

'Heartbeat Bill' could undo abortion precedent

Ohio's state legislature in mid-December was on the verge of passing a law that would ban abortions at the moment that a fetal heartbeat is detected, which can be as early as six weeks of pregnancy.

If not vetoed by Gov. John Kasich, a Republican who rejected similar legislation in December 2016, the "Heartbeat Bill," as it is known, could challenge U.S. Supreme Court precedents that currently prohibit states from outlawing abortion before a fetus is viable outside the womb, which is now around 22 weeks.

"The premise of this bill is to directly challenge *Roe v. Wade*, and present the question in a different way, based off of cardiac activity rather than the presumption of viability, which is an ever-moving target," said Ohio State Rep. Christina Hagan, the lead House sponsor of the bill.

Hagan told Our Sunday Visitor that she believed the "chances were good" for the state Senate to pass the bill, which the House approved in a 60-35 vote on Nov. 15, before the end of the current legislative session, which ends on Dec. 31.

A vote was originally scheduled for Dec. 6, but the Senate postponed the matter amid protests from abortion advocates from in- and outside Ohio who argued that the legislation would criminalize physicians and cause them to flee the state while leaving women open to criminal liability for seeking an abortion.

Hagan said those criticisms are unfounded.

"There are zero criminal penalties for any woman in the legislation unless she's the abortion provider who ignores the

law and the beating heart, and executes a child in the womb at that point," Hagan said.

Likely blocked

Under the bill, aborting an unborn baby with a detectable heartbeat would result in a fifth-degree felony, which is punishable in Ohio by up to one year in prison and a \$2,500 fine.

The legislation has exemptions that enable doctors to perform abortions in the event of a medical emergency, such as to save the mother's life or to prevent risking a substantial and irreversible impairment of a major bodily function.

According to an Ohio Legislative Services Commission analysis, the law would also encourage that women seeking abortion be informed of the available options for adoption, and would create a new legislative committee to further that goal.

Hagan said the idea for the legislation was presented to her shortly after she joined the Ohio state legislature in 2011.

"It just made an awful lot of sense, that we would protect children with beating hearts," Hagan said. "I think what's unique about this particular piece of legislation is that it's a more certain marker than viability for the uniqueness of the human DNA, and it gives us a better chance at challenging *Roe v. Wade*, and extending rights to the unborn."

If passed, Ohio would actually become the fourth state to ban abortion once a fetal heartbeat is detected. Since 2013, lawmakers in Iowa, Arkansas and North Dakota have passed similar legislation, but those laws are all blocked because of pending litigation in the federal courts.

Planned Parenthood, NARAL, the American Civil Liberties Union and similar organizations have challenged those laws in court, and have indicated that they will do so if the "Heartbeat

Bill” becomes law in Ohio.

“If it passes, we will challenge it, and it will likely be blocked by the lower courts,” Brigitte Amiri, the deputy director of the ACLU’s Reproductive Freedom Project, wrote in a Nov. 19 blog post where she suggested that the Ohio bill is “designed to directly challenge the fundamental constitutional right to abortion.”

Makings of a challenge

With President Donald Trump having appointed two conservative justices to the Supreme Court – Neil Gorsuch in 2017 and Brett Kavanaugh this year – advocates for and against legal abortion see a real possibility that the high court will soon be open to revisiting its abortion precedents.

“With Brett Kavanaugh, that definitely was a positive change. Whether or not that’ll be enough, that remains to be seen,” said Jessica Warner, the legislative director for Ohio Right to Life.

Warner told OSV that Ohio Right to Life has taken a neutral stance on the Heartbeat Bill, given the question of whether it would successfully withstand a legal challenge.

“We don’t want to send something to the Supreme Court that won’t be able to win,” Warner said. “Right now, we’re pushing dismemberment abortion ban, which we believe is really close to getting done as well. We believe that one has a really good chance of overturning Roe v. Wade if it would be taken to the Supreme Court, so that’s what we’re focusing on right now.”

Warner’s comments reflect an ongoing debate within pro-life circles over the strategy of using heartbeat bills as a vehicle to challenge Roe. On its website, the Catholic Conference of Ohio praised the bill’s life-affirming intent while adding that the state’s bishops support legislation that can withstand constitutional challenges and be implemented in

order to save lives.

“The bishops are concerned about bills being able to stand up in court,” said Carolyn Jurkowitz, the executive director of the Catholic Conference of Ohio who told OSV that other state Catholic conferences have also been reluctant to endorse heartbeat bills.

“That could all be different with a different court moving forward, but we’re not there right now, and I don’t think this bill is going to be going through anyway,” Jurkowitz said, adding that the bishops would want to analyze the legislation with their attorneys if the bill stalls in the Senate or is reintroduced next year, when Governor Mike De-Wine, a Republican, takes office. De-Wine has said he would sign the bill.

‘Count to five’

Hagan said she understands the arguments from within pro-life circles against using the heartbeat ban in the movement’s long-term strategy to overturn Roe. However, she disagrees with that position.

“A lot of the opposition, even within our own Republican Party, comes from the fact that they just didn’t think we had the court makeup for this to be able to survive a challenge,” said Hagan, who pointed out that the Supreme Court now has five justices considered to be pro-life.

“Obviously, all you have to do is count to five and know that we’re in a better environment for life-defending, constitution-protecting Supreme Court justices to consider this proposal,” said Hagan, who believes the heartbeat bill will eventually become law in Ohio.

“The worse-case scenario is that it’s only a matter of time,” Hagan said. “But the sad thing is, it’s 52 innocent lives a day being lost to abortion in Ohio in the meantime.”

In a move that surprised and disappointed pro-life groups, the Supreme Court on Dec. 11 announced that it would not hear two cases brought by Louisiana and Kansas, which were seeking to prohibit Planned Parenthood from receiving Medicaid funding. Justice Kavanaugh and Chief Justice John Roberts joined the court's four liberal justices in deciding not to hear those cases.

"It's definitely not encouraging news. We wish that Kavanaugh wasn't on that side. We expect Roberts to be kind of the swing vote now, so it isn't heartening to see Kavanaugh side with him," said Warner, from Ohio Right to Life.

However, Warner said it was important to note that the high court was looking specifically at Planned Parenthood funding as it relates to Medicaid funding, which she said is one of the more difficult defunding mechanisms that likely requires federal legislation.

"I don't think this is definitive," Warner said. "I think we'll have to wait and see when it actually comes time for the court to look at any abortion bans and restrictions."

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