

# Ordinance 2021-108

ORDINANCE OUTLAWING ABORTION, DECLARING MASON A SANCTUARY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS, PROVIDING FOR SEVERABILITY, ESTABLISHING AN EFFECTIVE DATE, AND DECLARING AN EMERGENCY

BE IT ORDAINED BY THE CITY COUNCIL OF MASON, OHIO THAT:

## A. FINDINGS

The City Council finds that:

- (1) Human life begins at conception.
- (2) Abortion is a violent act which purposefully and knowingly terminates an unborn human life which is distinctly separate from the mother and dependent upon the mother as his or her life support system.
- (3) Unborn human beings are entitled to the full and equal protection of the laws that prohibit violence against other human beings.
- (4) The Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), which invented a constitutional right for pregnant women to kill their unborn children through abortion, is a lawless and unconstitutional act of judicial usurpation, as there is no language anywhere in the Constitution that even remotely suggests that abortion is a constitutional right.
- (5) Constitutional scholars have excoriated *Roe v. Wade*, 410 U.S. 113 (1973), for its lack of reasoning and its decision to concoct a constitutional right to abortion that has no textual foundation in the Constitution or any source of law. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [Roe v. Wade] its legal effect."); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 54 (1988) ("We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion.").
- (6) The Ohio Human Rights and Heartbeat Protection Act has outlawed and criminalized abortion statewide if the unborn child has a detectable heartbeat. *See* Ohio Rev. Code § 2919.195(A). The only exception is for abortions needed 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. *See* Ohio Rev. Code § 2919.195(B).
- (7) Any person who performs or induces an abortion in violation of the Ohio Human Rights and Heartbeat Protection Act, other than the pregnant woman upon whom the abortion is performed or induced, is a criminal and felon who is subject

to punishment of up to 12 months imprisonment and a fine of up to \$2,500 for each illegal abortion performed. *See* Ohio Rev. Code §§ 2919.195(A); 2929.14(b)(5).

(8) Any person who aids or abets an abortion performed or induced in violation of the Ohio Human Rights and Heartbeat Protection Act, other than the pregnant woman upon whom the abortion is performed or induced, is a criminal and felon under the accomplice-liability provisions in section 2923.03 of the Ohio Revised Code, and is subject to punishment of up to 12 months imprisonment and a fine of up to \$2,500 for each illegal abortion that the person aided or abetted.

(9) The federal judiciary has no ability or power to veto, erase, or formally revoke the Ohio Human Rights and Heartbeat Protection Act, and it has no power to block the Ohio Human Rights and Heartbeat Protection Act from taking effect. The judiciary's powers extend only to resolving cases and controversies between named parties to a lawsuit. The power of judicial review allows a court to decline to enforce a statute when resolving a case or controversy between named litigants, and it allows a court to enjoin government officials from taking steps to enforce a statute—though only while the court's injunction remains in effect. But the Ohio Human Rights and Heartbeat Protection Act will continue to exist, even if a court opines that it violates the Constitution, and it will remain the law of Ohio until it is repealed by the legislature that enacted it.

(10) On July 3, 2019, a federal district judge temporarily enjoined the state's officials, as well as the County Prosecutors of Cuyahoga, Hamilton, Franklin, Richland, Mahoning, Montgomery, and Lucas Counties, from enforcing the Ohio Human Rights and Heartbeat Protection Act against the state's abortion providers. *See Preterm-Cleveland v. Yost*, No. 1:19-cv-00360-MRB (ECF No. 29). This district-court ruling did not "strike down" the Ohio Human Rights and Heartbeat Protection Act or "block" it from taking effect, as the media has falsely reported. The district court's order in *Preterm-Cleveland* merely prevents the named defendants in that lawsuit from bringing criminal charges or enforcing the statute against the named plaintiffs for as long as the court's injunction continues to exist.

(11) Individuals who violate the Ohio Human Rights and Heartbeat Protection Act in reliance on the injunction in *Preterm-Cleveland* remain subject to future criminal prosecution and penalties if the injunction is vacated on appeal or if *Roe v. Wade* is overruled. An injunction merely prevents the named defendants from initiating criminal charges or enforcement proceedings while the court's injunction remains in effect. It does not confer immunity or preemptive pardons on those who violate the statute, and it does not prevent government officials from prosecuting and punishing abortion providers after the injunction has been dissolved. *See Edgar v. MITE Corp.*, 457 U.S. 624, 653 (1982) (Stevens, J., concurring).

(12) The federal district court's ruling in *Preterm-Cleveland* does not bind the state judiciary; it does not bind nonparties to the lawsuit; and it does not bind private

citizens, who are not even subject to the Fourteenth Amendment, let alone the judiciary's purported interpretations of it. *See Civil Rights Cases*, 109 U.S. 3 (1883).

(13) Abortion after fetal heartbeat therefore remains a criminal offense under Ohio law, even though a federal district court has temporarily enjoined some government officials from prosecuting and punishing abortion providers who violate the Ohio Human Rights and Heartbeat Protection Act. Abortion providers who kill unborn children after a fetal heartbeat can be detected, and any individual who aids or abets a post-heartbeat abortion in Ohio, remain criminals and felons under Ohio law—even if they are not currently being prosecuted or punished for their criminal acts—and they should be treated and ostracized as such.

(14) The County Prosecutor of Warren County—along with every County Prosecutor in the State of Ohio other than the County Prosecutors of Cuyahoga, Hamilton, Franklin, Richland, Mahoning, Montgomery, and Lucas Counties — is not a party to the *Preterm-Cleveland* litigation, and is not subject to the injunction that is preventing other County Prosecutors in Ohio from indicting and prosecuting individuals and organizations that aid or abet abortions after fetal heartbeat.

(15) The County Prosecutor of Warren County—along with every County Prosecutor in the State of Ohio other than the County Prosecutors of Cuyahoga, Hamilton, Franklin, Richland, Mahoning, Montgomery, and Lucas Counties — may therefore indict and prosecute individuals and organizations that aid or abet abortions that occur after fetal heartbeat without violating the injunction in *Preterm-Cleveland*.

(16) The County Prosecutor of Warren County—along with every County Prosecutor in the State of Ohio other than the County Prosecutors of Cuyahoga, Hamilton, Franklin, Richland, Mahoning, Montgomery, and Lucas Counties — may indict and prosecute individuals and organizations that aid or abet abortions that occur after fetal heartbeat without contradicting the U.S. Supreme Court's abortion jurisprudence, so long as the prosecution and imprisonment of those individuals and organizations will not result in an "undue burden" on women seeking abortions.

(17) The city council of Mason finds it necessary to supplement the Ohio Human Rights and Heartbeat Protection Act with this ordinance, which will ensure that abortion at all stages of pregnancy will be regarded as an unlawful act in Mason, and that the state's criminal prohibitions on post-heartbeat abortion are enforced to the maximum possible extent.

## **B. DECLARATIONS**

(1) We declare Mason, Ohio to be a Sanctuary City for the Unborn.

(2) We declare that abortion at all times and at all stages of pregnancy is an unlawful act if performed in Mason, Ohio, unless the abortion was in response to a life-threatening physical condition aggravated by, caused by, or arising from a

pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.

(3) We declare abortion-inducing drugs to be contraband, and we declare the possession of abortion-inducing drugs within city limits to be an unlawful act.

(4) We also declare that abortion after fetal heartbeat remains a criminal act under section 2919.195 of the Ohio Revised Code, unless the abortion is needed 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.

(5) We declare that abortion after fetal heartbeat will remain a criminal act under state law until the legislature repeals section 2919.195 of the Ohio Revised Code, regardless of whether a court has enjoined government officials from prosecuting or punishing abortion providers who violate the Ohio Human Rights and Heartbeat Protection Act.

(6) We declare that the Ohio Human Rights and Heartbeat Protection Act remains enforceable against any person who is not a named party to a court ruling that has declared the statute unconstitutional or enjoined government officials from enforcing it.

(7) We declare that the Ohio Human Rights and Heartbeat Protection Act remains enforceable by any government official who has not been enjoined by a court from enforcing it. This includes the County Prosecutor of Warren County, as well as every County Prosecutor in the State of Ohio other than the County Prosecutors of Cuyahoga, Hamilton, Franklin, Richland, Mahoning, Montgomery, and Lucas Counties.

(8) We declare that the Ohio Human Rights and Heartbeat Protection Act remains enforceable against any person who lacks third-party standing to assert the constitutional rights of women seeking abortions, such as individuals who aid or abet abortions by providing financial assistance, transportation to an abortion clinic, or other forms of logistical support, and we urge the County Prosecutor of Warren County—and all County Prosecutors throughout the state of Ohio—to criminally prosecute these individuals under the Ohio Human Rights and Heartbeat Protection Act and the accomplice-liability provisions in section 2923.03 of the Ohio Revised Code.

(9) We declare that the Ohio Human Rights and Heartbeat Protection Act remains fully enforceable against any person whose criminal prosecution will not result in an “undue burden” on women seeking abortions, such as individuals who aid or abet abortions by providing financial assistance, transportation to an abortion clinic, or other forms of logistical support, including employers and insurance companies who pay for abortions, and we urge the County Prosecutor of Warren County—and all

County Prosecutors throughout the state of Ohio—to criminally prosecute these individuals under the Ohio Human Rights and Heartbeat Protection Act and the accomplice-liability provisions in section 2923.03 of the Ohio Revised Code.

(10) We declare that all individuals who violate the Ohio Human Rights and Heartbeat Protection Act, and all individuals who aid or abet violations of post-heartbeat abortion, are criminals and felons, regardless of whether a court has enjoined government officials from punishing these individuals for their crimes.

(11) We declare that any abortion provider or other individual who violates the Ohio Human Rights and Heartbeat Protection Act can be prosecuted for their crimes as soon as the injunction preventing the enforcement of that statute is vacated on appeal or in response to a Supreme Court ruling that overrules *Roe v. Wade*, 410 U.S. 113 (1973), as long as the six-year statute of limitations for felony prosecutions has not expired.

(12) We urge County Prosecutors throughout the state of Ohio to announce that they will prosecute every person who has violated the Ohio Human Rights and Heartbeat Protection Act, and every person who has aided or abetted a violation of the Ohio Human Rights and Heartbeat Protection Act, as soon as any injunction against the enforcement of that law is vacated on appeal or in response to a Supreme Court ruling that overrules *Roe v. Wade*, 410 U.S. 113 (1973), to the extent allowed by the six-year statute of limitations.

(13) We urge all residents of Mason and the state of Ohio to regard anyone who performs or assists a post-heartbeat abortion as criminals and felons, consistent with the law of Ohio, and to report their criminal activities to County Prosecutors and state and local authorities.

### C. AMENDMENTS TO CITY CODE

The Mason Code of Ordinances is amended by adding section 537.26 to read as follows:

#### Sec. 537.26. Abortion.

(A) It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the city of Mason, Ohio.

(B) It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the city of Mason, Ohio. This section does not prohibit referring a patient to have an abortion which takes place outside the city limits of Mason, Ohio. The prohibition in this section includes, but is not limited to, the following acts within the city limits of the city of Mason Ohio:

(1) Knowingly providing transportation to or from an abortion provider which is located within the city of Mason, Ohio;

(2) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion taking place within the city of Mason, Ohio;

(3) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion within the city of Mason, Ohio;

(4) Providing “abortion doula” services within the city of Mason, Ohio; and

(5) Coercing or pressuring a pregnant mother to have an abortion against her will within the city of Mason, Ohio.

(C) It shall be an affirmative defense to the unlawful acts described in Subsections (A) and (B) if the abortion was in response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed. The defendant shall have the burden of proving this affirmative defense by a preponderance of the evidence.

(D) It shall be unlawful for any person to possess or distribute abortion-inducing drugs in the city of Mason, Ohio.

(E) No provision of this section may be construed to prohibit any action which occurs outside of the jurisdiction of the city of Mason, Ohio and no provision of this section may be construed to prohibit any action occurring within the city of Mason, Ohio that aids or abets an action which occurs outside of the city of Mason, Ohio.

(F) No provision of this section may be construed to prohibit any conduct protected by the First Amendment of the U.S. Constitution, as made applicable to state and local governments through the Supreme Court’s interpretation of the Fourteenth Amendment, or by Article 1, Section 11 of the Ohio Constitution.

(G) Under no circumstance may the mother of the unborn child that has been aborted, or the pregnant woman who seeks to abort her unborn child, be subject to prosecution or penalty under this section.

(H) For purposes of this section, the following definitions shall apply:

(1) “Abortion” means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth-control devices or oral

contraceptives, and it does not include Plan B, morning-after pills, or emergency contraception. An act is not an abortion if the act is done with the intent to:

(a) save the life or preserve the health of an unborn child;

(b) remove a dead, unborn child whose death was caused by accidental miscarriage; or

(c) remove an ectopic pregnancy.

(2) "Unborn child" means a natural person from the moment of conception who has not yet left the womb.

(3) "Abortion-inducing drugs" include mifepristone, misoprostol, and any drug or medication that is used to terminate the life of an unborn child. The term does not include birth-control devices or oral contraceptives, and it does not include Plan B, morning-after pills, or emergency contraception.

(I) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, the provisions and applications of this section shall be severable as follows:

(1) It is the intent of the city council that every provision, subsection, sentence, clause, phrase, or word in this section, and every application of the provisions in this section, are severable from each other. If any application of any provision in this section to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this section shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the city council's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this section to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining applications and shall remain in force, and shall be treated as if the city council had enacted an ordinance limited to the persons, group of persons, or circumstances for which the section's application do not present an undue burden. The city council further declares that it would have enacted this section, and each provision, section, subsection, sentence, clause, phrase, or word, and all

constitutional applications of this section, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this section were to be declared unconstitutional or to represent an undue burden.

(2) If any court declares or finds a provision in this section facially unconstitutional, when there are discrete applications of that provision that can be enforced against a person, group of persons, or circumstances without violating the Constitution, then those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the city council had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the Constitution.

(3) If any provision of this section is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force, consistent with the declarations of the city council's intent in Subsections (I)(1) and (I)(2).

(4) No court may decline to enforce the severability requirements in Subsections (I)(1), (I)(2), and (I)(3) on the ground that severance would "rewrite" the ordinance or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a locality or government official from enforcing a subset of an ordinance's applications is never "rewriting" an ordinance, as the ordinance continues to say exactly what it said before. A judicial injunction or declaration of unconstitutionality is nothing more than a non-enforcement edict that can always be vacated by later courts if they have a different understanding of what the Constitution requires; it is not a formal amendment of the language in a statute or ordinance. A judicial injunction or declaration of unconstitutionality no more "rewrites" an ordinance than a decision by an executive official not to enforce a duly enacted statute or ordinance in a limited and defined set of circumstances.

(5) If any federal or state court ignores or declines to enforce the requirements of Subsections (I)(1), (I)(2), (I)(3), or (I)(4), or holds a provision of this section invalid or unconstitutional on its face after failing to enforce the severability requirements of Subsections (I)(1), (I)(2), and (I)(3), for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of this section that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of this section to



the maximum possible extent. The saving construction issued by the Mayor shall carry the same force of law as an ordinance; it shall represent the authoritative construction of this section in both federal and state judicial proceedings; and it shall remain in effect until the court ruling that declares invalid or enjoins the enforcement of the original provision in this section is overruled, vacated, or reversed.

(6) The Mayor must issue the saving construction described in Subsection (I)(5) within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this section after failing to enforce the severability requirements of Subsections (I)(1), (I)(2), and (I)(3). If the Mayor fails to issue the saving construction required by Subsections (I)(5) within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Subsections (I)(1), (I)(2), and (I)(3), or if the Mayor's saving construction fails to enforce the provisions of the ordinance to the maximum possible extent permitted by the Constitution or other superseding legal requirements, as construed by the federal or state judiciaries, then any person may petition for a writ of mandamus requiring the Mayor to issue the saving construction described in Subsection (I)(5).

(J) Whoever violates this section is guilty of a misdemeanor in the first degree.

~~D. EMERGENCY MEASURE~~

~~This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety, morals and welfare of the City of Mason, Ohio; and for the further reason that the immediate passage of this ordinance is necessary to preserve the lives of unborn children in Mason, Ohio then this ordinance shall take effect at the earliest date allowed by law.~~

PASSED, ADOPTED, SIGNED and APPROVED,

  
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Mayor of the City of Mason, Ohio

  
\_\_\_\_\_

Clerk of Council of the City of Mason, Ohio

Now, THEREFORE, be it ordained by the Council of the City of Mason, Ohio on the 25th day of October, 2021, four members elected thereto concurring that this ordinance shall take effect and be in force from and after the earliest period allowed by law.