February 17, 2019

Chairman Dave Burke
Vice Chairman Steve Huffman
Ranking Member Nickie Antonio and
Members of the Senate Health, Human Services & Medicaid Committee
The Ohio Senate
1 Capitol Square
Columbus, Ohio 43215-4275

Re: Ohio Lawmakers' Oath of Office Does Not Require them to Follow Supreme Court Nonoriginalist Precedent that Created a Constitutional Right to Abortion

Dear Senators:

Abortion continues to be one of the most important issues facing Americans more than forty-six years after the Supreme Court's nonoriginalist decision in *Roe v. Wade* manufactured a constitutional right to abortion,[1] a precedent that was itself modified and re-affirmed in a later nonoriginalist case, *Planned Parenthood v. Casey.*[2] Despite these cases, many states continue to pass pro-life legislation, and one such effort by state lawmakers is a prohibition on abortions after an unborn baby's heartbeat is detected. Ohio lawmakers have endeavored numerous times to adopt such a law. Ohio lawmakers are currently engaged in debate on whether to pass Senate Bill 23 (the "Heartbeat Bill"). One potentially powerful argument against passage of the Heartbeat Bill is that it would violate Ohio lawmakers' oath of office. In this brief letter, I explain that, even assuming the Heartbeat Bill is inconsistent with Supreme Court precedent such as *Roe* and *Casey*,[3] Ohio lawmakers' oath of office does not prohibit them from adopting it.

To do so, I will make six key arguments: (1) each Ohio legislator takes an oath of office that requires him or her to follow the written United States Constitution; (2) the written Constitution's text states that its meaning is its text's original public meaning; (3) the Fourteenth Amendment Due Process Clause's original meaning does not protect a right to abortion; (4) the Heartbeat Bill is consistent with the Constitution's original meaning; (5) the U.S. Supreme Court's nonoriginalist interpretation in *Roe* and *Casey* does not bind Ohio lawmakers; and, therefore, (6) Ohio legislators' oath of office permits them to vote for the Heartbeat Bill. To be clear: this is a brief summary of each of these arguments and not a fulsome explanation. I would be happy to provide further information at your request.

First, every Ohio lawmaker takes an oath of office. Ohio law states: "The oath of office of every other officer . . . shall be to support the constitution of the United States . . . ."[4] This

[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[3] I made the argument that a prior version of the Heartbeat Bill was inconsistent with Supreme Court precedent in previous testimony to the Ohio Statehouse. Lee J. Strang, *Interested Party Testimony on Substitute HB 125, the "Heartbeat Bill"* (2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304299.
[4] BALDWIN'S OHIO REV. CODE ANN. § 3.23 (West 2019).

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proper noun, "constitution of the United States," with the definite article "the," in the oath taken by Ohio lawmakers, refers to the written Constitution of the United States that is currently housed in the National Archives' Rotunda.[5] Thus, every Ohio legislator is sworn to support the written Constitution of the United States.

Second, the text of the written Constitution of the United States identifies the Constitution's original meaning—and only it—as the Constitution's authoritative meaning.[6] This argument has three parts. First, constitutional "indexicals" are the Constitution's text's identification of what the U.S. Constitution is. The U.S. Constitution contains many indexicals, beginning with the Preamble's identification of the document of which it is a part as "this Constitution,"[7] and ending with the Ratification Clause, at the book-end of the original Constitution, which confirms that "this Constitution" is the written Constitution that went through the ratification process.[8] In between the Preamble and Article VII are further numerous identifications of the Constitution as the written Constitution; for instance, Article V describes how changes to the text of "this Constitution" may occur.[9] Therefore, the Constitution's text identifies only the written Constitution—and not Supreme Court precedent—as the U.S. Constitution. Second, the Constitution's text makes explicit that the Constitution was chronologically expressed at the point(s) in time when it was ratified.[10] In other words, "this Constitution['s]" meaning was fixed at those chronological points. Article VII identified the discrete point in time at which "We the People" "Establish[ed]" the Constitution: when the Constitution was ratified.[11] Third, the Article VI Supremacy Clause confers on "[t]his Constitution" the status of "supreme Law of the Land."[12] The Constitution's text and chronological-identifiers, coupled with the Supremacy Clause, identify the Constitution's original meaning—and only it—as the Constitution's meaning, and therefore the proper method of constitutional interpretation.

Third, the original meaning of the Fourteenth Amendment's Due Process Clause does not protect a constitutional right to abortion. There is abundant evidence on this point[13]; I focus on two facets of it. First, the Due Process Clause did not have substantive content when enacted,[14] or its substantive content was limited.[15] Therefore, finding a substantive right to abortion in the

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[5] National Archives, *Founding Documents in the Rotunda for the Charters of Freedom*, *available at* https://museum.archives.gov/founding-documents (visited Feb. 14, 2019).

[6] The argument in this paragraph is derived from Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1641-65 (2009); and Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?,* 103 NW. U.L. REV. 857, 864-72 (2009).

[7] U.S. CONST. pmbl.

[8] *Id.* art. VII.

[9] *Id.* art. V.

[10] Green, at 1657-66.

[11] U.S. CONST. art. VII.

[12] *Id.* art. VI, cl. 2.

[13] Even legal scholars who are pro-choice acknowledge that the Constitution's original meaning does not protect a right to abortion. The most famous example of this genre is John Hart ELY, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 , 922-26 (1973).

[14] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 98 (1980).

[15] Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 460-99 (2010) .

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term "liberty" is contrary to the original meaning's procedural focus. Second, when the Due Process Clause was ratified in 1868, all (or nearly all) states limited abortion, many states strictly limited abortion, and the trend was toward complete prohibition of abortion except in rare cases.[16] Then-Justice Rehnquist, in his dissent in *Roe* itself, made this point:

> The fact that a majority of the States . . . have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). . . . . The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.[17]

Justice Scalia, in his dissenting opinion in *Casey*, articulated a similar argument:

> That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.[18]

In sum, the original meaning of our written Constitution's Due Process Clause does not protect a right to abortion. As a result, Ohio lawmakers' oath does not include swearing to "support" a right to abortion.

Fourth, the Heartbeat Bill is consistent with the Constitution's original meaning. The original meaning of the Fourteenth Amendment's Due Process Clause does not encompass a right to abortion. Therefore, the Heartbeat Bill complies with the Fourteenth Amendment. State legislatures possess the power to legislate on the subject of abortion because it falls within a state's police power. This is the authority to "regulat[e the] . . . morals . . . health, safety, and general welfare of the citizenry."[19] Thus, Ohio has the police power to enact the constitutional Heartbeat Bill.[20]

Fifth, the U.S. Supreme Court's nonoriginalist interpretation that created a constitutional right to abortion does not bind Ohio lawmakers. The Supreme Court's abortion precedents in *Roe* and *Casey* are nonoriginalist because they are inconsistent with the Constitution's original meaning. Nonoriginalist precedents' interpretations do not bind state lawmakers because they

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[16] The key source for the history of abortion regulation is JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006).
[17] *Roe v. Wade*, 410 U.S. 113, 174, 177 (1973) (Rehnquist, J., dissenting).
[18] *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting).
[19] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 108-109 (1973).
[20] Assuming that the Heartbeat Bill is authorized by and not prohibited by the Ohio Constitution.

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are not a proper exercise of federal power.[21] In our American system of federalism, states are independent sovereigns. Only to the extent the American People delegated authority to the federal government, and that authority has been properly exercised, are states constitutionally limited. Therefore, one must identify a source of constitutional authority that the U.S. Supreme Court lawfully exercised to constrain state lawmakers. Absent that, state lawmakers retain interpretive independence because the power they exercise is granted them by their state constitution and the citizens of their state. Because nonoriginalist precedents are incorrect interpretations of the Constitution, state lawmakers are not bound by them. Thus, the nonoriginalist interpretation of the Fourteenth Amendment in *Roe* and *Casey* is not binding on Ohio lawmakers.

Sixth, each Ohio lawmaker has taken an oath to support the written U.S. Constitution which, in turn, commits them to the original meaning of the Constitution. Nonoriginalist decisions are incorrect interpretations of the Constitution, and they do not bind state lawmakers. Thus, *Roe* and *Casey*'s nonoriginalist interpretation does not bind Ohio lawmakers who may vote for the Heartbeat Bill because it is consistent with the Fourteenth Amendment's original meaning.

In conclusion, even assuming the Heartbeat Bill is inconsistent with current Supreme Court nonoriginalist precedent, Ohio lawmakers' oath of office does not prohibit them from adopting it.

Sincerely,

Lee J. Strang

[21] This argument is drawn from Lee J. Strang, *State Court Judges Are Not Bound by Nonoriginalist Supreme Court Interpretations*, 11 FIU L. REV. 327 (2016). To be clear, the argument made in the cited essay and here is contrary to the Supreme Court's own nonoriginalist pronouncements. *Cooper v. Aaron*, 358 U.S. 1 (1958).

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