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## Bill Analysis

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**Primary Sponsors:** Reps. Powell and Hall

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### SUMMARY

#### 2363 Act

- Entitles the bill the 2363 Act “for the 2363 children lost to abortion every day in the United States.”

#### “Person” defined for the Revised Code

- Amends the “person” definition, applicable to the entire Revised Code, unless another definition for person is provided in a Revised Code Title, Chapter, or Section, to include a born or unborn human being at any stage of development.

#### Abortion prohibition

- Prohibits a person from purposely performing or inducing or attempting to perform or induce an abortion.
- Defines “abortion” as the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate a woman’s pregnancy, with knowledge that the termination by any of those means will, with reasonable likelihood, cause the death of the unborn child.
- Defines an “unborn child” as an individual organism of the species *Homo sapiens* from fertilization until live birth, with fertilization being the fusion of human spermatozoon with a human ovum.

#### Prohibition enforcement by private civil action

- Requires the abortion prohibition to be enforced exclusively through private civil actions and prohibits any other enforcement from being taken or threatened by the state of Ohio, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of Ohio or a political subdivision.

- Permits any person, other than (1) an Ohio state or local governmental agency officer or employee or (2) a person who impregnated the abortion patient through a criminal act, to bring an action against any person who does any of the following:
  - Performs or induces an abortion;
  - Knowingly engages in conduct that aids or abets the performance or inducement of an abortion for a woman who the person knows to be pregnant, if the abortion is performed or induced in violation of the bill's abortion prohibition;
  - Has taken action or made statements that demonstrate to a reasonable person that the person intends to engage in either of the two actions described above.
- Prohibits the state of Ohio, an Ohio official, or a district or county attorney from intervening in a private civil action enforcing the abortion prohibition, but permits those individuals to file an amicus curiae brief in the action.
- Requires, if a claimant prevails in an action enforcing the abortion prohibition and except as otherwise provided, the court to award the claimant all of the following:
  - Injunctive relief sufficient to prevent the defendant from violating or engaging in acts that aid or abet violating the abortion prohibition;
  - Statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced, and for each abortion performed or induced that the defendant aided or abetted;
  - Costs and attorney's fees.
- Prohibits a court from awarding relief to a claimant if the defendant demonstrates that the defendant previously paid the full amount of statutory damages in a previous action for (1) that particular abortion performed or induced or (2) the particular conduct that aided or abetted an abortion performed or induced, when a civil action is brought in response to one of the following violations:
  - Performing or inducing an abortion in violation of the bill's abortion prohibition;
  - Knowingly engaging in conduct that aids or abets the performance or inducement of an abortion for a woman who the person knows to be pregnant, if the abortion is performed or induced in violation of the bill's abortion prohibition.
- Prohibits a court from awarding costs or attorney's fees to a defendant in an action brought to enforce the abortion prohibition.
- Prohibits the use of certain specified defenses, including, for example, ignorance or mistake of law; a defendant's belief that the bill's requirements are or were unconstitutional; and the consent of the unborn child's mother to the abortion.
- Allows any of the following to be an affirmative defense to an action brought to enforce the abortion prohibition:
  - A licensed physician performed or induced an abortion that:

- ❖ Was designed or intended to prevent the death of a pregnant mother and the physician made reasonable medical efforts under the circumstances to preserve both the life of the mother and her unborn child; and
- ❖ It resulted in the accidental or unintentional injury or death to the unborn child.
- Under specified circumstances, the person sued reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion has complied, would comply, or will comply with the provisions immediately above.
- An undue burden defense.
- Permits a defendant to assert an undue burden affirmative defense if both of the following apply:
  - The defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion;
  - The defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.
- Prohibits a court from finding an undue burden unless the defendant introduces evidence proving either of the following:
  - An award of relief will prevent a woman or group of women from obtaining an abortion.
  - An award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.
- Prohibits a defendant from establishing an undue burden by either of the following:
  - Merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion.
  - Arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.
- States that the undue burden affirmative defense is not available if the U.S. Supreme Court overrules *Roe. v. Wade* or *Planned Parenthood v. Casey*, regardless of whether the basis for the action occurred before the U.S. Supreme Court overruled either of those decisions.
- States that nothing in the undue burden affirmative defense provisions can be construed to limit or preclude a defendant from asserting personal constitutional rights as a defense, and a court may not award relief if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

- Specifies that a defendant does not have standing to assert the rights of women seeking an abortion as a defense to liability unless either of the following apply:
  - The U.S. Supreme Court holds that Ohio courts must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law.
  - The defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the U.S. Supreme Court.
- Prohibits an action from being brought to enforce the abortion prohibition later than four years after the cause of action accrues.
- Specifies the permitted venues in which a civil action may be brought to enforce the abortion prohibition.
- Provides that if a civil action is brought to enforce the abortion prohibition in one of the permitted venues, the action cannot be transferred to a different venue without the written consent of all parties.

## **Legislative statements**

- Paraphrases the U.S. Declaration of Independence preamble: “All human beings are created equal and endowed by their creator with certain unalienable rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”
- States that “[t]he legislature may define, by law, the scope of protections afforded by this section to unborn persons. Any prohibition of conduct with regard to unborn persons must be prescribed by the legislature by law.”

## **Construction of bill’s provisions**

- States that nothing in the bill can be construed as doing any of the following:
  - Authorizing the charge or conviction of a woman with any criminal offense in the death of her own unborn child;
  - Legalizing a person purposely performing or attempting to perform an abortion, as prohibited under the bill;
  - Limiting in any way or affecting the availability of a remedy established under the bill;
  - Limiting the enforceability of any other laws that regulate or prohibit abortion;
  - Restricting a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.

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## TABLE OF CONTENTS

Overview .....	5
2363 Act .....	6
“Person” defined for the Revised Code .....	6
Abortion prohibition .....	7
Prohibition enforcement by private civil action .....	7
Who is permitted to bring a civil action .....	7
Who is prohibited from bringing a civil action .....	8
State intervention in a civil action .....	8
Claimant awards .....	8
Prohibition on awarding relief .....	9
For claimant .....	9
For defendant .....	9
Defenses .....	9
Defenses prohibited .....	9
Affirmative defenses permitted .....	10
Undue burden defense .....	11
Asserting the defense .....	11
Requirements for the defense .....	11
Standing to assert the rights of women seeking an abortion .....	12
Statute of limitations .....	13
Venue .....	13
Legislative statements .....	13
Construction of bill’s provisions .....	14

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## DETAILED ANALYSIS

### Overview

The bill does the following: (1) amends the definition of “person,” for purposes of the Revised Code, to include a born or unborn human being at any stage of development, (2) prohibits any person from purposely performing or attempting to perform an abortion, and (3) authorizes a private right of action against a person to enforce the bill’s abortion prohibition. Further, the bill governs who can and cannot bring the civil action, remedies and defenses to the action that are permitted and prohibited, statute of limitations for bringing the action, venues in which the action may be brought, and interpretation of the bill’s provisions. Finally, the bill contains legislative statements paraphrasing the U.S. Declaration of Independence’s preamble and concerning the General Assembly’s ability to define the scope of protections afforded by this section to unborn persons.

## 2363 Act

The bill is entitled the 2363 Act “for the 2363 children lost to abortion every day in the United States.”<sup>1</sup>

### “Person” defined for the Revised Code

The bill amends the definition of “person,” applicable to the Revised Code, to include a born or unborn human being at any stage of development. That definition will apply unless another definition of “person” is provided in the specific Revised Code Title, Chapter, or Section in which the term is used. Under current law, “person” includes a corporation, business trust, estate, trust, partnership, and association.<sup>2</sup>

The broad applicability of the amended “person” definition may affect other Ohio laws that are unrelated to abortion in ways that only a court could determine and LSC cannot predict. The table below provides examples of Revised Code chapters that rely on the definition of “person” as amended under the bill:

R.C. Chapter	Chapter Description
Chapter 1506	Coastal management
Chapter 1513	Coal surface mining
Chapter 2105	Descent and distribution
Chapter 2107	Wills
Chapter 2111	Guardians and conservatorships
Chapter 3113	Neglect, abandonment, or domestic violence
Chapter 3301	Department of Education
Chapter 3701	Department of Health
Chapter 4905	Public Utilities Commission, general powers
Chapter 5139	Youth services
Chapter 5163	Medicaid eligibility

<sup>1</sup> Section 2.

<sup>2</sup> R.C. 1.59(C).

Please note that the chapters listed above are not an exhaustive list of the Revised Code chapters that rely on the “person” definition amended under the bill.

## Abortion prohibition

Under the bill, notwithstanding any other provision of law to the contrary, no person can purposely perform or attempt to perform an abortion.<sup>3</sup>

The bill defines the following terms:

1. “Abortion” is the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate a woman’s pregnancy, with knowledge that the termination by any of those means will, with reasonable likelihood, cause the death of the unborn child.
2. “Fertilization” is the fusion of a human spermatozoon with a human ovum.
3. “Unborn child” is an individual organism of the species *Homo sapiens* from fertilization until live birth.<sup>4</sup>

Because an unborn child under the bill is a human from *fertilization* to live birth, there could be a question about the bill’s impact on contraceptives or other devices or substances that prevent implantation, but not necessarily fertilization.<sup>5</sup>

## Prohibition enforcement by private civil action

The bill requires, notwithstanding any other provision of law to the contrary, the abortion prohibition to be enforced exclusively through private civil actions as described under the bill. No enforcement of the bill’s abortion prohibition other than private civil action authorized under the bill can be taken or threatened by the state of Ohio, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of Ohio or a political subdivision.<sup>6</sup>

### Who is permitted to bring a civil action

The bill permits any person, except as described below under “**Who is prohibited from bringing a civil action**,” to bring an action against any person who does any of the following:

1. Performs or induces an abortion in violation of the bill’s abortion prohibition;
2. Knowingly engages in conduct that aids or abets the performance or inducement of an abortion for a woman who the person knows to be pregnant, including paying for or

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<sup>3</sup> R.C. 2919.082.

<sup>4</sup> R.C. 2919.08.

<sup>5</sup> See, e.g., “[Intrauterine devices](#),” American Pregnancy Association, last accessed November 16, 2021.

<sup>6</sup> R.C. 2919.083(A) and (B).

reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of the bill's abortion prohibition;

3. Has taken action or made statements that demonstrate to a reasonable person that the person intends to engage in either 1. or 2. (above).<sup>7</sup>

### **Who is prohibited from bringing a civil action**

The bill prohibits a civil action enforcing the abortion prohibition to be brought by either of the following:

1. An officer or employee of an Ohio state or local governmental agency;
2. A person who impregnated the abortion patient through an act of rape, sexual battery, gross sexual imposition, or any other act prohibited by Ohio's Criminal Code.<sup>8</sup>

### **State intervention in a civil action**

Notwithstanding any other provision of law to the contrary, the bill prohibits the state of Ohio, an Ohio official, or a district or county attorney from intervening in a private civil action enforcing the abortion prohibition. Such individuals are not prohibited, however, from filing an amicus curiae brief<sup>9</sup> in the action.<sup>10</sup>

### **Claimant awards**

Under the bill, except as described below under "**Prohibition on awarding relief**," if a claimant prevails in an action enforcing the bill's abortion prohibition, the court must award all of the following:

1. Injunctive relief sufficient to prevent the defendant from violating or engaging in acts that aid or abet violating the abortion prohibition;
2. Statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced, and for each abortion performed or induced that the defendant aided or abetted;
3. Costs and attorney's fees.<sup>11</sup>

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<sup>7</sup> R.C. 2919.084(A).

<sup>8</sup> R.C. 2919.084(B).

<sup>9</sup> An "amicus curiae brief" is a brief filed by a person or group who is not a party to an action, but has a strong interest in the matter, with the intent of influencing the court's decision. See, "[Amicus Curiae](#)," Legal Information Institute, Cornell Law School, last accessed November 3, 2021.

<sup>10</sup> R.C. 2919.083(C).

<sup>11</sup> R.C. 2919.085(A).

## **Prohibition on awarding relief**

### **For claimant**

The bill prohibits a court from awarding relief to a claimant for a civil action enforcing the bill's abortion prohibition brought against a defendant if the defendant demonstrates that he or she previously paid the full amount of statutory damages in a previous action for that particular abortion performed or induced or for the particular conduct that aided or abetted an abortion performed or induced, when a civil action is brought in response to one of the following violations:

1. Performs or induces an abortion in violation of the bill's abortion prohibition;
2. Knowingly engages in conduct that aids or abets the performance or inducement of an abortion for a woman who the person knows to be pregnant, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of the bill's abortion prohibition.<sup>12</sup>

### **For defendant**

Under the bill, notwithstanding any other provision of law to the contrary, a court cannot award costs or attorney's fees to a defendant in an action brought to enforce the bill's abortion prohibition.<sup>13</sup>

## **Defenses**

### **Defenses prohibited**

Under the bill, the following cannot be a defense against an action brought to enforce the bill's abortion prohibition:

1. Ignorance or mistake of law;
2. A defendant's belief that the bill's requirements are unconstitutional or were unconstitutional;
3. A defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision has not been overruled when the defendant engaged in conduct that violates the abortion prohibition;
4. A defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;
5. Nonmutual issue preclusion or nonmutual claim preclusion;<sup>14</sup>

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<sup>12</sup> R.C. 2919.085(B).

<sup>13</sup> R.C. 2919.085(C).

<sup>14</sup> Issue preclusion (or collateral estoppel) is a doctrine that prevents a person from relitigating an issue that the party has already litigated. Claim preclusion (or *res judicata*) applies to prevent a party to a lawsuit from litigating a claim more than once. Generally, the purpose of nonmutual issue or claim

6. The consent of the unborn child's mother to the abortion;
7. Except for the affirmative defenses permitted<sup>15</sup> (see below, "**Affirmative defenses permitted**"), any claim that the enforcement of the bill's civil action provisions or the imposition of civil liability against the defendant will violate the constitutional rights of third parties.<sup>16</sup>

### **Affirmative defenses permitted**

The bill allows any of the following to be an affirmative defense to an action brought to enforce the bill's abortion prohibition:

1. A licensed physician performed or induced an abortion to which either of the following apply:
  - a. It was designed or intended to prevent the death of a pregnant mother and the physician made reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child in a manner consistent with conventional medical practice.
  - b. It resulted in the accidental or unintentional injury or death to the unborn child.

Given the bill's definition of "abortion" as one of numerous acts done "with the purpose to terminate the pregnancy of a woman," the bill's application of the abovementioned affirmative defense is unclear. An affirmative defense based on a procedure not intended to be an abortion that results in the unintentional or accidental injury or death of an unborn child most likely could not be an abortion under the bill in the first place. The physician likely would not be performing or inducing an abortion.

2. The person, after conducting a reasonable investigation, reasonably believed that the physician performing or inducing the abortion has complied, would comply, or will comply with the requirements described in 1. above, if being sued for either of the following:
  - a. Knowingly engaging in conduct that aids or abets the performance or inducement of an abortion for a woman who the person knows to be pregnant, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of the bill's abortion prohibition;

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preclusion is to prevent a party from bringing an issue or claim if a court has rendered a final judgment on the merits in a previous action involving the same parties and claims. (See, Aaron Larson, "[Issue preclusion and claim preclusion: how prior litigation can block your claim](#)," *ExpertLaw*, last updated May 8, 2018, last accessed November 10, 2021.)

<sup>15</sup> An LSC technical amendment is required to correct the cross-reference error from R.C. 2151.087 to R.C. 2919.087.

<sup>16</sup> R.C. 2919.086(A).

- b. Has taken action or made statements that demonstrate to a reasonable person that the person intends to engage in either of the following:
  - i. Performing or inducing an abortion in violation of the bill’s abortion prohibition;
  - ii. Knowingly engaging in conduct that aids or abets the performance or inducement of an abortion for a woman who the person knows to be pregnant, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of the bill’s abortion prohibition.

(This affirmative defense may also be uncertain for the reason stated above that make the affirmative defense in 1. of uncertain application.)

3. An undue burden defense (see below, “**Undue burden defense**”).

Under the bill, the defendant has the burden of proving an affirmative defense by a preponderance of evidence.

The bill states that the provisions governing the permitted affirmative defenses cannot be construed to impose liability on any speech or conduct protected by the First Amendment to the U.S. Constitution, as made applicable to states through the U.S. Supreme Court’s interpretation of the Fourteenth Amendment to the U.S. Constitution.<sup>17</sup>

### **Undue burden defense**

#### ***Asserting the defense***

The bill permits a defendant to assert an undue burden affirmative defense if both of the following apply:

1. The defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion (see below, “***Standing to assert the rights of women seeking an abortion***”).
2. The defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.<sup>18</sup>

#### ***Requirements for the defense***

The bill prohibits a court from finding an undue burden unless the defendant introduces evidence proving either of the following:

1. An award of relief will prevent a woman or group of women from obtaining an abortion.
2. An award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

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<sup>17</sup> R.C. 2919.087.

<sup>18</sup> R.C. 2919.088(A).

Under the bill, a defendant is not permitted to establish an undue burden as described directly above under 2. by either of the following:

1. Merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion.
2. Arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

The bill states that the undue burden affirmative defense is not available if the U.S. Supreme Court overrules *Roe. v. Wade*<sup>19</sup> or *Planned Parenthood v. Casey*,<sup>20</sup> regardless of whether the conduct on which the cause of action to enforce the abortion prohibition is based occurred before the U.S. Supreme Court overruled either of those decisions.

Further, the bill states that nothing in the provisions governing the undue burden affirmative defense can be construed to limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability, and a court may not award relief to the claimant in accordance with the bill's requirements if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.<sup>21</sup>

### ***Standing to assert the rights of women seeking an abortion***

Under the bill, a defendant does not have standing to assert the rights of women seeking an abortion as a defense to liability unless either of the following apply:

1. The U.S. Supreme Court holds that Ohio courts must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law.
2. The defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the U.S. Supreme Court.<sup>22</sup>

The U.S. Supreme Court has not typically permitted third-party standing, as a litigant normally "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."<sup>23</sup> However, the Court has on many occasions allowed such standing for litigants (1) who have a close relationship to the right holders, and

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<sup>19</sup> 410 U.S. 113 (1973).

<sup>20</sup> 505 U.S. 833 (1992).

<sup>21</sup> R.C. 2919.088(B) to (E).

<sup>22</sup> R.C. 2919.086(B).

<sup>23</sup> See, *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

(2) when the right holders must face obstacles to suing on their own behalf<sup>24</sup> (although this test has been inconsistently applied by the Court<sup>25</sup>).

### **Statute of limitations**

Under the bill, notwithstanding any provision of law to the contrary, an action cannot be brought to enforce the abortion prohibition later than four years after the cause of action accrues.<sup>26</sup>

### **Venue**

Under the bill, notwithstanding any other provision of law to the contrary, a civil action brought to enforce the bill's abortion prohibition must be brought in:

1. The county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
2. The county of residence for any one of the natural person defendants at the time the cause of action accrued;
3. The county of the principal office in this state of any one of the defendants that is not a natural person;
4. The county of residence for the claimant if the claimant is a natural person residing in Ohio.

The bill provides that if the civil action is brought in any one of the venues permitted under the bill, the action cannot be transferred to a different venue without the written consent of all parties.<sup>27</sup>

### **Legislative statements**

The bill paraphrases the preamble to the U.S. Declaration of Independence, stating that “[a]ll human beings are created equal and endowed by their creator with certain unalienable rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”

The bill also states that “[t]he legislature may define, by law, the scope of protections afforded by this section to unborn persons. Any prohibition of conduct with regard to unborn persons must be prescribed by the legislature by law.”<sup>28</sup>

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<sup>24</sup> See, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976) (plurality opinion).

<sup>25</sup> See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678, 682-84 (1977); *Craig v. Boren*, 429 U.S. 190, 193-97 (1976).

<sup>26</sup> R.C. 2919.089.

<sup>27</sup> R.C. 2919.0810.

<sup>28</sup> R.C. 2919.081.

It is unclear what effect granting legislative authority over the scope of protections for unborn persons may have. Since *Marbury v. Madison*,<sup>29</sup> the federal courts interpret the U.S. Constitution and are able to declare legislation, as well as executive and administrative actions, unconstitutional. Therefore, while the General Assembly may enact a law to define the scope of protections afforded by unborn persons and the prohibition of conduct with regard to unborn persons, any such laws may be subject to constitutional challenge.

## Construction of bill's provisions

The bill states that nothing in its provisions can be construed as doing any of the following:

1. Authorizing the charge or conviction of a woman with any criminal offense in the death of her own unborn child;
2. Legalizing a person purposely performing or attempting to perform an abortion, as prohibited under the bill;
3. Limiting in any way or affecting the availability of a remedy established under the bill;<sup>30</sup>
4. Limiting the enforceability of any other laws that regulate or prohibit abortion;
5. Restricting a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as Ohio state laws.<sup>31</sup>

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## HISTORY

Action	Date
Introduced	11-02-21

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<sup>29</sup> 5 U.S. 137, 178-179 (1803).

<sup>30</sup> An LSC technical amendment is required to correct the cross-reference error from R.C. 2919.084 to R.C. 2919.085.

<sup>31</sup> R.C. 2919.0811.