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## Bill Analysis

**Version:** As Introduced

**Primary Sponsors:** Sens. Roegner and O'Brien

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### SUMMARY

#### Application upon the occurrence of a condition precedent

- Enacts several abortion-related provisions that apply only upon the occurrence of either of the following that wholly or partially upholds a state's authority to prohibit abortion:
  - The issuance of a U.S. Supreme Court opinion;
  - The adoption of an amendment to the U.S. Constitution.

#### Criminal provisions

- Prohibits, as the crime of criminal abortion, a person from purposely causing or inducing an abortion by using a drug or substance or an instrument or other means.
- Provides that criminal abortion is a felony of the fourth degree.
- Provides an affirmative defense to a criminal abortion charge if the physician performed or induced the abortion, or attempted to do so, under the determination that it was necessary to prevent the woman's death or a serious risk of the substantial and irreversible impairment of a major bodily function.
- Establishes the following list of conditions that must be met in order to invoke the affirmative defense above, provided that no medical emergency preventing compliance exists:
  - Written certification must be made that the abortion is necessary to prevent the woman's death or a serious risk of the substantial and irreversible impairment of a major bodily function from (1) the doctor performing or inducing the abortion, or attempting to do so, and (2) a different physician not professionally related to the first doctor;
  - Appropriate neonatal services for premature infants must exist at the facility where the physician performs or induces the abortion, or attempts to do so;

- The physician performing or inducing the abortion, or attempting to do so, terminates or attempts to terminate the pregnancy in a manner that provides the best opportunity for the unborn child to survive, unless certain exceptions apply;
- Written certification of the methods or techniques considered and reasons for choosing the method or technique employed must be made;
- The physician performing or inducing the abortion, or attempting to do so, must arrange for the attendance in the same room of another physician to take all reasonable steps necessary to preserve the life and health of the unborn child immediately upon the child's expulsion or extraction from the woman.
- Prohibits, as the crime of promoting abortion, any person from purposely manufacturing, possessing for sale or distribution, advertising, or holding one's self out as possessing for sale or distribution, or selling or distributing, any drugs, medicine, instrument, or device to cause an abortion if certain conditions are present.
- Provides that promoting abortion is a first degree misdemeanor.
- Prohibits, as the crime of abortion manslaughter, a person from purposely taking the life of a child born by attempted abortion who is alive when removed from the pregnant woman's uterus.
- Provides that abortion manslaughter is a felony of the first degree.
- Establishes a minimum of four to seven years and a maximum of 25 years of imprisonment and a fine of not more than \$10,000 for abortion manslaughter.
- Establishes a minimum of one-half to two years of imprisonment and a fine of not more than \$2,500 for criminal abortion.
- Grants immunity from prosecution for abortion manslaughter, criminal abortion, or promoting abortion to a woman on whom an abortion was induced or attempted.

### **Wrongful death cause of action**

- Creates a wrongful death cause of action for a woman on whom an abortion was performed in violation of crimes of abortion manslaughter, criminal abortion, or promoting abortion.
- Requires that a woman who prevails receives: (1) \$10,000 in damages, or an amount determined by the trier of fact after consideration of the evidence, whichever the woman elects before final judgment, and (2) court costs and reasonable attorney's fees.
- Provides that a defendant who prevails must receive reasonable attorney's fees if: (1) the court finds the action to be frivolous, (2) the finding of the frivolous conduct is not based on a judicial determination that the crime at issue is unconstitutional, and (3) the court finds that the defendant was adversely affected by the frivolous conduct.
- Provides that a judicial determination that the criminal act at issue is unconstitutional is a defense to the wrongful death action.

## Medical license revocation

- Requires the State Medical Board to revoke a physician's license to practice if the physician is guilty of abortion manslaughter, criminal abortion, or promoting abortion.

## Bill name

- Entitles the bill as the "Human Life Protection Act."

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## DETAILED ANALYSIS

### Application based on a condition precedent

The bill enacts several abortion-related provisions in the Revised Code. However, these provisions apply only upon the occurrence of one of the following conditions precedent:

- The U. S. Supreme Court issues an opinion that wholly or partially upholds a state's authority to prohibit abortion;
- An amendment to the U. S. Constitution is adopted to wholly or partially authorize a state to prohibit abortion.<sup>1</sup>

Once either condition precedent occurs, the bill's provisions supersede all conflicting Revised Code provisions, and no state funds may be disbursed to support their violation of. Additionally, the bill prohibits the enforcement of any contract executed after the new provisions become applicable, if the enforcement would require or support their violation.<sup>2</sup>

### Criminal provisions

#### Criminal abortion

The bill prohibits a person from purposely causing or inducing an abortion (which the bill defines as the purposeful termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus or embryo) by either of the following means:

- Prescribing, administering, or personally furnishing a drug or substance;
- Using an instrument or other means.<sup>3</sup>

The bill defines "drug" using the same definition in the Revised Code governing pharmacists and dangerous drugs, which includes, for example, any article recognized in the United States pharmacopoeia and national formulary, or any supplement to them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals

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<sup>1</sup> R.C. 2904.01(A).

<sup>2</sup> R.C. 2904.01(B).

<sup>3</sup> R.C. 2904.02(A) and 2904.03(A).

and any article, other than food, intended to affect the structure or any function of the body of humans or animals.<sup>4</sup>

A person who violates this is guilty of criminal abortion, which is a felony of the fourth degree (see “**Punishment**,” below).<sup>5</sup>

### **Affirmative defense**

The bill provides that an affirmative defense to a criminal abortion charge exists if both of the following are true: (1) a physician purposely performed or induced, or purposely attempted to perform or induce, the abortion, and (2) the physician determined, in the physician’s reasonable medical judgment, based on the facts known to the physician at the time, that the abortion was necessary to prevent the pregnant woman’s death or serious risk of substantial and irreversible impairment of a major bodily function.<sup>6</sup> The bill defines “physician” as a person who is licensed to practice medicine and surgery or osteopathic medicine and surgery by the State Medical Board or a person who otherwise is authorized to practice medicine and surgery or osteopathic medicine and surgery in Ohio. “Reasonable medical judgment” means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.<sup>7</sup> The bill, however, provides no definition of “serious risk of substantial and irreversible impairment of a major bodily function” and the definition of that term in other abortion law is not made applicable by the bill.

An abortion is not considered necessary: (1) on the basis of a claim or diagnosis that the pregnant woman will engage in conduct that would result in the woman’s death or a substantial or irreversible impairment of a major bodily function, or (2) based on any reason related to the woman’s mental health.<sup>8</sup> The bill provides no definition of “substantial and irreversible impairment of a major bodily function.”

In order to invoke the affirmative defense, the physician purposely performing or inducing the abortion, or attempting to do so, must comply with all of the following conditions:

- The physician certifies in writing that, in the physician’s reasonable medical judgment, based on the facts known to the physician at the time, the abortion is necessary to prevent the pregnant woman’s death or a serious risk of the substantial and irreversible impairment of a major bodily function;
- A different physician not professionally related to the physician performing or inducing the abortion, or attempting to do so, certifies in writing that, in that physician’s reasonable medical judgment, based on facts known to that physician at that time, the

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<sup>4</sup> R.C. 2904.02(B); R.C. 4729.01, not in the bill.

<sup>5</sup> R.C. 2904.03(B).

<sup>6</sup> R.C. 2904.031(A).

<sup>7</sup> R.C. 2904.02(C) and (D); R.C. 2305.113, not in the bill.

<sup>8</sup> R.C. 2904.031(B).

abortion is necessary to prevent the pregnant woman's death or a serious risk of the substantial and irreversible impairment of a major bodily function;

- The physician performs or induces the abortion, or attempts to do so, in a hospital or other health care facility that has appropriate neonatal services for premature infants;
- The physician performing or inducing the abortion, or attempting to do so, terminates, or attempts to terminate, the pregnancy in a manner that provides the best opportunity for the "unborn child" (an individual organism of the species *homo sapien* from fertilization until live birth)<sup>9</sup> to survive, unless the physician determines, in the physician's reasonable medical judgment, based on the facts known to the physician at that time, that the termination of the pregnancy in that manner poses a greater risk of the woman's death or substantial and irreversible impairment of a major bodily function than would other available methods of abortion;
- The physician certifies in writing the available methods or techniques considered and the reasons for choosing the method or technique employed;
- The physician performing or inducing the abortion, or attempting to do so, has arranged for the attendance in the same room in which the abortion is performed or induced, or attempted to be performed or induced, at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn child immediately upon the child's complete expulsion or extraction from the pregnant woman.

The conditions above do not apply if a medical emergency exists that prevents the physician from complying with any of them.<sup>10</sup>

### **Promoting abortion**

The bill prohibits any person from purposely: (1) manufacturing, (2) possessing for sale or distribution, (3) advertising, (4) holding one's self out as possessing for sale or distribution, or (5) selling or distributing, any drugs, medicine, instrument, or device, when any of the following apply:

- The person knows or has reasonable cause to believe that the drug, medicine, instrument, or device is capable of causing an abortion and is used primarily for that purpose;
- The person knows or has reasonable cause to believe that the recipient to whom the person sells or distributes the drug, medicine, instrument, or device, intends to use it to cause an abortion;

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<sup>9</sup> R.C. 2904.02(E).

<sup>10</sup> R.C. 2904.032.

- The person directly or indirectly represents that the drug, medicine, instrument, or device is effective in causing an abortion, regardless of whether it is actually effective as represented.<sup>11</sup>

The bill provides that the above conditions do not prohibit a manufacturer or distributor of drugs or surgical supplies, or a pharmacist or physician, from lawfully manufacturing, possessing, selling, or distributing, in the usual course of that person's business or profession, any drug, medicine, instrument, or thing intended for any lawful medical purpose. An example of a lawful medical purpose is an abortion that meets the affirmative defense for a criminal abortion (see "**Criminal abortion**," above).<sup>12</sup>

A person who violates this is guilty of promoting abortion, a misdemeanor of the first degree (see "**Punishment**," below).<sup>13</sup>

### **Abortion manslaughter**

The bill prohibits a person from purposely taking the life of a child born by attempted abortion who is alive when removed from the pregnant woman's uterus. No person who performs an abortion may fail to use reasonable medical judgment to preserve the life of a child who is alive when removed from the woman's uterus.<sup>14</sup>

A person who violates this is guilty of abortion manslaughter, a felony of the first degree (see "**Punishment**," below).<sup>15</sup>

### **Punishment**

Under the bill, a felony of the first degree is punishable by a minimum of four, five, six, or seven years and a maximum of twenty-five years of imprisonment and a fine of not more than \$10,000.<sup>16</sup>

A fourth degree felony is punishable by a minimum of one-half, one, one and one-half, or two years of imprisonment and a fine of not more than \$2,500.<sup>17</sup>

A first degree misdemeanor is punishable as provided under existing law, which may include a jail term of not more than 180 days, a nonresidential sanction, which includes, for example, a term of community service of up to 500 hours, or a fine of not more than \$1,000.<sup>18</sup>

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<sup>11</sup> R.C. 2904.04(A).

<sup>12</sup> R.C. 2904.04(B).

<sup>13</sup> R.C. 2904.04(C).

<sup>14</sup> R.C. 2904.05(A) and (B).

<sup>15</sup> R.C. 2904.05(C).

<sup>16</sup> R.C. 2904.40(A).

<sup>17</sup> R.C. 2904.40(B).

<sup>18</sup> R.C. 2929.24(A)(1), 2929.27(A)(3), and 2929.28(A)(2)(a)(i), not in the bill.

## **Immunity for pregnant woman**

The bill provides that a woman on whom an abortion was induced or attempted is immune from prosecution for criminal abortion, promoting abortion, or abortion manslaughter.<sup>19</sup>

## **Wrongful death cause of action**

The bill creates a wrongful death cause of action for a woman on whom an abortion was performed in violation of the provisions for criminal abortion, promoting abortion, or abortion manslaughter, and the criminal violation was the proximate cause of the death of her unborn child.

## **Awards for prevailing on an action**

### **For plaintiff**

A woman who prevails in such an action must receive both of the following from the defendant:<sup>20</sup>

- \$10,000 in damages, or an amount determined by the trier of fact after consideration of the evidence. The amount must be awarded at the mother's election at any time before the final judgment, subject to the same defenses and requirements of proof, except any requirement of live birth, as would apply in the case of a wrongful death lawsuit for a child born alive.
- Court costs and reasonable attorney's fees.

### **For defendant**

The court must award reasonable attorney's fees to the defendant in accordance with existing law if the defendant prevails and all of the following apply:<sup>21</sup>

- The court finds that the commencement of the action constitutes frivolous conduct.<sup>22</sup>

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<sup>19</sup> R.C. 2904.22.

<sup>20</sup> R.C. 2904.35(B).

<sup>21</sup> R.C. 2904.35(D).

<sup>22</sup> Under continuing law, "frivolous conduct" is defined, in relevant part, as conduct of a party to a civil action or party's counsel of record that: (1) obviously serves merely to harass or maliciously injure another party to the action or is for another improper purpose (e.g., causing unnecessary delay or needless increase in the cost of litigation), (2) is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law, (3) consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or delivery, or (4) is conduct that consists of denials or factual contentions not warranted by the evidence, or if specifically so identified, are not reasonably based on a lack of information or belief. R.C. 2323.51(A)(2)(a), not in the bill.

- The court’s findings regarding the frivolous conduct is not based on that court or another court determining that the provisions of the bill regarding criminal abortion, promoting abortion, or abortion manslaughter are unconstitutional.
- The court finds that the defendant was adversely affected by the frivolous conduct.

### **Defense**

A determination by a court of record that the provisions governing criminal abortion, promoting abortion, or abortion manslaughter are unconstitutional is a defense to a wrongful death action under the bill.<sup>23</sup>

### **Medical license revocation**

The State Medical Board must revoke a physician’s license to practice medicine if the physician is guilty of criminal abortion, promoting abortion, or abortion manslaughter.<sup>24</sup>

### **Bill name**

The bill provides that “This act shall be known as the ‘Human Life Protection Act.’”<sup>25</sup>

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## **COMMENT**

Ohio Constitution, Article II, Section 26 prohibits the General Assembly from passing laws, except those relating to public schools, that require the approval of any authority other than the General Assembly in order to take effect. The Ohio Supreme Court has upheld laws when a condition precedent (i.e., a factual event) must occur before the law becomes operative.<sup>26</sup> Conversely, the Court has struck down laws that require approval from an authority other than the General Assembly for the law to become effective.<sup>27</sup> It is not clear whether a court would consider the “condition precedent” in this bill as a factual event or an unconstitutional requirement that approval of an authority other than the General Assembly is required before the bill can take effect.

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<sup>23</sup> R.C. 2904.35(C).

<sup>24</sup> R.C. 2904.30.

<sup>25</sup> Section 2.

<sup>26</sup> See, e.g., *State ex rel. De Woody v. Bixler*, 136 Ohio St. 263, 263-264 (1940).

<sup>27</sup> See, e.g., *State ex rel. Allison v. Garver*, 66 Ohio St. 555 (1902).



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## HISTORY

Action	Date
Introduced	03-09-21

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