

WRITTEN TESTIMONY REGARDING S.B. No. 8, THE TEXAS HEARTBEAT ACT

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What Does the Bill Do?

The Texas Heartbeat Act, S.B. 8, modifies and supplements existing Texas legislation, with the final effect of establishing four main requirements.

First, regarding *informed consent*, the bill requires an abortionist to check to see if the unborn baby the pregnant woman is carrying has a heartbeat. New Sec. 171.204. This bolsters existing Sec. 171.012(a)(4)(A)-(D), which requires the abortionist to do a sonogram and describe, and allow the mother to hear, the child's heartbeat.

Second, abortions of babies with heartbeats are prohibited. New Sec. 171.204.

Third, 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. 171.008(c).

Fourth, the Act provides exclusively civil remedies. New Sec. 171.207.

Is It Constitutional?

The distinct sections of the Heartbeat Act 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 Act are expressly 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 Act 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.” However, several points merit mention.

First, the Heartbeat Act only provides for *civil* remedies in lawsuits brought by *private* parties (not government officials), as noted above. New Sec. 171.207. Under controlling federal court precedent, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), abortion providers are not permitted to challenge such civil remedy laws in a preenforcement federal court challenge. Obviously, where the state lacks enforcement power, relief against the state would be meaningless. And abortionists cannot sue all potential private party plaintiffs, as such defendants are not yet identifiable and it is pure speculation that any particular person might sue at some point in the future. What this means is that the abortion providers must wait until they are sued, at which time they can challenge the constitutionality of the heartbeat abortion prohibition as an affirmative defense to liability.

Second, the Heartbeat Act expressly provides for an “undue burden” exception to comply with *Casey*, though that defense will terminate if *Casey* is overruled. New Sec. 171.209. In other words, the Act is tailored to be immune from challenge under existing Supreme Court precedent.

Third, even if the Act were somehow challenged under Supreme Court precedents, those 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 (or to the *stare decisis* argument that the Court should be reluctant to overturn even mistaken rulings)? 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 attractive 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 a hindrance to 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.

Fourth, the Supreme Court could also uphold a heartbeat abortion ban 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' constitutions) do not bind

Texas, 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 Act 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.

Reporting

Reporting requirements 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. 171.008(c) 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, either by indicating the overuse of asserted, but actually flimsy or phony, “health” justifications, on the one hand, or by identifying genuine maternal health concerns that merit public response, on the other.

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 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

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 Meddy Bear, *4-D Ultrasound*, FACEBOOK (Dec. 19, 2015) available at <https://www.facebook.com/MeddyBear.Net/videos/900425126743429/?pnref=story>. 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. 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.) See also 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"); 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).

³ See ELLIOT INSTITUTE, REVERSING THE GENDER GAP at 13 (2010) [hereinafter Elliot Institute], available at <https://www.afterabortion.org/pdf/gendergapbooklet.pdf> (compiling data related to, *inter alia*, coerced abortions) ("30 to 60 percent of all abortions are primarily the result of women submitting to the demands of boyfriends, husbands, parents, employers, doctors, or other people with influence over their lives") (footnote 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>. Furthermore, coercive action can become violent and deadly. See, e.g., Bridget Spencer & Elizabeth Evans, *Former APD officer VonTrey Clark pleads guilty to capita murder*, FOX 7 AUSTIN (Dec. 16, 2019), available at <https://www.fox7austin.com/news/former-apd-officer-vontrey-clark-pleads-guilty-to-capital-murder> (last visited Mar. 13, 2021) ("Investigators say Clark conspired with several others to kill Dean because she refused to have an abortion"). See also NIH, "Homicide is a leading cause of pregnancy-associate death in Louisiana" (Feb. 3, 2020); Bonnie Eslinger, "Redwood City man who impregnated 12-year-old daughter goes to prison for 25 years," Mercury News (Jan. 29, 2014) ("brought her to a hospital for an abortion").

Finally, published research strongly indicates that abortion, rather than being safer than childbirth, is in fact more dangerous. (For a refutation of the false claim that abortion is safer than childbirth, and reference to many studies indicating the opposite, see the ACLJ's recent amicus brief filed in the U.S. Supreme Court, available at http://media.aclj.org/pdf/Slatery-v.-Adams-&-Boyle-ACLJ-Cert.-Stage-Amicus-Brief-Filed-11.12.20_Redacted.pdf.)

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 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),⁴ 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). *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 what would otherwise typically be a form of homicide or wrongful death – deliberately taking a human life before birth – can be, given the mother's fully informed and voluntary consent, 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

⁴ 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).

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.

The Heartbeat Act 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 Act 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.