



## POLICY BRIEF

# OHIO'S SIX-WEEK ABORTION BAN

## OVERVIEW *Last updated: 7/20/22*

As of June 24, 2022, Ohio is enforcing a “heartbeat” ban on abortion. That is, abortion is illegal in Ohio if embryonic cardiac cell activity – often mislabeled as a “heartbeat” – can be detected via ultrasound. In most cases, such cellular activity is first detected around six weeks after the last menstrual period, so these bans are also sometimes called “six-week” bans. Ohio’s legislation is based on embryonic cardiac cell activity, not a set gestational limit, so the actual cutoff may be slightly earlier or later than six weeks’ gestation. Medical professionals typically measure pregnancy from the first day of a person’s last menstrual period (LMP), which is about two weeks before embryonic development starts. Six weeks’ gestation is thus typically about four weeks since conception (i.e., fertilization).

Ohio’s legislature initially passed a six-week ban (Senate Bill 23) in 2019, which Governor Mike DeWine signed into law the same year. Several Ohio abortion providers requested an injunction to prevent the law from going into effect because it violated the constitutional rights established through the US Supreme Court’s decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*. A federal court quickly agreed that it was unconstitutional and granted an injunction to block the ban from going into effect. On June 24, 2022, however, the US Supreme Court’s decision in the *Dobbs v. Jackson Women’s Health Organization* case overturned the decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*. This change now allows states to prohibit abortion. Ohio’s Attorney General, Dave Yost, immediately asked the court to lift the injunction blocking the law. The judge did so within hours of Yost’s request, allowing the six-week ban to take effect. Thus, Ohio now enforces a six-week abortion ban (ORC §§ 2919.19, 2919.191-2919.196).

## KEY DETAILS OF THE LAW

- The law states “no person shall knowingly and purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected.”<sup>1</sup> This means that doctors cannot perform abortions on pregnant people whose embryos indicate cardiac activity, usually found via ultrasound.
  - Anyone who violates this prohibition is guilty of a felony of the fifth degree.
  - However, a person who has an abortion is immune from all civil and criminal liability. In other words, **a person who has an abortion does not violate this law**; only the doctor performing or inducing the abortion violates the law if an embryo has cardiac activity at the time of termination and no exception applies.
- The law only applies to intrauterine pregnancies, meaning it excludes ectopic pregnancies.
- Physicians do not violate the law if they perform an abortion to save the life, or to avoid “a serious risk of the substantial and irreversible impairment of a major bodily function,” of a pregnant person – even if the embryo has detectable cardiac activity.
  - According to Ohio law, “a medically diagnosed condition that constitutes a ‘serious risk of the substantial and irreversible impairment of a major bodily function’ includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman’s mental health.” (ORC § 2919.16)

- Abortion remains legal when no cardiac activity is detected via ultrasound. The state interprets the law to mean that an ultrasound must occur immediately before the procedure on the day of the abortion to ensure there is no cardiac activity, although the statute does not contain this limitation.
- Pregnant people are allowed to bring wrongful death suits against providers who performed an abortion on them if their abortion violated this law or if they were not given information about the presence of embryonic cardiac activity and the chances of bringing a pregnancy to term.
  - The prevailing party in wrongful death suits is entitled to court costs and attorney's fees.
- Anyone who performs or induces an abortion without first checking for embryonic cardiac activity is guilty of a felony in the fifth degree.
  - The exception to this rule is if a physician performs an abortion because they believe a medical emergency exists.
- The Ohio State Medical Board may penalize providers with a maximum forfeiture of \$20,000 for each violation of the law.

## CLINICAL INACCURACY AND IMPRECISION OF OHIO'S LAW

### *The Term "Fetal Heartbeat" is Clinically Inaccurate*

Ohio law defines a "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac" (ORC § 2919.19). **Equating embryonic cardiac activity at six weeks' gestation with a "fetal heartbeat" is not clinically accurate.** First, at six weeks' gestation, a developing human organism is considered an embryo, not a fetus. According to the American College of Obstetricians and Gynecologists (ACOG), the term fetus applies after the eighth week of gestational development, or beginning nine weeks after implantation (i.e., 11 weeks LMP). **At six weeks' gestation, an embryo initially measures between one and two millimeters in length<sup>2</sup> and has neither a fully developed heart nor cardiovascular system; therefore, it cannot have a heartbeat.<sup>3</sup>** Second, although ultrasound can sometimes detect embryonic cardiac activity at approximately six weeks of gestation or earlier,<sup>4,5</sup> the activity captured by such technology reflects the cells that eventually form the heart starting to fire.

### *Embryology Deep Dive*

Ultrasounds completed around the sixth week of gestation often pick up the electrical flutters of cells that eventually form a heart; this activity results from differentiating cardiomyocytes making "functional contractile units mature enough to begin spontaneous contractions" that move blood around the primitive embryo.<sup>6</sup> Around six weeks of gestation, an embryo has only developed a [primitive heart tube](#) (click to see sagittal cross-sectional view of an embryo at six weeks' gestation showing the fetal heart tube). The primitive heart tube begins arrhythmic contractions around 22 days of embryonic development or at the start of the fifth week of gestation (i.e., five weeks LMP).<sup>7</sup> This movement, however, begins before the heart tube has formed a working conduction system (i.e., the network of cells and signals that cause a heart to beat) or valvular system (i.e., the four heart valves that open and close when a heart beats to ensure blood flows in the proper directions and whose movement creates the sound of a heartbeat).<sup>7</sup> The heart chambers are similarly underdeveloped at this time and not functional.<sup>7</sup> The language of Ohio's ban, however, equates any cardiac activity with a fetal heartbeat. Thus, although an embryo lacks developed cardiovascular and circulatory systems at six weeks' gestation, the presence of maturing cardiac cells often precludes abortion.

### *The Term "Intrauterine Pregnancy" is Imprecise*

The law defines intrauterine pregnancy as "a pregnancy in which the fetus is attached to the placenta within the uterus of the pregnant woman." Although the embryo begins to attach to the placenta via a connecting stalk by the third week of gestation (i.e., 3 weeks LMP), an umbilical cord does not fully form until ten weeks gestation; at five weeks gestation, only a primitive umbilical ring has formed around the stalk.<sup>8</sup> As such, the interpretation and application of "fetal attachment" is also unclear.

## ONGOING LITIGATION

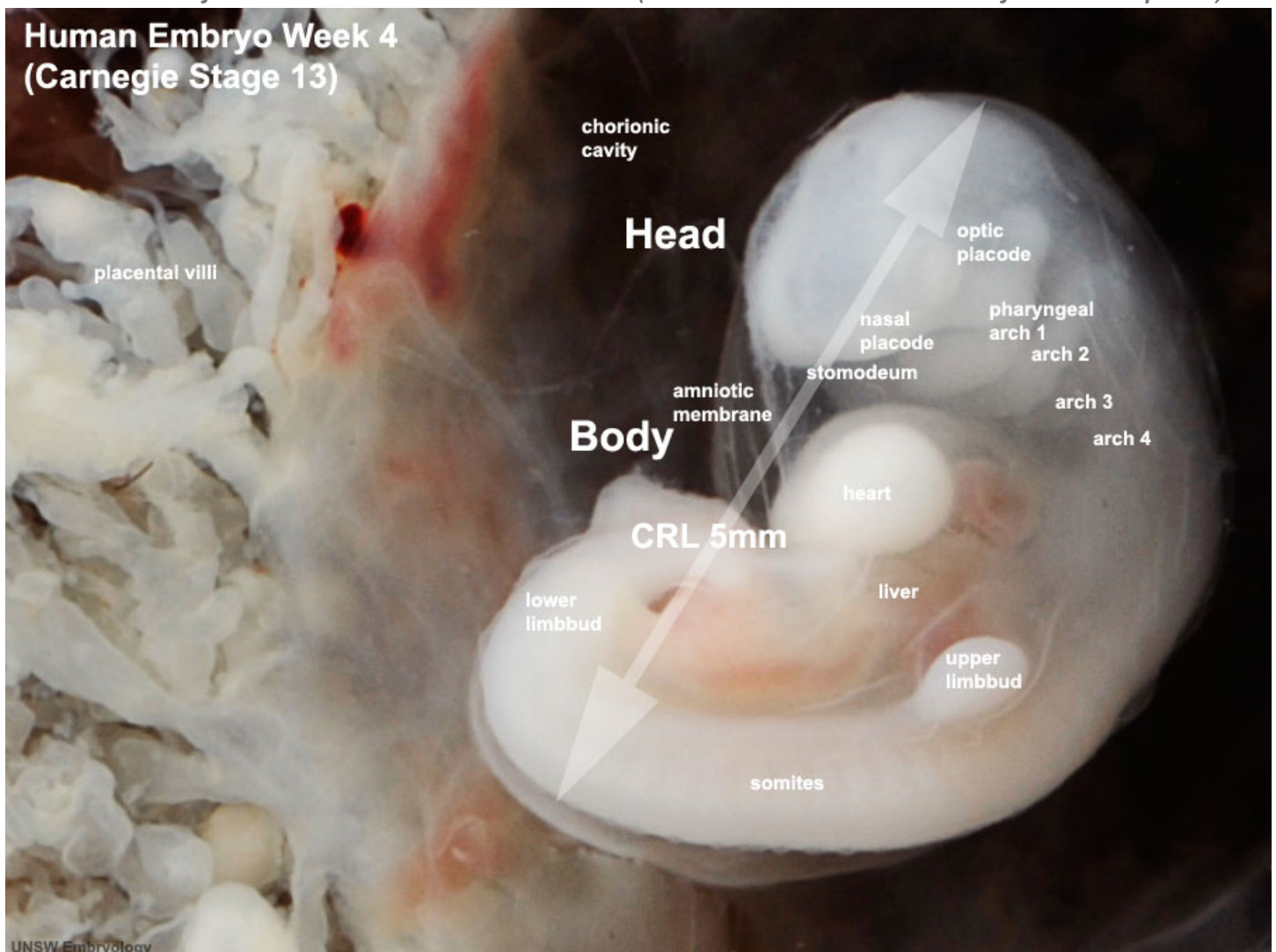
Providers sued in 2019 to block the law before it went into effect, and a federal judge issued a preliminary injunction on July 3, 2019. Several weeks later, the clinics asked the court to rule in their favor without a trial because the law was clearly unconstitutional under *Roe v. Wade*. The judge did not rule on that motion. On March 3, 2021, the judge officially put the case on hold to wait for the outcome of two similar cases pending before the court of appeals.

This litigation was still pending when the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* came down on June 24, 2022, overruling *Roe v. Wade*. Within minutes of that ruling, the Attorney General of the State of Ohio asked the federal court to lift the injunction on the "heartbeat" ban and allow the law to go into effect. The judge did so later that day. On July 7, the federal court dismissed the case.

On Wednesday, June 29, Ohio abortion clinics filed a new lawsuit before the Ohio Supreme Court, arguing that although there was no longer a federal constitutional right to abortion, the Ohio Constitution separately protects reproductive autonomy. They argued that the six-week ban is unconstitutional under the Ohio Constitution. They also asked for an emergency order preventing enforcement of the ban pending the outcome of the Ohio Supreme Court case. On July 1, 2022, the Ohio Supreme Court denied the request for emergency relief, but as of this writing, it has not yet decided whether to hear the case. Therefore, all abortion providers in Ohio are complying with the six-week ban and all other applicable Ohio laws.

Ohioans who need abortions after embryonic cardiac activity is detected must travel to other states to obtain that care. Currently, there is no explicit ban on travel to other states to obtain abortion services, nor for assisting people to seek that care.

### *Human Embryo at the End of Six Weeks' Gestation<sup>9</sup> (Six Weeks LMP / 4 Weeks Embryonic Development)*



## REFERENCES

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## FURTHER READING

- **SB 23 Full Text:** [https://search-prod.lis.state.oh.us/solarapi/v1/general\\_assembly\\_133/bills/sb23/EN/05?format=pdf](https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/sb23/EN/05?format=pdf)
- **SB 23 State Analysis:** <https://www.legislature.ohio.gov/download?key=12355&format=pdf>
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