

Professor Marc Spindelman*
Testimony Regarding H.B. 125
March 23, 2011
(Corrected March 12, 2012)

Ohio House of Representatives
Health and Aging Committee

Mr. Chairman, Members of the Ohio House Health and Aging Committee:

Recognizing many of the challenges presented by public debates about women's reproductive rights, and in particular, women's abortion rights, this analysis will focus squarely on whether H.B. 125,¹ The "Heartbeat" Bill, if enacted, could be upheld under the U.S. Constitution as interpreted by the Supreme Court of the United States.

After reading the proposed statutory language and the relevant federal constitutional materials, there is only one conclusion to reach. H.B. 125 cannot be upheld in its entirety under existing federal constitutional rules.

1. A Description of the Rules.

What these rules are, is neither difficult to discover nor to apprehend. Somewhat condensed, they can be summarized along the following lines.

First, the State has interests—independent from the pregnant woman's—that may be expressed through various sorts of legislation throughout the course of a woman's pregnancy. These interests include: the State's interest in the (potential) life of the fetus,² the State's interest in the pregnant woman's life and health,³ and the State's interest in regulating medical standards and the medical profession.⁴

* Professor of Law, The Ohio State University Michael E. Moritz College of Law. Though the views expressed here are mine alone, Ohio State law student Richard Muñiz is thanked for excellent research assistance.

¹ H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

² The Court has formulated this interest in various terms. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 150 (1973) ("the State's interest—some phrase it in terms of duty—protecting prenatal life"); *id.* at 154 ("a State may properly assert important interests . . . in preserving potential life"); *id.* at 155 ("at some point the state interests as to . . . prenatal life[] become[s] dominant"); *id.* at 162 (the State "has still *another* important and legitimate interest in protecting the potentiality of human life"); *id.* at 163 ("interest in potential life"); *id.* ("the State is interested in protecting fetal life after viability"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("the State has legitimate interests from the outset of the pregnancy in . . . the life of the fetus that may become a child"); *id.* at 853 ("legitimate interests in protecting prenatal life"); *id.* at 858 ("state interest in fetal protection"); *id.* at 870 (plurality opinion) ("legitimate interest in promoting the life or potential life of the unborn"); *id.* at 871 ("legitimate interests in . . . protecting the potential life within her"); *id.* at 872 ("State's interest in promoting fetal life"); *id.* at 873 ("State has an interest in protecting the life of the unborn"); *id.* at 875 ("State's interest in the potential life within the woman"); *id.* at 876 ("the State has an interest in protecting fetal life or potential life"); *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) [hereinafter *Carhart II*] ("legitimate and substantial interest in preserving and promoting fetal life"); *id.* at 146 ("legitimate interest of the Government in protecting the life of the fetus"); *id.* at 158 ("the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child"); *see also Casey*, 505 U.S. at 898 (holding that a spousal notification requirement justified by the "husband's interest in the life of the child his wife is carrying," and coupled with the State's interest in potential life, does not outweigh "a wife's liberty"); *cf. Doe v. Bolton*, 410 U.S. 179 (1973) (mem.) (White, J., dissenting) ("life or potential life of the fetus"); *Casey*, 505 U.S. at 949, 974 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("potential life of the fetus").

³ *Roe*, 410 U.S. at 150 ("the State retains a definite interest in protecting the woman's own health and safety"); *id.* at 154 ("important interests in safeguarding health"); *id.* at 162 ("the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman"); *Casey*, 505 U.S. at 871 (plurality opinion) ("the State has legitimate interests in the health of the woman"); *id.* at 882 (majority opinion) ("a substantial government interest justifying a requirement that a woman be apprised of the

Second, legally-speaking, lined up against the State's interests are the important, and constitutionally recognized, autonomy interests the pregnant woman has in choosing for herself whether to continue or to terminate her pregnancy. In a case called *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court explained that, prior to fetal viability, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."⁵ To safeguard the abortion right from State efforts to overly constrain or take it away, the Supreme Court has subjected previability abortion regulations to an "undue burden" test.⁶ The Court has explained this test this way:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be a permissible means of serving its legitimate ends.⁷

In contrast, after the point of fetal viability, the State's interest in protecting and preserving the (potential) life of the fetus becomes sufficiently powerful that, from this moment on, until the end of a pregnancy, it can justify broad State regulation of a woman's abortion choice⁸—even to the point of eliminating it altogether.⁹ Subject, that is, to one very important exception: Even after viability, when the State may regulate and even ban abortion outright, it must, if it chooses to do so,¹⁰ make express provision for

health risk of abortion and childbirth. . . . It cannot be questioned that psychological well-being is a facet of health."); *id.* at 900 (plurality opinion) (holding that the recordkeeping and reporting requirements of the statute relate to the state's interest in health).

⁴ *Roe*, 410 U.S. at 150 ("The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."); *id.* at 154 ("important interests . . . in maintaining medical standards"); *Carhart II*, 550 U.S. at 157 ("interest in protecting the integrity and ethics of the medical profession" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997))); *id.* at 158 ("legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn"); *see also Carhart II*, 550 U.S. at 159 ("lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . The State has an interest in ensuring so grave a choice is well informed."); *id.* at 160 ("State's interest in respect for life"); *id.* at 163 ("State's interest in promoting respect for human life at all stages in the pregnancy").

⁵ *Casey*, 505 U.S. at 846; *see also Carhart II*, 550 U.S. at 146 (assuming that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))).

⁶ *Casey*, 505 U.S. at 878 (plurality opinion); *see also Stenberg v. Carhart*, 530 U.S. 914, 921, 945–46 (2000) [hereinafter *Carhart I*] (applying the "undue burden" test by a majority of the Court to find state abortion statute unconstitutional); *Carhart II*, 550 U.S. 146 (applying *Casey*'s "standard to the cases at bar").

⁷ *Casey*, 505 U.S. at 877 (plurality opinion).

⁸ *See Casey*, 505 U.S. at 846 (holding that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure," but that after viability, "the State's power to restrict abortions" becomes complete).

⁹ *Roe*, 410 U.S. at 163–64 (holding that the State, after viability, "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother"); *id.* at 164–65 (same); *Casey*, 505 U.S. at 846 (same); *id.* at 879 (plurality opinion) (quoting *Roe*, 410 U.S. at 164–65); *see also Carhart I*, 530 U.S. at 161 (holding that the "prohibition in Act [being challenged] would be unconstitutional . . . if it subjected women to significant health risks" (alterations omitted) (citation omitted) (internal quotation marks omitted)).

¹⁰ This is not constitutionally required. The State may—but need not—ban abortions after viability. *See, e.g., Roe*, 410 U.S. at 163–64 ("If the State is interested in protecting fetal life after viability, it *may* go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." (emphasis added)); *id.* at 163–64 (holding that "[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life *may, if it chooses*, regulate, and even

abortion to be legal when necessary to protect or preserve the life or health of the pregnant woman.¹¹

Now, one may properly agree or disagree with these rules. Few—on either side of the abortion debate—embrace them without qualification. But they are in any event the formal elements of the Supreme Court’s current abortion jurisprudence by which the constitutionality of H.B. 125 must be judged. Doubters, if there are any, need look no farther than the U.S. Supreme Court’s recent partial birth abortion case, *Gonzales v. Carhart*.¹² In it, some Justices widely known to disagree fervently with the constitutional arrangement *Roe v. Wade*¹³ and its progeny have erected, and who believe this structure should be dismantled entirely,¹⁴ affirmed the formal status of these existing constitutional rules as they relate to abortion regulations.¹⁵

2. The Rules Applied.

a. H.B. 125’s Criminal Ban where a Fetal Heartbeat Has Been Detected.

Directly to the question at hand: What does the U.S. Supreme Court’s current abortion jurisprudence mean for H.B. 125, legislation that would criminally ban anyone, including licensed physicians, from performing abortions—including previability abortions—when a fetal heartbeat has been detected?

To begin, insofar as H.B. 125, if enacted, would ban abortions prior to viability, it is subject to the strictures of the “undue burden” test. According to that test, “a prohibition of abortion” is equated with “the imposition of a substantial obstacle to the woman’s effective right to elect the procedure,”¹⁶ both of which constitute undue burdens on a woman’s right to choose. H.B. 125’s previability prohibition on abortions where a fetal heartbeat has been detected is thus unconstitutional. It fails to give the woman’s abortion right its constitutional due.

This crisp, categorical conclusion is confirmed by digging more deeply into what the Supreme Court has said about the operation of the undue burden test. Recall that if a previability abortion regulation has the purpose or the effect of putting a substantial obstacle in the way of a woman’s abortion choice, it constitutes an undue burden.

So, what of H.B. 125’s purpose? Viewed in constitutional terms, the purpose of H.B. 125, evident from its statutory text, is to preclude abortions after a fetal heartbeat has been

proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother” (emphasis added)); *Casey*, 505 U.S. at 846 (confirming “the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health”).

¹¹ *Roe*, 410 U.S. at 163–64, 164–65; *Casey*, 505 U.S. at 846.

¹² 550 U.S. 124 (2007).

¹³ 410 U.S. 113 (1973).

¹⁴ *Casey*, 505 U.S. at 983 (Scalia, J., concurring in the judgment in part and dissenting in part) (“*Roe* was plainly wrong . . . , and even more so (of course) if the proper criteria of text and tradition are applied.”); *Carhart II*, 550 U.S. at 169 (Thomas, J., concurring) (writing “separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade* has no basis in the Constitution”) (citation omitted).

¹⁵ *Carhart II*, 550 U.S. at 146, 168 (applying *Casey*’s standard); *id.* at 168 (Thomas, J., concurring) (noting that the majority accurately applied the Court’s current jurisprudence, including *Casey*).

¹⁶ *Casey*, 505 U.S. at 846; *see also id.* at 878 (plurality opinion); *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992).

detected. In this sense, the design of the proposed legislation is to keep a certain class of abortions from ever taking place. To carry out this objective, H.B. 125 purposefully places “a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”¹⁷; chiefly, a legal prohibition against these abortions embodied in a criminal law ban.¹⁸ That this obstacle is meant to be substantial may be inferred from the consequence of its violation: a fifth degree felony carries with it a penalty of a maximum prison term of 12 months¹⁹ and a fine of not more than \$2,500.²⁰ H.B. 125’s criminal ban on previability abortions where a fetal heartbeat has been detected is thus an undue burden on a choice that, prior to viability, must ultimately be the pregnant woman’s own.²¹ In slightly different terms, but to the same effect, H.B. 125’s criminal prohibition against post-heartbeat abortions is in no way a measure “calculated to inform the woman’s free choice[.]”²² It plainly means to “hinder it,”²³ thus making it an unconstitutional restriction on a woman’s previability abortion decision.

The same result can also be reached by focusing on the effects, rather than the purposes, of H.B. 125.²⁴ The measure’s criminal ban on abortions after a fetal heartbeat has been detected can reasonably be expected to have the effect of keeping “any person”²⁵ from providing a pregnant woman an abortion she might seek. This, at least, if the law’s sanctions have their predictable deterrent effect. If they do, H.B. 125 would serve to block pregnant women who are constitutionally entitled to terminate pregnancies prior to viability for the reasons that they—not some third party or the State—choose. H.B. 125 fails the undue burden test on multiple grounds.

¹⁷ *Casey*, 505 U.S. at 877 (plurality opinion); see also *Carhart II*, 550 U.S. at 156 (holding that an statute “would be unconstitutional “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability” (quoting *Casey*, 505 U.S. at 878 (plurality opinion))).

¹⁸ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(E)(5) to create the offense of “performing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree”). In virtue of a conviction for such a crime, professional sanctions against a physician could follow. See OHIO REV. CODE ANN. § 4731.22(B)(10) (West 2010) (requiring the state medical board take disciplinary action against a certificate holder for the “[c]ommission of any act that constitutes a felony in this state”). There are also, of course, sanctions that H.B. 125 creates for a physician’s failure to determine whether “the fetus the pregnant woman is carrying has a detectible fetal heartbeat” before any abortion is performed. H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(C)(4) to subject physicians who perform abortions on pregnant women “prior to determining if the fetus the pregnant woman is carrying has a detectible fetal heartbeat to disciplinary action under § 4731.22(B)(41), though there is an exception to this rule in “medical emergency” circumstances. See *id.* (enacting OHIO REV. CODE § 2919.19(C)(1))). On the constitutionality of this last, see *infra* note 50.

¹⁹ OHIO REV. CODE ANN. § 2929.14(A)(5) (West 2010).

²⁰ OHIO REV. CODE ANN. § 2929.18(A)(3)(e) (West 2010).

²¹ *Casey*, 505 U.S. at 846 (recognizing the “right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State”); see also *Carhart II*, 550 U.S. at 146 (assuming that “[b]efore viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy’” (quoting *Casey*, 505 U.S. at 879 (plurality opinion))).

²² *Casey*, 505 U.S. at 877 (plurality opinion).

²³ *Id.*

²⁴ See *Carhart I*, 530 U.S. at 945–96 (holding that physicians performing abortions using the proscribed method “must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman’s right to make an abortion decision.”).

²⁵ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(C)(1) to require that “no person shall perform an on a pregnant woman prior to determining if the fetus the woman is carrying has a detectible fetal heartbeat”; enacting § 2919.19(C)(2) to require “[a] person who intends to perform an abortion on a woman shall determine if there is the presence of a fetal heartbeat of the unborn human individual that the pregnant woman is carrying according to standard medical practice”; enacting § 2919.19(D)(2)(a) to require “[t]he person intending to perform the abortion shall inform the pregnant woman in writing that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat and 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 based on the gestational age of the unborn human individual possessing a detectible fetal heartbeat”; enacting § 2919.19(E)(1) to require “no person shall knowingly perform an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual that the pregnant woman is carrying and whose fetal heartbeat has been detected”).

This constitutional conclusion is unaffected by what a number of proponents and supporters of H.B. 125 regard as its noble purposes: the protection and preservation of human life.²⁶ By constitutional lights, both the purpose and effect of H.B. 125 are not measured by what may be in legislators' hearts or the intentions of their minds. Rather, they are ascertained with reference to the proposed legislation's text, leavened with a common sense understanding of how legal rules do (and can be predicted) to work in the ordinary course of events.

Nor, for that matter, does it make any constitutional difference that H.B. 125 declines to treat a pregnant woman who would seek or obtain an abortion otherwise illegal under the proposed statute's terms as a criminal or otherwise subject to her civil liability for her acts.²⁷ It is enough for purposes of the undue burden test that H.B. 125 strips the pregnant woman of the choice whether to have an abortion by making the efforts of anyone who would help her—particularly, her consulting physician—illegal.

Nor, along somewhat similar lines, does the language of H.B. 125 that suspends its operation in cases where an abortion is necessary to “prevent the death of a pregnant woman or, in [a doctor's] reasonable medical judgment, to preserve the life or health of the pregnant woman,”²⁸ help. Without missing its significance, this exception does not provide a broad enough safe harbor to enable H.B. 125 to survive constitutional review. This is because a pregnant woman's constitutionally protected right to terminate an unwanted pregnancy prior to viability is not limited to those instances in which an abortion is, in a physician's professional judgment, required to preserve her life or health. Up to the point after viability when the State may prohibit abortions across the board,²⁹ a woman seeking an abortion need not provide public reasons for her choice. Nor must she limit her reasons to protecting or preserving her own life.

Nor, finally, is the conclusion that H.B. 125 places an undue burden on previability abortions altered by any of the factual recitations found in the text of the bill.³⁰ Crediting these unsourced data, they may well be regarded as having great moral or social or personal significance. The correlation between the existence of a fetal heartbeat, on the one hand, and fetal development to viability and to live birth, on the other, suggested by the data, may be taken to matter somehow. Still, a correlation (even a high correlation) between two different biological events (whether between the presence of a fetal heartbeat and fetal viability or between a heartbeat and live birth) does not and cannot make the events the same thing. Accordingly, even if one accepts that the presence of a fetal heartbeat is correlated to fetal viability or live birth, or both, that is not enough to say that H.B. 125 tracks, hence respects, viability as the constitutionally-significant dividing line that it is, meaning: the point before which it is the pregnant woman herself,

²⁶ See, e.g., *Hearings on H.B. 125 Before the H. Comm. on Health & Aging*, 129th Gen. Assemb., Reg. Sess. 2 (Ohio 2011) [hearing *House H.B. 125 Hearings*] (statement of David F. Forte) (concluding that HB 125, the Heartbeat Bill, is the most valuable for protecting the lives of the unborn”); *id.* at 1–2 (statement of Michael S. Parker, M.D) (basing support for the bill, inter alia, on “the protections provided to the silent unborn human individual”).

²⁷ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(F) to exempt pregnant women from criminal inchoate and derivative liability and civil liability).

²⁸ *Id.* (enacting OHIO REV. CODE § 2919.19(E)(2)).

²⁹ See *supra* text accompanying notes 8–11.

³⁰ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(A)(1)–(6) to declare the findings of the General Assembly).

and not the State, who must be allowed to make the ultimate decision whether an abortion shall be performed. While the text of H.B. 125 may seem to bow in the direction of the constitutional significance of the moment of viability, in actuality, it seeks to displace it in favor of the moment when a fetal heartbeat can be (and is) discerned. That moment under H.B. 125, the moment when a fetal heartbeat can be and is heard, is to be the new moment of viability, when the State's authority to regulate abortion to the point of banning it outright (or subject to an exception for a pregnant woman's life or health) becomes constitutionally acceptable.

The substitution of the viability line for a heartbeat rule seems more like a strategic, as opposed to a constitutionally principled, choice. What reason is there, after all, to prefer a heartbeat rule to one that would ban abortion from the moment of conception? Over forty years ago, John T. Noonan, Jr., one of the most vocal and eloquent opponents of abortion rights among legal elites, noted that "such studies as have been made" show that once "the conceptus is formed, . . . roughly in only 20 percent of the cases will spontaneous abortions occur. In other words, the chances are about 4 out of 5 that this new being will develop."³¹ If that's right, why not abandon H.B. 125's heartbeat rule for a rule grounded in conception? If one believes that conception defines humanity or personhood, wouldn't more lives be saved?

Of course, the shift from viability to heartbeat may seem to be a smaller step than the one from viability to conception. And it may be that incremental changes are easier for lawmakers—including legislators, who are politically answerable—to abide than larger, more dramatic leaps. As a constitutional matter, however, it must be understood that the incremental shift contemplated by H.B. 125—from viability to heartbeat—is a direct attack on what the controlling opinion in *Planned Parenthood v. Casey* deemed "the most central principle" of *Roe v. Wade*³²: the principle that viability is the vital constitutional dividing line between those moments, before, when the final decision about whether an abortion will be performed rests in the pregnant woman's hands, and the moments, after, when it is ultimately up to the State to decide who decides.³³ Stated slightly differently, H.B. 125's heartbeat rule would require the repudiation of the Court's viability line every bit as much as a rule banning abortions from the moment of conception, would. Whether one regards this as a good idea or not, the point it is meant to underscore is that H.B. 125's previability abortion ban where a fetal heartbeat has been detected can no more be squared with the Supreme Court's abortion jurisprudence than a flat ban on abortion from conception could be.

This is not merely a matter of perspective. Nor is it simply the product of an underlying normative perspective on women's reproductive choice. Though he did not say so expressly, it seems significant that, as careful a student of constitutional law as Professor David Forte, in his testimony before this Committee, nowhere expressed the view that

³¹ John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 55–56 (John T. Noonan, Jr. ed., 1970) (endnote omitted). Noonan treated these considerations as "buttressing" considerations, not primary arguments for the personhood of the fetus from conception on. *Id.* at 56.

³² 410 U.S. 113 (1973).

³³ *Casey*, 505 U.S. at 846; see also *id.* at 870–71 (plurality opinion) (concluding that constitutional "line should be drawn at viability" and affirming a "women's right to terminate her pregnancy before viability" as the "most central principle of *Roe*").

H.B. 125 is a constitutional piece of legislation. Indeed, read closely, the testimony he offered seems between the lines almost to concede that it is not. If so, it would certainly help to explain the main thrust of his testimony, which urged the utility of H.B. 125 as a vehicle for precipitating a modification in existing constitutional doctrine.³⁴ Of course, if H.B. 125 were already authorized by existing doctrine, if, that is, its rule were already encompassed by it, it would be ill suited to the purposes of triggering such a change.

Having come this far, a fair question to ask is, What's to be made of the view of H.B. 125 found in the written testimony provided to this Committee by Mr. Walter Weber, Senior Litigation Counsel of the American Center for Law and Justice?³⁵ That testimony, it may be recalled, suggested that H.B. 125, including what it deemed "the prohibition section of the Heartbeat Bill,"³⁶ is permissible under the federal Constitution. More specifically, after citing the companion case to *Roe v. Wade*, a case called *Doe v. Bolton*,³⁷ which relied in part, it explained, on an earlier case called *U.S. v. Vuitch*,³⁸ the written testimony proposed that "[u]nder this precedent, the prohibition section of the Heartbeat Bill, which has an exception for 'life or health,' is constitutionally defensible under current Supreme Court precedent."³⁹

This may come as a surprise given what has already been said about H.B. 125—though it really should not—but there is an important sense in which this view of the proposed legislation is correct. Because it contains an express exception for the protection and preservation of the pregnant woman's life and health,⁴⁰ the prohibition section of H.B. 125 is a constitutional exercise of State authority under existing constitutional rules. But this is only true—and, one surmises, this is the unarticulated context of Mr. Weber's testimony—after the point of fetal viability. That is: After fetal viability, though not before, according to the Supreme Court's abortion jurisprudence, the State may regulate and prohibit abortion except where necessary to protect and preserve a pregnant woman's life and health. Insofar as it applies postviability, then, H.B. 125, which stops short of asserting all of the State's postviability authority to regulate abortions, appears to contain a constitutionally permissible abortion ban.

To avoid confusion: Merely because H.B. 125 is a valid exercise of State authority after the point of viability does not make it a constitutionally valid exercise of State authority before. The same law—as with H.B. 125—can be unconstitutional with respect to some of its operations without being unconstitutional as to them all. Thus, to summarize: As for H.B. 125's criminal abortion ban where a fetal heartbeat has been detected, it is unconstitutional prior to fetal viability, and constitutionally permissible after that, given that it makes the required exceptions in cases where an abortion is needed to protect or to preserve a woman's life or health.

³⁴ *House H.B. 125 Hearings*, *supra* note 26, at 2 (statement of David F. Forte) (Forte argues that "a stand-pat strategy flies in the face of history. Courts never change their minds unless they are invited to.").

³⁵ *Id.* at 1 (statement of Walter M. Weber).

³⁶ *Id.* at 2.

³⁷ 410 U.S. 178, 191–92 (1973).

³⁸ 402 U.S. 61, 71–72 (1971).

³⁹ *House H.B. 125 Hearings*, *supra* note 26, at 2 (statement of Walter M. Weber).

⁴⁰ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(E)(2)).

b. H.B. 125's "Informed Consent" Provision.

This still leaves the constitutionality of H.B. 125 "informed consent" provisions to consider. By this point, only a few brief statements need to be made. Operating previability, the informed consent provision is subject to analysis under the undue burden standard. How does it measure up?

Although the undue burden test helps ferret out constitutionally impermissible constraints on women's previability abortion decisions, caselaw makes clear the State is permitted to pass legislation that only incidentally burdens the right to choose. Incidental burdens, like insubstantial obstacles in the way of a woman's choice, are not constitutionally-speaking "undue." Illustrative of permissible previability legislation, described at a high level of generality, are rules calculated to inform a woman's decision about how to exercise her constitutionally-protected choice. In the Court's words, prior to viability, State regulation of abortion "must be calculated to inform the woman's free choice, not hinder it."⁴¹ Closer to earth, and filling in the point more concretely, is *Planned Parenthood v. Casey*, which (among other things) upheld a 24-hour waiting period against a facial challenge to it.⁴² (It may be of no small point of note that the 24-hour waiting period upheld in *Casey* looks like the one contained in H.B. 125.⁴³) The Court's idea was that it was generally reasonable to ask a woman to give as important a decision as abortion is a required, short, State-mandated period of reflection before making the final choice.

The waiting period aside, the real constitutional question presented by H.B. 125's "informed consent" rule is found in its "information-centered" provisions—those provisions requiring the doctor to inform his pregnant patient about the presence of a fetal heartbeat where one has been detected and also to inform her of "certain specified information regarding the statistical probability of bringing"⁴⁴ that fetus to viability, then term. The key to the constitutionality of these dimensions of H.B. 125 is found in the consequence of the detection of a fetal heartbeat: Where one exists, any subsequent abortion is subject to the proposed law's criminal ban. What this means is that, after she

⁴¹ *Casey*, 505 U.S. at 877 (plurality opinion).

⁴² *Id.* at 887. A number of lower court decisions, since *Casey*, have rejected challenges to other waiting periods. See, e.g., *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 363–64 (6th Cir. 2006) (upholding a provision requiring women seeking an abortion to attend, for informed consent purposes, an in-person meeting with a physician at least 24 hours prior to receiving the abortion); *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (noting that no court other than the district court had invalidated a law similar to *Casey*); *Karlin v. Foust*, 188 F.3d 446, 488 (7th Cir. 1999); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091, 1094 (D. Ariz. 2009); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 456 (W.D. Ky. 2000); *Utah Women's Clinic v. Leavitt*, 844 F. Supp. 1482, 1491 (D. Utah 1994), *rev'd in part and dismissing appeal in part*, 75 F.3d 564 (10th Cir. 1995); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409, 1417 (D.S.D.1994), *aff'd*, 63 F.3d 1452 (8th Cir. 1995); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994); *Barnes v. Moore*, 970 F.2d 12, 13 (5th Cir. 1992).

⁴³ Compare H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(D) to read: "(D)(1) Division (D) of this section applies to all abortions that are not prohibited under sections 2919.12, 2919.121, and 2919.151 of the Revised Code, except those abortions that are necessary to save the life of the pregnant woman. (2) If the person who intends to perform an abortion on a pregnant woman detects a fetal heartbeat in the unborn human individual that the pregnant woman is carrying, no later than twenty-four hours prior to the performance of the intended abortion . . . (a) The person intending to perform the abortion shall inform the pregnant woman. . . ."), with *Casey*, 505 U.S. at 902 (appendix to joint opinion) ("§ 3205. Informed consent. (a) General rule.—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if: (1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of: . . .").

⁴⁴ OHIO LEG. SERV. COMM'N, BILL ANALYSIS, H.B. 125, 129th Gen. Assemb., Reg. Sess., at 2 (2011); see also H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(D)(2)(a) to require the physician to inform the pregnant woman of the fetal heartbeat and "the statistical probability of bringing the unborn human individual to term based on the gestational age").

receives the information H.B. 125 requires she receive, and even after she formally acknowledges it as the proposed law provides,⁴⁵ she is not legally entitled to decide whether to proceed with an abortion. H.B. 125 makes that decision for her.⁴⁶ It says she cannot have an abortion, unless it is “designed to or intended to prevent [her death] . . . or, in [her doctor’s] reasonable medical judgment, to preserve [her] life or health[.]”⁴⁷

While this may leave open some room for a woman to exercise her informed consent in some specific instances, she may not do so where, in her doctor’s judgment, her life or health is not at stake. In this sense, H.B. 125’s informed consent rules do not seek to inform a pregnant woman’s previability abortion decision, but constrain it, in plain conflict with the Court’s requirement that the ultimate decision about a previability abortion must be left in her hands. It thus appears that, operating previability, H.B. 125’s informed consent provision is infected by the proposed legislation’s more general flaw: its criminal ban on abortion where a fetal heartbeat has been detected means to block, not inform, the exercise of the pregnant woman’s informed choice.

A different state of affairs and a different conclusion might follow about the previability application of H.B. 125’s informed consent provision if the proposed legislation did not threaten or impose a criminal penalty on abortions performed after a fetal heartbeat has been discerned. Frankly, it would be a much closer constitutional call if all H.B. 125 did was to change the standard of care in abortion cases to require testing for and disclosure of information about the presence of a fetal heartbeat, along with the factually accurate information about what studies show the presence of a heartbeat means in developmental terms. Under those circumstances, the conclusion found in Mr. Weber’s written testimony to the Committee—that the informed consent provisions of H.B. 125 are constitutional under the Court’s abortion jurisprudence—might well be right.⁴⁸

But H.B. 125 does not present that kind of stand-alone situation. Its informed consent provision is textually woven into, hence tied to, proposed legislation that enacts a criminal prohibition on post-heartbeat, but previability abortions. The presence of this informed consent provision in this context reveals that it is suffused with H.B. 125’s larger constitutionally dubious purpose: it is an effort that does not seek to inform or enrich a woman’s constitutionally protected choice as much as to “hinder”⁴⁹ it. This is a flaw that is engrained in this informed consent provision. It would remain—it would not be cured—even if H.B. 125’s criminal abortion ban were to be struck down. As a vehicle for testing the Supreme Court’s willingness to contemplate limits on previability abortions in the name of promoting informed consent, H.B. 125 spoils the test case by going too far. If that is what the legislature wants, it may have to go back to the drawing board and start drafting anew.

⁴⁵ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(D)(2)(b) to require the pregnant woman to “sign a form acknowledging that the pregnant woman has received information . . .”).

⁴⁶ Seen in this light, H.B. 125’s “informed consent” provision doesn’t operate the way informed consent rules ordinarily do: requiring the disclosure of material information a reasonable person would want to have when deciding entirely for herself what particular medical decision she will make. See BARRY R. FURROW ET AL., HEALTH LAW 314–15 (2d ed. 2000) (discussing the reasonable patient standard of informed consent).

⁴⁷ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(E)(2)).

⁴⁸ *House H.B. 125 Hearings*, *supra* note 26, at 1 (statement of Walter M. Weber) (discussing H.B. 125’s informed consent provision and suggesting it is a constitutional exercise of State authority under the Supreme Court’s abortion cases, including *Casey*).

⁴⁹ *Casey*, 505 U.S. at 877 (plurality opinion).

That said, the simpler constitutional point should not be lost. Although previability, H.B. 125's informed consent provision is an unconstitutional limitation on a pregnant woman's right to choose, as it applies postviability, it does not raise the same concerns, and may even be a legitimate exercise of the State's authority, consistent with the Supreme Court's existing abortion jurisprudence.⁵⁰

With the hope that this analysis illuminates the constitutional problems posed by H.B. 125, thank you for your time.

⁵⁰ May, because a question does exist about whether the "emergency" provisions of H.B. 125 go far enough to satisfy existing rules about the permissible scope of abortion regulations after viability. *See* H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(D)(1) to provide for informed consent for abortions "except those abortions that are necessary to save the life of the pregnant woman").