Testimony of Paul Benjamin Linton, Esq.,
before the Senate Health Committee
on Senate Bill No. 123
Sponsored by Senators Roegner and O'Brien
October 27, 2021

Chairman Huffman, Vice-Chairman Antani, Ranking Member Antonio, Members of the Committee, thank you for providing me with an opportunity to testify today in support of Senate Bill No. 123, sponsored by Senators Roegner and O'Brien.

By way of background, I have been a practicing attorney for almost fifty years, and have spent the last thirty-two years professionally engaged in the pro-life movement, first at Americans United for Life (from 1988-1997), a national, public interest law firm then based in Chicago, and in my own practice for the past twenty-four years. I have been counsel of record for *amici curiae* ("friends-of-the-court") in more than a dozen cases in the United States Supreme Court, including landmark beginning-of-life and end-of-life cases such as *Webster v. Reproductive Health Services* (1989), *Cruzan v. Director*, *Missouri Dep't of Health* (1990), *Planned Parenthood v. Casey* (1992), *Washington v. Glucksberg* (1997), *Vacco v. Quill* (1997), *Stenberg v. Carhart* (2000), *Gonzales v. Oregon* (2006), *Ayotte v. Planned Parenthood of Northern New England* (2006), *Gonzales v. Carhart* (2007) and *Gonzales v. Planned Parenthood Federation of America* (2007). In both *Webster* and *Casey*, I represented hundreds of state legislators, including Ohio state senators and representatives. In *Guam Society of Obstetricans & Gynecologists*, I was appointed as a Special Assistant Attorney General for the Territory of Guam in defending the Territory's abortion statute. Just this past July, I submitted *two amicus curiae* briefs in the Supreme Court in support of the State of Mississippi in the challenge to Mississippi's fifteen-week abortion ban, *Dobbs v. Jackson Women's Health Organization*.

I have been counsel of record for *amici curiae* in scores of cases in most of the federal

circuit courts of appeals and more than half of all of the state reviewing courts in the United States, including the Ohio Court of Appeals. I have testified on pro-life legislation in more than a dozen States. Finally, I have published more than two dozen law review articles on a variety of subjects, including state and federal constitutional law, sex discrimination, criminal law, religious freedom, the history of abortion regulation and assisted suicide. I have also published the first and, to date, only comprehensive analysis of abortion as a state constitutional right, ABORTION UNDER STATE CONSTITUTIONS (Carolina Academic Press), the third edition of which was published in January 2020.

Turning to the legislation at hand, Senate Bill 123 would restore legal protection for unborn children, from conception to birth, upon a decision of the Supreme Court restoring the authority of the States to prohibit abortion, in whole or in part, or the adoption of a federal constitutional amendment that would do the same. Section 2904.01. Senate Bill 123 would prohibit abortion throughout pregnancy except when it was necessary "to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function." Section 2904.03.

Under this proposed legislation, a pregnant woman upon whom an abortion is performed or attempted in violation thereof, whether by herself or by a third party, would not be subject to criminal prosecution for having consented to the abortion. Section 2904.22. This is entirely consistent with the experience under the pre-*Roe* abortion laws in Ohio. To my knowledge, there is not a single reported example of a pregnant woman having been prosecuted in Ohio prior to *Roe v. Wade*, either for self-abortion or for having consented to an abortion performed upon her by another. On the other hand, there have been scores of prosecutions in Ohio of both physicians

and non-physicians for performing or attempting to perform abortions prior to *Roe v. Wade*. Indeed, shortly before *Roe v. Wade* was decided, the Ohio Court of Appeals affirmed the conviction of a physician for performing an abortion under the pre-*Roe* laws, in a judgment the Ohio Supreme Court declined to review for lack of a substantial constitutional question. *See State v. Kruze*, No. 72-11 (Ohio Supreme Court, March 10, 1972). That judgment was later vacated pursuant to the Supreme Court's intervening decision in *Roe v. Wade*, 410 U.S. 113 (1973), *see State v. Kruze*, 295 N.E.2d 916 (Ohio 1973).

Senate Bill 123 provides the woman upon whom an abortion has been performed in violation of the Act with the right to bring a wrongful death action, if the violation of the Act was a proximate cause of the death of her unborn child. Section 2904.35(A). In such an action, she would be entitled to recover damages, her attorney fees and court costs. Section 2904.35(B). Section Bill 123 also mandates the revocation of the license to practice medicine of any physician who is found guilty of violating §§ 2904.03, 2904.04 and 2904.05 of the Act. *See* § 2904.30.

At this point, I'd like to address three issues that may arise in respect to this legislation:

- first, whether the State may enact a law to take effect upon a future contingent event;
- second, whether such a law, if it is dependent upon the action of third parties, is an unconstitutional delegation of legislative power under art. II, § 1, of the Ohio Constitution; and,
- third, whether there would be adequate notice to persons affected by the act.

With respect to the first issue, it is not at all unusual for legislatures to provide that an act will take effect upon some future contingent event. For example, various Ohio laws take effect

only upon securing adequate state and/or federal funding,[1] or the concurrence of other States and/or the United States Congress.[2] The Ohio Supreme Court has held that the State may enact a law that "depends for its execution upon a contingency or an eventuality." *State ex rel. De Woody v. Bixler*, 25 N.E.2d 341, 344 (Ohio 1940). *See also State ex rel. De Woody v. Bixler*, 25 N.E.2d 341, 344 (Ohio 1940) (citing numerous Ohio precedents).[3]

With respect to the second issue, a law that would take effect upon the action of third parties does not constitute an improper delegation of legislative power in violation of art. II, § 1, of the Ohio Constitution, so long as the legislature has determined what that action is. *See State ex rel. Krieg v. Matia*, 37 N.E.2d 53, 55 (Ohio 1941) ("while the Legislature may not delegate its power to make a law, it may make a law to become operative on the happenings of a certain contingency, or a future specified event"). Perhaps the clearest example of this principle is the controlled substances act, Ohio Rev. Code § 3719.01 *et seq*. Under § 3719.43 of the act, the classification, reclassification or declassification of any controlled substance by the Attorney General of the United States under the *federal* Controlled Substances Act *automatically* affects

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[1] *See* Ohio Rev. Code § 5104.32(A) (entering into provider contracts for child day-care services contingent upon securing adequate state and/or federal funding).

[2] *See* Ohio Rev. Code § 1522.01, Great Lakes-St. Lawrence River Basin Water Resources Compact, § 9.4 (compact contingent upon the agreement of seven other States and the consent of Congress); § 3747.01, Midwest interstate compact on low-level radioactive waste, art. VIII(G) (compact contingent upon agreement of at least three eligible States and the consent of Congress).

[3] There are a wealth of cases holding that a state legislature may make a law go into effect upon the occurrence of a future contingent event. *See*, *e.g.*, *Bushnell v. Sapp*, 571 P.2d 1100, 1104 (Colo. 1977); *Eisele v. Morton Park District*, 258 N.E.2d 127, 129-30 (Ill. App. Ct. 1970); *State v. Dumler*, 559 P.2d 798, 803 (Kan. 1977); *City of Pittsburgh v. Robb*, 53 P.2d 203, 205-09 (Kan. 1930); *Bracey Advertising Co., Inc. v. North Carolina Dep't of Transportation*, 241 S.E.2d 146, 148 (N.C. Ct. App. 1978); *City of San Antonio v. Brady*, 315 S.W.2d 597, 598 (Tex. 1958).

the classification of such substances under *state* law.[4] In *State v. Klinck*, 541 N.E.2d 590 (Ohio 1989), the Ohio Supreme Court rejected an argument that § 3917.43 constituted an improper delegation of legislative power to a federal agency. A law prohibiting abortion that would take effect upon the overruling of *Roe v. Wade* would not "delegate" to the Supreme Court or any third party the authority to define conduct as criminal under Ohio law; it would have been the Ohio General Assembly itself that made that decision. Thus, there is no "delegation" of legislative power in such legislation.

With respect to the third issue, it is a fundamental principle of constitutional law (due process) that a person must have reasonable notice—actual or constructive—that his or her conduct is criminal. No one can be held accountable for engaging in criminal conduct unless he or she knows (or should know) that the conduct in which he wants to engage is prohibited by law. Normally, issues of "notice" arise in the context of statutes that are ambiguous or vague. No such issues would arise with respect to a statute criminalizing abortion. The "notice" issue would be different, to wit, whether persons would know (or should know) that performing abortions were now illegal. A law that would make abortion illegal as of the date of a Supreme Court ruling overruling *Roe v. Wade would* provide such notice. Moreover, anyone potentially affected by the law who was uncertain as to whether the event that would allow the law to go into

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[4] "When congress or, pursuant to the federal drug abuse control laws, the attorney general of the United States adds a compound, mixture, preparation, or substance to a schedule of the federal drug abuse control laws, transfers any of the same between one schedule of the federal drug abuse control laws to another, or removes a compound, mixture, preparation, or substance from the schedules of the federal drug abuse control laws, then such addition, transfer, or removal is automatically effected in the corresponding schedule or schedules established by rule adopted under section 3719.41 of the Revised Code, subject to amendment pursuant to section 3719.44 of the Revised Code."

effect had occurred (*i.e.*, that *Roe* had been overruled) could always bring a declaratory judgment action in state court asking for a judicial determination as to that question.

Let me turn back, for a moment, to the *Klinck* case I mentioned a few minutes ago. In *Klinck*, the Ohio Supreme Court stated that the drug in question "was *automatically* incorporated into Schedule IV of the Ohio schedules [of controlled substances] *when* the Attorney General added it to the federal schedule . . . " *Id*. at 592 (emphasis added). If a person may be prosecuted under Ohio law for possession or delivery of a controlled substance whenever the Attorney General of the United States has classified a drug as a controlled substance under federal law, then there is no reason why someone could not be prosecuted for performing an illegal abortion upon the overruling of *Roe v. Wade*. I would also point out that, under art. II, § 1(d), of the Ohio Constitution, the legislature may provide that a law will take effect *immediately* in certain circumstances (*e.g.*, an emergency and if the bill passes by a two-thirds majority in both chambers). That includes bills that define and punish criminal conduct. *See State v. Corn*, 177 N.E.2d 289, 291-92 (Ohio Ct. App. 1960). Thus, there is no "notice" issue with this legislation.

Finally, I'd like to address, briefly, whether the "Human Life Protection Act" would violate the Ohio Constitution. Article I, § 1, of the Ohio Constitution provides: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." Ohio Const. art. I, § 1. In *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), the Ohio Court of Appeals held that the "liberty" language of art. I, § 1, guarantees "the choice of a woman whether to bear a child," which choice "necessarily includes the right of a woman to have an abortion so long as there is

no valid and constitutional statute restricting or limiting that right." *Id*. at 575. The court held further, however, that such guarantee is not broader than the corollary right conferred by the Due Process Clause of the Fourteenth Amendment, as interpreted by *Roe* and modified by *Casey*. *Id*. at 577. Accordingly, the court upheld an informed consent statute similar to the one that passed federal constitutional scrutiny in *Casey*. *Id*. at 577-78.

The Ohio Court of Appeals decision in *Voinovich* would not bar enforcement of the provisions of the "Human Life Protection Act." First, *Voinovich* was a decision of the Ohio Court of Appeals, not the Ohio Supreme Court, which declined to review the court of appeals decision. *See Preterm Cleveland v. Voinovich*, 624 N.E.2d 194 (Ohio 1993) (denying certiorari). Thus, there is no state constitutional right to abortion that the Ohio Supreme Court has recognized or would be bound to follow. Second, as I have noted, the court of appeals decision held that the right to abortion it derived from art. I, § 1, of the Ohio Constitution is no broader than the federal right recognized by the United States Supreme Court in *Roe v. Wade* and *Planned Parenthood v. Casey*. To the extent that the Supreme Court overrules *Roe* and *Casey*, the corresponding "right" to an abortion under the Ohio Constitution would necessarily contract. And if the Court holds that there is no federal right to abortion, then, by a parity of reasoning, there would be no corresponding right to abortion under art. I, § 1, of the Ohio Constitution.

Third, the Ohio Supreme Court has implicitly rejected the theory on the basis of which the Ohio Court of Appeals discovered a right to abortion in the Ohio Constitution. In a case of first impression decided seven years after the court of appeals decided *Voinovich*, the state supreme court effectively undermined the jurisprudential basis of the court of appeals' opinion. In *State v. Williams*, 728 N.E.2d 342 (Ohio 2000), the Ohio Supreme Court held that the

language of art. I, § 1, "is not an independent source of [judicially enforceable] self-executing protections. Rather, it is a statement of fundamental ideals upon which a limited government is created." *Id*. at 354. As such, art. I, § 1, "requires other provisions of the Ohio Constitution or legislative definition to give it practical effect. That is so because its language lacks the completeness required to offer meaningful guidance for judicial enforcement." *Id*. Article I, § 1, by its own terms, provides no "standards for judicial enforcement" of the rights set forth therein and, therefore, those rights are not self-executing. *Id*. Although *Williams* did not discuss abortion or cite *Preterm Cleveland*, it follows from the holding in *Williams* that no judicially enforceable right to abortion may be derived solely from art. I, § 1, of the Ohio Constitution. Thus, the "Human Life Protection Act" could not be successfully challenged under art. I, § 1.

Conclusion

A law prohibiting abortion upon the overruling of *Roe v. Wade* would not violate the Ohio Constitution.

Thank you for your time and attention. I would be happy to answer any questions members of the Committee may have.