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To: Chairman Dave Burke
Vice Chairman Steve Huffman
Ranking Member Nickie Antonio
Members of the Senate Health, Human Services & Medicaid Committee

Re: S.B. 23, the Heartbeat Bill

Chairman Burke, Vice Chairman Huffman, Ranking Member Antonio, and members of the Committee, I thank you for the opportunity to provide testimony today with regard to S.B. 23 – the Heartbeat Bill.

I wish to address to what degree, if any, the General Assembly should feel bound by the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey v. Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), as it relates to viability being the dividing line as to the constitutionality of legislation prohibiting the performance of an abortion.

Before addressing that issue, to provide the Committee a brief overview of my background. A native of Ohio, I graduated from the United States Naval Academy in 1987. Following my service as a nuclear-trained officer on board a submarine, I attended and graduated from Vanderbilt Law School. I then clerked for Judge Rhesa Hawkins Barksdale of the United States Court of Appeals for the Fifth Circuit before starting 22 years of the private practice of law, with civil litigation at all levels of both the state and federal court system, including before the United States Supreme Court. And recently, I served for nearly two years as a judge of the Hamilton County Common Pleas Court.

In *Roe v. Wade*, the Supreme Court established what has been characterized as the viability rule as it concerns whether abortions could be banned or regulated, declaring that, with respect to "the State's important and legitimate interest in potential life, the 'compelling' point is at viability." 410 U.S. at 163. And driven by what the Supreme Court characterized only as "potential life", viability became the dividing line as to

whether a State could restrict or prohibit abortions. And two decades later, in *Casey*, the Supreme Court again expressly reaffirmed that the line which separated when States could regulate or ban abortions was viability as initially pronounced in *Roe*, though not assessing the underlying foundation for its viability line-drawing.

Notwithstanding the line-drawing engaged in by the Supreme Court when it premised the issue as "potential life" and "viability", I submit that neither *Roe* nor *Casey* preclude the General Assembly from proceeding forward and passing S.B. 23.

Most noteworthy, it is important to recognize that the drawing of the line at viability of when it is permissible to constitutionally regulate abortion was premised by the Supreme Court in *Roe* of the Court's avoidance of the more fundamental question of when does life begin. As the Court stated in *Roe:*

> 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.

410 U.S. at 159. Thus, *Roe* and its viability standard proceeded solely upon the concept of the fetus being "potential life", a phrase repeatedly used in both *Roe* and *Casey*. But in avoiding answering the question of when life begins, the Supreme Court begets the avoidance of another issue – how would the analysis in *Roe* be different if a determination was made that life actually began earlier than viability.

In declaring that it "need not resolve the difficult question of when life begins," the Supreme Court in *Roe* presupposes that the question of when life begins is within the sole and exclusive authority and province of the judicial branch of government; that another branch of government – specifically, the legislative branch – has no authority to make that decision as a matter of public policy. But common law – which is the foundation upon which the Constitution was adopted – has long recognized that the making of substantive public policy is primarily a legislative and not a judicial function. Thus, through S.B. 23, the General Assembly properly is asserting its prerogative as the primary pronouncer of public policy on the issue of when life begins.