WRITTEN TESTIMONY REGARDING S.B. 23, THE HEARTBEAT BILL
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What Does the Bill Do?

The Heartbeat Bill, S.B. 23, modifies and supplements existing Ohio legislation, with the final effect of establishing four main requirements.

First, the bill requires an abortionist to check to see if the unborn baby the pregnant woman is carrying has a heartbeat. Renumbered and amended Sec. 2919.192 & new Sec. 2919.193.

Second, if the child has been found to have a heartbeat, it requires the abortionist to let the mother know this. Renumbered and amended Sec. 2919.194.

Third, abortions of babies with heartbeats are prohibited. New Sec. 2919.195.

Fourth, the abortionist must keep certain important records relating to the abortion. In particular, the abortionist must note if the abortion is being done for "health" reasons, and if so, record the rationale for such conclusion. New Sec. 2919.196.

Is It Constitutional?

The distinct sections of the Heartbeat Bill must be analyzed separately for constitutionality under federal constitutional law. *Notably, the testing, informed consent, and recordkeeping requirements are all plainly constitutional under existing precedent.*

The Supreme Court has affirmed that States can require that a woman contemplating abortion receive informed consent. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). That a child already has a heartbeat plainly will be a material consideration to many women considering abortion. This developmental detail brings home the humanity of the child and boldly illustrates the fact that the baby is already alive. The presence of a heartbeat also has a strong correlation with the ultimate prospects of a successful, live birth. Thus, informing the pregnant woman that her child has a heartbeat, in those cases where a heartbeat has been detected, is a constitutionally permissible facet of informed consent.

The requirement that the abortionist test for the heartbeat simply ensures that the predicate for the informed consent is laid and that the woman is given accurate information tailored to her particular situation. And the requirement that certain records be kept is consistent with Supreme Court precedent, *Casey*, 505 U.S. at 900-01, and

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useful both for law enforcement and for an intelligent epidemiological study of abortion practice.

The provisions of the Heartbeat Bill are severable. Thus, even if some other part of the bill were enjoined as unconstitutional, the provisions discussed above would remain as valuable, common-sense regulations of human abortion.

The most contested section of the Heartbeat Bill is its prohibition (with limited exceptions) on abortions done on unborn babies with beating hearts. Critics argue that this prohibition is incompatible with repeated Supreme Court precedents disallowing either bans or "undue burdens" on abortions done prior to fetal "viability." Nevertheless, the Supreme Court's precedents contain as well the strands of a more life-protective jurisprudence. As far back as *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973), the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court upheld a law that prohibited any abortion that was not "necessary". Much later, in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court ruled that precedent it assumed to be controlling "confirms the State's interest in promoting respect for human life **at all stages of the pregnancy**," *id.* at 163 (emphasis added). As Justice Kennedy wrote in dissent in *Stenberg v. Carhart*, 530 U.S. 914 (2000), a dissent subsequently vindicated in *Gonzales*, "States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus." *Stenberg*, 530 U.S. at 961.

A procedure that deliberately takes the life of a live human being, heart pounding away in his or her mother's womb, is plainly a procedure that fosters insensitivity to, and disdain for, the life in the womb. Indeed, such a killing is the embodiment of disdain for human life. Will a confrontation with that shocking violation of basic human dignity be enough to outweigh the past or present commitment of any given Supreme Court Justice to an abortion autonomy? Is a freedom that depends upon the stopping of innocent human hearts, indeed the hearts of one's own flesh-and-blood offspring, one that a majority of the Court can honestly embrace? Must preborn children die to preserve liberty, or is any liberty so understood an imposter?

Recall that while many people view abortion as a tragedy, an injustice, or both, abortion looks good to: sexual predators who do not want evidence left of their misdeeds; irresponsible men who do not want to be liable for child support or the duties of fatherhood; heartless employers who view an employee's pregnancy and delivery of a child as no more than impairment of a bottom line profit; etc. In such cases, a woman's supposed "liberty" is really an escape hatch conscripted to serve the interests of uncaring third parties.

The Supreme Court, building upon *Doe*, *Casey*, and *Gonzales*, certainly has the wherewithal to reject the proposition that liberty requires the right to kill (or be pressured into killing) those who stand in someone's way, and instead to uphold a heartbeat bill and similar laws designed to secure the most minimal protection of respect and dignity for human life before birth.

Moreover, the Supreme Court could also uphold the heartbeat ban provision under a refashioning of the "viability" concept. Prof. David Forte has suggested that the high statistical correlation between detection of a heartbeat and ultimate live birth of that child make the presence of a detectable heartbeat a more useful and reliable marker of ultimate

"viability" than the current understanding of viability as the capacity to survive, immediately, outside the womb. Indeed, the current understanding of the significance of viability is perverse: under the *Roe v. Wade* understanding, the state can only step in to prevent the expulsion from the womb of those who can survive outside the womb. That's like saying the state can only save a person from being thrown overboard from a ship if they can swim. It is precisely backwards. Those who cannot swim – are not "viable" in the sea – are the ones who most need protection from being cast out of the safety of the ship, and those who cannot yet survive outside the womb are exactly those who most need protection from being cast out of that safe environment too soon. Prof. Forte argues that the pertinent medical facts therefore make the onset of heartbeat an attractive substitute for, and improvement upon, the Supreme Court's previous understanding of "viability" as the point at which abortion can generally be proscribed consistent with the federal Constitution. The Court has modified *Roe v. Wade* before – it did so in *Casey*. It can certainly do so again.

Does this mean a majority of the Supreme Court, either as currently composed or as composed when some future challenge to this or another state's heartbeat bill finally reaches the Supreme Court, will vote to uphold the constitutionality of a ban on taking the lives of developing babies with beating hearts? One would hope so, if only as a matter of basic human decency and fidelity to a written Constitution. Nevertheless, no one can properly claim the omniscience to answer that question with certainty. The Supreme Court has, at various times and in various cases, pushed its precedents in one direction or the other. The Court has also overruled seemingly well-entrenched aspects of its abortion jurisprudence, such as the trimester framework of *Roe v. Wade*. In this area, there are no guarantees. And, of course, the Court is far more likely to consider such a possibility if a case presenting that issue comes to the Court's docket.

That some other courts reviewing different versions of heartbeat bills from other states may have found those laws unconstitutional is not determinative. Decisions from other jurisdictions (especially those based on other states' constitutuions) do not bind Ohio, and certainly do not bind the Supreme Court. Moreover, sometimes the route to upholding a law can be very circuitous. For example, numerous partial birth abortions laws were struck down, even by the U.S. Supreme Court, before the Supreme Court finally upheld the federal partial birth abortion ban. The persistence of pro-life legislators made that ultimate victory possible.

Is the Heartbeat Bill a Good Idea?

Informed consent

The Heartbeat legislation, as supplemented and modified by SB 23, would serve several goals. Among these would be the enhancement of informed consent for abortions and public education about the humanity of the child in the womb. Presumably, a number of women contemplating abortion will decide not to do so upon learning that their baby has a heartbeat. These women will be spared the heartbreak and regret that can accompany finding out – too late – crucial details about the development of the baby in the womb. Also, the amendment to Sec. 2317.56(C)(2) removes the monopoly input authority of the state section of the American College of Obstetricians and Gynecologists

(ACOG). This is important, as on the national level ACOG has become a predictable opponent of abortion limitations. It is strange, and likely counterproductive, to confer privileged input to ACOG's state chapter in the preparation of materials used for informed consent for abortion. The proposed amendment instead authorizes consultation with "independent experts" rather than exclusively empowering ACOG and the state medical association.

Reporting

The reporting requirement of Sec. 2919.196 can provide valuable epidemiological data. Sometimes abortion is touted as part of "reproductive health." Sometimes abortion is defended as an exercise of "choice". New Sec. 2919.196 simply requires the abortionist to record and report for each abortion whether "health" is a reason for the abortion. If it turns out that health is rarely at issue, that is valuable public information. If, on the contrary, health is frequently cited as a rationale for the abortion, then it is important to know what health concerns are being invoked for these women and why abortion is considered a remedy. Such basic data can contribute importantly to public evaluation of abortion.

No abortion of babies with beating hearts

For many people, fundamental principles of justice and morality require strong efforts to reduce, and ultimately eliminate, the intentional taking of the lives of human children prior to birth, just as those same principles would preclude the deliberate killing of children after birth. But even if one were to leave aside questions of morality and justice, reducing the number of abortions definitely would reflect sound public policy.

The immediate adverse effects of abortion upon the child in the womb are obvious. In the years since abortion has become a widespread practice in the United States and elsewhere, other, less-obvious effects upon other persons have become clear. For example, abortion, especially when repeated, increases the odds that a future pregnancy will miscarry or result in a premature birth, the former resulting in the undesired loss of a child's life in the womb, the latter posing the threat of developmental difficulties to children successfully born alive after the abortion of one or more prior pregnancies.[1] Moreover, the negative effects of abortion upon a woman's physical and mental health after abortion have now been documented extensively. In addition, the social problems abortion was theorized to ameliorate (out of wedlock births; child abuse) have not in fact been eliminated, and in many cases have increased, in the wake of liberalized recourse to abortion.

Furthermore, scientific developments over the past decades have heightened society's awareness of the uniqueness, humanity, and sensitivity of prenatal human beings at earlier and earlier stages of gestation.[2] Likewise, the public has begun to

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[1] For a list of studies documenting the risks mentioned in this statement, and others, *see* www.afterabortion.org (click on link for "Research").

[2] The advent of 4-D ultrasounds has produced poignant images unveiling the humanity of the developing unborn child. *See* Brian Handwerk, *4-D Ultrasound Gives Video View of Fetuses in the Womb*, NAT'L GEOGRAPHIC NEWS (Feb. 25, 2005), *available at*

appreciate the horrific nature of particular abortion methods, such as partial birth abortion and dismemberment abortion.

Additionally, there is a growing body of evidence that, in many cases, abortion represents, not an empowering of women, but rather an instrument for facilitating male irresponsibility or sexual predations.[3]

Finally, published research strongly indicates that abortion, rather than being safer than childbirth, is in fact more dangerous.

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http://news.nationalgeographic.com/news/2005/02/0225_050225_tv_ultrasound.html (describing movement by the unborn visible at as early as 8 weeks into gestation and the gleeful responses of parents who are "immediately" able to recognize the ultrasound images because the fetus actually looks like a baby). Evidence of fetal pain also points to the humanity of the unborn and has posed a challenge for abortion activists who argue that unborn babies are incapable of feeling pain. *E.g.*, Annie Murphy Paul, *The First Ache*, N.Y. TIMES MAGAZINE (Feb. 10, 2008), *available at* http://www.nytimes.com/2008/02/10/magazine/10Fetal-t.html (describing the research of Drs. Kanwaljeet Anand and Nicholas Fisk, both of whom have discovered that unborn and premature babies are capable of experiencing tremendous pain and have subsequently begun to administer anesthesia to infant patients). Finally, the advances in preterm birth survival rates also have provided strong confirmation of the unborn child's independent humanity. *See* Dara Brodsky & Mary Ann Ouellette, *Introduction: Transition of the Premature Infant from Hospital to Home*, *in* PRIMARY CARE OF THE PREMATURE INFANT 1, 1 (Brodsky & Ouellette eds., 2008) (explaining that "medical advancements in obstetric and neonatal care have led to dramatically greater chances for survival of extremely premature infants [of whom those] born at 24 weeks' gestation currently have a survival rate of approximately 40% to 60%" and "almost 100% of infants born at 34 weeks' gestation survive"). *See also* Kim Carollo, *One of the World's Smallest Surviving Infants Goes Home*, ABC Good Morning America (July 10, 2012), available at http://abcnews.go.com/Health/worlds-smallest-surviving-babies-home/story?id=16714169 (recounting story of baby born at 24 weeks and weighing 9.6 ounces). More recently, a study in the New England Journal of Medicine, "Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants" (May 7, 2015), www.nejm.org/doi/full/10.1056/NEJMoa1410689, found that actively treated newborns as early as 22 weeks gestational age were surviving. "Gestational age" is measured from a woman's last menstrual period and is often referred to by the acronym LMP.

[3] *See* ELLIOT INSTITUTE, REVERSING THE GENDER GAP at 13 (2010) [hereinafter Elliot Institute], *available at* http://www.afterabortion.info/pdf/gendergapbooklet.pdf (compiling data related to, *inter alia*, coerced abortions) ("[Sixty-four] percent [of women] reported that they were pressured to abort by others. Indeed, most abortions are primarily the result of lack of support, pressure, emotional blackmail, coercion, manipulation, deceptive counseling, threats or even violence from partners, parents, employers, doctors, counselors or others with influence over women's lives") (footnotes omitted); *see also* Vincent M. Rue et al., *Induced abortion and traumatic stress: a preliminary comparison of American and Russian women*, MEDICAL SCIENCE MONITOR, Oct. 2004, *abstract available at* http://www.ncbi.nlm.nih.gov/pubmed/15448616. Studies show that most women feel coerced into, or at least inadequately informed about, having an abortion: "More than 50 percent [of post-abortive women] described themselves as feeling rushed or uncertain before the abortion; 79 percent said they were not counseled on alternatives to abortion; 84 percent said they did not receive adequate counseling before abortion; and 67 percent said they received no counseling before abortion." ELLIOT INSTITUTE, REVERSING THE GENDER GAP at 14 (2010) (footnote omitted). Furthermore, coercive action can become violent and deadly. *See, e.g.*, *Boyfriend Tells Police He Struck Pregnant Girlfriend With Bat, Strangled Her*, WBNS-10TV (Oct. 13, 2014), *available at* www.10tv.com/content/stories/2014/10/23/columbus-ohio-boyfriend-tells-police-he-struck-pregnant-girlfriend-with-bat-strangled-her.html (last visited Nov. 19, 2014) (man allegedly murdered pregnant girlfriend after trying to convince her to abort); *Homicide: A Top Cause of Death Among Pregnant Women*, ABCNEWS (June 24, 2007), *available at* http://abcnews.go.com/WN/story?id=3311859 (last visited Nov. 19, 2014) (discussing Ohio victim).

In Finland, for example, researchers drew upon national health care data to examine the pregnancy history of all women of childbearing age who died, for any reason, within one year of childbirth, abortion, or miscarriage, between the years of 1987 and 1994 (a total of nearly 10,000 women). The study found that, adjusting for age, *women who had abortions were 3.5 times more likely to die* within a year than women who carried to term.[4]

A subsequent study based upon Medicaid records in California likewise found significantly *higher mortality rates after abortion*. The study linked abortion and childbirth records in 1989 with death certificates for the years 1989-97. This study found that, adjusting for age, *women who had an abortion were 62% more likely to die from any cause* than women who gave birth.[5]

Yet another study, this one of nearly a half million Danish women, found that *the risk of death after abortion was significantly higher than the risk of death after childbirth*.[6] The study specifically examined both early (before 12 weeks gestation) and late (after 12 weeks gestation) abortions, and found statistically significantly higher death rates for both groups as compared to mortality after childbirth.

A more recent metanalysis of nearly 1000 studies concluded that *a woman's risk of premature death increase by 50%* and that this lethal effect lasts at least ten years.[7]

The Finland and California studies mentioned above both showed, *inter alia*, a heightened risk of suicide after abortion.[8] (The Danish study did not examine this aspect.) A British study found the same thing.[9] All these studies are consistent with the many studies documenting adverse emotional consequences after abortion.[10]

Of course, abortion can also cause physical harm, beyond the harm (*i.e.*, death) to the unborn child. This can result directly from the procedure itself (*e.g.*, perforation of the

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[4] Mika Gissler, et al., Pregnancy-associated deaths in Finland 1987-1994-definition problems and benefits of record linkage, 76 Acta Obstetrica et Gynecologica Scandinavica 651 (1997).

[5] David C. Reardon, et al., *Deaths associated with pregnancy outcome: A record linkage study of low income women*, 95 SO. MED. J. 834 (2002).

[6] David C. Reardon & Priscilla K. Coleman, *Short and long term mortality rates associated with first pregnancy outcome: Population register based study for Denmark 1980-2004*, 18 MED. SCI. MON. 71 (2012).

[7] David C. Reardon & John M. Thorp, *Pregnancy associated death in record linkage studies relative to delivery, termination of pregnancy, and natural losses: A systematic review with a narrative synthesis and meta-analysis*, 5 *Sage Open Medicine* 1 (2017).

[8] *See also* Mika Gissler, *et al., Suicides after pregnancy in Finland: 1987-94: register linkage study*, 313 BRITISH MED. J. 1431 (1996) (suicide rate after induced abortion was six times higher than suicide rate after childbirth).

[9] Christopher L. Morgan, et al., Mental health may deteriorate as a direct effect of induced abortion, 314 BRITISH MED. J. 902 (Mar. 22, 1997) (letters section) (found suicide attempts more than four times as frequent after abortion than after childbirth).

[10] See David C. Reardon, *Abortion Decisions and the Duty to Screen: Clinical, Ethical and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL'Y 33, 39 n.14 (2003) (citing nearly three dozen sources).

uterus, laceration of the cervix), from the deprivation of the health benefits of continuing pregnancy (*e.g.*, eliminating the protective effect of a full-term pregnancy against breast cancer),[11] or by masking other dangerous symptoms (*e.g.*, a woman with an infection or an ectopic pregnancy may believe her symptoms are merely normal after-effects of abortion, leading her to delay seeking medical help).[12] *See generally Physical effects of abortion: Fact sheets, news, articles, links to published studies and more*, The UnChoice, www.theunchoice.com/physical.htm (listing sequelae and referencing sources); Reardon, *Deaths Associated with Abortion*, *supra*, at 311-17 (same).

In short, the tragic and inhuman downsides of abortion have become more obvious, while the previously assumed advantages have failed to materialize. Abortion has proven to be, to say the least, a harmful social experiment.

The U.S. Supreme Court held in *Roe v. Wade* that abortion is a constitutional right protected, at least to a certain broad extent, by the federal Constitution. This decision has been subject to serious and sustained academic criticism and has, at least in part, already been overruled by the Supreme Court itself, *see Casey*. The Supreme Court has not yet overruled *Roe* completely, however, and thus has not yet restored to the States the authority to deal with abortion that States enjoy with regard to other destructive practices such as child abuse, drug abuse, and animal abuse. Consequently, until there are new developments in the pertinent case law from the Supreme Court, States are constrained in their ability to confront the harms abortion poses.

Nevertheless, States are not completely powerless in the face of abortion. The Supreme Court has expressed a willingness to uphold commonsense, defensible measures to limit or regulate abortion, *id.*, and in fact has upheld a variety of measures ranging from waiting periods, *id.* at 885-87, to informed consent requirements, *id.* at 887, to recordkeeping and reporting requirements, *id*. at 900-01, to bans on the use of State resources to facilitate abortion, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977), to bans on abortions by non-physicians, *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *see also City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 447 (1983) (stating that "[the Supreme Court has] left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions"), to parental involvement statutes, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326-27 (2006), to a ban on a particularly heinous method of abortion, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003). These examples certainly do not exhaust the possible responses a State could undertake. For example, States presumably can ban forced abortions, can protect the consciences of medical students, nurses, and pharmacists who do not wish to participate in abortions, can require basic sanitary conditions in abortion facilities, etc.

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[11] *See* Justin D. Heminger, *Big Abortion: What the Antiabortion Movement Can Learn from Big Tobacco*, 54 CATH. U.L. REV. 1273, 1288-89 & nn.119 & 121 (2005) (citing sources).

[12] *Cf*. Reardon, *Deaths Associated with Abortion*, *supra*, at 284 & nn26-27 (CDC does not count as abortion death a death from ectopic pregnancy that ruptures after the woman had an abortion, even though "the deaths are at least partially due to the failure of the abortion provider to verify the site of the pregnancy and the completion of the abortion").

The Heartbeat Bill attempts to follow the path laid out by these cases. The testing, informed consent, and recordkeeping requirements are consistent with Supreme Court precedent upholding common-sense abortion regulations. The Heartbeat Bill also attempts to secure additional protection for unborn children, namely, those whose hearts have begun to beat. By calling a halt to the deliberate slaying of innocent human beings with beating hearts, the prohibition section of the bill calls upon the Court to allow states to provide a level of protection for unborn children against abortion that is more consonant with basic human dignity.