

**Professor Marc Spindelman\***  
**Testimony Regarding S.B. 164**  
**November 14, 2017**

**Ohio Senate**  
**Health, Human Services and Medicaid Committee**

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

Like many, if not all, laws impacting the rights of women in relation to reproduction, S.B. 164 raises profound personal, ethical, spiritual, and political questions. These questions touch upon some of the most fundamental aspects of human existence and the human condition. These questions and their delicate nature must be acknowledged at the outset. They are vital questions to ask, and to ask as questions that ought to be talked about openly in the public sphere. What follows here, though, is something else. It is an engagement with an almost entirely different, though not wholly unrelated question: How does S.B. 164,<sup>1</sup> conform to the U.S. Constitution as that charter of government and civil and political rights now stands?

The conclusion is readily stated up front: S.B. 164, as written, is inconsistent with the federal Constitution's demands. The discussion that follows begins with a brief summary of what S.B. 164 does. It then turns to an analysis of the measure, starting with a basic overview of the relevant constitutional rules against which it must be measured. Next, it turns to an engagement with S.B. 164 in both its pre-viability and post-viability applications. By way of conclusion, finally, the testimony ends with a note on one personal question of conscience that S.B. 164 raises.

**What Does S.B. 164 Do?**

Succinctly, S.B. 164 prohibits anyone from “purposely perform[ing] or induc[ing] or attempt[ing] to perform or induce an abortion on a pregnant woman if that person has knowledge that the pregnant woman is seeking an abortion, in whole or in part”<sup>2</sup> because of any one of three reasons: (1) “[a] test result indicating Down syndrome in”<sup>3</sup> the fetus she carries, referred to in the bill as “the unborn child,”<sup>4</sup> (2) because of “[a] prenatal diagnosis of Down syndrome in”<sup>5</sup> the fetus she carries, or (3) because, to quote the language of the bill, of “[a]ny other reason [that the woman has or might have] to believe that an unborn child has Down syndrome.”<sup>6</sup> Anyone who performs or induces or attempts to

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<sup>1</sup> S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to amend OHIO REV. CODE § 3701.79 and to enact OHIO REV. CODE §§ 2919.10 and 2919.101).

<sup>2</sup> S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)).

<sup>3</sup> *Id.* at §§ 2919.10(B)(1)–(3).

<sup>4</sup> *Id.* at § 2919.10(B)(1).

<sup>5</sup> *Id.* at § 2919.10(B)(2).

<sup>6</sup> *Id.* at § 2919.10(B)(3).

perform or induce an abortion under these circumstances commits a fourth degree felony,<sup>7</sup> which carries a criminal penalty of six to eighteen months in prison and a fine of not more than \$5,000.00.<sup>8</sup> While the terms of S.B. 164 expressly exempt pregnant women themselves from the operation of its criminal liability rule,<sup>9</sup> physicians who violate its terms are subject to sanction by the State Medical Board, which is mandated to “revoke a physician’s license to practice medicine in this state”<sup>10</sup> for any violation of S.B. 164’s terms.

In addition to these professional sanctions, S.B. 164 expressly authorizes civil liability for the same underlying conduct. Along these lines, S.B. 164 holds that any physician who violates its terms will be “liable in a civil action for compensatory and exemplary damages and reasonable attorney’s fees to any person, or the representative of the estate of any person, who sustains injury, death, or loss to person or property as the result of the performance or inducement or the attempted performance or inducement of the abortion.”<sup>11</sup> Importantly, S.B. 164, far from leaving off with monetary liability, authorizes a court in a S.B. 164-related case to award “any injunctive or other equitable relief that the court considers appropriate.”<sup>12</sup> While the scope of these “injunctive or other equitable relief”<sup>13</sup> powers cannot be fully known in advance, they are, potentially, sweeping.

In addition, leaving aside some provisions of the measure that, while important, are not especially germane to the present analysis,<sup>14</sup> S.B. 164 imposes certain reporting requirements on attending physicians.<sup>15</sup> It demands that attending doctors “shall indicate”<sup>16</sup> in State-required reporting that she or he “does not have knowledge that the pregnant woman was seeking the abortion, in whole or in part”<sup>17</sup> because of any of the prohibited reasons for doing so.

Part of what is striking about S.B. 164 is the terrain that it affirmatively occupies. In sponsor testimony before the House Health Committee on S.B. 164’s House counterpart, H.B. 214,<sup>18</sup> Representative Derek Merrin referred to an even earlier bill, H.B. 135, that H.B. 214 “strengthened”<sup>19</sup> by expanding the earlier measure’s reach. Unlike that earlier measure, which prohibited “abortion ‘solely’ because of a test result indicating Down syndrome,”<sup>20</sup> H.B. 214 and S.B. 164 do more. These measures

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<sup>7</sup> *Id.* at § 2919.10(C).

<sup>8</sup> O.R.C. § 2929.14(4) (term); O.R.C. § 2929.18(A)(3)(d) (fine).

<sup>9</sup> See S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(F)). The immunity provision is silent on civil liability immunities.

<sup>10</sup> S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(D)).

<sup>11</sup> *Id.* at § 2919.10(E).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See, for example, S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(G)) (“the provisions of this section and sections 2919.11 to 2919.193 of the Revised Code are severable as provided in section 1.50 of the Revised Code”); *id.* at § 2919.10(H) (“The general assembly may . . . intervene as a matter of right in any case in which the constitutionality of this section is challenged”).

<sup>15</sup> See S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.101(A)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> H.B. 214, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)).

<sup>19</sup> *House Bill 214 - Sponsor Testimony: Before the House Health Committee*, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18), Sept. 13, 2017 (Statement of Rep. Derek Merrin).

<sup>20</sup> H.B. 135, 131st Gen. Assemb., Reg. Sess. 1 (Ohio 2015–16) (to enact OHIO REV. CODE § 2919.20(B)).

both prohibit “purposely perform[ing] or induc[ing] or attempt[ing] to perform or induce an abortion”<sup>21</sup> when the pregnant woman’s reasons for seeking the abortion have anything at all to do with the fact, expectation, or belief that the fetus she is carrying “has Down syndrome.”<sup>22</sup>

Another part of what is striking about S.B. 164 is the terrain that the measure does not occupy, what is not included in the introduced draft of the legislation. S.B. 164 contains within it no exception to its operative abortion ban for circumstances in which a pregnant woman’s life or health, however defined, is imperiled by her pregnancy.<sup>23</sup> Concretely, S.B. 164, by its own terms, would prohibit a pregnant woman from terminating her pregnancy for the most urgent reasons having to do with her own life or health if the fact, expectation, or belief that the fetus she is carrying “has Down syndrome”<sup>24</sup> plays any part in her decision. If any of the prohibited reasons has any bearing on the pregnant woman’s choice to terminate her pregnancy, it does not matter what other reasons she does or might have for wishing to end her pregnancy. A pregnant woman herself may suffer no direct criminal consequences for her choice,<sup>25</sup> but the reasons that S.B. 164 defines as illicit do suffice to render her attending physician’s conduct unlawful, and subject to professional,<sup>26</sup> civil,<sup>27</sup> and criminal liability,<sup>28</sup> if the physician knows of them.<sup>29</sup> A great deal—both for the pregnant woman and for her physician, and, of course, from a pro-life point of view, for her unborn child—hinges on what the legal meaning of “knowledge,”<sup>30</sup> as used in the legislation, is.

### **AN ASSESSMENT OF S.B. 164 UNDER THE U.S. CONSTITUTION**

Before turning to an assessment of S.B. 164’s constitutionality, it will be useful briefly to describe some relevant aspects of existing rules under the U.S. Constitution affecting women’s reproductive rights in the abortion setting.

First, central to the substantive promise of liberty protected by the U.S. Constitution and its Fourteenth Amendment is an autonomy-based right that pregnant women enjoy, recognized ever since *Roe v. Wade*.<sup>31</sup> This right safeguards the decisions pregnant women make whether to end pregnancies before they reach term. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>32</sup> the Supreme

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<sup>21</sup> H.B. 214, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)); S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)).

<sup>22</sup> H.B. 214, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)(1)); S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)(1)). *See generally* S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact Ohio Rev. Code § 2919.10(B)(1)–(3)).

<sup>23</sup> Accord *Deputy Director for NARAL Pro-Choice Ohio, Opposing House Bill 214: Before the House Health Committee*, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18), Oct. 11, 2017 (Testimony of Jamie Miracle).

<sup>24</sup> *See supra* note 22.

<sup>25</sup> S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(F)).

<sup>26</sup> *Id.* at § 2919.10(D).

<sup>27</sup> *Id.* at § 2919.10(E).

<sup>28</sup> *Id.* at §§ 2919.10(B), (C).

<sup>29</sup> *Id.* at § 2919.10(B). At this point, it would be pure speculation to consider what sort of “knowledge” might, consistent with the purposes animating S.B. 164, give rise to legal liability. Actual knowledge must certainly suffice, but what sorts of indirect or constructive modes of knowing might also count?

<sup>30</sup> S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)).

<sup>31</sup> 410 U.S. 113 (1973).

<sup>32</sup> 505 U.S. 833 (1992).

Court reaffirmed what it termed *Roe*'s "essential holding,"<sup>33</sup> including, perhaps most importantly, "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."<sup>34</sup> In saying this, *Casey* accepted *Roe*'s conviction that fetal viability marked a crucial point during pregnancy and fetal development that could and, as *Roe* explained,<sup>35</sup> should serve as a significant dividing line for purposes of constitutional doctrine. Prior to that point in pregnancy and fetal development, *Casey* explained, the State's various interests in regulating a pregnant woman's abortion choice—interests in regulating medical standards and the medical profession,<sup>36</sup> in the seeking to protect and preserve the pregnant woman's life and health,<sup>37</sup> and in the (potential) life of the fetus<sup>38</sup>—

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<sup>33</sup> *Id.* at 846. *See also id.* at 869, 870, 871, 873, 880.

<sup>34</sup> *Id.* at 846.

<sup>35</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capacity of meaningful life outside the mother's womb.").

<sup>36</sup> *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("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"); *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").

<sup>37</sup> *See, e.g., Casey*, 505 U.S. at 871 (plurality opinion) ("the State has legitimate interests in the health of the woman"); *id.* at 882 (joint opinion of O'Connor, Kennedy & Souter, JJ.) ("Those [earlier abortion decisions] . . . recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health." (citation omitted)); *id.* at 900 (concluding that the recordkeeping and reporting requirements of the statute relate to the state's interest in health); *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").

<sup>38</sup> The Court has formulated this interest in various terms. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("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"); *Planned Parenthood 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"); *Casey*, 505 U.S. at 873 ("The 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"); *Roe*, 410 U.S. 113, 150 (1973) ("the State's interest—some phrase it in terms of duty—in protecting prenatal life"); *id.* at 154 ("a State may properly assert important interests . . . in protecting potential life"); *id.* at 155 ("at some point the state interests as to . . . prenatal life[] become dominant"); *id.* at 162 (the State "has still *another* important and legitimate interest in protecting the potentiality of human life" (emphasis in original)); *id.* at 163 ("interest in potential life"); *id.* ("the State is interested in protecting fetal life after viability"); *see also Casey*, 505 U.S. at 897–98 (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. 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"); *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) ("life or potential life of the fetus").

“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 [abortion] procedure.”<sup>39</sup>

In order to safeguard the constitutional abortion right from State efforts that would either take it away or unduly constrain it, the Supreme Court has not only declared pre-viability abortion prohibitions unconstitutional, but it has also subjected pre-viability abortion regulations to what it called an “undue burden” test.<sup>40</sup> As *Casey* described the test:

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 considered a permissible means of serving its legitimate ends.<sup>41</sup>

More recently, the Supreme Court, in *Whole Woman’s Health v. Hellerstedt*,<sup>42</sup> clarified that *Casey*’s “undue burden” test is properly understood as a mode of judicial analysis that depends on a constitutional balancing of interests by courts. The test, as *Whole Woman’s Health* explained it, seeks to ensure that the benefits of a State’s pre-viability abortion regulation outweigh their relative imposition of costs on pregnant women’s abortion rights. In the Court’s own words: “The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”<sup>43</sup> Following this announcement, the *Whole Woman’s Health* Court struck down State-imposed restrictions on the conditions under which abortions were to be provided in the State as unconstitutional. The particular measures at issue in the case failed to survive constitutional review because the measures’ benefits to women did not outweigh the burdens on abortion rights that they imposed.<sup>44</sup>

In contrast to the significant restrictions on the State’s ability to regulate abortions prior to the moment of fetal viability, after it, the rule since *Roe* has been that the State’s interest in protecting and preserving the (potential) life of the fetus is sufficiently powerful in constitutional terms that, from and after the moment of fetal viability, the State is generally at liberty to regulate a woman’s abortion choice<sup>45</sup>—even to the point of prohibiting abortions altogether.<sup>46</sup> Subject, that is, to one very important

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<sup>39</sup> *Casey*, 505 U.S. at 846; see also *Gonzales v. Carhart*, 550 U.S. 124, 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))).

<sup>40</sup> *Casey*, 505 U.S. at 878 (plurality opinion); see also *Gonzales v. Carhart*, 550 U.S. at 146 (applying *Casey*’s “standard to the cases at bar”); *Stenberg v. Carhart*, 530 U.S. 914, 921, 945–46 (2000) (applying the “undue burden” test by a majority of the Court to find state abortion statute unconstitutional).

<sup>41</sup> *Casey*, 505 U.S. at 877 (plurality opinion).

<sup>42</sup> 136 S. Ct. 2292 (2016).

<sup>43</sup> *Whole Woman’s Health*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887–98 (opinion of the Court), and *id.* at 898–901 (joint opinion of O’Connor, Kennedy, and Souter, JJ.)).

<sup>44</sup> *Id.* at 2310–18.

<sup>45</sup> *Casey*, at 846 (majority opinion) (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” rises to its highest constitutional heights).

and sizeable exception. Even after viability, when the State’s interests in regulating abortion are at their height, when the State may generally regulate and even ban abortions outright, it must, if it chooses to exercise these constitutionally legitimate powers,<sup>47</sup> make express exceptions for abortions needed to protect or preserve the pregnant woman’s life or health.<sup>48</sup> This constitutionally-required life and health exception is quite broad. The understanding of “health” that animates it includes both threats to a pregnant woman’s physical health, as well as to her psychological well-being.<sup>49</sup> No abortion restriction that imperils women’s life or health, broadly understood, may stand when the State’s authority to regulate abortions is at its height. By practical consequence, no pre-viability abortion regulation that

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<sup>46</sup>*Id.* (holding that the State may “restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health”); *id.* at 879 (plurality opinion) (quoting *Roe*, 410 U.S. 113, 164–65 (1973)); *Roe*, 410 U.S. at 163–65 (same).

<sup>47</sup> This is not a constitutional obligation, only a constitutional permission. *See, e.g., 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”); *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 163–65 (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 proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother” (emphasis added)).

<sup>48</sup> *Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 163–65.

<sup>49</sup> *See Gonzales v. Carhart*, 550 U.S. at 170 (Ginsburg, J., dissenting) (“[T]he *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect ‘the health of the woman.’” (quoting *Casey*, 505 U.S. at 846)); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 327–28 (2006) (“[O]ur precedents hold . . . that a State may not restrict access to abortions that are ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the [woman].’” (quoting *Casey*, 505 U.S. at 879 (plurality opinion))); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (“Since the law requires a health exception in order to validate even a post-viability abortion regulation, it at a minimum requires the same in respect to previability regulation.”); *Casey*, 505 U.S. at 882 (joint opinion of O’Connor, Kennedy & Souter, JJ.) (“Those [earlier abortion] decisions . . . recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health.” (citation omitted)); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768–69 (1986) (invalidating a *post*-viability abortion regulation for “fail[ure] to require that [a pregnant woman’s] health be the physician’s paramount consideration”); *Roe*, 410 U.S. at 153 (“Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is a problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.”); *Doe v. Bolton*, 410 U.S. 179, 191–92 (1973) (“[T]he medical judgment may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All of these factors may relate to health.”); *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 209–10 (6th Cir. 1997) (“[W]e emphasize that we are holding that a maternal health exception must encompass *severe* irreversible risks of mental and emotional harm. The State’s substantial interest in potential life must be reconciled with the woman’s constitutional right to protect her own life and health.”) (emphasis original). The scope of the health exception has been a source of controversy, in part on the grounds, as some commentators maintain, that it makes the right to abortion, throughout a pregnancy, effectively a right to abortion on demand. *See, e.g., Clarke D. Forsythe & Stephen B. Presser, The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 97 (2005) (“[N]o objective reader of *Carhart* could fail to conclude that *Roe* and *Doe* legalized abortion-on-demand from conception to birth for virtually any reason.” (footnote omitted)); Jay Alan Sekulow & John Tuskey, *The “Center” is in the Eye of the Beholder*, 40 N.Y.L. SCH. L. REV. 945 (1996) (“Given this infinitely expandable definition of ‘health,’ ‘the truth of the matter about *Roe* is that something very much like the abortion-on-demand mandated for the first two trimesters persists until birth.” (footnote omitted)).

fails to create a safe-harbor for abortions needed to protect or preserve a pregnant woman's life or health is constitutional either.

### **Applying the Constitutional Rules to S.B. 164**

An application of these basic rules to S.B. 164 begins with the measure's pre-viability application and then turns to its operation post-viability.

### **The pre-viability operation of S.B. 164**

Insofar as S.B. 164, if enacted, would ban a class of abortions outright prior to viability, it constitutes an abortion prohibition inconsistent with *Planned Parenthood v. Casey's* understanding of the Fourteenth Amendment. Consistent with *Casey's* "undue burden" test, a prohibition on abortion is equated with "the imposition of a substantial obstacle to the woman's effective right to elect the procedure,"<sup>50</sup> both of which constitute "undue burdens" on a woman's constitutional right to choose.

Very recently, a federal district court in Indiana in a case known as *Planned Parenthood of Indiana and Kentucky, Inc., v. Commissioner, Indiana State Department of Health*<sup>51</sup> reached and articulated a conclusion along these very lines in relation to an Indiana law, HEA 1337,<sup>52</sup> that (until it was struck down as unconstitutional) bore a family resemblance to S.B. 164:

The anti-discrimination provisions of HEA 1337 clearly . . . prevent women from obtaining abortions before fetal viability. The woman's right to choose to terminate a pregnancy pre-viability[, however,] is categorical: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."

. . . .  
. . . . The anti-discrimination provisions [of HEA 1337] prohibit a woman from choosing to terminate a pregnancy pre-viability if the abortion is sought solely for one of the enumerated reasons. . . . [I]t is a woman's right to *choose* an abortion that is protected, which, of course, leaves no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice.<sup>53</sup>

Unsurprisingly, to view S.B. 164 as an unconstitutional prohibition on pre-viability abortions is consistent with the approach to the "undue burden" test outlined in *Whole Woman's Health*, which, again, declared: "The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."<sup>54</sup> Seen in light of this approach, S.B. 164, with its prohibition on abortion if the actual, expected, or believed Down syndrome status of the fetus plays any part in a pregnant woman's decision to end her pregnancy and the abortion

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<sup>50</sup> *Casey*, 505 at 846; *see also id.* at 878 (plurality opinion); *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992).

<sup>51</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 2017 WL 4224750, (S.D. Ind. Sept. 22, 2017) [hereinafter *Planned Parenthood v. Ind. Dep't of Health*].

<sup>52</sup> House Enacted Act 1337, Second Reg. Sess. of the 119th Gen. Assemb. (Ind. 2016) (enacted).

<sup>53</sup> *Planned Parenthood v. Ind. Dep't of Health*, 2017 WL 4224750, at \*6 (S.D. Ind., Sept. 22, 2017). As support for its position that the State has "no room" "to examine, let alone prohibit, the basis or bases upon which a woman makes her choice," the opinion cites *Casey*, at 846, 879.

<sup>54</sup> *Whole Woman's Health*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887–98 (opinion of the Court), and *id.* at 898–901 (joint opinion of O'Connor, Kennedy, and Souter, JJ)).

provider knows about it, is a 100% burden on her constitutionally protected choice. It obliterates it. And it does this while offering no offsetting benefits to a pregnant woman in relation to the exercise of her constitutionally protected right. Abortion bans like S.B. 164, which offer all burden and no benefit to pregnant women’s exercise of their pre-viability abortion rights are, according to the teaching of *Whole Woman’s Health*,<sup>55</sup> and *Casey* by extension, violative of the Fourteenth Amendment’s Due Process Clause.<sup>56</sup>

Now, it is conceivable that one might attempt to argue that S.B. 164 is not like other abortion prohibitions to date, and that, as a result, a different and more nuanced constitutional analysis of the measure is in order. In a sense, it is true that S.B. 164, like other similar, recent measures in other jurisdictions, has a novel quality to it.<sup>57</sup> S.B. 164 is not a categorical bar on abortions that focuses on an abortion procedure, like the federal Partial-Birth Abortion Ban Act of 2003<sup>58</sup> upheld in *Gonzales v. Carhart*<sup>59</sup> did. Nor is S.B. 164 a categorical bar on abortion that focuses on fetal anatomic development, like Ohio’s “Heartbeat Bill”<sup>60</sup> or its 20-week abortion ban,<sup>61</sup> or other measures that would ban abortion from the point of conception on. By contrast, S.B. 164’s abortion prohibition trains its sights on the workings of a pregnant woman’s mind, her deliberative decisional processes. Its legal block on abortions only arises when a pregnant woman seeks an abortion “in whole or in part,” “because of” “[a] test result indicating Down syndrome in”<sup>62</sup> the fetus she carries, “[a] prenatal diagnosis of Down syndrome in”<sup>63</sup> the fetus she carries, or “[a]ny other reason [that the woman has or might have] to believe that an unborn child has Down syndrome[.]”<sup>64</sup> and—importantly—where the pregnant woman’s reasons for wanting an abortion are also known by the person being asked to perform or induce or who seeks to perform or induce the abortion that the pregnant woman wants.<sup>65</sup> Should a pregnant woman’s reasons for seeking an abortion change, then so might its legality.

In this sense, S.B. 164 may be thought of as a “decisional prohibition” on abortion, but that characterization does not in any way alter the constitutional conclusion about it under governing law. After all, once a pregnant woman’s reasons do include a prohibited ground of decision in any way, and once another person who will help her carry out her choice to terminate the pregnancy knows of her illicit reason (or reasons) for seeking an abortion, no abortion may lawfully be provided to her. Instead, a physician will face a triple threat of sanctions—professional, civil, and criminal punishment, all—for respecting a pregnant woman’s choice. It is for these reasons that S.B. 164, despite whatever novelty it

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<sup>55</sup> *See id.* at 2310–18.

<sup>56</sup> U.S. CONST., AMEND. XIV.

<sup>57</sup> This is not quite to agree with the position taken in *Planned Parenthood v. Ind. Dep’t of Health*, where “[t]he State posit[ed] that HEA 1337 represents a ‘qualitatively new kind of [abortion] statute[.]’” 2017 WL 4224750, at \*4.

<sup>58</sup> 18 U.S.C. § 1531 (2003).

<sup>59</sup> 550 U.S. 124 (2007).

<sup>60</sup> H.B. 258, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to amend Ohio Rev. Code §§ 2317.56, 2919.171, 2919.19, 2919.191, 2919.192, 2919.193, & 4731.22; to enact Ohio Rev. Code §§ 2919.191 and 2919.193 and sections 2919.195, 2919.196, 2919.197, 2919.199, 2919.1910, and 2919.1911) (statute would “generally prohibit an abortion of an unborn human individual with a detectable heartbeat.”).

<sup>61</sup> S.B. 127, 131st Gen. Assemb., Reg. Sess. 1 (Ohio 2015–16) (enacted) (prohibits the “performance of an abortion on a pregnant woman when the probable post-fertilization age of the unborn child is twenty weeks or greater.”).

<sup>62</sup> S.B. 164, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE §§ 2919.10(B)(1)–(3)).

<sup>63</sup> *Id.* at § 2919.10(B)(2).

<sup>64</sup> *Id.* at § 2919.10(B)(3).

<sup>65</sup> *Id.* at § 2919.10(B).

possesses, is practically and doctrinally just like any other abortion prohibition operating prior to viability. What a long line of Supreme Court cases in the abortion setting protects is the right of a pregnant woman, prior to viability, to make “the ultimate decision”<sup>66</sup> whether to terminate a pregnancy as a matter of constitutional right. That decision is not to be made for her by the State, as S.B. 164 would, by taking her right away from her. The State’s choice of means—whether focused on the abortion procedure, a developmental landmark, or the constellation of a pregnant woman’s decision-making—does not matter. What matters is whether the State is prohibiting a pregnant woman from making her constitutionally-protected choice. Prior to fetal viability, the State has no valid constitutionally-recognized reasons for not finally allowing a pregnant woman to decide on whether to terminate a pregnancy for reasons that are wholly her own.<sup>67</sup>

To explain this conclusion on a somewhat deeper level, S.B. 164, were it to pass the Senate and become law, would arrive on a field of constitutional law suffused with intuitions about the boundaries of the relationship between and among the pregnant woman, her attending physician, and the State. For its own part, S.B. 164 presupposes that the State has the constitutional authority to operationalize the reasons that a pregnant woman has for exercising her constitutionally protected liberty to bring her pregnancy to an end as part of the State’s own governance apparatus. But, as the district court in *Planned Parenthood of Indiana and Kentucky, Inc.*, observed, the constitutional protections afforded a pregnant woman’s right to choose in the Supreme Court’s abortion case law “leave[] no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice.”<sup>68</sup>

This idea is very important in this setting and so worth filling out some more. When *Planned Parenthood v. Casey* reaffirmed the “essential holding”<sup>69</sup> of *Roe v. Wade*, the controlling opinion in *Casey* underscored how *Roe* and its protections for reproductive choice were situated “at an intersection of two lines of [Supreme Court] decisions[.]”<sup>70</sup> The first line of decisions focused (and still focuses) on “the liberty relating to intimate relationships, the family, and decisions about whether to bear or beget a child.”<sup>71</sup> The second lines of decisions involved (and still involves) cases “recognizing limits on governmental power to mandate medical treatment or to bar its recognition.”<sup>72</sup>

Both of these lines of cases show deep respect for “decisional autonomy,” by which is meant here not merely freedom from State efforts that would block a final choice from being made, but also a certain freedom in and throughout the last processes of decision-making themselves. To illustrate, consider the right to marry, protected as part of “the liberty relating to intimate relationships” and “the family.” In the right-to-marry setting, the State is obligated to recognize the decision to marry for those who are entitled to exercise the right. This obligation does not in any way authorize the State to ask the parties to a would-be marriage to give an account to the State of how deeply and in what ways they love one

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<sup>66</sup> *Casey*, 505 U.S. at 875, 877, 879.

<sup>67</sup> *Casey*, 505 U.S. at 870, 879 (“a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability”); *id.* (noting that before viability, “the woman has a right to choose to terminate her pregnancy”); *Stenberg v. Carhart*, 530 U.S. 914, 920 (the Court has determined “the Constitution offers basic protection to the woman’s right to choose.”); *Gonzales*, 550 U.S. at 146 (“*Casey*, in short, struck a balance [between a woman’s right and state interest]. The balance was central to its holding.”); *Whole Woman’s Health*, 136 S. Ct. at 2300 (noting that laws imposing “substantial obstacle[s] in the path of women” who seek pre-viability abortions are “undue burden[s] on abortion access”).

<sup>68</sup> *Planned Parenthood v. Ind. Dep’t of Health*, 2017 WL 4224750, at \*6.

<sup>69</sup> See *supra* note 33.

<sup>70</sup> *Id.* at 857.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 857.

another. Nor could the State condition the right to marry on the reasons that an individual exercises the right.<sup>73</sup> People get to choose to marry someone the right to marry lets them choose to marry whether the State believes their actual reasons are wrong or right. That is what the freedom to marry that is constitutionally protected means. Or take a related example from the same line of cases: In the realm of parental decision-making, where the State must let parents make certain choices about the welfare of their children, the State cannot ordinarily put parents to the test of explaining why they are making a particular, constitutionally-protected decision about their child's or children's well-being. The same point holds true in the other line of cases to which the abortion right is related, including choices, say, about certain kinds of end-of-life decisions.<sup>74</sup> The right to refuse unwanted medical treatment, for instance, even when exercised in ways that may be life-ending, cannot be made by the State to turn on whether the reasons for the choice are self-regarding or altruistic. As in these various settings, where the State may not condition the exercise of a constitutionally protected right on the basis of what it thinks are the right sorts of reasons, so, too, the idea is, in the abortion rights setting.

What has been said to this point has been said with some care in the articulation. This is because it turns out that the uniqueness of the abortion right—another perspective on it that the controlling opinion in *Casey* noted<sup>75</sup>—is not a decision that, in recent years, has been defined by freedom from State involvement in the processes of individual decision-making. Without question, *Casey* affirmed that “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*[.]”<sup>76</sup> and it called this right “a rule of law and a component of liberty”<sup>77</sup> that it emphatically refused to “renounce.”<sup>78</sup> But, the governing opinion in *Casey* also went out of its way to note that it is a mistake—or as the opinion called it: “an overstatement[—]to describe [the abortion right] as a right to decide whether to have an abortion ‘without interference from the State.’”<sup>79</sup> What the opinion meant by that was clarified to an important degree when it turned to discuss the “guiding principles”<sup>80</sup> of the Supreme Court’s earlier abortion decisions to which it was recommitting itself. In that context, the *Casey* lead opinion remarked that, in the abortion setting, “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”<sup>81</sup> This perspective helps explain how *Casey* could countenance and affirm both the pregnant woman’s right to make the final abortion decision pre-viability and also the State’s authority to enact measures “designed to persuade her to choose childbirth over abortion”<sup>82</sup> and how it could also approve pre-viability regulations of abortion designed to ensure that women’s final choices—which were theirs—were meaningfully informed and deliberate.

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<sup>73</sup> For an illustration, see *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

<sup>74</sup> See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (“[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”).

<sup>75</sup> *Casey*, 505 U.S. at 857 (“Finally, one could classify *Roe* as *sui generis*.”).

<sup>76</sup> *Id.* at 875.

<sup>77</sup> *Id.* at 871.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Casey*, 505 U.S. at 877–79.

<sup>81</sup> *Id.* at 877.

<sup>82</sup> *Id.* at 878.

Even though *Casey* went this far in allowing the State to make what it saw as constitutionally permissible bids to influence pregnant women’s decision-making about how to exercise the right to abortion that was finally theirs, the governing opinion in the case did not in any way indicate it was displacing the situated sense in this area of doctrine, with its two converging lines of cases, that the State may not hold women who exercise the abortion right to account by “examining”<sup>83</sup> their reasons for doing so. Stated somewhat differently, *Casey* recognize the authority of the State to influence the pregnant woman’s decision—by requiring that she be given “truthful, non-misleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus,”<sup>84</sup> and even by making her wait a short, reasonable amount of time to deliberate over this serious decision<sup>85</sup>—without suggesting that the State may additionally ask a pregnant woman to account for her reasons for exercising her right. Much less did *Casey* authorize the State to do what S.B. 164 does: Make a pregnant woman’s reasons for exercising her constitutional right to abortion the very condition for the right’s legal exercise. Nothing in *Casey* affirms the proposition that S.B. 164 depends upon: that a pregnant woman has a constitutional right prior to viability to make the final abortion decision except when the State dislikes her reasons for exercising that right. This is so even if the State has good reasons for its own preferences.

True enough, *Casey* did and does allow the State to “require a woman to give her written informed consent to an abortion.”<sup>86</sup> To that extent, it might be thought that the State is constitutionally permitted to hold pregnant women and their reasons to account. But there is still an important difference to be found between: (1) an informed consent mechanism that acknowledges that a pregnant woman has received certain types of information deemed material by the State, and that acknowledges that a pregnant woman has knowingly and voluntarily undertaken the constitutionally-protected choice to end her pregnancy, and (2) a State law that makes a pregnant woman’s right to an abortion conditional upon her reasons for exercising that right. If the legitimacy of an informed consent procedure seems—as, to some, it might—to be no different than a more substantive inquiry into a pregnant woman’s reasons for exercising her constitutional right, the practical difference between a procedural and substantive accounting may be to little avail. But whether the line is non-existent or subtle from one angle of vision, it is very bold from another, seen in terms of its effects. To say a pregnant woman must give an informed consent in the course of the exercise of her constitutional right to choose, pre-viability, to end a pregnancy leaves the final decision in her hands. To say the State can condition her exercise of her rights depending on her reasons, does not. In that case, the State makes the decision for her by taking it wholly out of her hands.

No court asked to evaluate S.B. 164 could possibly miss this difference, or, in view of it, the major shift that would be required in the U.S. Supreme Court’s constitutional landscape of abortion rights to uphold S.B. 164 as a pre-viability abortion ban. To appreciate why, it should be enough by this point to recall that *Casey* reaffirmed that, prior to viability, the pregnant woman’s decision whether to continue or to end a pregnancy is ultimately hers. It is also equally clear that, throughout the course of pregnancy, the State must allow a pregnant woman to terminate an unwanted pregnancy not only when the decision is on the general terrain of her conscientious choice, but also when the pregnancy would pose a danger

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<sup>83</sup> *Planned Parenthood v. Ind. Dep’t of Health*, 2017 WL 4224750, at \*6.

<sup>84</sup> *Casey*, 505 U.S. at 881.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

to her life or to her health.<sup>87</sup> Were S.B. 164 to become law, a pregnant woman could not have an abortion under State law if a medical practitioner knows her reasons for wanting one are “in whole or in part,”<sup>88</sup> because (1) “[a] test result indicating Down syndrome in”<sup>89</sup> the fetus she carries, referred to in the bill as “the unborn child,”<sup>90</sup> (2) because of “[a] prenatal diagnosis of Down syndrome in”<sup>91</sup> the fetus she carries, or (3) because, to quote the language of the bill, of “[a]ny other reason [that the woman has or might have] to believe that an unborn child has Down syndrome.”<sup>92</sup> If any of these three reasons plays any part in a pregnant woman’s abortion decision and the person performing the procedures knows it, the abortion is a crime. It does not matter under S.B. 164 that the illicit reason is a relatively minor calculation and that the major driver of the decision to end a pregnancy is the threat that the pregnancy poses to a pregnant woman’s life or health. No abortion prohibition that forces a pregnant woman to run risks like this to her life or health could be upheld under existing constitutional rules. S.B. 164’s failure to include a life and health exception in relation to the operation of its rule is its own independent constitutional flaw.

In view of all of this, no court asked to review S.B. 164 for its constitutionality could possibly be unaware that to uphold S.B. 164 would be to take a significant step into a new era of abortion jurisprudence—one in which the right to end an abortion belongs to a pregnant woman only insofar as she has what the State deems to be the right sorts of reasons for ending her pregnancy. In that new era, it would no longer be true, as it consistently has been since *Roe* to the present day, that the right to end a pre-viability abortion belongs to the pregnant woman and to her alone in ways that are finally, in terms of her deepest reasons, unaccountable to the State.

Here is, then, no small aside: Given how women’s abortion rights are, as the lead opinion in *Casey* acknowledged, complexly woven into the complex fabric of constitutional law, to establish the principle of private accountability to the State for reasons for exercising constitutional rights as a basis for blocking their exercise is a principle that, once established in the abortion setting, would be hard to keep limited to it. Would-be spouses, and parents, and other individuals exercising constitutionally protected rights protected by the Fourteenth Amendment’s Due Process Clause, including rights affecting bodily autonomy and medical decision-making, might, in a legal system that in principle affirmed S.B. 164, soon find themselves having the State judging and second-guessing their reasons for exercising their constitutional rights, and, in some circumstances, losing those rights in the face of the State’s judgment that their reasons for exercising their constitutional rights are not the right ones.

### **Post-viability application of S.B. 164.**

This still leaves the question of S.B. 164 and its post-viability applications to consider.

As background, to bring it to mind again, the general idea of the governing law in this area is that the State may, after the point of fetal viability, regulate and even prohibit abortions outright subject to the

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<sup>87</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (“Since the law requires a health exception in order to validate even a post-viability abortion regulation, it at a minimum requires the same in respect to previability regulation.”).

<sup>88</sup> S.B. 164. 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–18) (to enact OHIO REV. CODE § 2919.10(B)).

<sup>89</sup> *Id.* at § 2919.10(B)(1).

<sup>90</sup> *Id.* at § 2919.10(B)(1)–(3)). The Ohio Revised Code defines “unborn child” as “an individual organism of the species *homo sapiens* from fertilization until live birth.” OHIO REV. CODE § 2919.16.

<sup>91</sup> *Id.* at § 2919.10(B)(2).

<sup>92</sup> *Id.* at § 2919.10(B)(3).

provision for exceptions in cases where an abortion is needed in order to protect or preserve a pregnant woman's life or health. No one should forget that the State of Ohio already outlaws all abortions after viability,<sup>93</sup> and that it presently also bars abortions at a somewhat earlier point,<sup>94</sup> a ban the constitutionality of which must at the very least be in some serious doubt in light of existing Supreme Court doctrine. Just so, S.B. 164's failure to provide for any life or health exception at all is fatal to it in constitutional terms not only, as has been suggested, in its pre-viability applications, but in its post-viability applications, as well. Even when the State's authority to regulate abortion is at its height, as it is after fetal viability, the State may still not force pregnant women to carry pregnancies to term in the interests of protecting and preserving the (potential) life of the fetus when doing so would imperil their own lives or their health.

While this is the easiest and more straight-forward reason for coming to see S.B. 164's post-viability constitutional flaws, there is another, somewhat less obvious basis for understanding the general constitutional problematic of this would-be law. The idea might have been quickly visible in the era in which *Roe v. Wade* governed abortion rights. At that time, State efforts to restrict a pregnant woman's abortion right, a fundamental right protected within the constitutional right of privacy guaranteed by the Fourteenth Amendment, triggered the highest and most restrictive form of judicial scrutiny, so-called "strict scrutiny." Even after viability, when the State's interest in protecting and preserving the (potential) life of the fetus was "compelling," which is to say was at its highest point, a measure like S.B. 164 would have had to satisfy a test associated with "strict scrutiny" known as a "narrow tailoring" requirement. The function of "narrow tailoring" requirements is to ensure that there is a very close and very tight fit between the reasons the State has for enacting a particular measure and the actual measure that the State has finally enacted. The tailoring requirement ensures that the State intrudes on a protected choice no more than its reasons, carefully understood, call for and justify.

In the *Roe* era, thinking of the case of S.B. 164, which the State would now presumably defend as a proper exercise of its compelling governmental interest in protecting and preserving fetal life, as well as its important and compelling interest in declaring the equal dignity and worth of people with Down syndrome, one question about the measure might well have been: Is there something distinctive about Down syndrome that would justify a measure like S.B. 164 that singles it out from other legally-recognized disabilities, and that, more generally, singles out disabilities from other axes of social and political inequality that the State has powerful reasons to want to redress?

Although the current, *Casey*-era doctrinal apparatus governing post-viability abortion regulations does not have as part of its moving pieces an operative "narrow tailoring" requirement, and does not even very visible have any very strong "fit" requirement at all, the intuition about post-viability abortion prohibitions from the *Roe*-era persists. To give it some voice: Post-viability abortion prohibitions, in virtue of the importance of the right to abortion, which continue to be constitutionally protected, must yet be subject to some meaningful constitutional review for their reasonableness or at least their non-arbitrariness. If this is right, it may be difficult for the State to defend the distinctive treatment that S.B. 164 affords to Down syndrome among the entire range of medical conditions and other kinds of inequalities that define social and political life. S.B. 164 does take one step in that direction—and that might be enough to defend it if post-viability abortion prohibitions were subject only to "ordinary" or

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<sup>93</sup> See OHIO REV. CODE §§ 2919.201(A). This rule requires that "[n]o person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman when the unborn child is viable." OHIO REV. CODE § 2919.17(A).

<sup>94</sup> See *supra* note 61.

“traditional” “rational basis review.” But unless a pregnant woman’s constitutional right to abortion counts for naught after the fetus she is carrying becomes viable—and, doctrinally, it does not, as witnessed by the continuing right of a pregnant woman to end a pregnancy where doing so is indicated as a means of protecting her life or health—then there must, even in the *Casey*-era, be some meaningful constitutional examination of the State’s justifications for outlawing abortion both before . . . and after viability. Obviously, just how searching that examination is will vary, depending on when it occurs during the course of pregnancy in light of fetal development. Post-viability abortion prohibitions will come in for less searching constitutional scrutiny, and, correspondingly, considerably more judicial deference than their pre-viability counterparts, which are presently subject to the demands of the undue burden test with its balancing of interests. But given the configurations of the current constitutional doctrine involving abortion rights, there cannot be no limits—or, stated affirmatively: there must be some limits—on how and why the State bars post-viability abortion procedures.

To say this, of course, is to recognize a distinctive lack of symmetry in our federal constitutional system. Unlike pregnant women and their reasons, the State in our constitutional regime, where constitutionally-protected interests like abortion rights are at stake, must stand ready to give at least a meaningful and reasonable, or at least non-arbitrary, account of itself and the reasons for its governance rules. This is not, to be clear, an ineluctable fact. It could change and there are arguments that hold it should be changed. In any case, what this is, is a description of a feature of our legal system as it exists at this place and at this moment in time, a way of noticing a fact about that system that has existed for long enough to constitute as aspect of the traditions of our constitutional, rule-of-law regime.

## **Conclusion**

Having come this far, it is hopefully clear now that and why S.B. 164 is inconsistent with the existing constitutional rules governing abortion rights both pre-viability and post-viability, and why, if enacted, courts should, consistent with those rules, strike it down.

But there is—if I might be allowed a point of personal privilege—one very last note to be offered. S.B. 164 may appeal to some as a righteous piece of legislation designed to further the protections that the State offers to human life from the moment of conception on. It may appeal to others for the way that it is said to advance the equal dignity and respect that those who live life with Down syndrome are unquestionably entitled to. In counterpoint, S.B. 164 may be condemned by others who regard it as an attempt to treat the lived realities of those with Down syndrome as a political device to advance a project that is ultimately not about them and their equal dignity or their needs for flourishing, but about something else entirely, perhaps a project that is actually inconsistent with the commitments to equal dignity and respect of all the members of our shared political communities that the measure in a sense seeks to claim for itself.

Beyond these different and opposing perspectives on S.B. 164 is another point of view. Leaving the measure’s constitutionality aside, inasmuch as it should be in no doubt, this legislation offers up a powerful reminder. Nobody who looks attentively and seriously across the social and political landscape that we all inhabit with one another can possibly think that we do enough for those who live lives affected by Down syndrome. Nor, for that matter, that we do enough for those who live lives affected by other types of disabilities or that even larger range of social identities that conventionally mark some of us as less entitled to the equal dignity and respect of first-class citizenship status that our constitutional ideals, and many constitutional decisions, require.

Speaking for myself, reading and thinking about S.B. 164 has served as a call, finally, less to try to come to terms with the constitutional questions the measure raises, which for the most part seem fairly easy given current doctrine, than as a challenging device with the capacity to prick a conscience. In my own case, the measure has made me stop and consider: Have I done as much as I might to work to ensure that the abundant blessings of living in our great State and great country are enjoyed as equally, as fairly, as justly, as they might be by those who live lives defined in part by differing abilities and by other social inequalities? What more might I try to do to help empower these friends and neighbors and fellow citizens as they travel their own paths in this world? What role should the State play in this undertaking? How should I push on that front? Candidly, S.B. 164 reminds me of how I have fallen short in living up to my own ideals of and for our shared social and political life. I wonder if this is strictly a personal truth.