



# Ohio Legislative Service Commission

## Bill Analysis

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### **Am. Sub. H.B. 125** 129th General Assembly (As Passed by the House)

**Reps.** Wachtmann, Henne, Buchy, Blessing, Rosenberger, Amstutz, McClain, Stautberg, Maag, Bubb, J. Adams, Snitchler, Sears, Roegner, Burke, Grossman, Hottinger, Johnson, Martin, Gardner, Combs, Beck, Schuring, Goodwin, R. Adams, Young, Brenner, Huffman, Hall, Mecklenborg, Slaby, Carey, Blair, Gonzales, Hackett, Kozlowski, Balderson, Hayes, Baker, Dovilla, Boose, Peterson, Derickson, Ruhl, Landis, Sprague, Newbold, Thompson, Uecker, Butler, Conditt, C. Hagan, Batchelder

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## **BILL SUMMARY**

### **Performing an abortion prior to fetal heartbeat determination**

- Prohibits a person from performing an abortion on a pregnant woman prior to determining if the fetus has a detectible fetal heartbeat, except when there is a medical emergency.
- Requires a person who intends to perform an abortion to determine if there is the presence of a fetal heartbeat of the unborn human individual according to standard medical practice.
- Authorizes the Director of Health to promulgate rules for the appropriate methods of performing an examination for the presence of a fetal heartbeat of an unborn human individual based on standard medical practice.
- Provides that a physician who performs an abortion prior to determining if the fetus has a detectible fetal heartbeat is subject to disciplinary action by the State Medical Board.

### **Prohibition against performing an abortion when there is a fetal heartbeat**

- Generally prohibits a person from knowingly performing an abortion with the specific intent of causing or abetting the termination of the life of an unborn human individual whose fetal heartbeat has been detected.

- Provides that a person who violates the above prohibition is guilty of performing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree.
- Provides that a person is not in violation of the above prohibition if that person performs a medical procedure designed to or intended to prevent the death of a pregnant woman or, in that person's reasonable medical judgment, to preserve the life of the pregnant woman.
- Provides that a person is not in violation of the prohibition if that person has performed an examination for the presence of a fetal heartbeat in the fetus and that examination does not reveal a fetal heartbeat or the person is informed by a physician who has performed the examination that the examination did not reveal a fetal heartbeat.
- Provides that the prohibition does not repeal any other provision of law that restricts or regulates the performance of an abortion by a particular method or during a particular stage of pregnancy.

### **Informed consent**

- Requires a person who intends to perform an abortion on a pregnant woman after detecting a fetal heartbeat to provide the woman, no later than 24 hours prior to the performance of the intended abortion, with certain specified information regarding the statistical probability of bringing the unborn human individual to term.
- Requires the pregnant woman, no later than 24 hours prior to the performance of the intended abortion, to sign a form acknowledging that the pregnant woman received the above-described specified information and that the pregnant woman is aware of the statistical probability of bringing the unborn human individual to term.
- Authorizes the Director of Health to define and promulgate by rules based upon available medical evidence the statistical probability of bringing an unborn human individual to term based on the gestational age of an unborn human individual who possesses a detectible fetal heartbeat.

### **Other provisions**

- Requires a person to fulfill certain documentation requirements when the person performs an abortion under any of the exceptions to the bill's prohibitions or to preserve the health of the woman.
- Provides that a pregnant woman upon whom an abortion is performed in violation of the bill's prohibitions is not subject to criminal or civil penalties.

- Provides that nothing in the bill prohibits the sale, use, prescription, or administration of a measure, drug, or chemical designed for contraceptive purposes.

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## CONTENT AND OPERATION

### Performing an abortion prior to fetal heartbeat determination

The bill generally prohibits a person from performing an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat. A person who intends to perform an abortion on a pregnant woman must determine, according to standard medical practice, if there is the presence of a fetal heartbeat of the unborn human individual that the pregnant woman is carrying.<sup>1</sup>

There is one exception to the bill's prohibition on performing an abortion prior to a fetal heartbeat determination. The prohibition does not apply when a medical emergency exists that would prevent a person from complying with the prohibition. Any person who performs an abortion on a pregnant woman based on this exception

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<sup>1</sup> R.C. 2919.19(C)(1) and (2).

must note in the pregnant woman's medical records that a medical emergency necessitating the abortion existed.<sup>2</sup>

The Director of Health may promulgate rules for the appropriate methods of performing an examination for the presence of a fetal heartbeat of an unborn human individual based on standard medical practice. The determination of the presence of a fetal heartbeat required by the bill must be made regardless of whether or not the Director has promulgated the rules.<sup>3</sup>

If a physician performs an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat, that physician is subject to disciplinary action by the State Medical Board.<sup>4</sup> The State Medical Board must do either of the following:<sup>5</sup>

- (1) Limit, revoke, or suspend the physician's certificate to practice medicine and surgery or osteopathic medicine and surgery;
- (2) Refuse to register the physician, refuse to reinstate a certificate, or reprimand or place on probation the holder of the certificate.

The bill defines the following terms:<sup>6</sup>

(1) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

(2) "Fetus" means the human offspring developing during pregnancy from the moment of conception and includes the embryonic stage of development (see **COMMENT 2**).

(3) "Gestational sac" comprises the extra embryonic membranes that envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy.

(4) "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

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<sup>2</sup> R.C. 2919.19(C)(1).

<sup>3</sup> R.C. 2919.19(C)(2) and (3).

<sup>4</sup> R.C. 2919.19(C)(4).

<sup>5</sup> R.C. 4731.22(B)(41).

<sup>6</sup> R.C. 2919.19(B)(2), (3), (4), (6), (7), and (10).

endangers the life of the pregnant woman or a major bodily function of the pregnant woman as to necessitate the immediate performance or inducement of an abortion.

(5) "Physician" means a person who is licensed to practice medicine and surgery or osteopathic medicine and surgery by the State Medical Board or a person who otherwise is authorized to practice medicine and surgery or osteopathic medicine and surgery in this state (cross reference to R.C. 2305.113).

(6) "Unborn human individual" means an individual organism of the species homo sapiens from fertilization until live birth (see **COMMENT 2**).

### **Prohibition against performing an abortion when there is a fetal heartbeat**

The bill generally prohibits a person from knowingly performing 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 in accordance with the requirements of the bill. Whoever violates this prohibition is guilty of performing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree.<sup>7</sup>

#### **Exceptions to the prohibition**

As described below, there are two circumstances in which a person is not in violation of the prohibition against performing an abortion when there is a fetal heartbeat.

##### **(1) Medical procedures to prevent a woman's death or bodily impairment**

A person who performs a medical procedure designed or intended, in that person's reasonable medical judgment, to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman is not in violation of the prohibition.<sup>8</sup> The bill does not define what constitutes a "serious risk of the substantial and irreversible impairment of a major bodily function." This phrase was defined for purposes of the abortion-related prohibitions in H.B. 78 of the 129th General Assembly, an act that became effective October 20, 2011 (see "**Background: current Ohio law regarding abortion, Post-viability abortions**"), but the H.B. 78 definition does not extend to the use of the phrase in the bill's provisions.

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<sup>7</sup> R.C. 2919.19(E)(1) and (5).

<sup>8</sup> R.C. 2919.19(E)(2)(a).

A person who performs a medical procedure in this circumstance must declare in writing, under penalty of perjury, that the medical procedure is necessary, to the best of that person'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. The person must also provide in the written document, under penalty of perjury, the medical condition that the procedure will assertedly address, and the medical rationale for the conclusion that the procedure is necessary.<sup>9</sup> The person must place the written documentation in the pregnant woman's medical records and maintain a copy of the written documentation in the person's own records for at least seven years.<sup>10</sup>

## **(2) No fetal heartbeat revealed**

A person who has performed an examination for the presence of a fetal heartbeat in the fetus, utilizing standard medical practice, that does not reveal a fetal heartbeat is not in violation of the prohibition. Also, a person who has been informed by a physician that the examination performed by that physician did not reveal a fetal heartbeat is not in violation of the prohibition.<sup>11</sup>

The bill requires a person who acts based on either of these two exceptions to the prohibition to make a note of the act in the pregnant woman's medical records. The note must specify which of the exceptions the person invoked.<sup>12</sup>

## **Abortions performed to preserve a woman's health**

### **Additional documentation requirement**

After a fetal heartbeat has been detected pursuant to the bill's requirements, any person performing an abortion for the purpose of *preserving the health* of the pregnant woman is required by the bill to set forth in a separate document the medical condition that the abortion will assertedly address and the medical rationale for the conclusion that the abortion is necessary to address the condition. This act must be taken under penalty of perjury. The person must place this written documentation in the pregnant woman's medical records and maintain a copy in the person's own records for at least seven years. This documentation requirement is independent of the documentation

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<sup>9</sup> R.C. 2919.19(E)(2)(b).

<sup>10</sup> R.C. 2919.19(E)(2)(c).

<sup>11</sup> R.C. 2919.19(E)(3).

<sup>12</sup> R.C. 2919.19(E)(1).

requirements discussed above relative to medical procedures performed to prevent a woman's death or bodily impairment.<sup>13</sup>

Although the bill refers to the performance of an abortion to preserve a pregnant woman's health, the bill does not contain an express exception that would authorize an abortion to be performed for this purpose after a fetal heartbeat has been detected.

### **Relationship to other abortion laws**

The prohibition against performing an abortion when there is a fetal heartbeat does not repeal any other provision of the Revised Code that restricts or regulates the performance of an abortion by a particular method or during a particular state of a pregnancy.<sup>14</sup> Under the bill, "pregnancy" is defined as the human female reproductive condition that begins with fertilization, when the woman is carrying the developing human offspring, and that is calculated from the first day of the last menstrual period of the woman.<sup>15</sup>

### **Informed consent**

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 24 hours prior to the performance of the intended abortion, both of the following apply:<sup>16</sup>

(1) The person intending to perform the abortion must inform the pregnant woman in writing that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat. Further, the person must 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. A person must comply with this requirement regardless of whether or not the Director of Health promulgated the rules described below.

(2) The pregnant woman must sign a form acknowledging that the pregnant woman has received information from the person intending to perform the abortion that the unborn human individual that the pregnant woman is carrying has a fetal

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<sup>13</sup> R.C. 2919.19(F).

<sup>14</sup> R.C. 2919.19(E)(4).

<sup>15</sup> R.C. 2919.19(B)(8).

<sup>16</sup> R.C. 2919.19(D)(2).

heartbeat and that the pregnant woman is aware of the statistical probability of bringing the unborn human individual that the pregnant woman is carrying to term.

The bill states that the provisions regarding informed consent apply to all abortions that are not prohibited under R.C. 2919.12 (unlawful abortion), 2919.121 (unlawful abortion upon a minor), and 2919.151 (partial birth feticide), except when a medical emergency exists that prevents compliance with this requirement.<sup>17</sup>

The bill authorizes the Director of Health to define and promulgate by rules based upon available medical evidence the statistical probability of bringing an unborn human individual to term based on the gestational age of an unborn human individual who possesses a detectable fetal heartbeat.<sup>18</sup> The bill also provides that the provisions regarding informed consent do not repeal any other provision of the Revised Code relating to informed consent for an abortion.<sup>19</sup>

The bill defines "gestational age" to mean the age of an unborn human individual as calculated from the first day of the last menstrual period of a pregnant woman.<sup>20</sup>

### **Pregnant woman not subject to criminal or civil penalties**

Under the bill, a pregnant woman upon whom an abortion is performed in violation of the bill's prohibitions is not guilty of violating those prohibitions or of attempting to commit, conspiring to commit, or complicity in committing a violation of those prohibitions. Further, the pregnant woman is not subject to a civil penalty based on that violation.<sup>21</sup>

### **No prohibitions regarding contraception**

Nothing in the bill prohibits the sale, use, prescription, or administration of a measure, drug, or chemical designed for contraceptive purposes.<sup>22</sup> "Contraceptive" means a device, drug, or chemical that prevents conception.<sup>23</sup>

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<sup>17</sup> R.C. 2919.19(D)(1).

<sup>18</sup> R.C. 2919.19(D)(3).

<sup>19</sup> R.C. 2919.19(D)(4).

<sup>20</sup> R.C. 2919.19(B)(4).

<sup>21</sup> R.C. 2919.19(G).

<sup>22</sup> R.C. 2919.19(H).

<sup>23</sup> R.C. 2919.19(B)(1).

## Findings by the General Assembly

Under the bill, the General Assembly declares that it finds, according to contemporary medical research, all of the following:<sup>24</sup>

- (1) As many as 30% of natural pregnancies end in spontaneous miscarriage;
- (2) Less than 5% of all natural pregnancies end in spontaneous miscarriage after detection of fetal cardiac activity;
- (3) Over 90% of in vitro pregnancies survive the first trimester if cardiac activity is detected in the gestational sac;
- (4) Nearly 90% of in vitro pregnancies do not survive the first trimester where cardiac activity is not detected in the gestational sac;
- (5) Fetal heartbeat, therefore, has become a key medical predictor that an unborn human individual will reach viability and live birth;
- (6) Cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac.

## Effective date of the bill

The bill provides that if a state or federal court of competent jurisdiction finds that a provision of the bill is unconstitutional, the effective date of that provision is tolled until either of the following occur (see **COMMENT 3**):<sup>25</sup>

- (1) That provision is found to be constitutional by an appellate tribunal;
- (2) The Ohio Attorney General certifies in an opinion to the Ohio Governor that, due to a subsequent decision or decisions by the United States Supreme Court, it is reasonably probable that the provision would be upheld as constitutional by a court of competent jurisdiction.

If a provision of the bill is found constitutional by an appellate tribunal or the Attorney General issues an opinion as described in (2) above, the provision is prospective.<sup>26</sup>

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<sup>24</sup> R.C. 2919.19(A).

<sup>25</sup> R.C. 2919.19(I).

<sup>26</sup> R.C. 2919.19(J).

## Severability

The bill provides that if any provisions of R.C. 2919.19 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of R.C. 2919.19 that can be given effect without the invalid provision or application, and to this end the provisions of R.C. 2919.19 are severable.<sup>27</sup>

## Background: current Ohio law regarding abortion

### Post-viability abortions

H.B. 78 of the 129th General Assembly (effective October 20, 2011) generally reinstated with modifications provisions of Ohio law enacted by Sub. H.B. 135 of the 121st General Assembly that were held to be unconstitutional by federal courts.<sup>28</sup> Among the provisions H.B. 78 reinstated with modifications were prohibitions on (1) purposely performing or inducing or attempting to perform or induce an abortion on a pregnant woman carrying a viable unborn child, and (2) performing an abortion (except in a medical emergency) after a certain point of gestation (20 weeks in H.B. 78 and 22 weeks in H.B. 135) unless a determination is made by the physician, in the physician's good faith medical judgment, that the unborn child is not viable after performing required tests to determine the unborn child's viability. The method by which H.B. 78 reinstated these provisions (by repealing and re-enacting them with modifications) appears to be an affirmative act of the General Assembly to indicate the General Assembly's intent to revive the statutes with amendments.<sup>29</sup>

### Post-viability abortion prohibition

Pursuant to the first prohibition, a person cannot purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman carrying a viable unborn child.<sup>30</sup> "Viable" is defined as the stage of development of a human fetus at which in the determination of the physician, based on the facts of the woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of

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<sup>27</sup> R.C. 2919.19(K).

<sup>28</sup> *Women's Medical Professional Corp. v. Voinovich* (1995), 911 F.Supp. 1051, *aff'd* (6th Cir. 1997) 130 F.3d 187, *cert. denied* (1998) 523 U.S. 1036.

<sup>29</sup> See *Ohio v. Hodge* (2010), Slip Opinion No. 2010-Ohio-6320 (discussed in **COMMENT 3**).

<sup>30</sup> R.C. 2919.17(A).

maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.<sup>31</sup>

It is an affirmative defense to this prohibition that the abortion was performed or induced or attempted to be performed or induced by a physician and that the physician determined, in the physician's good faith medical judgment and based on the facts known to the physician at that time, that either (1) the unborn child was not viable, or (2) the abortion was necessary to prevent the death of the pregnant woman or there existed a serious risk of the substantial and irreversible impairment of a major bodily function of the woman.<sup>32</sup> "Serious risk of the substantial and irreversible impairment of a major bodily function of the woman" is defined as 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. A medically diagnosed condition that constitutes a "serious risk of the substantial and irreversible impairment of a major bodily function" includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes; may include, but is not limited to, diabetes and multiple sclerosis; and does not include a condition related to the woman's mental health.<sup>33</sup> The physician must comply with six conditions for this affirmative defense to apply.<sup>34</sup>

Whoever violates this prohibition is guilty of terminating or attempting to terminate a human pregnancy after viability, a felony of the fourth degree.<sup>35</sup>

### **Viability testing**

Pursuant to the second prohibition, a physician cannot (except in a medical emergency) perform or induce or attempt to perform or induce an abortion on a pregnant woman after the beginning of the 20th week of gestation unless, prior to the performance or inducement of the abortion or the attempt to perform or induce the abortion, the physician determines, in the physician's good faith medical judgment, that the unborn child is not viable, and the physician makes that determination after performing a medical examination of the pregnant woman and after performing or causing to be performed those tests for assessing gestational age, weight, lung maturity, or other tests that the physician, in that physician's good faith medical judgment,

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<sup>31</sup> R.C. 2919.16(M).

<sup>32</sup> R.C. 2919.17(B)(1).

<sup>33</sup> R.C. 2919.16(K).

<sup>34</sup> R.C. 2919.17(D).

<sup>35</sup> R.C. 2919.17(F).

believes are necessary to determine whether an unborn child is viable.<sup>36</sup> In addition, a physician cannot perform or induce or attempt to perform or induce an abortion on a pregnant woman after the beginning of the 20th week of gestation without first entering the determination described above and the associated findings of the medical examination and tests in the medical record of the pregnant woman.<sup>37</sup>

Whoever violates either of these provisions is guilty of failure to perform viability testing, a misdemeanor of the fourth degree.<sup>38</sup>

### **Informed consent**

Existing law prohibits any person from performing an abortion without the informed consent of the pregnant woman.<sup>39</sup> Whoever performs an abortion without obtaining informed consent is guilty of unlawful abortion, a misdemeanor of the first degree on a first offense, and a felony of the fourth degree on each subsequent offense.<sup>40</sup> It is an affirmative defense to a charge of unlawful abortion that obtaining informed consent was not possible because an immediate threat of serious risk to life or physical health of the pregnant woman from the continuation of the pregnancy created an emergency necessitating the immediate performance of an abortion.<sup>41</sup>

### **Consent issues regarding pregnant minors**

Current law prohibits any person from performing an abortion on a pregnant minor unless the attending physician obtains informed written consent from one of the following:<sup>42</sup>

- (1) The minor (if unemancipated) and one parent, guardian, or custodian of the minor;
- (2) The minor, if emancipated;
- (3) The minor, if she has been authorized to consent by court order (see below);

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<sup>36</sup> R.C. 2919.18(A).

<sup>37</sup> R.C. 2919.18(B).

<sup>38</sup> R.C. 2919.18(C).

<sup>39</sup> R.C. 2919.12(A).

<sup>40</sup> R.C. 2919.12(D).

<sup>41</sup> R.C. 2919.12(C)(2).

<sup>42</sup> R.C. 2919.121(B).

(4) A court, upon application by the minor or the minor's next friend, with appropriate jurisdiction.

Whoever performs an abortion on a pregnant minor without obtaining informed consent is guilty of unlawful abortion.<sup>43</sup>

To obtain authorization to consent or the court's consent to an abortion, a pregnant minor or the minor's next friend must petition the juvenile court to authorize the minor to consent to the abortion. The minor may petition the juvenile court of the county in which the minor resides, the county bordering the county of residence, or the county in which the facility where the abortion is to be performed is located.<sup>44</sup> The petition must set forth several items, including personal information about the minor and her family and attest that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion. The petition must ask, as an alternative to authorizing consent, that the court find that it is in the minor's best interests to obtain the abortion.<sup>45</sup> The petition and all other papers and records pertaining to this type of action are confidential and not public records under Ohio's public records law.<sup>46</sup>

The court must hold a hearing on the application within five days after the application is filed. If the minor does not have legal counsel, the court must appoint counsel not later than 24 hours before the hearing. The court must also appoint a guardian ad litem to protect the minor's interests at the hearing. At the hearing, the court must hear evidence regarding the minor's emotional development, maturity, intellect, understanding of the possible consequences and alternatives to abortion, and any other evidence the court determines to be useful. If the court determines that the minor is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court is required to grant the petition and permit the minor to consent to the abortion.<sup>47</sup>

The court must issue its order on the hearing not later than 24 hours after the hearing. If it finds that the abortion is in the minor's best interest, the court must give judicial consent to the abortion and set forth the grounds for its finding. The petition must be denied if the court does not make either of these findings. Once a juvenile court has granted or denied the minor's petition, no juvenile court has jurisdiction to

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<sup>43</sup> R.C. 2919.121(E).

<sup>44</sup> R.C. 2919.121.

<sup>45</sup> R.C. 2919.121(C).

<sup>46</sup> R.C. 149.43.

<sup>47</sup> R.C. 2919.121(C).

rehear a petition regarding the same pregnancy. The minor may appeal the juvenile court's decision to the appropriate court of appeals.<sup>48</sup>

### **Partial birth feticide**

Under existing law, when the fetus that is the subject of an abortion procedure is viable, a person is prohibited from knowingly performing a partial birth procedure on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.<sup>49</sup> When the fetus that is the subject of an abortion procedure is not viable, existing law prohibits a person from knowingly performing a partial birth procedure on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.<sup>50</sup> Whoever violates either of these prohibitions is guilty of partial birth feticide, a felony of the second degree.<sup>51</sup>

"Partial birth procedure" means the medical procedure that includes all of the following elements in sequence:<sup>52</sup>

(1) Intentional dilation of the cervix of a pregnant woman, usually over a sequence of days;

(2) In a breech presentation, intentional extraction of at least the lower torso to the navel, but not the entire body, of an intact fetus from the body of the mother, or in a cephalic presentation, intentional extraction of at least the complete head, but not the entire body, of an intact fetus from the body of the mother;

(3) Intentional partial evacuation of the intracranial contents of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, intentional compression of the head of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, or performance of

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<sup>48</sup> R.C. 2919.121(C).

<sup>49</sup> R.C. 2919.151(B).

<sup>50</sup> R.C. 2919.151(C).

<sup>51</sup> R.C. 2919.151(D).

<sup>52</sup> R.C. 2919.151(A)(3).

another intentional act that the person performing the procedure knows will cause the death of the fetus;

(4) Completion of the vaginal delivery of the fetus.

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## COMMENT

1. In 1973, the United States Supreme Court held in *Roe v. Wade*<sup>53</sup> that certain bans on abortion are unconstitutional. The Court held that the right of personal privacy includes the right to terminate a pregnancy, subject to the state's interests in protecting the life and health of a pregnant woman and the developing embryo or fetus. The Court in *Roe* generally held that during the first trimester of pregnancy, states cannot impede a woman's right to obtain an abortion. During the second trimester, the state's interest in protecting the woman's health becomes more pressing because the risks associated with abortion are higher. Therefore, the Court stated that a state may regulate abortion "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."<sup>54</sup> Finally, the Court stated that at the point of fetal viability, the beginning of the third trimester as determined by the Court, the state's interest in potential life of the fetus is sufficiently compelling to restrict or prohibit abortion.<sup>55</sup> The Court cautioned, however, that a state may not proscribe abortion at any point when abortion is necessary to preserve the life or health of the mother.<sup>56</sup>

Subsequent cases provided further guidance to the states as to how and when abortions may be regulated.<sup>57</sup> In *Planned Parenthood of Southeastern Pa. v. Casey*,<sup>58</sup> the Court reaffirmed what it termed *Roe's* three-part "essential holding." First, a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State. Second, the State has the power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering the woman's life or health. And third, the State has legitimate interests from the pregnancy's outset in protecting the health of the woman and the life of the fetus that may become a child.<sup>59</sup>

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<sup>53</sup> 410 U.S. 113, 154 (1973).

<sup>54</sup> 410 U.S. at 163.

<sup>55</sup> 410 U.S. at 163-164.

<sup>56</sup> 410 U.S. at 163-164.

<sup>57</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>58</sup> 505 U.S. 833 (1992).

<sup>59</sup> 505 U.S. at 846.

In *Stenberg v. Carhart*,<sup>60</sup> the Court struck down a Nebraska law that criminalized the performance of partial-birth abortions because it lacked an exception to protect the health of the pregnant woman and because it could be interpreted to prohibit a more common abortion procedure, thus placing an undue burden on a woman's right to obtain an abortion. In *Gonzales v. Carhart*,<sup>61</sup> the Court upheld the Partial-Birth Abortion Ban Act of 2003.<sup>62</sup> The Act banned a specific type of partial birth abortion, the intact dilation and evacuation. The Court found that "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."<sup>63</sup>

2. The bill defines the terms "fetus" and "unborn human individual" and uses the terms interchangeably. While not identical, these terms are very similar and could possibly cause confusion in the application of the bill.

3. The Ohio Supreme Court in *State v. Hodge*<sup>64</sup> found that none of their precedents have suggested to the General Assembly that a statute that has been held unconstitutional by the court and that has never been repealed by that body may be automatically and suddenly revived through a later court decision. In *State v. Foster*,<sup>65</sup> the Supreme Court held some sections and provisions of Ohio's sentencing statutes unconstitutional. Subsequent to *Foster*, the United States Supreme Court, in *Oregon v. Ice*,<sup>66</sup> upheld the constitutional validity of an Oregon statute similar to Ohio's pre-*Foster* sentencing statutes that requires Oregon's trial judges to make factual findings prior to imposing consecutive sentences. The defendant in *Hodge* asked the Ohio Supreme Court to hold that *Ice* reinstated or revived the Ohio statutory provisions pertaining to consecutive sentences that were held unconstitutional in *Foster*. The Court rejected this argument, stating that a conclusion in this case that the previously stricken statute should automatically revive because it was never affirmatively repealed by an act of the General Assembly would conflict with and subvert fundamental finality interests that should normally be part and parcel of the Court's definitive holding that a statute fails

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<sup>60</sup> 530 U.S. 914 (2000).

<sup>61</sup> 550 U.S. 124 (2007).

<sup>62</sup> 18 U.S.C. § 1531.

<sup>63</sup> 550 U.S. at 158.

<sup>64</sup> Slip Opinion No. 2010-Ohio-6320.

<sup>65</sup> 109 Ohio St.3d 1, 2006-Ohio-856.

<sup>66</sup> *Oregon v. Ice*, 555 U.S. 160 (2009).

to comply with either the United States Constitution or the Ohio Constitution. The Court found that the statutes that were severed in *Foster* are not automatically revived and therefore those statutes remain null and of no effect absent an affirmative act of the General Assembly.

Based on these holdings, it is not clear if the bill's effective date provision expressed in R.C. 2919.19(I) would qualify as an affirmative act of the General Assembly. Thus, it is not clear if R.C. 2919.19(I) would revive a provision of the bill if that provision were found unconstitutional in one case, and then subsequently constitutional in an unrelated case. If an appellate court considering the original case in which a provision was held unconstitutional reverses that decision, R.C. 2919.19(I) may then apply. However, R.C. 2919.19(I) may not be necessary in that circumstance.

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## HISTORY

ACTION	DATE
Introduced	02-24-11
Reported, H. Health & Aging	03-30-11
Passed House (54-44)	06-28-11

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