Clear.**

Petitioners claim that the proposed amendment on abortion is vague and could be construed to substantively alter other rights under other constitutional provisions. However, the collateral harms suggested by Petitioners cannot logically flow or even

be inferred from the proposed amendment—which even in its most direct effect, makes no substantive changes to abortion law.

The Court in *Grimaud*, addressing the assertion that the proposed amendment in that case may impact other constitutional provisions, stated:

The test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution. Indeed it is hard to imagine an amendment that would not have some arguable effect on another provision; clearly the framers knew amendments would occur and provided a means for that to happen. The question is whether the single ballot question *patently* affects other constitutional provisions, not whether it *implicitly* has such an effect, as appellants suggest.

*Grimaud*, 865 A.3d at 842 (emphasis added). The mere possibility that other constitutional provisions may be affected is not a valid consideration; the test is whether an amendment *facially* affects other parts of the Constitution. *Id.* at 843, n.1. Here there is not even the possibility that other provisions may be affected.

*Amicus curiae* Professor Marci A. Hamilton, in her brief in support of Petitioners, erroneously claims that the proposed amendment infringes on religious freedom by imposing a “narrow religious belief related to the inherent worth and dignity of human life that conflicts with the practice and beliefs of other religious faiths.” (Professor Marci Hamilton *amicus* brief, 6). However, the language of the proposed amendment speaks for itself, and what the proposed amendment says is simple. The proposed amendment contains no policy at all nor does it advocate for,

or even address, any specific position with respect to that area of policy. It simply reserves for the legislative and executive branches the ability to determine abortion policy—as is the status quo—rather than to have substantive policy determined by the Court. Thus, there is no basis to the claim that the proposed amendment will negatively impact religious freedom. Rather, the proposed amendment accomplishes the direct opposite by maintaining policy-making through the legislative process, which allows all voices the opportunity to be heard through the people’s elected representatives.

The proposed amendment concerning abortion involves only one issue, and a clear issue at that—whether Pennsylvania will maintain the status quo by reserving all policy-making concerning abortion to the General Assembly and the Governor. The proposal does not ban abortion, as was suggested by Professor Hamilton, and does not make any substantive changes even to the existing abortion law, let alone to unrelated issues such as trial by jury, the right to be represented by counsel, or the right to public accommodations irrespective of race or ethnicity. Courts, Congress, and state legislatures have often spoken to constitutional and statutory rights related to abortion. Thus, the universe of issues related to abortion is knowable. Changes affecting abortion, if any, will only be through the legislative process, such as the General Assembly’s bill to prohibit abortions solely on the basis of a Down syndrome diagnosis, that was vetoed by the Governor. *See* H.B. 321 (2019). If

legislative enactments signed by the Governor are later believed to violate another aspect of our Constitution, this Court can and should properly apply our constitutional safeguards. The remedy for an unconstitutional law is to strike that law, not to strike a proposed amendment relating only to the issue of who has the authority to make the law.

The proposed amendment concerning abortion should not be faulted for lack of specificity: the Constitution is meant to speak generally to topics, not set forth every parameter in detail. In this case, however, the proposed amendment is specific to the issue in question, that abortion policy is to be set by the General Assembly and the Governor, not the courts. Therefore, the proposed amendment concerning abortion should not be struck as vague and invalid.

### **III. The Pennsylvania Constitution Contains No Abortion Right, Let Alone an Indefeasible Abortion Right.**

Our Commonwealth’s Constitution recognizes that “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const, art. I, § 1. Seemingly missing the irony, Petitioners cite this provision—a provision which contains the “inherent and indefeasible right[] . . . of enjoying and defending life”—to argue that some persons have the right to end the



life of other persons and that such a right is indefeasible. Petitioners explain that the provision referring to “pursuing their own happiness” includes a right to privacy. (Petitioner’s Br. at 25.) While this Court has recognized that “[o]ne of the pursuits of happiness is privacy,” it has done so in the context of the dangers of wiretaps interfering with the “right to be let alone.” *Commonwealth v. Murray*, 423 Pa. 37, 50-51 (1966).

But if detectives and private intermeddlers may, without legal responsibility, peer through keyholes, eavesdrop at the table, listen at the transom and over the telephone, and crawl under the bed, then all constitutional guarantees become meaningless aggregation of words, as disconnected as a broken necklace whose beads have scattered on the floor.

*Id.* at 51-52. While the Pennsylvania Supreme Court has extended the right to privacy, it has not extended it to include a right to abortion.

To expand this principle so that the “pursuit of happiness” contained in our Constitution were to include abortion, the notion of indefeasible rights would be turned on its head by elevating a right to autonomy of some over the right to life for others. The Supreme Court of the United States recognized the tension between these principles. On the one hand the Court observed that many feel “that any regulation of abortion invades a woman’s right to control her own body and prevents women from achieving full equality.” *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2240 (2022). And while an appeal to autonomy typically aligns with the

liberties protected by both the federal and state constitutions, countervailing interests are at stake if “abortion ends an innocent life.” *Id.*

The Pennsylvania Supreme Court has never recognized a right to abortion. In fact, the abortion industry is presently suing the Commonwealth in hopes that this Court recognizes such a right. *See Allegheny Reprod. Health Ctr., supra.* But because such a right has not been recognized—and any recognition could hardly be reconciled with the right of “enjoying and defending life”—the right to abortion cannot be deemed infeasible.

The Supreme Court of the United States in *Dobbs* addressed this argument through an exhaustive review of American law and history. The Court first observed that “[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.” *Dobbs*, 142 S.Ct. at 2248. No state constitution had recognized such a right and no federal or state court had recognized such a right. *Id.* Even law review articles proposing the existence of a constitutional right to abortion did not appear until a few years before the Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973). *See Dobbs*, 142 S.Ct. at 2248. The Court continued:

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single state. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-

quarters of the States had made abortion a crime at any stage of pregnancy and the remaining States would soon follow.

*Id.* at 2248-2249.

Noting that *Roe* had either misstated or ignored this history, the Court proceeded to review common law authorities dating back to the 13th century and historical records and early American jurisprudence before stating the following:

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.

*Id.* at 2249, 2253-2254.

As noted by the Court in *Dobbs*, there is no historical evidence for any state, including Pennsylvania, to support the claim that the right to abort a child is an indefeasible right encompassed within the state Constitution. The historical evidence supports the opposite conclusion.

## CONCLUSION

The subject matter of abortion does not appear at all in the Pennsylvania Constitution. The proposed amendment concerning abortion for the first time addresses the entirety of the subject by providing that all policy and rights concerning abortion remain outside of the scope of the Constitution and within the scope of the Pennsylvania Legislature, subject to the Governor's veto. It makes no substantive changes at all to current laws on abortion, and certainly has no effect on

other provisions of the Constitution, as suggested by Petitioners. Additionally, there is no infeasible right to abortion in the Constitution. The context and language of the proposed amendment make clear that it survives constitutional scrutiny. Therefore, the subject matter criticisms of SB 106 lack merit.

Respectfully submitted,

Dated: August 24, 2022



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## **CERTIFICATE OF WORD COUNT**

I hereby certify that this brief includes 3,045 words, excluding the materials specified in Pa.R.A.P. 2135(b).

## **CERTIFICATE OF COMPLIANCE WITH RULE 127**

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the parties via PACFile.

Respectfully submitted,

/s/Janice Martino-Gottshall  
Janice Martino-Gottshall