Testimony of Paul Benjamin Linton, Esq.,
before the House Judiciary & Civil Jurisprudence Committee
on Committee Substitute for House Bill 2350
Authored by Representative Capriglione

April 1, 2019

Chairman Leach, Members of the Committee, thank you for providing me with an opportunity to testify today in support of the Committee Substitute for Rep. Capriglione's bill, HB 2350, which, for the sake of brevity, I shall simply refer to as HB 2350.

By way of background, I have been a practicing attorney for almost forty-five years, and have spent the last thirty 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-two 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, Fourth, 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 twenty law review articles on a variety of subjects, including state and federal constitutional law, sex discrimination, criminal law, 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 (2d ed. 2012) (Carolina Academic Press), a third edition of which will be published later this year.

Turning to the legislation at hand, HB 2350 would supplement the pre-*Roe* statutes criminalizing abortion, which the Texas legislature has never repealed, with civil sanctions, civil liability, and mandatory disciplinary action that are not now available. These remedies would take effect upon 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. These remedies would apply to all abortions except where the abortion is necessary to prevent the death or substantial impairment of a major bodily function of the woman.

Let me emphasize that under HB 2350, a pregnant woman upon whom an abortion is performed or attempted in violation thereof is not subject to civil sanctions 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 are dozens of prosecutions 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 "triggering" mechanism. The mechanism in the bill is essentially no different from similar laws that have been enacted in Kentucky, Louisiana and South Dakota, and which are also being considered in Tennessee and other States. 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] None of this involves an improper delegation of legislative authority under art.

---

[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.

II or art. III, § 1, of the Texas Constitution. And, indeed, in HB 2350, 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 Tex. 572, 591, 296 S.W. 1070, 1080 (Tex. 1927).[8] That is precisely what HB 2350 does.

Finally, I would like to address the issue of "notice." It states that the civil remedies shall go into effect, to the extent permitted, on the thirtieth day after:

- The issuance of a judgment of the United States Supreme Court 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, a "judgment" of the Supreme Court is the mandate, which typically is issued three to four weeks after the Court renders its decision, unless a petition for rehearing is filed, in which case it would be three to four weeks after the petition is denied. It is only thirty days thereafter that the civil remedies provided by HB 2350 would go into effect. As a result, there would be a period of, *at a minimum*, seven to eight weeks between the time the Supreme Court hands down a decision overruling *Roe v. Wade* (or otherwise

[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).

recognizing the States' authority to prohibit abortion) and when HB 2350 would take effect, more than ample time to place anyone who performs abortions on notice that his or her conduct will be subject to civil remedies. And that period of time could be much longer, possibly as many as several months, if a petition for rehearing in the case overruling *Roe* (or otherwise recognizing the States' authority to prohibit abortion) were filed (such petitions are routinely filed).

One other brief comment on the question of notice:

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. HB 2350 provides far more notice of when the civil remedies would take effect.

In sum, there is no plausible "notice" issue with HB 2350.

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