Testimony of Paul Benjamin Linton, Esq.,
before the Senate State Affairs Committee
on Senate Bill 9
Authored by Senator Angela Paxton

Chairman Hughes, Members of the Committee, thank you for providing me with an opportunity to testify today in support of Senate Bill 9 authored by Senator Paxton.

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 Texas 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. In addition to the foregoing Supreme Court cases, I also submitted briefs in support of the State in *Lawrence v. Texas* (2007) and in defense of traditional marriage in *Obergefell v. Hodges* (2015).

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 Texas Supreme Court, the Texas Court of Criminal Appeals and the Texas Third, Fifth and Thirteenth Courts of Appeals. I have testified on pro-life legislation in more than a dozen States, including Texas. 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 (3d ed. 2012) (Carolina Academic Press), the third edition of which was published in January 2020.

Turning to the legislation at hand, SB 9 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, or the adoption of a federal constitutional amendment that would do the same. SB 9 would prohibit abortion throughout pregnancy except in very narrow circumstances, which are essentially the same as those under which an abortion after twenty weeks may now be performed in Texas.

The first question that might be asked is why is this legislation necessary? After all, Texas has never repealed the abortion statutes struck down in *Roe v. Wade* (1973). Although the Texas legislature has not *expressly* repealed its pre-*Roe* statutes, the United States Court of Appeals for the Fifth Circuit has held that the pre-*Roe* statutes *prohibiting* abortion have been repealed by implication by the enactment of post-*Roe* statues *regulating* abortion (*McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004). The Fifth Circuit's decision is not binding upon any state

court, but it cast a cloud over the pre-*Roe* statutes. It is entirely possible that the Texas Supreme Court or the Texas Court of Criminal Appeals would agree with the Fifth Circuit and conclude that the pre-*Roe* laws have been repealed by implication. Enactment of SB 9 would ensure that Texas would have a law in place to prohibit abortion upon the overruling of *Roe v. Wade*, without having to enact a new law at that time.

Let me emphasize that under SB 9, a pregnant woman upon whom an abortion is performed or attempted in violation thereof would not be subject to criminal prosecution (or civil liability) for having consented to the abortion. This is entirely consistent with the experience under the pre-*Roe* abortion laws in Texas. To my knowledge, there is not a single reported example of a pregnant woman having been prosecuted 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 dozens of prosecutions in Texas of both physicians and non-physicians for performing or attempting to perform abortions prior to *Roe v. Wade*. Indeed, only fifteen months before *Roe v. Wade* was decided, the Texas Court of Criminal Appeals affirmed the conviction of a physician for performing an abortion under the pre-*Roe* laws. *See Thompson v. State*, 493 S.W.2d 913 (Tex. Crim. App. 1971), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade sub nom. Thompson v. Texas*, 410 U.S. 950 (1973).

At this point, I'd like to say a few words about the circumstances (contingencies) under which the criminal and civil penalties authorized by the bill would go into effect. They are essentially no different from those set forth in laws that have been enacted in ten other States, as well as one which is being considered in Ohio. There is nothing novel or unusual about Texas providing that a law will go into effect upon a future contingent event. This is done in a variety

of contexts. Texas, for example, has made statutes take effect upon identifying and securing adequate state funding,[1] federal funding[2] or both,[3] upon the concurrence of other States,[4] or the concurrence of other States and the federal government,[5] or upon enactment of federal law authorizing imposition of a sales tax on remote sales.[6] In addition, Texas has made certain provisions of criminal laws take effect upon a future contingent event, which is the case under the Texas Controlled Substances Act, which *automatically* adopts the classification (or reclassification) of drugs by the Attorney General of the United States under the federal Controlled Substances Act.[7] None of this involves an improper delegation of legislative authority under art. II or art. III, § 1, of the Texas Constitution. And, indeed, in SB 9, there is no delegation of authority at all.

More than ninety years ago, the Texas Supreme Court noted, "The authorities . . . hold that while the Legislature may not delegate its power to make a law, it may enact a law to become operative upon a certain contingency or future event . . . ." *Trimmier v. Carlton*, 116

---

[1] *See*, *e.g.*,Tex. Government Code § 441.116; Health & Safety Code §§ 614.0205, 771.106(d); Labor Code § 302.062(d); Transportation Code § 224.063(b).

[2] *See*, *e.g.*, Tex. Agriculture Code § 76.103(a).

[3] *See*, *e.g*,, Tex. Family Code § 231.0011(e).

[4] *See, e.g.*, Tex. Family Code § 60.10, Interstate Compact for Juveniles, art. IX(A).

[5] *See*, *e.g.*, Tex. Water Code § 46.013, Red River Compact, art. XIII, § 13.02(a), (b).

[6] Tex. Tax Code § 151.059.

[7] Tex. Health & Safety Code § 481.034(g).

Tex. 572, 591, 296 S.W. 1070, 1080 (Tex. 1927).[8] That is precisely what SB 9 does.

Unlike the abortion bans that have been enacted in some other States—Arkansas, Mississippi, North Dakota, Missouri, Tennessee and Utah—SB 9 does *not* require the action of any third party (*e.g.*, the Attorney General or some other official or body) before the law can go into effect. That is deliberate. Requiring a third party to "declare" or "certify" that one of the contingencies set forth in the bill has occurred is unnecessary. Moreover, imposing such a requirement is imprudent. It would effectively place in the hands of a third party the power to nullify the law by refusing—out of bad faith, political pressure or mere ignorance—to make the required declaration or certification. The decision of the Texas Legislature to prohibit abortions should not be held hostage to the possibly hostile (or merely indifferent) views of a public official or body. And, because the determination as to whether a given contingency has occurred involves a matter of judgment and discretion, a court would not have the power to compel that official or body (via a writ of mandamus) to make the required declaration or certification. Four other States—Idaho, Kentucky, Louisiana and South Dakota—have enacted contingency abortion bans that, like SB 9, do not require the involvement of a third party to become effective.

Finally, I would like to address the issue of "notice." It is a basic principle of state (due course of law) and federal (due process) constitutional law that a person must be on notice — actual or constructive — that his conduct is now criminal. SB 9 provides such notice. It states that the prohibition shall go into effect, to the extent permitted, on the thirtieth day after:

---

[8] *See also State v. City of Dallas*, 319 S.W.2d 767, 776 (Tex. Ct. Civil Appeals–Austin 1958) (citing *Trimmier*), *affirmed sub nom. State v. City of Austin*, 331 S.W.2d 737 (Tex. 1960).

- the issuance of a judgment of the United States Supreme Court in any decision overruling, wholly or partly, *Roe v. Wade* (1973), as modified by *Planned Parenthood v. Casey* (1992);

- the issuance of a judgment of the United States Supreme Court in any decision that recognizes, wholly or partly, the authority of the States to prohibit abortion; or

- adoption of an amendment to the United States Constitution that, wholly or partly restores to the States their authority to prohibit abortion.

With respect to the first two contingencies—relating to a decision of the United States Supreme Court—the criminal and civil penalties created by SB 9 would not go into effect until thirty days after the Court's decision, which would place anyone who performs abortions on notice that his or her conduct will be subject to criminal prosecution and civil liability after that thirty-day period expires. Anyone who is uncertain as to whether one of the contingencies set out in SB 9 has occurred could bring a declaratory judgment action in state court seeking a judicial resolution of that matter.

Two other brief comments on the question of notice:

First, under art. III, § 39, of the Texas Constitution, the legislature may provide that an Act will take effect *immediately* if it passes by a two-thirds majority in both chambers. That includes bills that define and punish criminal conduct. SB 9 provides far more notice of when the criminal (and criminal) penalties would take effect.

Second, assuming that, contrary to the Fifth Circuit's opinion, the pre-*Roe* statutes prohibiting abortion have *not* been repealed by implication (an issue on which Texas courts have expressed no opinion), those statutes would be enforceable during the thirty-day period between

the time the Supreme Court issues an opinion overruling *Roe v. Wade* (or otherwise recognizing the States' authority to prohibit abortion) and the date on which the criminal and civil penalties created by SB 9 would take effect. Thus, even before the criminal and civil penalties created by SB 9 would go into effect, anyone who was performing abortions (or wanted to perform abortions) would be on notice that his or her conduct is subject to criminal prosecution. In sum, there is no plausible "notice" issue with SB 9.

I would be happy to answer any questions members of the Committee may have.