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Ohio House of Representatives  
Health Committee, Chairman Derek Merrin  
1 Capital Square  
Columbus, OH 43215

RE: Testimony in Support of Senate Bill 23, The Heartbeat Bill

Dear Chairman Merrin and Committee Members,

My name is Attorney Josh Brown and I am here today representing the Ohio Christian Alliance, a public policy, voter education organization that advocates for pro-life, pro-family, religious liberty, and First Amendment issues. We write today to testify in support of the Senate Bill 23, the Heartbeat Bill.

### **OVERVIEW**

The current case law that will determine the Heartbeat Bill's fate will be *Casey v. Planned Parenthood*, 505 U.S. 833 (1992). This decision dramatically altered the previously operative decision, *Roe v. Wade*, 410 U.S. 113 (1973). In these cases, the Court balances the interest of an individual women's right to privacy against the states' compelling interest in protecting the life of unborn children. The balance between the two interests is fluid and has shifted greatly toward the states' interest since *Roe* was first issued.

In both cases, the pivotal point of pregnancy was the viability standard. This standard suffers from a number of extraordinary maladies that need to be remedied, namely that the Court has failed to explain the difference between life before and after the ill-defined period called “viability.”

The only intellectually honest alternative is a life standard, that analyses signs of life to determine the pivotal point in the balance of interests identified in *Roe* and *Casey*. *Casey* was one productive step in that direction. The natural next step is the Heartbeat Bill. Passage of the Heartbeat Bill is the only way to give the Court an opportunity to make this adjustment.

#### **I. WHY THE HEARTBEAT BILL MUST PASS, REGARDLESS OF CONFLICT WITH PAST PRECEDENT**

The Ohio General Assembly has a constitutional duty to protect the health and safety of the people of Ohio and each member takes a sworn oath to uphold the Constitution of Ohio and the United States.

The Supreme Court of the United States only hears “cases and controversies,” and does not issue advisory opinions. U.S. Const., Art. III, Section 2, Clause 1. Therefore, in order to adjust a precedent of this Court that members believe are violative of their duties and oath, they must pass bills into law that conflict with those precedents.

The “viability standard,” discussed below, violates the General Assembly’s duties to protect the health and safety of Ohioans, and its members’ constitutional oaths. This

testimony explains why. In addition, it explains why the Heartbeat Bill is the perfect alternative and an opportunity to correct the deeply flawed viability standard.

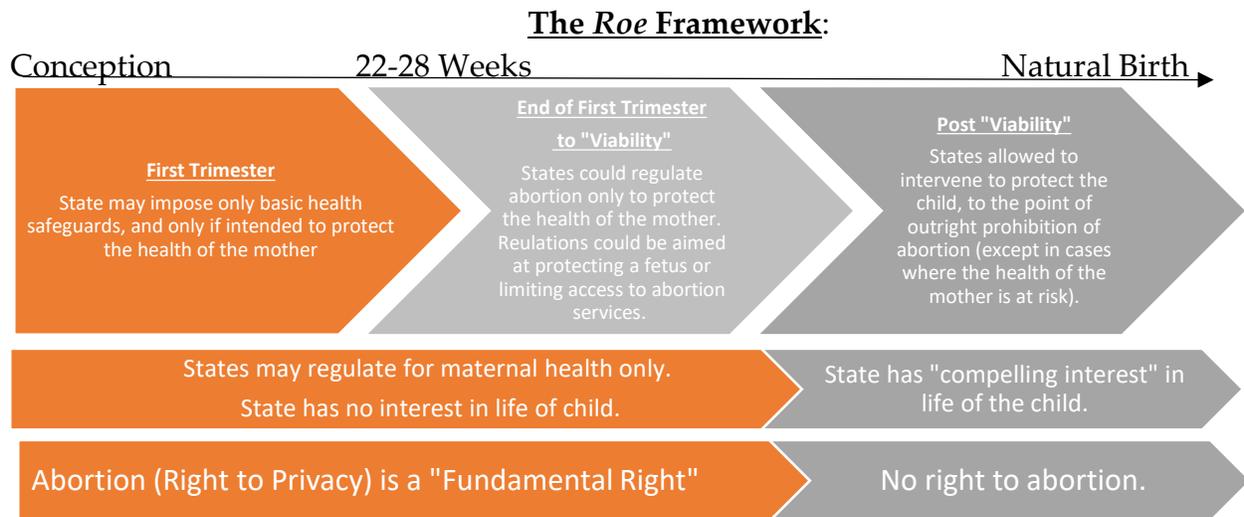
## II. HOW HAS CURRENT PRECEDENT EVOLVED? SHIFTING OF BALANCE

### A. *Roe v Wade*: Balancing Privacy v. Life

The Courts in *Roe* and *Casey*, balanced two competing interests. *Roe* established the precedent that expectant mothers have a “fundamental” constitutional right to privacy, and therefore the right to choose an abortion. However, the Court also recognized that the state has an “important and legitimate interest” in protecting the health of the mother and “the potentiality of human life” inside of her. *Roe*, at 114.

The Court saw these two competing interests on a sliding scale, with the right to privacy being its strongest prior to “viability.” Conversely, the states’ interest in protecting life began after “viability.” The Court created the trimester system to map out the period of the pregnancy.

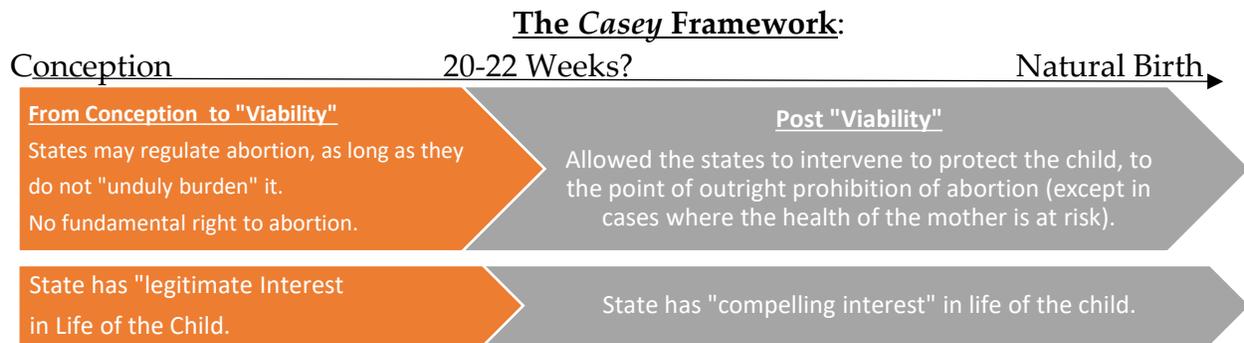
The first trimester allowed very little state intervention—only basic health safeguards, and only if intended to protect the health of the mother. First trimester safeguards for the child and efforts to dissuade abortion were not allowed under *Roe*’s trimester system. The second period began at the end of the first trimester, to “viability.” At viability, the state could only impose some state intervention. The third period, post viability, allowed the states to intervention to the point of outright prohibition of abortion (except in cases where the health of the mother is at risk).



### **B. *Casey*: Shifting the Balance Toward Protecting Life**

The trimester system was abandoned by the Court in *Casey*. The *Casey* Court chose to retain only the "essential holdings" of *Roe*: 1) Women have the right (although, not a fundamental right) to have an abortion prior to viability without "undue burdens" from the State, 2) the State can restrict the abortion procedure post viability, so long as the law contains exceptions for pregnancies which endanger the woman's life or health, and 3) the State has "legitimate interests" from the outset of the pregnancy in protecting the health of the woman and the life of the child.

*Casey* allowed states to: 1) regulate abortion prior to viability, and 2) regulate for the purpose of protecting the health of the child prior to viability. Essentially, after *Casey*, the states' interest in protecting the child existed throughout the pregnancy period, not just slowly kicking in at some point after viability.



*Casey* also eliminated abortion as a “fundamental” right. This distinction is key. Any regulations of rights deemed “fundamental” are almost never constitutional under the “strict scrutiny” standard they receive. So the *Casey* Court imposed a new “undue burden” standard, which is far easier for state restrictions to pass. Subsequently, over the following decades, numerous abortion restrictions passed constitutional muster that would have been unconstitutional under *Roe*.

### III. WHY THE VIABILITY STANDARD IS FUNDAMENTALLY FLAWED

#### A. Standard for Adjusting a Precedent

Why did *Casey* retain the “essential holdings” of *Roe*? The *Casey* Court did not say it retained them because *Roe* was rightly decided. Rather, it was because of the concept of *stare decisis*: respecting precedent because people order their lives around precedents and it is important for the Court to be consistent over time. The Court said, “the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.” *Casey*, at 871.

The *Casey* Court said that it would overrule precedent only when, “the factual underpinnings of *Roe*’s central holding [or] our understanding of it has changed.” *Casey*, at 857-860. Apparently, the factual underpinnings and the Court’s understanding had changed when applied to the elements of *Roe* that it did change. The Heartbeat Bill argues that both the facts and our understandings have materially changed as to the viability standard as well.

a. Factual Underpinnings Have Changed:

The *Casey* court did not explain what the “factual underpinnings” of *Roe* were. However, the dissent described them as such:

“What might be called the basic facts which gave rise to *Roe* have remained the same -- women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases.” *Casey*, dissent, at 956.

As the facts surrounding abortion have become increasingly publicized, the states’ interest in protecting unborn life prior to viability appears to become more and more compelling, while the viability standard appears to be more and more arbitrary.

We have vastly superior factual knowledge as to the signs of life at the viability stage. For example, we know more about how these children: feel pain, have brain and cardiac activity, have muscular movement, have the features of a human such as eyes, hands, mouth, etc. We also know more about the mental health damage done to women

who have abortions. Each of these makes it more difficult for Courts to deprive these children of basic human rights.

b. Understanding of the Issues Has Changed:

We understand now how the holdings of *Roe* and *Casey* lack sustainable credibility. The Court itself said, “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” (declining to take an “expansive view of our authority to discover new fundamental rights.”). *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

We now understand the results of the expansive view taken in *Roe* and *Casey*. State legislatures across the country continuously enact laws challenging the viability precedent,<sup>1</sup> treating unborn children as human beings endowed with rights.<sup>2</sup> State governments increasingly monitor and dictate all kinds of private medical decisions, in all areas of medicine. Meanwhile, the federal courts must continuously reassert indefensible precedents based on *stare decisis* alone. This undermines the assertion that a “right to privacy” trumps the states’ interest in protecting the rights of unborn children.

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<sup>1</sup> See, State Policy Trends 2018: With *Roe v. Wade* in Jeopardy, States Continued to Add New Abortion Restrictions. Can be accessed at: <https://www.guttmacher.org/article/2018/12/state-policy-trends-2018-roe-v-wade-jeopardy-states-continued-add-new-abortion>

<sup>2</sup> See, e.g., “State Laws On Fetal Homicide And Penalty-Enhancement For Crimes Against Pregnant Women” National Council of State Legislatures (NCSL). May 1, 2018. Can be accessed at: <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

## **B. Where Does the Government's Interest In Protecting Life Begin?**

The government's interest in protecting unborn children was firmly established by *Roe* itself and has only been expanded upon by subsequent cases, such as *Casey*. At that point, it becomes necessary to define where that interest begins, as challenges arise to the government's work to protect that interest.

The *Roe* Court asserts that it chose not to define where human life begins. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe*, at 159.

Instead, of a life standard, the *Roe* Court chose a viability standard as the point where the government's interest in protecting life begins. The *Casey* Court then expanded that interest to the entire pregnancy, but it only becomes a "compelling interest" at the point of viability.

The Court in *Roe* explained its reasoning behind the viability standard, saying, "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 capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." *Roe*, at 163.

The Court in *Casey* offered a similar explanation, saying viability is, “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can, in reason and all fairness, be the object of state protection that now overrides the rights of the woman.” *Casey*, at 870 (citing *Roe*, at 163).

### **C. The Viability Standard is a Fatally Flawed Standard**

The Court’s justification for using the viability standard is conclusory and circular logic. *Casey*, appears to adopt a “my house, my rules” logic, indicating that a child’s rights are somehow a function of the child’s lack of physical dependency on his/her mother’s body for survival—to the point that the mother has a right to terminate the child’s life, provided the child is dependent on her body for survival. *Roe* and *Casey* grossly fail to explain the logic of this connection. We are not aware of any other constitutional rights that hinge on one’s dependency orientation—although many explicitly cannot.

Perhaps the Court fails to explain this because the distinction between life inside and outside the womb is entirely arbitrary. Human children are born in the fetal stage and we remain completely dependent on other humans for survival, throughout our lives. Whether the child’s dependency occurs inside the womb or outside, or that dependency takes one form or another, is completely irrelevant to the child’s rights, “independent existence,” or his/her “capability” to live a “meaningful life.”

#### **D. A Better Standard: The Life Standard**

The Heartbeat Bill suggests a better standard to the Court, the life standard. Inanimate objects do not have rights—life is what gives humans rights. And it is entirely irrelevant whether that human is located in one place or another, or whether a human is dependent on others for survival in one way or another.

Fetal heartbeat is an objective, easily detectable, biological marker of human life. The distinction between pre and post heartbeat is truly meaningful, as this is a key sign of life, and hence the endowment of human rights.

The Heartbeat Bill invites the Court to dispense with its arbitrary and circular viability analysis, and seriously engage the only question that matters: where does life begin? If it does so, it will find that signs of life (such as a heartbeat) are the only logical, biologically-based, intellectually-honest markers that it can consider.

Contrary to the Roe Court's suggestion, an approach of asking the life question does not require the great minds of law, philosophy, or religion—just common sense. The viability standard requires an explanation as to why there is a difference between the importance of life or a "potential life" inside and outside a mother's womb.

The life standard does not require such convoluted rationalizations or pretense—it only requires an explanation as to why a heartbeat is a sign of human life. It does not take a special skills to figure that out. The heartbeat distinction is not arbitrary. It is intellectually honest. It is logical. It is a fixed, objective, biological marker.

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Hence, we suggest that this General Assembly pass the Heartbeat Bill and give the Supreme Court of the United States an opportunity to fix a flawed precedent.

Thank you for your attention to this matter. I am available for any questions you would like to ask.

Respectfully submitted,

Date: March 26, 2019

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