February 17, 2019

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

From: Adam Mathews
Partner, Dearie Fischer & Mathews LLC

Re: Support of SB 23 of General Assembly 133; Short tile "Prohibit abortion if detectable heartbeat"

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

My name is Adam Mathews, and I am a partner in a firm in Lebanon, Ohio. I have been a licensed attorney in the state of Ohio since 2013 and in that time I have counseled dozens of businesses, families, and individuals on how best to protect their interests and stay within the bounds of the law.

Law is best followed and enforced when it is clear and easily understood. A speed limit provides a threshold and binary result for a driver. He or she is either above or below the speed limit and therefore either in compliance with the law or not. With two words and one number, there is very little to interpret, misunderstand, or argue.

With respect to the very grave and important matter as to when to protect the life of the unborn, the law should be similarly clear and easy to understand. The current framework for determining whether an abortion can take place is under that of *Planned Parenthood v. Casey*[1], wherein only a plurality, not a majority, held that, with other considerations, a state can regulate abortion after the point of "fetal viability." At the time of its decision, the justices for the plurality acknowledged that viability was a moving target, going from "28 weeks, as was usual in the time of *Roe*, [to] 23 or 24 weeks, as it sometimes does [at the time of Casey.]"[2]

Further, the justices who signed on to the plurality opinion in *Casey* themselves disagreed as to what viability meant[3]. In *Stenberg v. Carhart*[4], only eight years after *Casey*, Justices Souter, O'Connor, and Kennedy, who each were in the plurality of *Casey*, disagreed and signed on to distinct opinions regarding the meaning of viability and therefore whether or not partial birth abortion bans were constitutional.[5] As an aside, the Supreme Court later distinguished *Stenberg*

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[1] 505 U.S. 833 (1992).
[2] *id.* at 860.
[3] J. Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, UKMC L. Rev 75, 713 (2002)
[4] 530 U.S. 914 (2000).
[5] *Compare id.* at 920-946 (opinion of the Court, joined by Justices Souter and O'Connor), *and id.* at 947-951 (O'Connor concurring), *with id.* at 960-961 (Justice Kennedy dissenting) (each using the reasoning of viability held in *Casey*), from Beck, footnote 5.

and upheld partial birth abortion bans.[6] If the Supreme Court Justices who were there at the creation of the viability standard cannot agree on a working definition of viability or how to apply it, how then, can Ohio's doctors, lawyers, mothers, and families figure it out?

The reason it is so difficult to apply the viability standard is that is arbitrary.[7] The viability standard was arbitrary and seen as such from the beginning. Justice Blackmun, the writer of the majority opinion in *Roe v. Wade*[8], noted in its attached memo that the selection of the end of the first trimester as the legal threshold was "arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary."[9]

Since it is arbitrary, relying upon viability is morally and legally random with results leading to unfortunate consequences. An identical 25 week old fetus in 1975 and now would have entirely different legal status, even though there is no difference in either the fetus nor the burden placed on the mother. Time alone should not be a determining factor in whether legal status can be extended.

Viability is not only dependant on the vagaries of time, but of place. A woman with the fullest access to the highest quality of NICUs and other medical services would have a different point of viability for her pregnancy than a woman, or even the same woman, residing elsewhere with more limited means. In fact, there would be an argument that a fetus could be considered viable, then the mother move to a place or situation with lesser care, and then even though the pregnancy has further progressed in time, the fetus is now considered not yet viable.

Since determining viability, itself a prediction of what may happen if a fetus is removed from the womb, doctors in good faith can reach diverging opinions of evaluating the likelihood of survival for any particular situation. Viability is often tied to lung strength, which is rarely used for any other granting of legal status. Doctors may disagree on which factors to use, or the determination may be dependent upon the skill of the doctor or the quality of the instruments at hand. Additionally, determinations that lead to whether or not protection is available for the unborn could be biased by the level of risk-aversion or prevailing treatment philosophies at the medical facility.[10]

Relying on viability advantages the strong over the weak and even, if followed logically, means different rights are extended based on genetic strength and race. The medical evidence shows that viability tends to occur at different points in development, depending on the race, ethnicity,

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[6] Gonzales v. Carhart, 550 U.S. 124 (2007).
[7] *Casey,* at 870 ("Legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not.")
[8] 410 U.S. 113 (1973)
[9] Cover Memorandum Accompanying Draft of *Roe v. Wade*, *quoted in* DAVID GARROW, LIBERTY AND SEXUALITY 580 (2005).
[10] Coluatti v. Franklin, 439 U.S. 379, 395-396 (Even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all) *See* Beck, at Gonzales, Casey, and the Viability Rule. Nw. UL Rev., 103, 249 n 64.

and sex of the fetus.[11] It seems unjust to have a standard with such a disparate impact, especially at the earliest point of life.

As noted in the test of the bill, the overwhelming majority of babies with a detectable heartbeat make it to full term, and those without do not[12]. This data supports the use of the heartbeat as a usable rule of providing the legal threshold of when to regulate abortion.

As a clear rule, the determination of a heartbeat reduces the legal and moral arbitrariness that has previously been allowed through the viability standard. Legal status and protection for the smallest among us should not be dependent upon means, location, sex, race, or any other irrelevant consideration.

Please, support the Heartbeat Bill and send the message that Ohio believes every life is worth protecting.

Thank you for your time and consideration.

[11] Beck, *see supra* at note 3, at 731. S.L. Lukacs & K.C. Schoendorf, *Racial/Ethnic Disparities in Neonatal Mortality-United States 1989-2001,* 292 JAMA 2461 (2004); Greg R. Alexander et. al, *US Birth Weight/Gestational Age-Specific Neonatal Mortality: 1995-1997 Rates for Whites, Hispanics, and Blacks*, 111 PEDIATRICS 61 (2003).
[12] Senate Bill 23, 2019, Section 2919.191