Testimony of Paul Benjamin Linton, Esq.,
before the House Government Oversight Committee
on House Bill No. 598
Sponsored by Representative Schmidt
May 19, 2022

Chairman Wilkin, Vice-Chairman White, Ranking Member Brown, Members of the Committee, thank you for providing me with an opportunity to testify today in support of House Bill No. 598, sponsored by Representative Schmidt.

By way of background, I have been a practicing attorney for almost fifty years, and have spent the last thirty-three 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-five 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. Last 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 (S.B. 123). I have testified on pro-life legislation in more than a dozen States, including Ohio just last October. 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, House Bill 598 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. Twelve other States have already enacted similar legislation. House Bill 598 would prohibit abortion throughout pregnancy (§ 2904.03) unless the procedure 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 of the pregnant woman." Section 2904.031.

It should be noted that the limited circumstances under which an abortion could be performed under H.B. 598 are structured as an affirmative defense, not as an exception. The reason for that is that the facts on the basis of which the defense exists are peculiarly within the knowledge of the person who has performed the abortion. As with other affirmative defenses under Ohio law (there are upwards of fifty or more criminal statutes in Ohio that provide affirmative defenses), it is reasonable to place the burden of justifying the abortion on the person

who has a unique knowledge of the facts as they relate to the affirmative defense. That said, it is most unlikely that any physician who actually had a valid affirmative defense would be charged under the law. Prosecutors do not typically bring charges unless they have a high degree of confidence that they can prove their case. If a possible defendant has a valid affirmative defense, he would not likely be charged. Ohio's experience with its statutes prohibiting post-viability abortions (§ 2919.17) and abortions after twenty weeks gestational age (§ 2919.201) supports this conclusion.

Ohio's current ban on post-viability abortions went into effect on October 20, 2011; the ban on twenty-week abortions went into effect on March 14, 2017. Both statutes provide an affirmative defense that is essentially the same as that provided in H.B. 598. *See* §§ 2919.17(B)(1)(b), 2919.201(B)(1)(b). According to data provided by the Ohio Department of Health, between 2012, the first full year the post-viability ban was in effect, and 2020, the last year for which data is available—a nine-year period—there were *nine* reported abortions that were performed after the unborn child was determined to be viable. And between 2017, the year the twenty-week abortion ban went into effect, and 2020—a four-year period—there were *fifty-nine* reported abortions that were performed after completion of the nineteenth week of gestation. Was any physician charged under either of these laws for these abortions? No, and why is that? Because the physicians would have indicated on the forms provided by the Department of Health that the abortion 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 of the pregnant woman." Ohio's experience with two abortion bans that include an affirmative defense indistinguishable from that set forth in H.B. 598 demonstrates that the fear that physicians who perform an

abortion in compliance with the affirmative defense provided in H.B. 598 would have to go through a criminal prosecution in order to be vindicated is unfounded.

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 were 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).

House Bill 598 provides the pregnant 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 the unborn child. Section 2904.35(A). In such an action, the plaintiff would be entitled to recover damages, attorney fees and court costs. Section 2904.35(B). House Bill 598 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] More specifically, a State

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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 Hand v. Stapleton*, 33 So. 689, 692 (Ala. 1902); *Housing Authority of the County of Los Angeles v. Dockweiler*, 94 P.2d 794, 807 (Cal. 1939); *Bushnell v. Sapp*, 571 P.2d 1100, 1104 (Colo. 1977); *People ex rel. Caldwell v. Reynolds*, 10 Ill. 1, 12-13 (1848); *People ex rel. Wilson v. Salomon*, 51 Ill. 37, 54-55 (1869); *Eisele v. Morton Park District*, 258 N.E.2d 127, 129-30 (Ill. App. Ct. 1970); *Edwards v. Housing Authority of the City of Muncie*, 19 N.E.2s 741, 746 (Ind. 1939); *State v. Dumler*, 559 P.2d 798, 803 (Kan. 1977); *City of Pittsburgh v. Robb*, 53 P.2d 203, 205-09 (Kan. 1930); *Walton v. Greenwood*, 60 Me. 356, 366-67 (1872); *Mayor & City Council of Baltimore v. Clunet*, 23 Md.

may make implementation of a statute turn on action by the United States Supreme Court, as several States have done in other areas of the law.[4]

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

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449, 469 (1865); *Fell v. State*, 42 Md. 71, 85 (1875); *State v. Sullivan*, 69 N.W. 1094, 1095-96 (Minn. 1897); *Lennox v. Housing Authority of Omaha*, 290 N.W. 451, 457 (Neb. 1940); *State ex rel. Nelson v. Butler*, 17 N.W. 683, 690 (Neb. 1945); *Alcorn v. Hamer*, 38 Miss. 652, 753 (1859); *Hudspeth v. Swayze*, 89 A. 780, 786 (N.J. 1914); *People v. Long Island R.R. Co.*, 31 N.E. 873, 874 (N.Y. 1892); *Bracey Advertising Co., Inc. v. North Carolina Dep't of Transportation*, 241 S.E.2d 146, 148 (N.C. Ct. App. 1978); *Peck v. Weddell*, 17 Ohio. St. 271, 288 (1867); *City of San Antonio v. Brady*, 315 S.W.2d 597, 598 (Tex. 1958); *State v. Scampini*, 59 A. 201, 203 (Vt. 1904); *Bull v. Reed*, 54 Va. 78, 89 (1855); *State ex rel. Attorney General v. O'Neill*, 24 Wis. 149, 154 (1869); *Smith v. City of Janesville*, 26 Wis. 291, 292 (1870); *State ex rel. Van Alstine v. Frear*, 125 N.W. 961, 963 (Wis. 1910).

[4] States, for example, have conditioned the imposition of sales taxes on sales to in-state residents by out-of-state sellers upon a decision of the Supreme Court overruling its decisions holding that such taxes may not be collected, *Quill Corp. v. North Dakota*, 504 US. 298 (1992), *National Bellas Hess v. Illinois Dep't of Revenue*, 386 U.S. 753 (1967), *overruled*, *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). *See* La. Rev. Stat. Ann. §§ 47-339(A)(2), (B)(3), 47-340(E)(3), (H)(1); Senate Bill No. 2298, 65th North Dakota Legislative Assembly (2017); S.D. Comp. Laws § 10-64-1 (2016). States have also enacted statutes reinstating redistricting plans that had been struck down by a lower court if the Supreme Court ultimately upheld the plans. *See* Session Law 2002-1, Extra Sess., House Bill 4. §§ 3, 3.2 (state redistricting plans), North Carolina General Assembly (referencing, by implication, *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), *stay denied*, 535 U.S. 1301 (2002)); Session Law 2016-1, Extra Sess., Senate Bill 5, § 2 (congressional redistricting plan), North Carolina General Assembly (referencing *Harris v. McCrory*, 159 F.Supp.3d 60 (M.D. N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S.Ct. 1455 (2017)); Session Law 1998-2, Session 1997, House Bill 1394, § 1.1 (congressional redistricting plan) North Carolina General Assembly (referencing, by implication, *Cromartie v. Hunt*, 34 F.Supp.2d 1029 (E.D. N.C. 1998), *rev'd*, *Hunt v. Cromartie*,, 526 U.S. 541 (1999)).

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 the classification of such substances under *state* law.[5] 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

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[5] "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."

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 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.