

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

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
PROFESSOR MARCI A. HAMILTON
IN SUPPORT OF PETITIONERS**

APPLICATION FOR INVOCATION OF KING'S BENCH POWER TO
DECLARE SENATE BILL 106 OF 2021 INVALID AND ENJOIN FURTHER
ACTION ON CONSTITUTIONAL AMENDMENTS

- 1) Pursuant to Pa. R.A.P. 531(b)(iii), Professor Marci A. Hamilton requests leave to file the accompanying brief as *amicus curiae* in the above-referenced case.
- 2) Professor Hamilton is Professor of Practice in Political Science at the University of Pennsylvania. She is also a leading constitutional scholar in

First Amendment rights related to extreme religious liberty. She successfully challenged the constitutionality of the federal Religious Freedom Restoration Act (“RFRA”) at the Supreme Court in *Boerne v. Flores* (1997) and defeated the RFRA claim brought by the Archdiocese of Milwaukee against hundreds of child sex abuse survivors in *Committee of Unsecured Creditors v. ListECKI*, (7th Cir. 2015).

- 3) In the accompanying brief, Professor Hamilton addresses the constitutionality of the amendment denying any right to an abortion as contained in SB 106 within the context of religious freedom under the Pennsylvania Constitution. Her expertise in these issues makes her uniquely positioned to provide this Court with accurate analysis regarding the constitutionality of the amendment denying any right to any abortion in SB 106, the constitutional and statutory history of religious freedom within the State, and the need for exemptions for differing religious faiths.
- 4) For these reasons, Professor Hamilton respectfully requests that the Court grant this Motion for Leave to File Brief of *Amicus Curiae* and accept the accompanying proposed *amicus* brief for filing.
- 5) Given the emergent nature of this matter, *Amicus Curiae* has attached the Brief she proposes to file as **Exhibit A**.

EXHIBIT A

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Marci A. Hamilton, Esq. is a Professor of Practice in Political Science at the University of Pennsylvania and a constitutional scholar. She is the leading expert on child sex abuse statutes of limitations and is the author of the book on the subject, *Justice Denied: What America Must Do to Protect Its Children*. Professor Hamilton has submitted testimony and advised legislators in every state where significant reform has occurred. She is also the co-chair of the Task Force for Global Statute of Limitations Reform.

Professor Hamilton has also been an influential constitutional scholar on First Amendment rights in the context of extreme religious liberty, advocating for the vulnerable in many contexts and in particular, children. She successfully challenged the constitutionality of the federal Religious Freedom Restoration Act (“RFRA”) at the Supreme Court in *Boerne v. Flores* (1997) and defeated the RFRA claim brought by the Archdiocese of Milwaukee against hundreds of child sex abuse survivors in *Committee of Unsecured Creditors v. Listecky*, (7th Cir. 2015). She is the author of *Learning Constitutional Law* (Cognella Academic Press 2022), *Children and the Law* (Carolina Academic Press 2017), *God vs. the Gavel: The Perils of Extreme Religious Liberty* (Cambridge University 2014), and *Fundamentalism, Politics, and the Law* (Palgrave Macmillan 2011).

This case will have immediate and broad implications concerning the religious liberty of women, girls, clergy, and physicians and other healthcare providers in Pennsylvania to practice their sincerely held religious beliefs as it pertains to decisions regarding life, family, and death. *Amicus curiae* respectfully submits this brief to the Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case. No party or counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

On July 8, 2022, the Pennsylvania General Assembly passed Senate Bill 106 (“SB 106”), a joint resolution proposing five amendments to the Pennsylvania Constitution. On the day prior to its passage, and following the United States Supreme Court decision in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), which overturned federal constitutional protections for abortion rights, the Republican-controlled Senate proposed an amendment to SB 106 that added an entirely new provision to the Declaration of Rights. The proposed Article I, § 30, declares that “[t]his Constitution does not grant the right to taxpayer-funded abortion or any other right relating to abortion.” Senate Bill 106, 2021 Reg. Sess. No. 1857 (July 7, 2022) (emphasis added). SB 106 interferes with the rights of many religious

Pennsylvanians to pursue abortions based on their deeply held religious beliefs regarding family, women's health, and life and death. Religions from time immemorial have held beliefs regarding when life begins, the value of the pregnant woman or girl's well-being and life, and how to make decisions in this context. Indeed, religions are distinguished one from another often based on their viewpoints on these issues. SB 106 chooses a minority of believers' beliefs as the law of the state of Pennsylvania and would severely burden many faiths.

It is evident through the legislative history that this new amendment is designed to restrict or ban abortion access for all Pennsylvanians based on a particular religious view of when human life begins. These restrictions can include women and girls with non-viable or life-threatening pregnancies, and victims with pregnancies resulting from rape, incest, or trafficking. In reality, major religions, including Judaism, Protestantism, and Buddhism, adopt a different view of when "life" begins and fundamentally support a woman or girl's right to self-determination and dignity, particularly as it relates to reproductive healthcare and the difficult decision to terminate a pregnancy for various reasons. Thus, the amendment enshrines in the state constitution numerous violations of the rights of Pennsylvanians, including the bedrock principle of women, girls, and abortion providers to practice their sincerely held religious beliefs as delineated in the Declaration of Rights, Article I, § 3. Additionally, contrary to prior statutory

authority, the amendment provides for no exemptions for those women, girls, and abortion providers whose faith supports the right to an abortion in a variety of circumstances.

Therefore, SB 106 should be declared invalid and further action on attempting to fundamentally infringe the fundamental rights already enshrined in the Pennsylvania Constitution without any exemptions should be enjoined.

III. ARGUMENT

A. The Proposed Abortion Amendment Is Invalid Because It Infringes and Substantively Alters the Inherent and Indefeasible Right of Religious Freedom Enshrined in the Declaration of Rights of the Pennsylvania Constitution

In their application, Petitioners submit that the resolution to amend the Constitution to nullify any right to abortion fails as it infringes on privacy rights outlined in Article I, § 1. Additionally, Petitioners assert that the proposed amendment substantively alters Article I, §§ 1, 25, 26, and 28 and provides no notice of these changes or an opportunity for voters to vote separately on each change, violating Article IX, §1. *Amicus curiae* further submits that the amendment in SB 106 violates the fundamental right to the freedom of religion as acknowledged in the Declaration of Rights in Article I, § 3 of the Pennsylvania Constitution and substantively alters said provision without providing notice or an opportunity for voters to vote on the change.

1. The confines of Article I, § 3 of the Pennsylvania Constitution follows federal precedent under the First Amendment of the United States Constitution

Article I, § 3 of the Pennsylvania Constitution states:

All men have a natural and indefeasible right to worship Almighty God *according to the dictates of their own consciences*; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and *no preference shall ever be given by law to any religious establishments or modes of worship.*”

Pa. Const. art. 1, §3. (emphasis added).

Pennsylvania precedent offers guidance in its interpretation and application of Article I, § 3 within the context of the U.S. Constitution. The Pennsylvania Supreme Court has held that Article I, § 3 of the Pennsylvania Constitution does not exceed the limitations in the First Amendment’s Establishment Clause. *Springfield School Dist., Delaware County v. Department of Ed.*, 397 A.2d 1154, 1170 (Pa. 1979) (citing *Wiest v. Mt. Lebanon School District*, 320 A.2d 362, 266 (Pa. 1974)). This provides, in relevant part, that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. The Court even recognized Chief Justice Burger’s decision in *Walz v. Tax Commission of City of New York*, which stated:

The course of constitutional neutrality in this area cannot be an absolute straight line; rigidity could well defeat the basic purpose of (the religion clauses), which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.

Springfield School Dist., 397 A.2d at 1158 (citing *Walz v. Tax Commission of City of New York*, U.S. 664, 669 (1970)).

Further, although the Pennsylvania Constitution is free to protect a broader range of interests than the Federal Constitution, it has not done so in considering free exercise claims, and the Pennsylvania courts have used federal precedent in interpreting claims brought under Article I, § 3 of the Pennsylvania Constitution. *Meggett v. Pa. Dep't. of Corr.*, 892 A.2d 872, 878 (Pa.Commw.Ct. 2006) (noting that Pennsylvania's Free Exercise Clause can be interpreted using First Amendment precedents). The Free Exercise Clause of the First Amendment provides that governments may "make no law prohibiting the free exercise [of religion]." U.S. Const. amend. I.

Pursuant to Article I, §3, women, girls, clergy, and physicians within the State have the right to their religious beliefs, speech, and conduct according to their respective faiths in consultation with their own consciences and without government control or preference by law to any particular religious establishments. SB 106 proposes an amendment that directly alters and infringes this right enshrined in the Pennsylvania Constitution as it relates to one of the most spiritually based decisions a family, woman, or girl can face: abortion.

- 2. The abortion amendment in SB 106 imposes 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**

The amendment in SB 106 is the codification of a narrow religious belief regarding when life begins held by a minority of believers. Months before being added to SB 106, a nearly identical amendment was introduced by State Senator Judy Ward through another bill, Senate Bill 956 (“SB 956”). SB 956 stated that “the policy of Pennsylvania is to protect the life of every unborn child from conception to birth, to the extent permitted by the Federal Constitution.” Senate Bill 956, 2021 Reg. Sess. No. 1286 (December 15, 2021). Senator Ward publicly revealed that she believes life begins at conception that “probably originates from a strong spiritual upbringing.”¹ She also advocated that abortion should only be allowed in “rare circumstances,” that could include when a pregnant woman’s life is in danger, and possibly for cases of rape and incest.² SB 956 was referred to the Republican-controlled Health and Human Services Committee on December 15, 2021 and passed on January 25, 2022. However, the bill was repeatedly “laid on the table” through the spring and was ultimately removed in June. SB 106 was thereafter amended to include the proposed constitutional provision.

From time immemorial, religions have answered the question of when “life” begins and prescribed how to value each life in a myriad of ways. Some religious

¹ Brian X. McCrone, *Pa. Lawmaker Leading Push to Ban Abortions: ‘I See It as Morally Wrong’*, NBC 10 Philadelphia (May 3, 2022), <https://www.nbcphiladelphia.com/news/politics/pa-lawmaker-leading-push-to-ban-abortions-i-see-it-as-morally-wrong/3227537/>.

² *Id.*

traditions posit that life begins at some point during pregnancy or even after a child has been born, while others embrace the view that life begins at the moment of conception, as Senator Ward believes. Other faiths simply decline to identify a precise moment when life begins. Further, many major religions believe that the decision to terminate a pregnancy is a woman's moral prerogative and support the moral right of each woman or girl to make her own decisions about her pregnancy in accordance with her faith, beliefs, and individual conscience.

For example, Jewish law, practice, and core tenets are unequivocal that all human life is sacred. While Judaism cherishes both actual and potential life, the physical and mental well-being of the mother always takes precedence over an unborn fetus.³ Therefore, the body of sacred and source texts that comprise Jewish ideology with respect to reproductive issues takes a layered and nuanced approach to determining whether abortion is permissible, discouraged, or, in certain limited cases, mandated. The Buddhist Churches of America similarly assert that “it is the woman carrying the fetus, and no one else, who must in the end make this most difficult decision” of terminating a pregnancy.⁴

Many Protestant denominations also reflect the diverse understandings of when life begins and espouse the view that every woman or girl has the ultimate

³ See e.g. Rabbi Jacob Emden, Responsa She'elat Ya"vetz 1:43, 1739-1759, Germany.

⁴ Buddhist Churches of America Social Issues Committee, A Shin Buddhist Stance on Abortion at 6, Buddhist Peace Fellowship Newsletter 6 (1984).

right to determine whether to terminate a pregnancy consistent with her religious beliefs. Specifically, the Episcopal Church believes that “access to abortion is a key element in preserving the health, independence, and autonomy of those who can bear children,” and “all Episcopalians should be able to access abortion services and birth control with no restriction on movement, autonomy, type, or timing.”⁵ Since 1971, the United Church of Christ (“UCC”) has preached reverence for human life, which has included a woman’s and girl’s freedom to choose to have an abortion. Based on these principles, the UCC faith believes that all persons are called by their Lord Jesus Christ to “celebrate, nurture, and support life,”⁶ and thus “every woman and girl must have the freedom of choice to follow her personal, religious, and moral convictions concerning the completion or termination of her pregnancy.”⁷ Similarly, Unitarian Universalism upholds that “the inherent worth and dignity of every person, the right of individual conscience, and respect for human life are inalienable rights due every person; and that the personal right to choose in regard to contraception and abortion is an important aspect of these rights.”⁸

The amendment in SB 106 infringes and alters the constitutional values under the Pennsylvania Constitution because it imposes a singular religious belief with no

⁵ General Convention, D083 Addressing the erosion of reproductive rights and autonomy, JOURNAL OF THE GENERAL CONVENTION OF...THE EPISCOPAL CHURCH (July 8-11, 2022).

⁶ United Church of Christ, Freedom of Choice Concerning Abortion: A Proposal for Action adopted by the Eighth General Synod (June 29, 1971).

⁷ United Church of Christ, The Thirteenth General Synod: Resolution on Freedom of Choice (1981).

⁸ Unitarian Universalist Association, Right to Choose: 1987 General Resolution, <https://www.uua.org/action/statements/right-choose>.

plausible secular justification. The imposition of this core religious belief of a few on all believers in the state is the quintessential establishment of religion the Framers of the Constitution feared. As the First Amendment's drafter, James Madison, put it: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"⁹

Religious freedom within the meaning of Article I, § 3 requires the freedom to believe, speak, and act according to one's faith, which in many religions, act in favor of bodily autonomy for pregnant women and girls, including abortion procedures. This is especially true where pregnancy and childbirth risk the mother's life and in cases of rape, incest, and trafficking. The robust and sacrosanct right enshrined in Article I, § 3 of the Pennsylvania Constitution include the indefeasible liberty right to freedom of religion. The Pennsylvania Constitution prohibits the government from imposing one set of religious beliefs, or religion at all, on others. The amendment in SB 106, as well as its probable consequences, directly infringes and alters this right.

As argued by Petitioners concerning the right to privacy under Article I, §1, the General Assembly's abortion amendment nullifies this right which predates and

⁹ See James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in 5 THE FOUNDERS' 30 CONSTITUTION 82 (P. Kurland & R. Lerner eds. 1986).

exists independent of the Constitution is facially invalid and void *ab initio*. See generally *Driscoll v. Corbett*, 69 A.3d 197, 209 (Pa. 2013); *Commonwealth v. Tharp*, 754 A.2d 1251, 1253 (Pa. 2000); *Stander v. Kelley*, 250 A.2d 474, 478 (Pa. 1969). Because an amendment cannot alter or infringe the inherent and inalienable right to freedom of religion in Article I, § 3, the resolution to eliminate “any other right concerning abortion” is a nullity and pursuit of such an amendment should be enjoined.

B. The Proposed Abortion Amendment Fails to Provide Conscience Exemptions for Patients and Providers of Different Religious Faiths

Not only does the amendment in SB 106 denying any right to an abortion infringe and substantively alter the inalienable right to religious freedom regarding family planning, women’s healthcare, and life and death under Article I, § 3 of the Pennsylvania Constitution, but it provides no exemptions for patients who receive an abortion or providers who perform the procedures, as required and/or consistent with their religious beliefs. Constitutional and statutory authority in Pennsylvania demonstrate similar exceptions have been implemented and safeguarded for those whose religious beliefs are infringed by a government action.

The amendment, as written, would repeal the Pennsylvania Religious Freedom Restoration Act (“RFRA”) in the context of abortions. In 2002, the Pennsylvania General Assembly and Senate enacted RFRA, 71 PA. STAT. ANN. §§ 2401-2407, describing it as “an Act protecting the free exercise of religion; and

prescribing the conditions under which government may substantially burden a person's free exercise of religion." 71 PA. STAT. ANN. § 2401. The RFRA was predicated on the following legislative findings:

- (1) Laws and governmental actions which are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, may have the effect of substantially burdening the free exercise of religion. However, neither State nor local government should substantially burden the free exercise of religion without compelling justification.
- (2) The General Assembly intends that all laws which it has heretofore enacted or will hereafter enact and all ordinances and regulations which have been or will be adopted by political subdivisions or executive agencies shall be constructed so as to avoid the imposition of substantial burdens upon the free exercise of religion without compelling justification.

71 PA. STAT. ANN. § 2402.

The legislative history of the RFRA demonstrates the concern of the General Assembly in protecting these religious principles. Former Senate Pro Tempore Robert Jubelirer was the primary sponsor of the bill in the Pennsylvania General Assembly and offered examples of infringement on religious freedoms that the bill was designed to protect, including "where local officials are aggressively acting to restrict church activities or prevent them from offering significant services."¹⁰ Prior to the passage of the bill, he stated:

¹⁰ Christian Alexandersen, *Pennsylvania has a religious freedom law too, but not like Indiana's*, PENNLIVE (Apr. 1, 2015), https://www.pennlive.com/midstate/2015/04/pennsylvania_has_a_religious_f.html.

“...when we take the oath of office and swear to uphold the Constitution, each and every one of us renews our commitment to religious freedom, *one of the bedrock principles of our nation*, so Pennsylvanians might indeed be surprised that we must act further to protect religious freedom in our Commonwealth... It is noteworthy that while Pennsylvania’s diverse religious groups have divergent views on many issues, this issue has brought them together. *This is not an issue of faith; it is a matter that has significance for all faiths*. This is not just a philosophical debate. Rather, there is urgency because of discriminatory situations that are standing in the way of the appropriate practice of religion...”

186th Gen. Assem., PA. SENATE J., 2002 Reg. Sess. No. 67, *Bill on Third Consideration and Final Passage* (November 20, 2002) (emphasis added).

Without question, a decision by a woman or girl to terminate a pregnancy, or a physician to perform an abortion procedure, is frequently an exercise of religion. True, the many religious believers who support access to abortion do not share the religious precepts underlying the amendment. But, that is precisely the point of this amicus brief. This amendment is not neutral, but rather would be the imposition of a religious belief on all believers in the state, severely restricting many people with deeply held religious beliefs.

The expected ramifications of the amendment in SB 106 substantially burden any member of a religion who supports or whose faith requires reproductive healthcare, including abortion procedures, in the exercise of their beliefs and practices when making decisions regarding life, family, and death.

Protecting a woman or girl’s right to dignity and self-determination, which can include the right to quality reproductive healthcare, is often a critical aspect of a

religion's practice. Any government action that restricts access to abortion, as would occur pursuant to the amendment, may impose a substantial burden on a woman, girl, or abortion provider's deeply held religious belief, religious speech, and religious conduct, which wholly undermines the rights designed to be protected by the passage of the RFRA.

SB 106 lacks a conscience clause for those whose religious beliefs, speech, and conduct would be burdened by it. When *Roe v. Wade* governed abortion and guaranteed access, the Commonwealth accommodated those who reject abortion in the Pennsylvania Abortion Control Act of 1982.¹¹ The Act provides an accommodation for the "right of conscience" for healthcare providers, defined as "a sincerely held set of moral convictions arising from belief in and relation to a deity or which, though not so derived, obtains from a place in the life of its possessor parallel to that filled by a deity among adherents to religious faiths." 18 PA. STAT. ANN. § 3203. The Act emphasizes the public policy of the Commonwealth of Pennsylvania to "respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept, or provide abortions, including those persons who are engaged in the delivery of medical services and medical care..." 18 PA.

¹¹ Enacted in 1982, the law permits abortions up to 24 weeks into pregnancy with some restrictions and requirements. 18 PA. STAT. ANN. § 3211. Later exceptions can be made for other circumstances, including when the health of the mother is at risk. 18 PA. STAT. ANN. § 3204. The legislative intent of the Act includes the protection of the "life and health of the woman subject to abortion" as well as "the life and health of the child subject to abortion." 18 PA. STAT. ANN. § 3202.

STAT. ANN. § 3202(d). Thus, “all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.” *Id.* SB 106 would essentially end access to abortion but provide no right of conscience for believers who support abortion in instances consistent with their faith to be accommodated.

Pennsylvania statutory and constitutional authority emphasize the significance of safeguarding the religious beliefs and values of all Pennsylvanians, not just a minority of believers, against governmental interference. Therefore, exemptions to the amendment in SB 106 are necessary for those women, girls, clergy, and healthcare providers whose religious beliefs support the right to receive and provide an abortion in a variety of circumstances.

IV. CONCLUSION

The amendment in SB 106 providing that there is no constitutional right to an abortion substantially alters and infringes the right to religious freedom as enshrined in Article I, § 3 of the Pennsylvania Constitution and fails to provide any religious exemptions for Pennsylvania patients and abortion providers of differing faiths. Therefore, this Court should declare that SB 106 is constitutionally invalid and enjoin further action on the joint resolution.

CERTIFICATE OF WORD COUNT

I hereby certify that this brief includes 3,715 words as calculated with the word-counting feature of Microsoft Office, excluding the materials specified in Pa.R.A.P. 2135(b).

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Dated: August 15, 2022

CERTIFICATE OF SERVICE

I, Marci A. Hamilton, Esq., do hereby certify that I have this day caused to be served the foregoing *Amicus Curiae* Brief by electronic service via PACFile.

By: /s/ Marci A. Hamilton
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