

NACDL REPORT

ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS: Ohio Appendix

I. Introduction

On April 11, 2019, Ohio Governor Mike DeWine signed a six-week abortion ban into law. The law, which is Ohio Senate Bill 23, formally known as the “Human Rights and Heartbeat Protection Act,” and colloquially known as the “Heartbeat Bill,” bans almost all abortions once fetal cardiac activity is detected. For purposes of this appendix, Ohio’s Heartbeat Bill will be referred to as “SB 23.”

Fetal cardiac activity can occur as early as six weeks into pregnancy, which is before many women even know that they are pregnant. SB 23, which was the sixth such bill to be signed into law in the country, was scheduled to take effect on July 11, 2019. On July 3, 2019, the Southern District of Ohio issued a preliminary injunction staying the law from taking effect in the case of *Preterm-Cleveland v. Yost*, 1:19cv360 (S.D. Ohio). SB 23 does not include any exceptions for rape or incest; once fetal cardiac activity is detected, it is a felony to knowingly and purposefully perform or induce an abortion unless it is to save the life or health of the mother. Although the law grants immunity to the

pregnant woman if she self-aborts, criminal liability arguably attaches to non-physician third parties, including family members, partners, or friends, if they perform or induce the abortion.

The purpose of this appendix is to summarize SB 23's requirements and criminal provisions, and to briefly summarize a multitude of recently passed laws and pending pieces of legislation that criminalize abortion in Ohio. For example, less than six months before Governor DeWine signed SB 23 into law, former Governor John Kasich criminalized Dilation & Extraction abortions, which are the most common and safe form of second-trimester abortions, under the moniker of a "Dismemberment Abortion Ban."ⁱ Likewise, on November 14, 2019, a bill—a copy of which is not presently available—was introduced in the Ohio House that, according to news reports, would grant fetal personhood and ban all abortions.ⁱⁱ This memo also briefly discusses potentially related Ohio criminal statutes.

II. *SB 23 / Ohio's Heartbeat Bill*

SB 23, which is currently enjoined by the Southern District of Ohio, criminalizes abortion once fetal cardiac activity is detected. The law is codified as O.R.C. 2919.19 et seq.

All relevant definitions are in O.R.C. 2919.19. In lieu of the term “fetus,” the law uses the term “unborn human individual,” which it defines as “an individual organism of the species homo sapiens from fertilization until live birth.” Likewise, in lieu of fetal cardiac activity, the law uses “fetal heartbeat,” which is the “cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.”ⁱⁱⁱ Finally, while the law does not contain exemptions for pregnancy resulting from rape or incest, there are exceptions if the pregnant woman experiences a “medical emergency.”^{iv}

SB 23 consists primarily of three separate sections with criminal penalties: (i) A requirement to first determine the presence or absence of a fetal heartbeat; (ii) A prohibition on performing or inducing un-exempted abortions after the detection of a fetal heartbeat, and; (iii) A requirement to satisfy specified notice obligations at least 24 hours before performing or inducing exempted abortions after the detection of a fetal heartbeat.

A. Determining the Presence of a Fetal Heartbeat, O.R.C. 2919.192 and 2919.193

SB 23 first requires all persons who intend to perform an abortion on a pregnant woman to determine whether there is a detectable fetal heartbeat of the unborn human individual that the pregnant woman is carrying. In determining whether the unborn human individual has a detectable heartbeat, the person shall use a method required

under Ohio rule, or, if no rule has yet been created, a practice that is consistent with the person's good faith understanding of standard medical practice. The person who determines the presence or absence of a fetal heartbeat shall record in the pregnant woman's medical record the estimated gestational age of the unborn human individual, the method used to test for a fetal heartbeat, the date and time of the test, and the results of the test. The individual who performs the examination shall also give the pregnant woman the option to view or hear the fetal heartbeat.

Any person who knowingly and purposefully performs or induces an abortion in violation of the above requirements shall be guilty of performing or inducing an abortion before determining whether there is a detectable fetal heartbeat. This violation is a felony of the fifth degree.

There are only three exceptions to this determination requirement. First, SB 23 contains a general immunity clause for the pregnant woman.^v Second, a person is exempt if they make the necessary determination in compliance with this law, and the method used to determine the presence of a fetal heartbeat does not reveal a fetal heartbeat. Finally, physicians are exempted if they believe that a "medical emergency. . . exists that prevents compliance." If a physician performs or induces an abortion under this exemption, the physician must make written notations in the pregnant woman's medical records of both of the following: (1) the physician's belief that a medical

emergency necessitating the abortion exists, and; (2) the medical condition of the pregnant woman that assertedly prevented compliance. Additionally, for at least seven years from the date the notations are made, the physician shall maintain in the physician's own records a copy of the notations.

This requirement is not waived in cases of rape and incest. Given that this requirement applies to all persons who perform or induce an abortion, and SB 23 provides immunity only to pregnant women upon whom an abortion is performed, third parties who knowingly and purposefully perform or induce abortions—such as friends and family members who procure or supply abortifacients—may be subject to criminal prosecution.

B. Prohibiting Unexempted Abortions After Detection of Fetal Heartbeat, O.R.C. 2919.195

SB 23 next prohibits all unexempted abortions after the detection of a fetal heartbeat. Under SB 23, no person may knowingly and purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected. Whoever violates this requirement is guilty of performing or inducing an abortion after the detection of a fetal heartbeat, which is a felony of the fifth degree.

There are only three exceptions to this determination requirement. First, the pregnant woman herself has immunity. Second, a person is exempt if they make the necessary determination in compliance with this law, and the method used to determine the presence of a fetal heartbeat does not reveal a fetal heartbeat. Finally, a physician is exempt if they perform a medical procedure that in the physician's reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman. A physician who performs a medical procedure under this exception shall declare, in a written document, that the procedure is necessary, to the best of the physician's reasonable medical judgment, to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman. In the document, the physician shall specify the pregnant woman's medical condition that the procedure is asserted to address and the medical rationale for the physician's conclusion. The written document shall be placed in the pregnant woman's medical records, and the physician shall maintain a copy of the document in the physician's own records for at least seven years.

This prohibition is not waived in cases of rape and incest. Given that this prohibition applies to all persons who perform or induce an abortion, and SB 23 provides immunity

only to pregnant women upon whom an abortion is performed, third parties who knowingly and purposefully perform or induce abortions—such as friends and family members who procure or supply abortifacients—may be subject to criminal prosecution.

C. Satisfying Notice and Waiting Obligations for Exempt Abortions, O.R.C. 2919.194

Finally, SB 23 also has mandatory notice and waiting obligations for exempted abortions. No person who intends to perform or induce an abortion on a pregnant woman who is carrying an unborn human individual with a detectable fetal heartbeat may perform said abortion without meeting the following three notice requirements and waiting at least 24 hours after the last notice requirement is met.

First, the person intending to perform or induce the abortion shall inform the pregnant woman in writing that the unborn human individual she is carrying has a fetal heartbeat. Second, the person intending to perform or induce the abortion shall inform the pregnant woman, to the best of the person's knowledge, of the statistical probability of bringing the unborn human individual to term. If the Ohio Department of Health has specified statistical probability information, the person shall provide that information to the pregnant woman. Third, the pregnant woman shall sign a form acknowledging that she has received the above-mentioned statistical probability

information and that she is aware of the statistical probability of bringing the unborn human individual she is carrying to term.

Whoever violates SB 23's notice and waiting requirements is guilty of performing or inducing an abortion without informed consent when there is a detectable fetal heartbeat. A first offense is a misdemeanor of the first degree. Each subsequent offense is a felony of the fourth degree.

There are only two exceptions to this notice and waiting requirement. First, the pregnant woman herself has immunity. Second, this requirement does not apply if the person who intends to perform or induce the abortion believes that a medical emergency exists that prevents compliance.

This requirement is not waived in cases of rape and incest. Given that this requirement applies to all persons who intend to perform or induce an abortion, and SB 23 provides immunity only to pregnant women upon whom an abortion is performed, third parties who intend to perform or induce abortions—such as friends and family members who procure or supply abortifacients—may be subject to criminal prosecution.

III. *Recent Laws that Criminalize Abortion and Are Subject to Litigation*

In addition to SB 23, Ohio has recently enacted two other laws that criminalize abortion. Both are in litigation. First, Ohio criminalized abortion after the fetus has been diagnosed with Down syndrome (O.R.C. 2910.10 / House Bill 214). The law went into effect on March 23, 2018, but it has been stayed subject to further appeal. The other law criminalizes the most common and safe form of second-trimester abortion, which is known as Dilation & Extraction (O.R.C. 2919.15 / Senate Bill 145). The law, which calls Dilation & Extraction a “dismemberment abortion,” went into effect on March 22, 2019. The law was stayed in part on April 18, 2019 and does not presently apply to abortions performed before 18 weeks’ gestation. Summaries of these two laws are below.

1) R.C. 2910.10 / House Bill 214 / Down Syndrome Abortion Ban

A. Status

- i. Effective March 23, 2018.
- ii. In a 2-1 decision on [October 11, 2019](#), the Sixth Circuit Court of Appeals upheld a lower court’s grant of a preliminary injunction staying the law. Ohio will be seeking en banc review. The case is *Preterm-Cleveland v. Himes*, Case No. 2018cv3329 (6th Cir.).

B. *Prohibition with Criminal Penalties*

- i. No person shall purposely perform, or induce or attempt to perform, or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any of the following: (1) A test result indicating Down syndrome in an unborn child; (2) A prenatal diagnosis of Down syndrome in an unborn child; or (3) Any other reason to believe that an unborn child has Down syndrome.

C. *Criminal Penalties*

- i. Whoever violates the above prohibitions is guilty of performing or attempting to perform an abortion that was being sought because of Down syndrome, which is a felony of the fourth degree.
- ii. A pregnant woman on whom an abortion is performed, however, is not guilty of performing or attempting to perform an abortion that was being sought because of Down syndrome, or of attempting to commit, conspiring to commit, or complicity in committing such a crime.

2) R.C. 2919.15 / Senate Bill 145 / Dilation & Extraction [aka Dismemberment Abortion] Ban

A. *Status*

- i. Effective March 22, 2019.
- ii. This law refers to the procedure of Dilation and Extraction (“D&E”), which is the most common and safe form of second-trimester abortion, as “dismemberment abortion.” The term “dismemberment abortion” is not a medical term used by physicians.
- iii. In a decision on April 18, 2019, the Southern District of Ohio issued an order granting in part a preliminary injunction. The injunction prohibits enforcement of the law only for those D&E procedures before 18 weeks’ gestation. The case is *Planned Parenthood Southwest Ohio Region v. Yost*, 1:19cv118 (S.D. Ohio).

B. *Definitions*

- i. “Dismemberment abortion” means, with the purpose of causing the death of an unborn child, to dismember a living unborn child and extract the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp a portion of the unborn child’s body to cut or rip it off. The term “dismemberment abortion” does not include a procedure performed after the death of the unborn child to extract any remaining parts of the unborn child.
- ii. “Serious risk of the substantial and irreversible impairment of a major bodily function” means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function.
- iii. “Unborn child” means an individual organism of the species homo sapiens from fertilization until live birth.

C. Prohibition and Criminal Penalties

- i. Subject to limited exception as listed below, No person shall knowingly perform or attempt to perform a dismemberment abortion when the dismemberment abortion is not necessary, in reasonable medical judgment, to preserve the life or physical health of the mother as a result of the mother's life or physical health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function. This requirement does not prohibit the suction curettage procedure of abortion or the suction aspiration procedure of abortion. Whoever violates this prohibition is guilty of dismemberment feticide, which is a felony of the fourth degree.

D. Exceptions to Criminal Liability

- i. None of the following are guilty of committing, attempting to commit, complicity in the commission of, or conspiracy in the commission of a violation of this law:
 1. A pregnant woman upon whom a dismemberment abortion is performed;
 2. An individual who is employed by the person who violates this law and who acts at the direction of the person who violates this law, and;
 3. A pharmacist or other individual who fills a prescription or provides instruments or materials used in violating this law.

IV. Pending Legislation

In addition to the above recently enacted laws, there are several pieces of pending legislation that further criminalize abortion in Ohio. On November 14, 2019, a fetal personhood bill was introduced in the Ohio House that would completely ban all abortion in Ohio. According to news articles, there are no exceptions for rape or incest, and it would make any physician who performs an abortion not necessary to preserve

the mother's life guilty of murder. A copy of the bill was unavailable as of the date of this appendix. However, the bill allegedly has 19 co-sponsors.^{vi}

Other recent pieces of legislation that criminalize abortion include: (i) Senate Bill 27, which requires the cremation or burial of aborted fetal remains; (ii) Senate Bill 155, which requires the provision of scientifically inaccurate information at least 24 hours before a pregnant woman is given the abortifacient mifepristone, and; (iii) Senate Bill 208, which expands Ohio's "abortion manslaughter" law and requires physicians to submit "child survival forms" if a child is born alive following an attempted abortion. Summaries of these pieces of legislation are below.

1) Senate Bill 27 / Addresses disposition of aborted fetal remains

A. Status

- i. Passed in the Ohio Senate on January 17, 2018.
- ii. Reported by House Health Committee to Ohio House on February 28, 2018.

B. Definitions

- i. "Abortion facility" means an ambulatory surgical facility (as defined under R.C. 3702.30) or any other facility in which abortion is legally provided.
- ii. "Cremation" means 'cremation' as defined in R.C. 4717.01.
- iii. "Fetal remains" means the product of human conception that has been aborted.
- iv. "Interment" means the burial or entombment of fetal remains.

C. Requirements with Criminal Penalties

- i. All fetal remains resulting from a surgical abortion at an abortion facility must be disposed of by cremation or interment. [Proposed R.C. 3726.02]

- ii. Abortion facilities may not release fetal remains from a surgical abortion nor arrange for the cremation or interment of such remains, until they obtain the necessary final disposition determination from the pregnant woman. [Proposed R.C. 3726.05]
- iii. Abortion facilities shall document in the pregnant woman's medical record the necessary final disposition determination. [Proposed R.C. 3726.10]
- iv. Abortion facilities shall maintain evidentiary documentation demonstrating the date and method of the disposition of fetal remains from surgical abortions performed or induced in the facility. [Proposed R.C. 3726.11]

D. Criminal Penalties

- i. Whoever knowingly violates any of the above-noted requirements is guilty of failure to humanely dispose of fetal remains, which is a misdemeanor of the first degree.

2) Senate Bill 155 / Regards pretreatment notice of mifepristone abortion reversal

A. Status

- i. Passed in the Ohio Senate on November 6, 2019.
- ii. Introduced in the Ohio House on November 12, 2019.

B. Definitions

- i. "Medical emergency" means a condition that in the physician's good faith medical judgment, based upon the facts known to the physician at that time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function (as defined in R.C. 2919.16) of the pregnant woman that delay in the performance or inducement of the abortion would create.
- ii. "Mifepristone abortion" means an abortion that involves a regimen of taking mifepristone first, then one or more subsequent dangerous drugs, as the term "dangerous drugs" is so defined in R.C. 4729.01.

C. Requirements with Criminal Penalties [Proposed R.C. 2919.125]

- i. Unless the below exception applies, no physician shall knowingly perform or induce a mifepristone abortion in a pregnant woman without the physician or their agent doing both of the following:

1. Informing the woman, at least 24 hours before providing her with the mifepristone, that: (a) it may be possible to reverse the intended effects of the mifepristone abortion if she changes her mind, but that time is of the essence; and (b) information on and assistance with reversing the mifepristone abortion is available on the Ohio Department of Health’s website. The physician or agent must give the woman the link to the Ohio Department of Health website where the information and assistance is available. AND
2. Providing the woman with printed materials, immediately prior to providing the woman with the mifepristone, that contain the following statement: “Recent developing research has indicated that mifepristone alone is not always effective in ending a pregnancy. It may be possible to avoid, cease, or even to reverse the intended effects of an abortion utilizing mifepristone if the second pill has not been taken. Please consult with a health care professional immediately.”
 - ii. *Exception:* The above-noted requirements do not apply to a physician who performs or induces a mifepristone abortion if the physician determines, based upon their reasonable medical judgment, that a medical emergency exists that prevents compliance.

D. Criminal Penalties

- i. Whoever violates any of the above-noted requirements, without qualifying for the exception, is guilty of failure to disclose the reversibility of a mifepristone abortion. A first offense is a misdemeanor of the first degree, and each subsequent offense is a felony of the fourth degree.

3) Senate Bill 208 / Regards child born alive after attempted abortion

A. Status

- i. Passed in the Ohio Senate on November 6, 2019.
- ii. Introduced in the Ohio House on November 12, 2019.

B. Proposed Expansion of Pre-existing Abortion Manslaughter Law, R.C. 2919.13^{vii}

- i. Ohio already criminalizes an act called “abortion manslaughter,” which is a felony of the first degree.
- ii. Under R.C. 2919.13, it is “abortion manslaughter” if a person either:
 1. Purposely takes the life of a child born by attempted abortion who is alive when removed from the uterus of a pregnant woman;

2. Fails, after performing an abortion, to take the measures required by the exercise of medical judgment in light of the attending circumstances to preserve the life of a child who is alive when removed from the uterus of the pregnant woman.
- iii. Senate Bill 208 proposes to expand upon R.C. 2919.13, Ohio's "abortion manslaughter" law, by making it a first degree felony if a person either:
 1. Purposely takes the life of a child born by attempted abortion who is alive when removed from the uterus of a pregnant woman;
 2. *Purposely* fails, after performing an abortion, to take the measures required by the exercise of medical judgment in light of the attending circumstances to preserve the *health or* life of a child who is alive when removed from the uterus of the pregnant woman.

C. *Reporting Requirements with Criminal Penalties [Proposed R.C. 3701.792]*

- i. The attending physician who performed or attempted to perform an abortion in which a child was born alive shall complete a "child survival form" to be developed by the Ohio Department of Health. The physician shall submit the completed form to the Ohio Department of Health within 15 days after the woman is discharged from the facility. The "child survival form" shall be made part of the medical record maintained for the woman by the facility in which the abortion was performed or attempted.
- ii. Each facility in which an abortion was performed or attempted and in which a child was born alive shall submit monthly and annual reports to the Ohio Department of Health listing the total number of women on whom an abortion was performed or attempted and in which a child was born alive, delineated by the type of abortion procedure that was performed or attempted. The annual report shall be submitted following the conclusion of the state's fiscal year, and each monthly or annual report shall be submitted no later than 30 days after the end of the applicable reporting period.

D. *Criminal Penalties for Purposely Failing to Meet Reporting Requirements*

- i. It is a felony of the third degree for any person to purposely fail to comply with the above-noted reporting requirements.

V. *General Criminal Statutes*

There are a number of Ohio general criminal statutes that may be implicated by the increased criminalization of abortion in Ohio. Persons who may be impacted include physicians, third parties who perform or induce abortions, third parties who transport a pregnant woman across state lines (particularly if the woman is a minor), and even the pregnant woman herself. Although recent laws and legislation include immunity provisions for the pregnant woman, Ohio's definition of the term "abortion" expressly recognizes self-induced abortions. General statutes that may be implicated include:

- (i) Personhood for Criminal Purposes (O.R.C. 2901.01(B));
- (ii) Unlawful Termination of Another's Pregnancy (O.R.C. 2903.09);
- (iii) Domestic Violence (O.R.C. 2919.25);
- (iv) Attempt (O.R.C. 2923.02);
- (v) Endangering Children (O.R.C. 2919.22);
- (vi) Kidnapping (O.R.C. 2905.01), and;
- (vii) Criminal Child Enticement (O.R.C. 2905.05).

Although Ohio does not appear to apply general criminal statutes to those who help women obtain abortions, it could be done as Ohio expands the criminalization of abortion and the concept of fetal personhood.

1) Personhood for General Criminal Purposes, O.R.C. 2901.01(B)

Ohio has two similar but interrelated statutes concerning criminal penalties for harm done to fetuses. For purposes of Ohio's criminal statutes, which are Title XXIX (29) of the Ohio Revised Code, intentionally aborted fetuses are not considered persons.

Specifically, under O.R.C. 2901.01(B), the term “person” shall *not* be construed or applied for purposes of Title XXIX in such a way that it would result in criminal charges against a woman who obtains an abortion or self-aborts, or “so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the actual consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman.” The statute further states that, for purposes of Title XXIX, “consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with” Ohio’s abortion law requiring parental consent for minors (O.R.C. 2919.12). Abortions that are performed without consent may be punished under a variety of criminal statutes (such as aggravated murder, O.R.C. 2903.01) and abortions that are performed with consent but in violation of another Ohio law may be prosecuted pursuant to that applicable law.

Case law concerning Ohio’s personhood for criminal purposes appears to be primarily limited to holding that pregnant women who use drugs cannot be held criminally liable for birthing addicted children. *See State v. Bales*, 5th Dist. Knox No. 13CA5, 2013-Ohio-4957, ¶ 12. *But see State v. Hade*, 6th Dist. Ottawa No. OT-07-037, 2008-Ohio-1859, ¶2 (recognizing that a pregnant woman had pled guilty to child

endangerment for taking drugs while pregnant). Although there is no case law interpreting this statute to abortion providers or those who help women obtain abortions, the general personhood exclusion should still apply, and there should not be criminal liability for killing a person when one helps a woman obtain a consented-to abortion.

Accordingly, barring future attempts by the Ohio legislature to expand the concept of fetal personhood, the abortion of a fetus—even the fetus of a minor who does not have parental consent—should not be considered as harm to a “person” under Ohio’s general criminal statutes.

2) Unlawful Termination of a Pregnancy, O.R.C. 2903.09

In addition to Ohio’s “personhood” definition for criminal purposes, there is an Ohio statute that defines when there is an “unlawful termination of another’s pregnancy. This statute is substantively identical to O.R.C. 2901.01(B), holding that a person should not be held criminally liable for the unlawful termination of another’s pregnancy when there is a consented-to abortion. However, if a person performs an abortion that violates an abortion-specific law, that person may still be held criminally liable under those abortion-specific laws.

3) Domestic Violence, O.R.C. 2919.25

Ohio's domestic violence statute makes it a crime to knowingly cause or attempt to cause physical harm to a family or household member, or to recklessly cause serious physical harm to a family or household member. The term "family or household member" includes any child who is residing or has resided with the offender. The statute appears to treat fetuses as separate from the born child from the offender, and adds enhanced penalties only if, in the commission of the domestic violence, the offender also caused "serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy." Given the limiting language of O.R.C. 2901.01(B) and O.R.C. 2903.09, it is unlikely that a family member who helps another obtain an abortion could be criminally liable for domestic violence. However, should Ohio continue to expand the concept of personhood to fetuses, it is possible that assisting a pregnant family member in obtaining an abortion could satisfy the statutory requirements for domestic violence.

4) Attempt, O.R.C. 2923.02

Ohio law prohibits a person from purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, to engage in conduct that, if successful, would constitute or result in the offense. Given the fact that, for Title XXIX purposes, intentionally aborted fetuses are not persons, there should not be criminal liability for helping a woman attempt to obtain an abortion. However, as

Ohio expands the criminalization of abortion, it is possible that the State could argue that attempting to assist a woman in obtaining an unlawful abortion is the crime of attempt.

5) Endangering Children (O.R.C. 2919.22)

Ohio's child endangerment statute makes it a crime to create a substantial risk to the health or safety of the child. Ohio case law is clear that it is not child endangerment for a woman to harm her fetus, such as through drug use. *See State v. Gray*, 62 Ohio St.3d 514 (1992), at syllabus ("A parent may not be prosecuted for child endangerment under R.C. 2919.22(A) for substance abuse occurring before the birth of the child."); *but see State v. Hade*, 6th Dist. Ottawa No. OT-07-037, 2008-Ohio-1859, ¶2 (recognizing that a pregnant woman had pled guilty to child endangerment for taking drugs while pregnant).

There is no case law suggesting that it is child endangerment for a parent to help their child obtain an abortion, and such an argument could be subject to constitutional challenge. *See State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, ¶66 (recognizing that the state cannot unduly burden a minor's right to an abortion) (O'Connor, C.J., dissenting). However, should Ohio continue to expand its criminalization of abortion, a zealous prosecutor could theoretically argue that the act of helping one's child obtain an

abortion, in and of itself, creates a substantial risk to the health and safety of the pregnant child.

6) Kidnapping (O.R.C. 2905.01)

Ohio's kidnapping statute prohibits the removal of anyone under the age of 13 by any means for the purpose of facilitating the commission of a felony or flight thereafter.

There is no case law applying Ohio's kidnapping statute to a person who helps a minor under the age of 13 obtain an abortion. However, this statute could theoretically be applied to Ohio's recently expanded anti-abortion statutes, such as SB 23, which makes it a felony to induce or perform an abortion once a fetal cardiac activity is detected.

Theoretically, this kidnapping statute could be used against persons who remove minors under the age of 13 for the purpose of inducing an abortion once fetal cardiac activity is detected.

7) Criminal Child Enticement (O.R.C. 2905.05)

Ohio's criminal child enticement statute prohibits the luring of anyone under the age of 14 to accompany them in any manner, including into a vehicle, for an unlawful purpose without the consent of a parent or legal guardian. There is no case law applying Ohio's child enticement statute against a person who helps a minor under the age of 14 obtain an abortion without parental consent. However, as Ohio continues to criminalize abortion, there is nothing per se prohibiting its application in such a context.

ⁱ Due to their voluminous nature, this memo will not delve into all of the Ohio laws that criminalize abortion and will focus only on recent laws and pending legislation with criminal penalties. For example, in 2017, Ohio criminalized abortion after 20 weeks. See O.R.C. 2919.201.

ⁱⁱ A news article on the just-introduced bill is available at: https://www.cleveland.com/open/2019/11/ohio-state-lawmakers-propose-total-abortion-ban.html?fbclid=IwAR0eebQd_-IEuQuwGp625XilfCq_VFLqJbxp4ke2HRFZ06QFw9OabdSGCew

ⁱⁱⁱ To avoid confusion, the term “fetal heartbeat” shall henceforth be used throughout this memo.

^{iv} The term “medical emergency,” which is the same as under O.R.C. 2919.16, means “a condition that in the physician's good faith medical judgment, based upon the facts known to the physician at that time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function [as defined in O.R.C. 2919.16] of the pregnant woman that delay in the performance or inducement of the abortion would create.”

^v O.R.C. 2919.198 (Immunity of Pregnant Woman) reads: A pregnant woman on whom an abortion is performed or induced in violation of section 2919.193, 2919.194, or 2919.195 of the Revised Code is not guilty of violating any of those sections; is not guilty of attempting to commit, conspiring to commit, or complicity in committing a violation of any of those sections; and is not subject to a civil penalty based on the abortion being performed or induced in violation of any of those sections.

^{vi} A news article on the just-introduced legislation is available at:

https://www.cleveland.com/open/2019/11/ohio-state-lawmakers-propose-total-abortion-ban.html?fbclid=IwAR0eebQd_-IEuQuwGp625XilfCq_VFLqJbxp4ke2HRFZ06QFw9OabdSGCew

^{vii} Ohio defines abortion as “the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo.” O.R.C. 2919.11.