IN THE SUPREME COURT OF PENNSYLVANIA

NO. 73 MM 2022

TOM WOLF, Governor of the Commonwealth of Pennsylvania, and LEIGH M. CHAPMAN, Acting Secretary of the Commonwealth of Pennsylvania,

Petitioners,

v.

GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE PRO-LIFE UNION OF GREATER PHILADELPHIA IN SUPPORT OF RESPONDENT

Alison M. Kilmartin (PA Bar # 306422)
Denise M. Harle (GA Bar # 176758)
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Leesburg, VA 20176
571-707-4655
akilmartin@ADFlegal.org
dharle@ADFlegal.org

Attorneys for Amicus Curiae

1. Pursuant to Pa. R.A.P. 531(b)(iii), Pro-Life Union of Greater Philadelphia requests leave to file the attached brief as Amicus Curiae in this matter.

2. Pro-Life Union seeks to build a culture of life so that human life is respected from conception to natural death. As a result of its pro-life mission, proposed Amicus supports S.B. 106's proposed amendment related to abortion and can provide unique insight into the amendment's effect and constitutional implications.

3. In the accompanying proposed brief, Pro-Life Union addresses issues raised by Petitioners and several Amici Curiae, including Amicus Curiae Marci A. Hamilton. More specifically, Pro-Life Union addresses the contention that the amendment alters or denies the right to abortion in Pennsylvania, and the contention that the amendment violates the establishment clause and religious freedom.

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 Amici 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 Pro-Life Union of Greater Philadelphia respectfully requests that this Court grant leave to file its proposed amicus brief, attached here as Exhibit A.

Dated: August 24, 2022

Respectfully submitted,

/s/Alison M. Kilmartin
Alison M. Kilmartin,
PA Bar No. 306422
Denise M. Harle.
GA Bar No. 176758
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Leesburg, VA 20176
571-707-4655
akilmartin@ADFlegal.org
dharle@ADFlegal.org

Attorneys for Amicus Curiae

EXHIBIT A

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 73 MM 2022

TOM WOLF, Governor of the Commonwealth of Pennsylvania, and LEIGH M. CHAPMAN, Acting Secretary of the Commonwealth of Pennsylvania,

Petitioners,

v.

GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF OF AMICUS CURIAE PRO-LIFE UNION OF GREATER PHILADELPHIA IN SUPPORT OF RESPONDENT

Alison M. Kilmartin (PA Bar # 306422)
Denise M. Harle (GA Bar # 176758)
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Leesburg, VA 20176
571-707-4655
akilmartin@ADFlegal.org
dharle@ADFlegal.org

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

INTEREST OF AMICI CURIAE[1]

Proposed Amicus Curiae Pro-Life Union of Greater Philadelphia is the largest pro-life organization in the Greater Philadelphia area. It advocates for the rights of the unborn child and provides support for mothers and their children. Through its many member organizations it provides education on family planning and abortion alternatives, and assists women medically and materially during and after their pregnancy. One such program aligned to the Pro-Life Union is Guiding Star Ministries, a Maternity Home, which gives shelter and assistance to pregnant women and their children. The organization also provides rent assistance, housing, job and life skills, and more so that women can confidently choose life for their unborn children..

Pro-Life Union has a strong interest in preserving the life and health of unborn children and their mothers. It believes that all human life is worth protecting—from conception until natural death—and that abortion is a great moral and social wrong. Pro-Life Union filed an amicus brief in this Court in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, Case No. 26 MAP 2021, in support of the Commonwealth of Pennsylvania's commonsense, pro-life law restricting taxpayer funding of elective abortion through Pennsylvania's Medicaid program. Pro-Life Union seeks to file the current amicus

[1] This brief is filed under Pennsylvania Rule of Appellate Procedure 531(1)(i). No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than Amicus Curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

brief in support of S.B. 106's amendment related to abortion, which reserves to the General Assembly the power to pass laws protecting unborn life and women's health.

SUMMARY OF THE ARGUMENT

Petitioners ask this Court to invoke King's Bench jurisdiction so that they might thwart the General Assembly's proposal of several constitutional amendments, one of which concerns abortion. For the reasons laid out in Respondent General Assembly's Answer in Opposition to Petitioner's Application, that request should be denied. But there is more. In making their plea, Petitioners and several Amici mischaracterize the amendment, labeling it an abortion ban or an outright denial of a right to abortion. They are mistaken.

The amendment does one thing: it retains for the General Assembly its rightful power to make policy and pass laws on abortion. It clarifies *who* decides what the law is or will be, not *what* that law permits or restricts. It is thus an unremarkable structural provision that respects the separation of powers principles animating the Pennsylvania Constitution. It also realizes the promise of the United States Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which returned the abortion issue to "the people and their elected representatives." *Id*. at 2259.

The amendment's purely structural design and effect also dooms Amicus Curiae Marci Hamilton's argument that it violates the establishment clause and religious freedom under the Pennsylvania Constitution. In addition to the amendment not being the type of substantive abortion law Hamilton imagines it to be, it still would not violate either constitutional guarantee regardless.

ARGUMENT

I. The amendment preserves the right of the General Assembly to make laws on abortion, and nothing more.

S.B. 106's proposed amendment is clear and concise: it provides that the Pennsylvania Constitution "does not grant the right to taxpayer-funded abortion or any other right related to abortion." S.B. 106, Printer's No. 1857 (attached as Ex. A to Resp't General Assembly's Answer n. 4). But in Petitioners' and Amici's telling, the amendment is a substantive provision setting a restrictive abortion policy. Petitioners speak of a "ban on taxpayer funding" and the "denial of a right to abortion." Pet'rs' Appl. for Invocation of King's Bench Power 23. And Amici similarly speak of the amendment as a "ban on abortion,"[2] one which "remove[s] the right to abortion."[3]

Both Petitioners and Amici are mistaken. The amendment makes no abortion policy and does not change current Pennsylvania abortion law. It simply establishes that there are no constitutional rights related to abortion, including taxpayer-funded abortion. It ensures that policymaking on this issue remains with the General Assembly. This reservation of lawmaking authority aligns with the Pennsylvania Constitution, which vests the "legislative power [with the] General Assembly." PA. CONST. art. II, § 1; *see also Blackwell v. Com., State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989) ("the legislative power . . . is the power to make, alter and repeal laws," and "it is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government") (cleaned up);

---

[2] Amicus Curiae Br. of Marci A. Hamilton 3 ("this ... amendment is designed to restrict or ban abortion access for all Pennsylvanians").

[3] Amicus Curiae Br. of Child USA 2 ("Amending the Pennsylvania Constitution to remove the right to abortion will severely impact girls and teens who are pregnant."); Amicus Curiae Br. of AFL-CIO 21 (characterizing amendment as a "denial of any right 'related to abortion'").

Lurie v. Republican All., 192 A.2d 367, 370 (Pa. 1963) ("The enunciation of matters of public policy is fundamentally within the power of the legislature.").

The amendment also tracks the *Dobbs* decision, in which the United States Supreme Court reversed *Roe v. Wade*, 410 U.S. 113 (1973), held there is no federal constitutional right to abortion, and declared that "the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 142 S. Ct. at 2279. The amendment realizes the salutary effect contemplated by *Dobbs* by avoiding the type of "controversy that . . . embittered our political culture for half a century." *Id.* at 2241. Because of the amendment, the General Assembly and the people remain free to figure this issue out among themselves, absent the rancor an "abrupt[]" judicial decision can create. *Id.*

II. The amendment does not violate the establishment clause.

Amicus Hamilton argues that the amendment violates the Pennsylvania Constitution's establishment clause because it has no "plausible secular justification" and "impos[es] [a] core religious belief of a few on all believers in the state." Hamilton Br. 9–10. This argument lacks merit. The amendment sets no abortion policy at all, let alone imposes religious beliefs, whether those beliefs are framed as "singular," "core," or "extreme." *Id.* at 1, 9-10. For these reasons, the argument fails.

A. Laws are not invalid under the establishment clause because they favor childbirth over abortion.

Amicus Hamilton contends that the amendment establishes religion, but she is wrong on the facts and the law. First, as mentioned, the amendment sets no new rules, so any argument that it even implicates the establishment clause founders from the start. Second, to the extent Amicus Hamilton means to apply the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in arguing that the amendment lacks a "plausible secular justification," she applies the wrong legal

standard. Hamilton Br. 9-10. The U.S. Supreme Court's recent decision in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2427–29 (2022), abrogated the *Lemon* test.[4] The controlling test instead requires courts to interpret the establishment clause by "reference to historical practices and understandings" which "faithfully reflect the understanding of the Founding Fathers." *Kennedy*, 142 S. Ct. at 2428 (cleaned up). Under this proper test, Amicus Hamilton's establishment clause argument fails, because there is no history or tradition supporting a right to abortion. "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." *Dobbs*, 142 S. Ct. at 2242. In fact, "[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law." *Id.* Contrary to Amicus Hamilton's unsupported assertion, the amendment thus poses no establishment clause concerns.

B. The amendment is supported by plausible secular justifications.

Although laws favoring childbirth over abortion do not offend the establishment clause in any event, they are still supported by plausible secular

[4] This Court has "held that the provisions of Article I, Section 3 of our constitution do not exceed the limitations in the first amendment's establishment clause." *Springfield Sch. Dist., Delaware Cnty. v. Dep't of Ed.*, 397 A.2d 1154, 1170 (Pa. 1979). It has also analyzed and relied on federal precedent in handling cases brought under the Pennsylvania Constitution. *See, e.g.*, *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 365 (Pa. 1974) ("prior discussion" of First Amendment's Establishment Clause was "equally apposite" to claim brought under Pennsylvania's version); *see also Bishop Leonard Reg'l Cath. Sch. v. Unemployment Comp. Bd. of Rev.*, 593 A.2d 28, 32 (Pa. Commw. Ct. 1991) (holding denial of unemployment benefits to Catholic grade school teacher did not violate First Amendment's Establishment Clause or related provision of Pennsylvania Constitution); Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103, 169 (2013), https://bit.ly/3woYA8g ("The 'rights of conscience' and anti-preference language of article I, section 3, have generally been interpreted consistently with Supreme Court precedent interpreting the Free Exercise and Establishment Clauses of the First Amendment.").

justifications. So Amicus Hamilton's argument on this point fails too. The science of human embryology testifies to the humanity of the unborn. "The time of fertilization represents the starting point in the life history, or ontogeny, of the individual." Bruce M. Carlson, PATTEN'S FOUNDATIONS OF EMBRYOLOGY 3 (McGraw-Hill ed, 6th ed. 1996); *see also* T.W. Sadler, LANGMAN'S MEDICAL EMBRYOLOGY 3 (Williams & Wilkins eds., 7th ed. 1995) ("The development of a human begins with fertilization . . ."). Consistent with this fact of biological reality, the Supreme Court has recognized that "abortion is [a] fundamentally different" issue, precisely because it "destroys . . . an unborn human being." *Dobbs*, 142 S. Ct. at 2243. That is no doubt why, even under *Roe*, when abortion was considered a federal constitutional right, a state was not limited in its "authority . . . to make a value judgment favoring childbirth over abortion." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506 (1989). It was "free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion). In other words, a state can "use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

In sum, a state's prerogative to protect life has been routinely recognized by the Supreme Court, even under *Roe*. That authority is not grounded in religion, and is even more robust after *Dobbs*, now that no federal constitutional right to abortion exists.

C. The amendment does not "impose" a religious belief, nor is it unconstitutional because it may happen to coincide with some religious beliefs.

Amicus Hamilton erroneously claims the amendment reflects a policy choice mirroring a religious belief. Hamilton Br. 9–10. Her establishment clause argument fails regardless. While "neither a State nor the Federal Government can

constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, . . . it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319–20 (1980) (concluding "that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause") (cleaned up).

This axiom makes sense, not only in the abortion context, but throughout the law. "Congress or state legislatures [often] conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation." *McGowan v. State of Md.*, 366 U.S. 420, 442 (1961). For instance, murder is universally proscribed. But just because homicide laws may "agree[] with the dictates of the Judaeo-Christian religions [but] may disagree with others," that does not make them invalid or suspect. *Id.* The same could be said for "theft, fraud, etc., because those offenses were also proscribed in the Decalogue." *Id.* That many laws have religious parallels or underpinnings does not make them invalid under the establishment clause. If this were not the case, all laws would be jeopardized. Religious diversity means there will always be either some consistency or some dissonance between certain religious beliefs and the laws on the books. But that does not render such laws unconstitutional.

The General Assembly's proposed amendment is no exception. Whether it protects unborn life or the health of women in ways that line up with the beliefs of certain religious denominations, it poses no establishment clause concern, and is no less valid than laws against murder, fraud, or theft.

III. The amendment does not violate religious freedom.

Amicus Hamilton incorrectly argues that the amendment "den[ies] any right to abortion," and so "directly alters and infringes" the Pennsylvania Constitution's

religious-freedom protections. Hamilton Br. 6, 11. She also argues that the amendment "nullifies" the right to "act according to one's faith, which in many religions . . . [means] act[ing] in favor of bodily autonomy for pregnant women and girls, including abortion procedures." *Id*. at 10. Hamilton is mistaken. As discussed, the amendment makes no abortion policy. *See supra* 3-4.

A. The amendment preserves the opportunity of all citizens to have a say in the debate as to what the Commonwealth's policy and law on abortion should be.

By preserving for the General Assembly—and by extension the people—the power to resolve this issue, the amendment leaves room for debate going forward. Citizens who are religious, non-religious, or anywhere in between remain free to weigh in and shape public policy on abortion. Even still, Hamilton argues, without support, that the amendment prevents people from believing, speaking, and acting in accord with their faith. Hamilton Br. 10. But vague assertions aside, no one's religious exercise has been burdened—the amendment does not change Pennsylvania's abortion laws.[5] Even assuming Hamilton's claim that some religions "mandate[]" abortion in "certain limited cases," she has not shown how religious freedom is compromised by the amendment. Hamilton Br. 8.

B. Religious adherents who favor abortion rights do not possess veto power over valid laws passed by the General Assembly.

Amicus Hamilton next argues that the amendment must be struck because certain religious believers may view abortion as either permitted or even sometimes required. Hamilton Br. 8. Put another way, she essentially argues that religious

---

[5] In fact, if any of the religious believers Hamilton refers to want to get an abortion in the state they can do so, all the way up to the 23rd week of pregnancy. *See* Pa. Off. of Att'y Gen., *Abortion Laws in Pennsylvania—Questions and Answers* (June 30, 2022), https://bit.ly/3wsyXDB ("The U.S. Supreme Court's recent *Dobbs* decision has no impact on the legality of abortion in Pennsylvania. Abortions are still legal here through the 23rd week of pregnancy, and after that if your life or health is in danger. Medical ("pill") abortions and in-clinic procedure abortions are both still legal.").

beliefs favoring abortion rights confer a sort of veto power over the General Assembly's prerogative to make law and policy on abortion, rendering its efforts a "nullity." Hamilton Br. 11. Hamilton provides no caselaw to support this proposition, because there is none.

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), for instance, the Supreme Court held that Philadelphia was required to grant Catholic Social Services an accommodation to the City's foster care regulations, because CSS could not place foster children with same-sex couples on account of its religious beliefs. But the Court noted that CSS did "not seek to impose [its] beliefs on anyone else," and it left the City's regulations otherwise intact and enforceable. *Id*. at 1882.[6] Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), the Court held that Wisconsin could not compel Amish parents to send their children to "formal high school." But the Court made clear that its decision did not "undermine the general applicability of the State's compulsory school-attendance" laws. *Id*. at 236. Finally, in *Meggett*, although an inmate's desire to wear dreadlocks was a sincerely held religious belief, the court rejected his challenge to prison grooming standards, because the standards were supported by valid penological interests in ensuring prison order and preventing concealed contraband. 892 A.2d at 883-84.

The teaching of these cases is clear. The General Assembly's authority to deliberate and make laws protecting unborn life is not to be set aside merely because some religions might favor abortion rights. If the General Assembly eventually makes substantive law favoring childbirth over abortion, the remedy for any objecting religious adherents—to the extent they really do exist in the way

---

[6] Pennsylvania courts have followed federal jurisprudence in adjudicating free exercise claims under the Pennsylvania Constitution. *See supra* n. 4; *see also Meggett v. Pa. Dep't of Corr.*, 892 A.2d 872, 879 (Pa. Commw. Ct. 2006), as amended (Apr. 24, 2006) ("[W]e will follow federal precedent in considering Meggett's freedom of religion claim under the Constitutions of both Pennsylvania and the United States.").

Hamilton describes—is to seek an accommodation or an exemption to that law. Religious freedom often protects believers from laws which hinder their religious exercise, but it does not *automatically* permit courts to jettison valid laws altogether. The General Assembly's authority to legislate on abortion remains intact.

CONCLUSION

S.B. 106's proposed amendment confirms that the Pennsylvania Constitution is silent on abortion and leaves the General Assembly to set policy and make law on the matter. The amendment thus recognizes the legislative power *Dobbs* restored, almost 50 years after *Roe* usurped it. And it does so in a way that causes no establishment clause or religious freedom concerns. For all the reasons in Respondent's Answer, and this amicus brief, this Court should therefore deny Petitioner's Application.

Dated: August 24, 2022

Respectfully submitted,

/s/Alison M. Kilmartin
Alison M. Kilmartin,
PA Bar No. 306422
Denise M. Harle.
GA Bar No. 176758
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Leesburg, VA 20176
571-707-4655
akilmartin@ADFlegal.org
dharle@ADFlegal.org

Attorneys for Amicus Curiae

CERTIFICATE OF WORD COUNT

I certify that this brief complies with the type-volume limitation set forth in Pa.R.A.P 531. This brief contains 2,986 words.

Dated: August 24, 2022

/s/ Alison M. Kilmartin
Alison M. Kilmartin

CERTIFICATE OF COMPLIANCE

I certify that this brief 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 requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Alison M. Kilmartin
Alison M. Kilmartin

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2022, I caused a copy of the foregoing to be served on the following via PACFile to all counsel of record, which satisfies Pennsylvania Rule of Appellate Procedure 121:

Gregory G. Schwab, General Counsel
Governor's Office of General Counsel
333 Market St., 17th Fl
Harrisburg, PA 17126-0333
Counsel for Petitioners

Erik R. Anderson
James J. Kutz
Erin R. Kawa
Sean C. Campbell
17 North 2nd St., 12th Fl.
Harrisburg, PA 17101
Counsel for Respondent, General Assembly of the Commonwealth of Pennsylvania

Matthew H. Haversick
Joshua J. Voss
Shohin H. Vance
Kleinbard, LLC
Three Logan Square
1717 Arch St., Fl 5
Philadelphia, PA 19103
Counsel for Possible Intervenors Pa. Senate Republic Caucus and Kim Ward

Tara L. Hazelwood
Lam D. Truong
Matthew S. Salkowski
Pa. House of Representatives
House Democratic Caucus
Office of Chief Counsel
620 Main Capitol Building
Harrisburg, PA 17120-2248

Daniel T. Brier
Donna A. Walsh
John B. Dempsey
Richard L. Armezzani
Meyers, Brier & Kelly, LLP
425 Spruce St., Suite 200
Scranton, PA 18503
Counsel for Petitioners

Joel L. Frank
John J. Cunningham, IV
Scott R. Withers
Joseph R. Podraza
Lamb McErlane, PC
24 East Market St
P.O. Box 565
West Chester, PA 19381-0565
Counsel for Possible Intervenor Pa. House Republican Caucus and Kerry Benninghoff

Deborah R. Willig
Amy L. Rosenberger
John R. Bielski
Willig, Williams & Davidson
1845 Walnut Street, 24thFloor
Philadelphia, PA 19103
Counsel for Possible Intervenors Pa. Senate Democratic Caucus and Costa

Marci A. Hamilton
3508 Market Street, Suite 202

Counsel of Possible Intervenor Pa. House Democratic Caucus and Joanna E. McClinton

Robert F. Williams
Rutgers University School of Law
E427
217 North 5th Street
Camden, NJ 08102
Counsel for Amici Curiae AFL-CIO, et al.

Irwin Aronson
Alaine S. Williams
Stuart W. Davidson
Bruce M. Ludwig
John R. Bielski
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Counsel for Amici Curiae AFL-CIO, et al.

Philadelphia, PA 19104
Counsel for Amicus Curiae Professor Marci A. Hamilton

Jessica Schidlow
Alice Bohn
CHILD USA
3508 Market Street, Suite 202
Philadelphia, PA 19104
Counsel for Amicus Curiae CHILD USA

/s/Alison M. Kilmartin
Alison M. Kilmartin