

Interested Party Testimony on Substitute HB 125
James Bopp Jr.*
Ohio Senate Health, Human Services, and Aging Committee
December 13, 2011

Mr. Chairman, Members of the Ohio Senate Health, Human Services, and Aging Committee:

On June 28, 2011, the Ohio House of Representatives passed Substitute HB 125 (the “Bill”), which was introduced in the Ohio Senate on June 30.¹ This Bill centers around the presence of a fetal heartbeat in the abortion context—(1) requiring that the informed-consent dialogue between abortionists and women seeking abortion include the presence of a fetal heartbeat, if there is one, and (2) banning abortions after fetal heartbeat begins (with both inapplicable where there exists a risk to the life or health of the mother).

Part I addresses the Bill generally and the ban specifically. I believe that the ban is unconstitutional, imprudent, and dangerous.² Part II addresses the informed-consent provision. I believe that the informed-consent provisions are constitutional and useful legislation.

I. The Ban

A. What Would the Bill Do?

What would the Bill do if enacted? It requires essentially the following things of a potential abortionist when a woman seeks an abortion: (1) check for a fetal heartbeat; (2) if there is a heartbeat, advise her in writing, at least 24 hours before an abortion, of the heartbeat and “the statistical probability of bringing the unborn human individual to term based on the gestational age”; (4) obtain from her a signed form acknowledging receipt of the prescribed information; and (5) not perform an abortion where there is a fetal heartbeat and there is no risk of death or serious physical harm to the mother. There are also stated exceptions to the informed-consent requirement, and there are recordkeeping requirements, a penalty classification, a severability clause, and provisions relating to the effect of different outcomes of litigation.

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¹ See http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_125 (text); <http://lsc.state.oh.us/coderev/hou129.nsf/House+Bill+Number/0125?OpenDocument> (legislation status).

² A post-heartbeat ban might have constitutional applications post-viability, but whether it would be facially upheld on that basis raises several issues that will not be addressed here. A post-viability ban has already been enacted in Ohio, so there would be no practical effect from such an application of the heartbeat ban.

B. Is the Ban Constitutional?

Is the ban constitutional? The controlling precedent is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), in which it was hoped that Justice Kennedy would join a majority willing to overturn *Roe v. Wade*, 410 U.S. 113 (1973), the case proclaiming a right to choose abortion. He did not. Instead, he jointly authored the Court's opinion with Justices O'Connor and Souter, in which the Court reaffirmed *Roe* as follows:

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before 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. Second is a confirmation of 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. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

Casey, 505 U.S. at 846. The three coauthors then modified *Roe*'s trimester framework as follows:

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. See *Webster v. Reproductive Health Services*, 492 U.S., at 518 (opinion of REHNQUIST, C.J.); *id.*, at 529 (O'CONNOR, J., concurring in part and concurring in judgment) (describing the trimester framework as "problematic"). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

* * *

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.

Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874 (O'Connor, Kennedy & Souter, JJ.).

So a state may *ban* abortion *after fetal viability*, provided there are appropriately worded exceptions for the mother's life and health. Before that, a state has considerable latitude to assert its interests in protecting the unborn child and assuring fully informed consent, so long as there is no "undue burden" on the right to choose abortion.

Under this controlling analysis, the informed-consent provisions of the Bill should survive constitutional scrutiny. *See* Part II. But the ban on abortions after a heartbeat is detected is unconstitutional. It does not follow the viability line that the Court established in *Roe* and reaffirmed in *Casey*, and is not even close to it because a heartbeat may be detected long before viability.

C. Is the Ban Wise, and Is It Dangerous?

Is it wise to enact a ban that is unconstitutional under current precedent? Is there danger? To answer these questions, here is more of the big picture.

Roe declared a right of privacy that encompassed abortion. 410 U.S. 113. That case was widely-decried by legal scholars as being without constitutional warrant, but a series of subsequent cases made the declared right virtually absolute, as demonstrated in a comprehensive law review article I co-authored. *See* James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. Law 181 (1989).

In the early years following *Roe*, there was much scholarly debate over how best to obtain reversal of *Roe* by means of a federal statute or constitutional amendment. In 1984, the Horatio R. Storer Foundation published *Restoring the Right to Life: The Human Life Amendment*, which I edited. I also wrote Chapter 1, "An Examination of Proposals for a Human Life Amendment." The chapter discussed the pros and cons of a variety of proposals and concluded by setting out the language of a proposed human life amendment that had been unanimously approved by the National Right to Life Committee's board of directors in 1981. The NRLC Amendment was the work of multiple groups of constitutional scholars and consultants over a year of study on how to improve on the Garn Amendment (a then-current proposal) based on meeting eleven vital objectives for a full and proper reversal of *Roe*. "The intent of the NRLC Amendment [wa]s to fully reverse *Roe v. Wade* and meet all of the objectives of full restoration of legal protection to the unborn," Bopp, *Restoring the Right to Life* at 50. "Unlike the Garn Amendment, which meets only eight of the eleven objectives, the NRLC Amendment accomplishes them all." *Id.* Despite valiant efforts in the 1980s, attempts to reverse *Roe* by a federal constitutional amendment or statute failed (and prospects for doing so now or in the near future are nonexistent in light of current political realities).

Attention also focused on altering the balance of Supreme Court justices supporting *Roe*. In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986),

Chief Justice Burger switched sides to increase dissenters to *Roe* from three to four. With the arrival of Justice Kennedy on the Court it seemed likely that a majority for reversal had finally been achieved. In fact, during this time I was active in presenting the Court with an opportunity to reverse *Roe* by bringing a series of cases seeking consideration of the rights of fathers who objected to the planned abortion of their unborn children.³ But Justice Kennedy dashed those hopes by joining a reaffirmation of the basic abortion right in *Casey*. 505 U.S. 833.

As the Court currently stands, it seems that Justices Scalia and Thomas would vote to reverse *Roe*, and there is a possibility that Chief Justice Roberts and Justice Alito might ultimately do so as well, though these two votes remain speculative. But those four votes, even if assured, would remain one short of the five necessary to create a majority. And it should be noted that even anti-*Roe* Justice Scalia apparently believes that the Constitution requires return of abortion regulation to the states, not that it requires protection of the unborn as “persons” (absent a federal constitutional amendment making them so, of course).

The Supreme Court’s current makeup assures that a declared federal constitutional right to abortion remains secure for the present. This means that now is not the time to pass state abortion bans because (1) such provisions will be quickly struck down by a federal district court, (2) that decision will be affirmed by an appellate court, (3) the Supreme Court will not grant review of the decision, and (4) the pro-abortion attorneys who brought the legal challenge will collect statutory attorneys fees from the state that enacted the provision in the amount of hundreds of thousands of dollars. The effort will have enriched the pro-abortion forces for no gain for the pro-life side. In fact, there will be a loss because there will be yet another federal-court decision declaring that state law on abortion is superseded by the federal constitution. No amount of stirring rhetoric arguing that the states have a duty to do something to trigger reconsideration of *Roe* changes the hard fact that such an effort is presently doomed to expensive failure. Both passion for the pro-life cause and wisdom about the means to achieve it must be maintained if the pro-life movement is to ultimately succeed.

But if the U.S. Supreme Court, as presently constituted, were to accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current “substantive due process” analysis (i.e., reading “fundamental” rights into the “liberty” guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg has long advocated—an “equal protection” analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the dissent, written by Justice

³ I also authored or co-authored several scholarly articles advocating reversal of *Roe* during this time. See Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. Law 181 (1989); Bopp & Coleson, *What Does Webster Mean?*, 138 U. Penn. L. Rev. 157 (1989); Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. Contemp. L. 131 (1989); Bopp & Coleson, *Webster and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1990); Bopp, Coleson & Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule Roe v. Wade?*, 1 Const. L. J. 55 (1990).

Ginsberg, in fact did so. *See id.* at 172 (Ginsberg, J., joined by Stevens, Souter & Breyer, JJ.) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”). If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize all current laws on abortion, such as laws requiring parental involvement for minors, waiting periods, specific informed consent information, and so on. A law *prohibiting* abortion would force Justice Kennedy to vote to strike down the law, giving Justice Ginsberg the opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as partial-birth-abortion bans, parental-involvement laws, women’s-right-to-know laws, waiting periods, and other legislative acts that do not prohibit abortion in any way, since Justice Kennedy is likely to approve such laws.⁴

An equal-protection justification for the declared abortion right was advocated by attorneys for the Planned Parenthood Federation and the ACLU in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). It has also been advocated by Harvard Law School Professor Laurence Tribe, among others. *See, e.g.* Tribe, *American Constitutional Law* 1353 n.109 (2d ed. 1988). While an argument can be made that the equal protection clause provides no basis for a right to abortion, *see* Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. Contemp. L. at 136-41, now-Justice Ginsberg has argued that the equal-protection clause provides a justification for an abortion right that is superior to the analysis employed in *Roe*. *See* Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L Rev. 375 (1985). And as noted above, three justices in *Gonzales* joined her position, stated in her dissent. Were the Court to embrace her view that the equal-protection clause protects the right to choose abortion on the basis of gender discrimination (in a majority opinion, or even in a plurality opinion), states would likely have to fund abortions that they are not currently required to fund in programs for indigent persons. This has happened in some states that passed an equal-rights amendment (which has a similar analytical effect to adopting an equal protection rationale for abortion rights). *See, e.g., Fisher v. Dept. Pub.*

⁴ Note that in *Casey*, 505 U.S. at 846, the Court abandoned the trimester scheme of *Roe* but retained a distinction between pre- and post-viability, stating that post-viability abortions could be prohibited provided there was a sufficient health exception. Of course, since *Doe v. Bolton*, 410 U.S. 179 (1973), pro-life scholars and leaders have been trying to cut back on the Court’s on-demand definition of the “health” for which an exception must be permitted. In *Gonzales*, 550 U.S. 124, the Supreme Court upheld *on its face* a federal partial-birth abortion ban that applied in both pre- and post-viability situations even though it lacked a health exception. That ban left in place other commonly used abortion methods, and there was dispute over whether the PBA procedure offered any advantage over those. (*Gonzales* is notable for treating an abortion case with usual rules of jurisprudence—instead of treating abortion as a “super” right and simply throwing out most efforts to restrict it.) Whether such a PBA ban will be found unconstitutional as applied to specific fact patterns remains to be seen. But other cases make clear that a life and health exception is normally required.

Welfare, 482 A.2d 1137 (1984), *rev'd*, 502 S.2d 114 (Pa. 1985); *Maher v. Roe*, 515 A.2d 134 (Conn. Super. Ct. 1986).

In sum, it is imprudent to enact abortion bans presently, and there is serious danger in doing so. Rather, current efforts should focus on permissible non-ban legislation,⁵ and on education and advocacy designed to change hearts and minds, to get pro-life officials elected, and to get favorable justices on the U.S. Supreme Court so that one day *Roe* may be reversed.

II. The Bill's Informed-Consent Requirements

A. What Would the Bill's Informed-Consent Requirements Do?

Without the ban, the Bill would yet have important informed-consent requirements, i.e., requiring a potential abortionist, with medical-emergency exceptions, to (1) check for a fetal heartbeat; (2) if there is a heartbeat, advise the mother in writing, at least 24 hours before an abortion, of the heartbeat and “the statistical probability of bringing the unborn human individual to term based on the gestational age”; and (4) obtain from her a signed form acknowledging receipt of the prescribed information.

B. Are These Informed-Consent Requirements Constitutional?

In analyzing the constitutionality of these informed-consent requirements, I shall first discuss the analyses in the Supreme Court's *Casey* decision and the Sixth Circuit's *Voinovich* decision.

Recall that the three *Casey* coauthors said that in their (controlling) view, “[m]easures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*” and “[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.” 505 U.S. at 874 (O'Connor, Kennedy & Souter, JJ.).

In *Casey*, the Court upheld Pennsylvania's medical-necessity exception, which made an exception—to provisions requiring informed consent, a waiting period, and the woman's certification—where “a delay would create a serious risk of substantial and irreversible impairment of a major bodily function.” *Id.* at 879-80 (citation omitted).⁶ The Bill provides a similar

⁵ An example of a current effort is Rep. Michele Bachmann's “Heartbeat Informed Consent Act” (HR 3130). A copy is appended.

⁶ As the Sixth Circuit noted in *Voinovich*, Pennsylvania's exception applied only to physical, not mental, health. 130 F.3d at 207-08. *Voinovich* distinguished Pennsylvania's law, which involved only a *delay* in obtaining an abortion, from Ohio's law at issue in *Voinovich*, which involved *banning* abortion. Because the Ohio law involved a ban, not a mere delay, it was held unconstitutional for lacking a mental-health exception. *Id.* at 207-10. In the present Bill, the ban would be subject to this holding, but not the informed-consent provisions. *Voinovich* also held the ban unconstitutional because it lacked a *scienter* requirement, which generally requires that a forbidden act be done with some particular mental state, such as “knowingly” or “willfully.” *Id.* at 203-06. Note that the Bill includes “knowingly” in connection with the ban. In *Voinovich*, the

exemption for “medical emergency,” defined as follows:

“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 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.

Casey upheld Pennsylvania’s “informed consent requirement,” which included mandated information to be communicated and offered, a waiting period, and a requirement that the woman certify receipt, all described as follows:

Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the “probable gestational age of the unborn child.” The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Id. at 881 (plurality opinion).

These requirements are quite similar to what the Bill’s informed-consent requirements would require. Requiring that a woman seeking an abortion be informed if a fetal heartbeat is present is simply a type of the now-familiar, women’s-right-to-know laws that have been passed and upheld as part of the informed-consent dialogue between a woman and an abortionist. Requiring this to be done 24 hours before an abortion may be done, is simply a type of the now-familiar, waiting-period laws that have been passed and upheld as providing the woman adequate time to reflect on the information imparted in the informed-consent dialogue and to check out alternatives to abortion if desired.⁷

particular scienter problem was that the determination of viability was left objective, not subjective, so that an abortionist’s viability determination could be second-guessed by other doctors, which the court held would have a chilling effect and created an “undue burden.” *Id.* at 206. The present Bill, leaves the viability determination to the abortionist’s subjective determination, based on knowledge known at the time.

⁷ The Ohio Legislative Service Commission provides a bill analysis of the Bill, which analysis includes an overview of Ohio abortion law. See <http://www.lsc.state.oh.us/analyses129/h0125-ph-129.pdf>. It indicates that Ohio currently has laws in effect that, with exceptions: (1) require viability testing before abortions, *id.* at 11-12; (2) ban post-viability abortions, *id.* at 10-11; (3) require informed consent, *id.* at 12; (4) require parental involvement for minors seeking abortion, *id.* at 12-14; and (5) ban partial-birth abortion, *id.* at 14-15. Ohio’s current

In sum, these informed-consent provisions are constitutional. And they provide valuable information to women contemplating abortion.

informed-consent statute already requires that certain information be conveyed to women seeking an abortion 24 hours in advance of an abortion. *See* Ohio Rev. Code Ann. § 2317.56 (West 2011).

Appendix

112TH CONGRESS
1ST SESSION

H. R. 3130

To ensure that women seeking an abortion receive an ultrasound and an opportunity to review the ultrasound before giving informed consent to receive an abortion.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 6, 2011

Mrs. BACHMANN (for herself, Mr. GIBBS, Mr. FRANKS of Arizona, Mr. GOHMERT, Mr. JONES, Mr. HUIZENGA of Michigan, Mr. SMITH of New Jersey, Mr. JOHNSON of Ohio, Mrs. SCHMIDT, Mr. BURTON of Indiana, Mr. AUSTRIA, Mr. KING of Iowa, Mr. MCKINLEY, Mr. BUCSHON, Mr. LAMBORN, Mr. SCALISE, Mr. KELLY, Mr. WESTMORELAND, Mr. BILIRAKIS, Mr. LATTA, Mrs. ELLMERS, Mr. MCCOTTER, Mr. HARRIS, Mr. BRADY of Texas, Mr. LONG, Mr. CRAVAACK, Mr. BOUSTANY, Mr. MILLER of Florida, Mr. PALAZZO, and Mr. FLEMING) introduced the following bill; which was referred to the Committee on Energy and Commerce

A BILL

To ensure that women seeking an abortion receive an ultrasound and an opportunity to review the ultrasound before giving informed consent to receive an abortion.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Heartbeat Informed
5 Consent Act”.

1 **SEC. 2. FINDINGS.**

2 The Congress finds as follows:

3 (1) The presence of a heartbeat in a woman's
4 unborn child will be a material consideration to
5 many women contemplating abortion.

6 (2) The presence of a heartbeat in a woman's
7 unborn child is a developmental fact that illustrates
8 to the woman that her baby is already alive.

9 (3) On about the 21st or 22nd day after fer-
10 tilization (which is about 5 weeks from the first day
11 of the last menstrual period) the heart of an unborn
12 child begins to beat.

13 (4) The heartbeat of an unborn child can be
14 visually detected at an early stage of pregnancy
15 using an ultrasound machine, typically, at 4 to 4.5
16 weeks after fertilization (6 to 6.5 weeks from the
17 first day of the last menstrual period) on
18 transvaginal ultrasound, and at 5.5 to 6 weeks after
19 fertilization (7.5 to 8 weeks from the first day of the
20 last menstrual period) on transabdominal
21 ultrasound.

22 (5) The heartbeat of an unborn child can be
23 made audible at later stages, including by using a
24 handheld Doppler fetal monitor.

25 (6) Less than five percent of all natural preg-
26 nancies end in spontaneous miscarriage after detec-

1 tion of cardiac activity. A fetal heartbeat is therefore
2 a key medical indicator that an unborn child is likely
3 to achieve the capacity for live birth.

4 (7) The observation of a heartbeat in a wom-
5 an’s unborn child, when a heartbeat has been de-
6 tected, is an important component of full informed
7 consent.

8 (8) Ensuring full informed consent for an abor-
9 tion is imperative, because of the profound physical
10 and psychological risks of an abortion. As the Su-
11 preme Court has observed, “[t]he medical, emo-
12 tional, and psychological consequences of an abortion
13 are serious and can be lasting.” *H.L. v. Matheson*,
14 450 U.S. 398, 411 (1981). The woman’s decision
15 whether to abort “is an important, and often a
16 stressful one, and it is desirable and imperative that
17 it be made with full knowledge of its nature and
18 consequences.” *Planned Parenthood v. Danforth*,
19 428 U.S. 52, 67 (1976). “Whether to have an abor-
20 tion requires a difficult and painful moral decision,”
21 in which “some women come to regret their choice
22 to abort the infant life they once created and sus-
23 tained,” and “[s]evere depression and loss of esteem
24 can follow . . . The State has an interest in ensur-
25 ing so grave a choice is well informed. It is self-evi-

1 dent that a mother who comes to regret her choice
2 to abort must struggle with grief more anguished
3 and sorrow more profound when she learns, only
4 after the event, what she once did not know . . .”
5 *Gonzales v. Carhart*, 550 U.S. 124, 159–160
6 (2007).

7 (9) Requiring providers to give a woman an op-
8 portunity to observe her unborn child’s heartbeat is
9 constitutionally permissible, and the ultrasound
10 image of an unborn child is truthful, nonmisleading
11 information. “In attempting to ensure that a woman
12 apprehend the full consequences of her decision, the
13 State furthers the legitimate purpose of reducing the
14 risk that a woman may elect an abortion, only to
15 discover later, with devastating psychological con-
16 sequences, that her decision was not fully informed.
17 If the information the State requires to be made
18 available to the woman is truthful and not mis-
19 leading, the requirement may be permissible.”
20 (Opinion of O’Connor, Kennedy, and Souter,
21 *Planned Parenthood v. Casey*, 505 U.S. 833, 882
22 (1992)).

23 (10) Further, recent research, taking into ac-
24 count 22 studies with control groups and more than
25 877,000 women over a 14-year period, finds that

1 women who have had an abortion have an 81 per-
 2 cent increased risk for mental health problems and
 3 10 percent of the mental health problems of women
 4 who have had an abortion are directly attributed to
 5 abortion.

6 **SEC. 3. AMENDMENT TO THE PUBLIC HEALTH SERVICE**
 7 **ACT.**

8 The Public Health Service Act (42 U.S.C. 201 et
 9 seq.) is amended by adding at the end the following:

10 **“TITLE XXXIV—INFORMED**
 11 **CONSENT**

12 **“SEC. 3401. DEFINITIONS.**

13 “In this title:

14 “(1) ABORTION.—The term ‘abortion’ means
 15 the intentional use or prescription of any instru-
 16 ment, medicine, drug, or any other substance, de-
 17 vice, or method to terminate the life of an unborn
 18 child, or to terminate the pregnancy of a woman
 19 known to be pregnant, with an intention other
 20 than—

21 “(A) to produce a live birth and preserve
 22 the life and health of the child after live birth;
 23 or

24 “(B) to remove an ectopic pregnancy, or to
 25 remove a dead unborn child who died as the re-

1 sult of a spontaneous abortion, accidental trauma,
2 ma, or a criminal assault on the pregnant female
3 or her unborn child.

4 “(2) ABORTION PROVIDER.—The term ‘abortion
5 provider’ means any person legally qualified to perform
6 an abortion under applicable Federal and State
7 laws.

8 “(3) CERTIFIED TECHNICIAN.—The term ‘certified
9 technician’ means—

10 “(A) a registered diagnostic medical
11 sonographer who is certified in obstetrics and
12 gynecology by the American Registry for Diagnostic
13 Medical Sonography (ARDMS); or

14 “(B) a nurse midwife, or an advanced
15 practice nurse practitioner in obstetrics, with
16 certification in obstetrical ultrasonography.

17 “(4) EMBRYONIC OR FETAL HEARTBEAT.—The
18 term ‘embryonic or fetal heartbeat’ means embryonic
19 or fetal cardiac activity or the steady and repetitive
20 rhythmic contraction of the embryonic or fetal heart.

21 “(5) UNBORN CHILD.—The term ‘unborn child’
22 means a member of the species homo sapiens, at any
23 stage of development prior to birth.

24 “(6) UNEMANCIPATED MINOR.—The term
25 ‘unemancipated minor’ means a minor who is sub-

1 ject to the control, authority, and supervision of his
2 or her parents or guardians, as determined under
3 the law of the State in which the minor resides.

4 “(7) WOMAN.—The term ‘woman’ means a fe-
5 male human being whether or not she has reached
6 the age of majority.

7 **“SEC. 3402. REQUIREMENT OF INFORMED CONSENT.**

8 “(a) REQUIREMENT OF COMPLIANCE BY PRO-
9 VIDERS.—Any abortion provider in or affecting interstate
10 or foreign commerce, who knowingly performs any abor-
11 tion, shall comply with the requirements of this title.

12 “(b) PERFORMANCE AND REVIEW OF
13 ULTRASOUND.—

14 “(1) REQUIREMENT.—Prior to a woman giving
15 informed consent to having any part of an abortion
16 performed, the abortion provider who is to perform
17 the abortion, a certified technician, or another agent
18 of the abortion provider who is competent in
19 ultrasonography shall—

20 “(A) perform an obstetric ultrasound on
21 the pregnant woman;

22 “(B) during the performance of the
23 ultrasound, display the ultrasound images (as
24 described in paragraph (2)) so that the preg-
25 nant woman may view the images; and

1 “(C) provide a medical description of the
2 ultrasound images of the unborn child’s cardiac
3 activity, if present and viewable.

4 “(2) QUALITY OF ULTRASOUND IMAGES.—To
5 be displayed in accordance with paragraph (1)(B),
6 ultrasound images shall—

7 “(A) be of a quality consistent with stand-
8 ard medical practice;

9 “(B) contain the dimensions of the unborn
10 child; and

11 “(C) accurately portray the presence of ex-
12 ternal members and internal organs, if present.

13 “(3) ABILITY TO AVERT EYES.—Nothing in this
14 section shall be construed to prevent a pregnant
15 woman from closing or averting her eyes from the
16 ultrasound images required to be displayed, or not
17 listening to the description of the images required to
18 be given, by the provider or the provider’s agent
19 pursuant to paragraph (1).

20 “(c) AUDIBLE EMBRYONIC OR FETAL HEART-
21 BEAT.—

22 “(1) REQUIREMENT.—Prior to a woman giving
23 informed consent to having any part of an abortion
24 performed, if the pregnancy is at least 8 weeks after
25 fertilization (10 weeks from the first day of the last

1 menstrual period), the abortion provider who is to
2 perform the abortion, a certified technician, or an-
3 other agent of the abortion provider shall, using a
4 hand-held Doppler fetal monitor, make the embry-
5 onic or fetal heartbeat of the unborn child audible
6 for the pregnant woman to hear.

7 “(2) UNSUCCESSFUL ATTEMPTS AT DETECTING
8 HEARTBEAT.—An abortion provider, a certified tech-
9 nician, or another agent of the abortion provider
10 shall not be in violation of paragraph (1) if—

11 “(A) the provider, certified technician, or
12 agent has attempted, consistent with standard
13 medical practice, to make the embryonic or fetal
14 heartbeat of the unborn child audible for the
15 pregnant woman to hear using a hand-held
16 Doppler fetal monitor;

17 “(B) that attempt does not result in the
18 heartbeat being made audible; and

19 “(C) the provider has offered to attempt to
20 make the heartbeat audible at a subsequent
21 date.

22 “(3) ABILITY TO NOT LISTEN.—Nothing in this
23 section shall be construed to prevent the pregnant
24 woman from not listening to the sounds detected by

1 the hand-held Doppler fetal monitor, pursuant to
2 paragraph (1).

3 **“SEC. 3403. EXCEPTION FOR MEDICAL EMERGENCIES.**

4 “(a) EXCEPTION.—The provisions of section 3402
5 shall not apply to an abortion provider in the case that
6 the abortion is necessary to save the life of a mother whose
7 life is endangered by a physical disorder, physical illness,
8 or physical injury, including a life-endangering physical
9 condition caused by or arising from the pregnancy itself.

10 “(b) CERTIFICATION.—

11 “(1) IN GENERAL.—Upon a determination by
12 an abortion provider under subsection (a) that an
13 abortion is necessary to save the life of a mother,
14 such provider shall certify the specific medical condi-
15 tions that support such determination and include
16 such certification in the medical file of the pregnant
17 woman.

18 “(2) FALSE STATEMENTS.—An abortion pro-
19 vider who knowingly or recklessly falsifies a certifi-
20 cation under paragraph (1) is deemed to have know-
21 ingly or recklessly failed to comply with this title for
22 purposes of section 3404.

23 **“SEC. 3404. PENALTIES.**

24 “(a) IN GENERAL.—An abortion provider who know-
25 ingly or recklessly fails to comply with any provision of

1 this title shall be subject to civil penalties in accordance
2 with this section in an appropriate Federal court.

3 “(b) COMMENCEMENT OF ACTION.—The Attorney
4 General may commence a civil action under this section.

5 “(c) FIRST OFFENSE.—Upon a finding by a court
6 that a respondent in an action commenced under this sec-
7 tion has knowingly or recklessly violated a provision of this
8 title, the court shall notify the appropriate State medical
9 licensing authority and shall assess a civil penalty against
10 the respondent in an amount not to exceed \$100,000 for
11 each such violation.

12 “(d) SECOND AND SUBSEQUENT OFFENSES.—Upon
13 a finding by a court that the respondent in an action com-
14 menced under this section has knowingly or recklessly vio-
15 lated a provision of this title, the court shall notify the
16 appropriate State medical licensing authority and shall as-
17 sess a civil penalty against the respondent in an amount
18 not to exceed \$250,000 for each such violation if the re-
19 spondent has been found in a prior civil action to have
20 knowingly or recklessly committed another violation of a
21 provision of this title.

22 “(e) PRIVATE RIGHT OF ACTION.—A woman upon
23 whom an abortion has been performed in violation of this
24 title, or the parent or legal guardian of such a woman if
25 she is an unemancipated minor, may commence a civil ac-

1 tion against the abortion provider for any knowing or reck-
2 less violation of this title for actual and punitive dam-
3 ages.”.

4 **SEC. 4. PREEMPTION.**

5 Nothing in this Act or the amendments made by this
6 Act shall be construed to preempt any provision of State
7 law to the extent that such State law establishes, imple-
8 ments, or continues in effect greater disclosure require-
9 ments regarding abortion than those provided under this
10 Act and the amendments made by this Act.

11 **SEC. 5. SEVERABILITY.**

12 If any provision of this Act, an amendment by this
13 Act, or the application of such provision or amendment
14 to any person or circumstance is held to be unconstitu-
15 tional, the remainder of this Act and the amendments
16 made by this Act, and the application of the provisions
17 of such remainder to any person or circumstance, shall
18 not be affected thereby.

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