

Testimony in favor of H.B. 258
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It is time to face facts. These are the facts.

The Heartbeat Bill will help to protect the lives of the unborn.

- The Heartbeat Bill will provide the Supreme Court with an opportunity to modify its abortion jurisprudence so that Ohio and other states may protect those unborn children who are virtually certain to be born.
- The Heartbeat Bill will affirm the humanity of the unborn.
- The call for the Supreme Court to reexamine the viability rule is now coming from lower federal courts. The Court cannot long put aside what even lower courts are asking it to do.

I. Based on recent medical evidence, the Heartbeat Bill gives an opportunity for the courts to recognize the states' interest in preserving the life of a human person who is virtually certain to be born.

Over the past two decades, the Supreme Court has changed significant parts of its abortion jurisprudence without having formally to overrule many of its precedents. In each situation, the Supreme Court **reviewed the logic of its precedents, examined medical evidence, and adjusted the law accordingly.**

For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court undid much of *Roe v. Wade*, 410 U.S. 113 (1973), without formally overruling *Roe*.

1) Under *Roe v. Wade*, the “right” to an abortion was made “fundamental,” and any legislation limiting access to an abortion could be constitutionally valid only if it passed a strict scrutiny test, “to be sustained only if drawn in narrow terms to further a compelling state interest.” But under the plurality opinion in *Casey*, laws that might have an effect on limiting access to an abortion prior to viability would held invalid only if they constituted an “undue burden.”

2) Under *Roe*, laws dealing with abortion were treated differently depending upon the trimester in the pregnancy. But in *Casey*, the Supreme Court jettisoned the “rigid” trimester formula and treated all laws having an effect before viability in the same way.

3) Under *Roe*, the state had a recognizable interest in the “potential” life of the unborn child only after the start of the third trimester. But in *Casey*, the state’s interest in the life of the fetus was present throughout pregnancy.

4) Under *Roe*, viability was estimated at twenty-eight weeks of the pregnancy. But medical evidence at the time of *Casey* convinced the Court to estimate viability as early as twenty-three or twenty-four weeks.

5) Under *Roe*, regulations on abortion prior to viability could only have as their purpose the health of the woman. But in *Casey*, a state's regulation could evince a preference for childbirth over abortion, a key principle underlying the rationale of the Heartbeat Bill. Note that the preference is not for the fetus over abortion, but for childbirth over abortion.

6) In *Casey*, the Court upheld the requirement of informed consent and a waiting period "to permit a State to further its legitimate goal of protecting the life of the unborn," and here, the Court did overrule contrary holdings in *City of Akron v. Akron*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986).

In other cases, the Supreme Court has acceded to legislation more protective of the unborn without needing to revisit its precedents.

1) In *Casey*, the Court defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." But in *Mazurek v. Armstrong*, 520 U.S. 968 (1997), the Court seemed to indicate that the *purpose* prong of the undue burden standard alone could not invalidate an abortion restriction.

2) In *Ayotte v. Planned Parenthood of Northern New England*, 540 U.S. 320 (2006), the Court declared that the lower courts should not, in ordinary circumstances, strike down abortion regulations "on their face," as had been the previous practice, but only if *in their application*, the laws constitute an undue burden.

3) In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court struck down Nebraska's partial birth abortion prohibition statute, but in *Gonzales v. Carhart*, 550 U.S. 124 (2007) the Court upheld a similar federal partial birth abortion statute without formally overruling *Stenberg*.

4) Even those opposed to pro-life legislation recognize what the Court can do. Thus, although the Supreme Court in *Doe v. Bolton*, 410 U.S. 179 (1973) required a nearly limitless health exception in any abortion regulation, pro-choice groups have decided not to contest much more limited health exceptions in current legislation prohibiting post-viability abortions.

The Heartbeat Bill gives the Court the opportunity to rethink the viability standard of *Casey*, in the same way the Court analyzed and rejected the

trimester formula of *Roe*, the voiding of informed consent bans in *Akron I* and *Thornburg*, and the partial birth abortion regulations in *Stenberg*.

The Court declared in *Casey* that the state's interest in banning nontherapeutic abortions becomes dominant after viability, which the Court defined as "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." The Court affirmed that the state can require a woman to continue the pregnancy *even after* the child could possibly survive on its own so that the state's interest in "potential life" could be fulfilled. In other words, that state's interest in the child being born alive is so strong that it can require the woman to carry the child to full term. Full term pregnancy was the best guarantee that the fetus can have a "meaningful life outside the mother's womb."

Thus, under *current* Court doctrine, 1) the state has an interest in the life of the fetus throughout pregnancy, 2) a state's regulation can evince a preference for *childbirth* over abortion, and 3) viability is a marker that a child will most likely survive if brought to full term.

The Heartbeat Bill is based on two factors that make the detected onset of cardiac activity in the fetus a *better marker* than viability, factors that the Supreme Court has yet to consider.

First, medical surveys completed after the decision in *Casey* demonstrate that a naturally conceived child with a detected heartbeat has approximately a 95% chance of surviving until full term birth absent the lethal intervention of an abortion.

Second, the detection of heartbeat is much more easily determined than the Court's idea of viability. In point of fact, a physician does not determine the viability (that is, the survivability) of any particular infant in the womb by the physical or medical condition of that infant (unless there are unusual problems). Rather, he makes a calculated guess of the gestational age of the infant based on a crown to rump measurement. Based on the varying opinions as to when viability actually does occur, along with the margin of error in calculating gestational age from the crown to rump measurement, a physician's estimation of an infant's chances of survival can range between 10% and 90%. The viability line is not, therefore, a particularly reliable marker. The onset of cardiac activity in the fetus has been shown by study after study to be more exact and more easily determined.

The Supreme Court has never yet investigated the reliability of the viability line, nor been made aware of recent evidence of the more definite and reliable marker of heartbeat as a predictor of survival of the unborn child until full term birth. **The Heartbeat Bill will allow the Court to confront these heretofore unexamined**

issues and give it the opportunity to allow the states to protect children from the time of their detected heartbeat.

II. The Heartbeat Bill affirms the humanity of the unborn.

In common with other laws that seek to protect the lives of the unborn, the Heartbeat Bill testifies to the humanity of the unborn child.

When many states, as well as the Congress, outlawed partial birth abortion, the nation recoiled when it saw how a partially born child was put to death by a horrendous procedure that destroyed its brain. The people understood that this was an actual human person being cruelly destroyed.

Similarly, fetal homicide laws recognize the separate human person in the womb, when a woman is subjected to violence and her unborn child is injured or killed.

Laws outlawing abortion for pain sensitive fetuses speak to the sentient person who suffers whilst he or she is killed.

In sum, the Heartbeat Bill affirms what people for centuries have understood: a fetus with a heartbeat is a living human person, destined to be born if only given the chance.

- **III. The call for the Court to reexamine the viability rule is coming from lower federal courts.**

In affirming a district court's grant of summary judgment against North Dakota's heartbeat bill, the Eighth Circuit declared, "Although controlling Supreme Court precedent dictates the outcome in this case, good reasons exist for the Court to reevaluate its jurisprudence." *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (2015).

The court then extensively listed the reasons why the Supreme Court should reexamine or reject the viability line established in *Casey*, including the following:

"[T]he Court's viability standard has proven unsatisfactory because it gives too little consideration to the substantial state interest in potential life throughout pregnancy."

"By taking this decision away from the states, the Court has also removed the states' ability to account for 'advances in medical and scientific technology [that] have greatly expanded our knowledge of prenatal life,'" *Hamilton v. Scott*, 97 So. 3d 728, 742 (Ala. 2012) (Parker, J., concurring specially).

“Another reason for the Court to reevaluate its jurisprudence is that the facts underlying Roe and Casey may have changed.”

“In short, the continued application of the Supreme Court’s viability standard discounts the legislative branch’s recognized interest in protecting unborn children.”

Conclusion: The Supreme Court never changes a bad precedent until it is asked. Beginning with Ohio, state after state asked the Supreme Court to recognize the unacceptability of partial birth abortion. Eventually, the Supreme Court did approve of a federal bill outlawing that horrendous practice. Now there is an ever greater opportunity to save thousands upon thousands of children. The Heartbeat Bill will invite the Supreme Court to revisit and revise its jurisprudence on abortion giving the unborn, once their heartbeat begins, the right to be born.