

Protecting the Unborn through the “Heartbeat Bill.”

Statement of

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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 states may protect those unborn children who are virtually certain to be born.**
- **The Heartbeat Bill will affirm the humanity of the unborn.**
- **The Heartbeat Bill will add to the moral edifice that people of good will have erected against abortion.**

- I. **Resting upon 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 all of *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 be 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 Court recognized the state’s interest in the life of the fetus as 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*.

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. In fact, lower courts declare that the purpose prong of the undue burden standard can be met by a simple rational relation test.

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, abortion providers 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 sufficiently 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 97% 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 viability. In point of fact, a physician does not determine the viability 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 is 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 Ohio and other 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 including Ohio's Fetal homicide law, 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 while he or she is killed.

Similarly, the Heartbeat Bill affirms what a strong majority of Ohioans have understood: a fetus with a heartbeat is a living human individual, destined to be born if only given the chance.

III. In tandem with other pieces of pro-life legislation, the Heartbeat Bill erects a moral edifice against abortion and the damage abortion does to unborn children, to women, and to our country.

Over the past two decades, groups seeking to advance social causes have used the law to educate and change the behavior of people. Today, for example, smoking is something that polite people do not do, whether at others' homes, at social gatherings, or when children are present. Alcohol is legal, but the campaign against drunk driving is such that the "designated driver" is now part of our social landscape. The long history of the effort to combat segregation and racial prejudice is another example of how the nation accepts the moral position on how to treat another human being.

Ever since 1992 when the Supreme Court decided *Planned Parenthood v. Casey*, the pro-life movement has gathered its resources and, step by step, has built up a moral edifice against abortion.

Today, 13 states have passed Pain Capable Child Protection Acts.

24 states have a form of ultrasound law.

27 states have Woman's Right to Know/Informed Consent law.

45 states have Parental Involvement Acts

12 states ban "Web Cam" abortions.

A majority of states have post-viability bans.

37 states have fetal homicide acts.

4 states ban sex selective abortions, while 9 others are considering it.

32 states ban partial birth abortions.

Heartbeat bills provide one of the most important bricks in the moral edifice against abortion. They demonstrate that abortion is not just a "procedure," but an intentional act, the purpose of which is to end the life of another human person whose heart is beating and who will, with virtual certainty, be born.

IV. Conclusion

By giving the courts the opportunity to understand that heartbeat is the best marker of a child who is destined to be born, by affirming the humanity of the unborn child, and by building up the moral consensus that children in the womb deserve the right to live, **the Heartbeat Bill has a real chance of saving thousands of lives.**