Testimony of B. Jessie Hill
Associate Dean for Academic Affairs and
Judge Ben C. Green Professor of Law
Case Western Reserve University
to the House Health Committee
Opposing House Bill 258
December 6, 2017

I am writing to oppose H.B. 258. I am the Associate Dean for Academic Affairs and Judge Ben C. Green Professor of Law at Case Western Reserve University School of Law. I have been teaching, publishing scholarship, and litigating in the field of constitutional law, with a particular focus on reproductive rights, for fifteen years. I write now to share with the Committee my constitutional analysis of the bill currently under consideration, which criminalizes performing an abortion after a fetal heartbeat is detectable except in very limited circumstances. I am submitting this testimony on my own behalf and not on behalf of Case Western Reserve University.

This bill is unconstitutional. H.B. 258 prohibits performing an abortion except in narrowly defined circumstances to preserve the life or health of the woman, as early as six weeks of pregnancy. However, longstanding precedent that has been reaffirmed by the U.S. Supreme Court as recently as 2016 clearly and unequivocally holds that the state may not outlaw abortion before the point of viability—that is, the point at which the fetus would be capable of surviving outside the womb. Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). In *Planned Parenthood v. Casey*, the Supreme Court upheld "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State," explaining 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."

The point of viability arrives much later in pregnancy than the early first-trimester point at which the heartbeat is detectable. Since H.B. 258 thus outlaws a large percentage of pre-viability abortions, it is clearly unconstitutional; for this reason, similar laws adopted by other states have been struck down. In *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015), the Eighth Circuit Court of Appeals stated, "Because there is no genuine dispute that [the Nebraska law] generally prohibits abortions before viability—as the Supreme Court has defined

that concept—and because we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions," it was required to hold the law unconstitutional. And in *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015), the same court struck down a ban on abortions after twelve weeks, relying again on *Roe* and *Casey*.

Moreover, although H.B. 258 seeks to define viability as beginning when the heartbeat becomes detectable, the U.S. Constitution does not permit the state to create its own definitions of critical concepts in abortion jurisprudence as a way of avoiding or making an end-run around that jurisprudence. In *Roe v. Wade*, the State of Texas had argued that life begins at conception and therefore that abortion may be outlawed in all circumstances except to save the life of the woman. The Supreme Court rejected this attempt to eliminate women's right to abortion by redefining fetuses as constitutional persons, explaining that the state may not, "by adopting one theory of life, … override the rights of the pregnant woman that are at stake." 410 U.S. at 162.

The State of Ohio should not expend any further time or resources on this flagrantly and unquestionably unconstitutional bill, which, if passed, will undoubtedly provoke a legal challenge and result in an award of attorney fees against the state.

For all of these reasons, I oppose this legislation.