

Amendment No. 3 to HB2263

Sexton J
Signature of Sponsor

AMEND Senate Bill No. 2196

House Bill No. 2263*

by deleting all language after the caption and substituting instead the following:

WHEREAS, on June 2, 2020, in *EMW Women's Surgical Center v. Friedlander*, the United States Court of Appeals for the Sixth Judicial Circuit rejected a legal argument by the state of Kentucky, citing the U.S. Supreme Court's decision in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), that an exception to the Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 8334 (1992) should be made for abortions performed by Dilation and Extraction ("D&E"), commonly referred to as "dismemberment abortion," which procedure the Court said began to be used on or about the 15th week of fetal gestation; and

WHEREAS, on August 22, 2018, in *West Alabama Women's Center v. Williamson*, 900 F.3d 1310 (2018), the United States Court of Appeals for the Eleventh Judicial Circuit rejected a legal argument by the state of Alabama, citing the U.S. Supreme Court's decision in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), that an exception to the Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 8334 (1992) should be made for "dismemberment abortions," which, according to the appellate court, were "usually done during the 15 to 18 week stage of development, at which time the unborn child's heart is already beating"; and

WHEREAS, on June 28, 2019, the United States Supreme Court, in a unanimous decision, denied a Petition for Certiorari from the state of Alabama regarding the unconstitutionality of its dismemberment abortion ban, and, in a concurring opinion, 588 U.S. ____ (2019), Justice Clarence Thomas stated that this type of law and legal argument "does not present the opportunity to address our demonstrably erroneous 'undue burden' standard"; and

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WHEREAS, on June 27, 2016, in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), the United States Supreme Court rejected the use of severability clauses to protect those provisions in an abortion law that might be constitutional if other provisions in that law were unconstitutional on its face, rejecting the argument of the state that "instead of finding the entire surgical-center provision unconstitutional, we should invalidate (as applied to abortion clinics) only those specific surgical-center regulations that unduly burden the provision of abortions, while leaving in place other surgical center regulations"; and

WHEREAS, in rejecting the use of severability clauses to preserve those portions of a law that might not be constitutional from those that were facially unconstitutional, the Court in *Hellerstedt* said:

[O]ur cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision. "We have held that a severability clause is an aid merely; not an inexorable command." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884-885, n. 49, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (internal quotation marks omitted). Indeed, if a severability clause could impose such a requirement on courts, legislatures would easily be able to insulate unconstitutional statutes from most facial review. . . . A severability clause is not grounds for a court to "devise a judicial remedy that ... entail[s] quintessentially legislative work." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). Such an approach would inflict enormous costs on both courts and litigants, who would be required to proceed in this manner whenever a single application of a law might be valid; and

WHEREAS, in *Casey*, the U.S. Supreme Court said, "Where . . . the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation" and "whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure"; and

WHEREAS, the legal arguments made by Kentucky and Alabama offered no precedential force "equally rare" to that employed in *Roe* and *Casey* by which those decisions could be reexamined and sought only an exception to those precedents based more on specific medical facts than "accepted standards of [judicial] precedent" regarding the validity of a woman's Fourteenth Amendment liberty interest in abortion; and

WHEREAS, in light of the foregoing, the General Assembly believes there is a strong likelihood that constitutional arguments by Tennessee similar to those made by Kentucky and Alabama for any prohibition on abortion prior to viability, that rely primarily on medical and scientific facts for an exception to those decisions, and that rely on severability clauses that would make the U.S. Supreme Court "proceed application by conceivable application" will be treated by the federal courts in the same manner as described above; and

WHEREAS, the General Assembly believes that a different constitutional argument will be required if this body wants to "present" to the U.S. Supreme Court "the opportunity to address [its] demonstrably erroneous 'undue burden' standard"; and

WHEREAS, a different constitutional argument was presented to the Senate Judiciary Committee of the Tennessee General Assembly on August 12 and 13, 2019, in connection with an amendment resting on and pointing to the conception of law and rights referenced in the Ninth Amendment to the U.S. Constitution; and

WHEREAS, the Senate Judiciary Committee heard testimony from over twenty witnesses concerning House Bill 77, as adopted by the House of Representatives, and the Senate companion bill, Senate Bill 1236, as amended by the committee on April 9, 2019; and

WHEREAS, all of the testimony heard by the committee was communicated by contemporaneous streaming over the internet and thereafter was archived, making the testimony available to all members of the House of Representatives and Senate and the citizens of Tennessee; and

WHEREAS, the General Assembly heard un-rebutted testimony that the majority opinion in *Hellerstedt* noted that "the relevant statute" in that case did "not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective"; and

WHEREAS, the General Assembly does not want to leave any federal court in the position of having to "infer" that its members seek "to further a constitutionally acceptable objective" founded in the Ninth Amendment and pursued by means of the powers recognized by the Tenth Amendment as belonging to the State; and

WHEREAS, the General Assembly also wants to begin by making clear its allegiance to the separation of powers between the legislative and judicial branches, the principles arising from the existence of dual sovereigns and the limited powers and objects of the federal or national government under the United States Constitution, and its understanding of the limited nature of the judicial power as one of judgment and not will or force; and

WHEREAS, the General Assembly agrees with the statement made by Abraham Lincoln in his first inaugural address, "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal"; and

WHEREAS, in this regard, this General Assembly heard un-rebutted testimony, citing Daniel J. Meador & Jordana S. Bernstein, *Appellate Courts in the United States*, 75-76 (1994), that "the opinion of an appellate court is the explanation of what the court is deciding; it is not a legally operative instrument"; and

WHEREAS, Article VI, clause 2 of the United States Constitution, known as the Supremacy Clause, makes the Constitution itself supreme as to the law governing the whole of the people and makes no reference to opinions of the United States Supreme Court which only "say what the law is," *Marbury v. Madison*, 5 U.S. 137 (1803), in a particular "case" or "controversy," by which and to which its jurisdictional authority is limited and constrained by Article III of the United States Constitution; and

WHEREAS, on the basis of the foregoing, the General Assembly agrees with the rebuke by Justice Antonin Scalia of a dissenting opinion authored Justice Stephen Breyer in *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000), because it proceeded "on the erroneous and all-too common assumption that the Constitution means what [Supreme Court Justices] think it ought to mean. It does not; it means what it says"; and

WHEREAS, the Ninth Amendment to the United States Constitution provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and

WHEREAS, Joseph Story, Justice of the United States Supreme Court from 1811 to 1845, Dane Professor of Law at Harvard University from 1829 to 1845, and author of the first comprehensive commentary on the United States Constitution, wrote that the Ninth Amendment "was manifestly introduced to prevent any perverse, or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and the converse, that a negation in particular cases implies, an affirmation in all others," *Commentaries on the Constitution of the United States*, Section 1898; and

WHEREAS, with respect to the Ninth Amendment to the United States Constitution and the United States Supreme Court's Fourteenth Amendment-based abortion jurisprudence,

Professor Adam MacLeod testified before the Senate Judiciary Committee that *Roe* and *Casey* were not controlling precedent for an abortion law grounded on the rights retained by the people of the states under the Ninth Amendment; and

WHEREAS, Professor MacLeod also testified that Ninth Amendment arguments were "expressly bracketed and set aside" by Justice Blackmun in *Roe* and that, in the abortion context, the Ninth Amendment "has not been considered ever since"; and

WHEREAS, the un-rebutted testimony demonstrated that the Ninth Amendment's reference to "other rights" meant those rights recognized at common law, which law is referenced in the Bill of Rights, explicitly in the Seventh Amendment and implicitly in all of the others; and

WHEREAS, in *Powell v. Hartford Accident and Indemnity Co.*, 398 S.W.2d 727, 730-31 (1966), the Tennessee Supreme Court said, "Tennessee is a common law state, and so much of the common law as has not been abrogated or repealed by statute is in full force and effect"; and

WHEREAS, common sense as well as the un-rebutted testimony of Professor MacLeod tell us that the enumerated rights referenced in the Ninth Amendment would be such as those found in the Bill of Rights and the Fourteenth Amendment; and

WHEREAS, both the Fifth and Fourteenth Amendments provide, as enumerated rights, that neither the federal or state governments shall deprive "any person" of "life, liberty, or property, without due process of law"; and

WHEREAS, according to the Ninth Amendment, this enumerated right shall not be "construed" to deny and disparage the rights the people held at common law; and

WHEREAS, the General Assembly heard un-rebutted testimony that the Ninth Amendment reserves to the people and states the power to specify and secure common law rights, which are those rights that Americans enjoy by virtue of ancient customary law and natural law; among these ancient rights is the right to life, which in the common law is known as an "absolute right"; the right to life is enjoyed by all natural persons, which includes unborn

human beings, the aged, and the infirm; and the Fourteenth Amendment did not abrogate the powers of the people and states reserved by the Ninth Amendment; and

WHEREAS, the General Assembly heard un-rebutted testimony that "the first duty of every state is to secure the rights that people already have"; and

WHEREAS, Blackstone's Commentaries is in accord with such testimony, wherein it is written, "the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature," and, "hence, it follows, that the first and primary end of human law is to maintain and regulate these absolute rights of individuals," and, "therefore the principle view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple"; and

WHEREAS, in accord with the Ninth Amendment and the common law, from the very first constitution of the state of Tennessee to the present time, it has set forth the following in its "Declaration of Rights":

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper; and

WHEREAS, in *Moore v. United States*, 91 U.S. 270, 274 (1876), quoting *Schick v. United States*, 195 U.S. 65, 69 (1904), the Court said the common law, "is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law"; and

WHEREAS, in *Smith v. Alabama*, 124 U.S. 465, 478 (1888), the Court said, "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history"; and

WHEREAS, in *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898), the Court said the Constitution "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U.S. 417, 422; *Boyd v. United States*, 116 U.S. 616, 624, 625; *Smith v. Alabama*, 124 U.S. 465"; and

WHEREAS, the un-rebutted testimony of law professor Adam MacLeod was that William Blackstone's Commentaries on the Laws of England "supplied the lexicon and lessons from which American jurists drew at the Founding and for more than a century thereafter"; and

WHEREAS, Professor MacLeod's un-rebutted testimony is corroborated by the United States Supreme Court, which, with respect to Blackstone's Commentaries on the Laws of England, has said, "Sir William Blackstone's ... Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers," *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997), and has said that they "constituted the preeminent authority on English law for the founding generation," *District of Columbia v. Heller*, 554 U.S. 570 (2008), quoting *Alden v. Maine*, 527 U.S. 706 (1999); and

WHEREAS, in *Schick v. United States*, 195 U.S. 65, 69 (1904), the Court wrote that "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England....[U]ndoubtedly the framers of the Constitution were familiar with it"; and

WHEREAS, the General Assembly heard un-rebutted testimony that the common law was discussed and considered most recently in the majority opinions of the United States Supreme Court in *Ramos v. Louisiana*, 590 U.S. ____ (2020) in regard to a Fourteenth Amendment "right to a . . . public trial" and "impartial jury"; in *Gamble v. United States* (2019) in regard to the word "offense" in the provision preventing double jeopardy; and in *Knick v. Township of Scott* (2019) in regard to the prohibition on a government taking of property without compensation. Subsequent research shows the same to have been true with respect to the Fourteenth Amendment the right to "keep and bear arms"; in *McDonald v. City of Chicago*, 561

U.S. 742 (2010); the Second Amendment right to "keep and bear arms" in *District of Columbia v. Heller*, 554 U.S. 570 (2008); the right to confront one's accusers secured by the Sixth Amendment in *Crawford v. Washington*, 541 U.S. 36 (2004); the right to jury for facts relative to sentencing in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); the immunities recognized by the Eleventh Amendment in *Alden v. Maine*, 527 U.S. 706 (1999); and the word "crimes" relative to the right to a trial by jury in *Bloom v. Illinois*, 391 U.S. 194 (1968); and

WHEREAS, in his Commentaries, William Blackstone began his explication of law, in general, with the following statement, "Law, in its most general and comprehensive sense, signifies a rule of action ... which is prescribed by some superior, and which the inferior is bound to obey"; and

WHEREAS, a "rule" as respects law and the rule of law, on which Americans pride themselves, was understood as that which operates on or is in relation to the people or a group of people as a whole, not just particular persons, and for such a rule to be equitable and just, Blackstone wrote in his Commentaries that its nature had to be "permanent, uniform, and universal"; and

WHEREAS, according to Blackstone's Commentaries, enacted laws and policies were understood at the time of the adoption of the United States Constitution to be "a rule of civil conduct, commanding what is right, and prohibiting what is wrong" from which it "follow[ed] that the primary and principal object of the law are RIGHTS and WRONGS"; and

WHEREAS, at common law, Blackstone said "rights" were subdivided between "those which concern and are annexed to the persons of men ... or the rights of persons," and the second were such as persons "may acquire over external objects, or things unconnected with his person ... or the rights of things"; and

WHEREAS, at common law, Blackstone wrote that the rights of persons that are commanded to be observed by enacted law "are of two sorts: first, such as are due from every citizen, which are usually called civil duties; and, secondly, such as belong to him, which is the more popular acceptation of rights," and therefore, an understanding of rights as simply a

freedom to do or not do as one pleases is base and contrary to our nation's fundamental law;
and

WHEREAS, at common law, Blackstone wrote, "persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic"; and

WHEREAS, at common law, Blackstone wrote, "The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons"; and

WHEREAS, at common law, in accord with the un-rebutted testimony of Professor MacLeod, Blackstone wrote, "the first and primary end of human laws is to maintain and regulate these absolute rights of individuals"; and

WHEREAS, Blackstone said that at common law the absolute rights of individuals "may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property"; and

WHEREAS, Blackstone said, "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; and

WHEREAS, based on the common law as explicated in Blackstone's Commentaries, the framers of the U.S. Constitution understood the word "life" as being "the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb"; and

WHEREAS, Blackstone said "an infant in ventre sa mere," or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born"; and

WHEREAS, Blackstone said, "This natural life, being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority"; and

WHEREAS, notwithstanding all of the foregoing, in *Roe v. Wade*, Justice Blackmun, writing for the majority, said, "The Constitution does not define 'person' in so many words"; and

WHEREAS, the preceding statement in *Roe v. Wade* does not prove that the unborn cannot be considered persons under the Constitution, but only that the rights the Court therein noted can only be predicated upon the person being already born, which says nothing about whether the words "any person" could have any prenatal application; and

WHEREAS, Justice Blackmun, by ignoring the word "any" and limiting his analysis to the word "person" and then only to constitutional provisions pertaining to specific categories of persons described with respect to particular postnatal purposes, the majority in *Roe* was able to avoid consideration of the broader and more indeterminate words "any person," the term's meaning in the common law, or how the term would have been understood in 1868; and

WHEREAS, this type analysis blatantly ignores the United States Supreme Court's own use of the common law and Blackstone's Commentaries to define and understand other terms in the United States Constitution, as previously described; and

WHEREAS, an assumption that because certain rights under the Constitution can only be predicated upon a person being born means only born persons can be constitutional persons leads to the fallacious conclusion that the unborn do not have any rights relative to property by inheritance, to damages for injury to their limbs, or to justice by the vindication of their lives taken in connection with criminal acts, all of which have been recognized by law; and

WHEREAS, this denial of rights to unborn persons based on the fact that certain rights can only extend to those already born violates the very purpose of the Ninth Amendment as previously described by Justice Story in his Commentaries, namely, that the express affirmation of certain rights for certain people and persons was not intended to exclude the existence of

"other rights" in other "people" or to another person and the recognition of those "other rights"; and

WHEREAS, the United States Supreme Court's construction of the word "person" in the Fourteenth Amendment as the possessor of the rights therein provided must necessarily take on two different meanings in the same sentence when it comes to "life" and "property," which violates the normal rules of grammar, as well as long-held canons of construction; and

WHEREAS, according to Story's Commentaries, "true rules of interpretation applicable to the constitution" should provide "some fixed standard, by which to measure its powers, and limit its prohibitions, and guard its obligations, and enforce its securities of our rights and liberties"; and

WHEREAS, the jurisprudence expressed by the majority opinion in *Roe v. Wade* and its subsequent opinions on abortion provide no fixed standard for understanding the words "any person" in the Fourteenth Amendment, singling out unborn persons for disparate treatment in regard to life inconsistent with their treatment in all other areas of law; and

WHEREAS, substantiating the foregoing proposition that *Roe* provides no fixed standard for understanding the word "person" in the Fourteenth Amendment was un-rebutted testimony before the Senate Judiciary Committee showing that in 2007 a majority of justices in *Gonzales v. Carhart* disregarded the *Casey* standard of fetal viability in regard to a woman's liberty interest in abortion; and

WHEREAS, there was testimony that within the United States Supreme Court's Fourteenth Amendment abortion jurisprudence the majority opinion in *Gonzales v. Carhart* was the one "most apposite" to the common law rights secured by the Ninth Amendment and explicated by Blackstone; and

WHEREAS, the testimony showed that a jurist familiar with common law concepts would have known that what justified the ban on partial birth abortion notwithstanding its pre-viability application was the common law right to life; and

WHEREAS, the testimony showed that in *Gonzales*, Justice Ginsburg understood that the nature of this fundamental common law right to life was being implicated, because she said, "The Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion. . . . The Court's hostility to the right *Roe* and *Casey* secured is not concealed"; and

WHEREAS, the disregard of previability and postviability in *Gonzales* is consistent with the opinion of Justice Sandra Day O'Connor in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 461, that, "The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy" and this is no less so from the perspective of the unborn child's interest whose right to continued life is being weighed by this arbitrary balance of third-party interests; and

WHEREAS, when the majority of the United States Supreme Court can refer to a "living fetus" as an "unborn child," as it did in *Gonzales*, and yet continue to allow the nature of the dependency in which a child has its being (being which is dependent on medical technology or on prenatal or postnatal provision by a mother), location of a child as in or just outside the womb, and the means by which the child's life is ended by a third party to determine whether a pre-born natural person is a constitutional rights-bearing person, then, as Justice O'Connor said in *City of Akron*, the legal standard by which a "person" exists, whether under the pre-political conception of law and rights preserved by the Ninth Amendment or by the Fifth and Fourteenth Amendments, is "arbitrary"; and

WHEREAS, arbitrariness in law is contrary to the elements of permanency, uniformity, and universality foundational to a true understanding of the rule of law and without which the words "rule of law" are devoid of any meaning other than compliance with prescribed procedural processes; and

WHEREAS, this construction of "any person" violates the rule of law itself inasmuch as the meaning of the those words cannot be applied uniformly to all the words in the sentence applicable to and predicated on the subject of the sentence, namely, life and property; and

WHEREAS, the un-rebutted testimony showed that in every other area of the law—criminal, tort, and property, which is referenced in the Fifth and Fourteenth Amendments—the state has the power and authority to declare and protect unborn persons as rights-bearing persons; and

WHEREAS, this arbitrary exception of the unborn as persons under the Court's Fourteenth Amendment abortion jurisprudence is made more arbitrary by making the unborn human being's viability determinate only in the abortion context and not with respect to property rights with respect to which a guardian ad litem is often appointed; and

WHEREAS, this "double" arbitrariness relative to unborn human beings as rights-bearing persons under the Fifth, Ninth, and Fourteenth Amendments also violates the principles of permanency, uniformity, and universality that give meaning to the rule of law; and

WHEREAS, the justices of the United States Supreme Court, as judicial officers, have an ethical duty to protect and preserve the rule of law on behalf of the people; and

WHEREAS, Article I, Section 2 of the Tennessee Constitution rightly says "[t]hat government being instituted for the common benefit, the doctrine of nonresistance against arbitrary power ... is absurd, slavish, and destructive of the good and happiness of mankind"; and

WHEREAS, this provision of the Tennessee Constitution imposes a duty on the members of the General Assembly, as representatives of the people and in the promotion of their common good, to resist constitutional jurisprudence that rests upon arbitrary foundations and, as a consequence, produces arbitrary conclusions; and

WHEREAS, the un-rebutted testimony of Alan Keyes showed that at the time the U.S. Constitution was adopted, slaves were considered by the U.S. Supreme Court in *Scott v.*

Sandford, to be "subordinate and inferior beings" even though slaves were considered persons under the three-fifths clause of Article I, Section 2 thereof; and

WHEREAS, as non-persons, the United States Supreme Court said that descendants of slaves, even though born in the United States "had no rights or privileges but such as those who held the power and the Government might choose to grant them"; and

WHEREAS, in a similar way, the United States Supreme Court in *Roe v. Wade* necessarily considered unborn human beings a class of subordinate and inferior human beings whose lives could be taken by third parties without any due process prior, yet no court would hold that an unborn child could have a property interest protected by the Fourteenth Amendment taken without due process, which makes the word "person" arbitrary and equivocal in connection with the three rights enumerated therein; and

WHEREAS, in *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938), the United States Supreme Court explicated this broader understanding of the Fourteenth Amendment's purpose in light of the *Scott* decision as follows:

The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings . . . The Fourteenth Amendment followed the freedom of a race from slavery. Justice Swayne said in the *Slaughter House Cases*, supra, that "by 'any person' was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color." . . . He knew the Amendment was intended to protect the life, liberty, and property of human beings.

and

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law; and

WHEREAS, unless the words "any person" in the Fourteenth Amendment are an exhaustive reference to all natural persons, as understood at common law, then the aspiration

in the Fourteenth Amendment to equal protection of the law can be nullified if a state or judicial body can define some human natural persons as non-persons; and

WHEREAS, if unborn natural persons can be classified by the judiciary as persons having only such rights "as those who held the power and the Government might choose to grant them" as done in the *Scott* opinion and effectively done in the *Roe* opinion, then nothing logically prohibits those in power and on the United States Supreme Court from concluding in the future that the rights of other natural persons can be based on differing levels of development and function, their location, or how humane or brutally they are treated; and

WHEREAS, this latter rationale was referenced by Justice Kennedy in *Gonzales* to justify the constitutionality of Congress banning the partial birth abortion procedures known as an "intact D&E" while not banning a standard D&E, saying that "The main difference between the two procedures is that in [an] intact D&E a doctor extracts the fetus intact or largely intact with only a few passes," and fewer "passes" are needed because the intact D&E "extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart"; and

WHEREAS, this can mean nothing other than the pre-born child became a "person" worthy of constitutional protection by the state only because of how it was being treated or killed, unless the child's status and cause for protection was derived from or based on a pre-political, non-positive law conception of persons, life, and liberty, which is in accord with common law and the conception of law and rights found in the Ninth Amendment; and

WHEREAS, the majority opinion in *Gonzales* also noted that "Congress stated as follows: 'Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life'; and

WHEREAS, the majority opinion in *Gonzales* noted that Congress had found that "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life"; and

WHEREAS, the General Assembly concurs in those statements by the majority in *Gonzales* and finds their truth and significance buttressed by un-rebutted testimony regarding the callousness toward life engendered by abortion seen in the proud appellations of New York's state officials over the state's enactment of laws allowing abortion up to the delivery of the unborn child; and

WHEREAS, in accord with *Gonzales*, the United States Court of Appeals for the Sixth Circuit, applying the United States Supreme Court's Fourteenth Amendment abortion jurisprudence, said in *EMW Women's Surgical Center, PSC v. Beshear*, 920 F.3d 421 (2019), "We have long understood *Casey* as marking a shift toward greater respect for States' interests in informing women and protecting unborn life"; and

WHEREAS, in *Beshear*, the Sixth Circuit made the following statement regarding the "decision in Eighth Circuit's decision in *Planned Parenthood Minn., ND., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc), which "involved a South Dakota informed-consent statute":

The statute required physicians to give patients a written statement providing, among other things, "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being," "[t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and the laws of South Dakota," "[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated," and "[a] description of all known medical risks of the procedure ... including... [d]epression and related psychological distress [and] [i]ncreased risk of suicide ideation and suicide." *Id.* The statute defined "Human being" as "an individual living member of the species of homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." *Id.* at 727; and

WHEREAS, relationships are personal only as between persons, whereas the relation between a person and non-persons, whether animate or inanimate, is that of possession or

ownership, and to speak of a relationship with "an unborn human being" as not involving persons is to blur the distinction between the nature of the relationship that exists between persons and between persons and non-persons or things and between the common law "rights of persons" and the "rights of things" to be protected by the Constitution; and

WHEREAS, the un-rebutted testimony showed that the medical ethics governing physicians requires them to give consideration to the welfare of the unborn child during the course of a continuing pregnancy; and

WHEREAS, the standard D&E can be described as follows in The American College of Obstetricians and Gynecologists Practice Bulletin, No. 135, June 2013, reaffirmed 2019: "After achieving adequate dilation and administering analgesia and sedation or anesthesia, D&E is accomplished by aspirating the amniotic fluid and removing the fetus with forceps through the cervix and vaginal canal. Usually disarticulation (or dismemberment) occurs as the physician delivers the fetal part grasped in the instrument and pulls it through the cervix. A final suction curettage is often performed to ensure that the uterus is completely evacuated."; and

WHEREAS, the General Assembly believes that knowingly permitting and constitutionally protecting any procedure that at any stage of pregnancy "rips apart" or "dismembers" a natural person is inhumane, callous, and conducive to the callousness toward life being demonstrated daily in our country and the growing lack of civility toward one another; and

WHEREAS, the General Assembly agrees with the statement by Justice Clarence Thomas in *Harris v. West Alabama Women's Center*, 590 U.S. ___ (2019) (Thomas, J., concurring) (slip op., at 2) that an interpretation of the Constitution "requiring" states to permit such procedures is "a stark reminder that [the Court's] abortion jurisprudence has spiraled out of control"; and

WHEREAS, in *Roe v. Wade*, the majority opinion said, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine,

philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer"; and

WHEREAS, even though the Court in *Roe* confused scientific and medical questions about when a new human organism's life begins with the ethical and legal question of whether that life possesses intrinsic value and demands protection and the broader question of the effect treatment of life has on society as a whole, the General Assembly believes that science and medicine now unequivocally establish the answer to this question; and

WHEREAS, the un-rebutted testimony of Dr. Brent Boles before the Senate Judiciary Committee showed that the question of when biological life begins is clearly known according to the discipline of medicine, and in *Gonzales*, the United States Supreme Court acknowledged as much in saying, "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb"; and

WHEREAS, conception is the union of a sperm and egg to form a zygote, and at conception, a new and genetically distinct human being is formed; and

WHEREAS, the presence of a fetal heartbeat is medically significant because the heartbeat is one of the discernible signs of life and is so at every stage of human existence; and

WHEREAS, an unborn child's heart begins to beat at five weeks gestational age, blood begins to flow during the sixth week, and depending on what type of equipment is utilized, an unborn child's heartbeat can be detected as early as six to eight weeks gestational age; and

WHEREAS, an unborn child's heartbeat can consistently be made audible using a handheld Doppler fetal heart rate device by twelve weeks gestational age, and a pregnancy can be confirmed through the detection of the unborn child's heartbeat; and

WHEREAS, by the beginning of the second trimester, physicians view the absence of a fetal heartbeat as an instance of fetal death; and

WHEREAS, it is standard medical practice to monitor an unborn child's heartbeat throughout pregnancy and labor to measure the heart rate and rhythm of the unborn child,

which averages between one hundred ten and one hundred sixty beats per minute, and this monitoring is used as an indicator of the health of the unborn child; and

WHEREAS, since the Supreme Court's decision in *Roe v. Wade*, medical professionals have expanded their understanding of life in utero to include, among other indicia, the presence of a heartbeat, brain development, a viable pregnancy or viable intrauterine pregnancy during the first trimester of pregnancy, and the ability to experience pain; and

WHEREAS, the detectability of a fetal heartbeat is a key predictor of survivability to term, especially if the heartbeat is present at eight weeks gestational age or later; and

WHEREAS, when a fetal heartbeat is detected between eight and twelve weeks gestational age, the rate of miscarriage is extremely low, with approximately ninety-eight percent of naturally conceived pregnancies carrying to term; and

WHEREAS, at eight weeks gestational age, an unborn child begins to show spontaneous movements and reflexive responses to touch. The majority of an unborn child's body is responsive to touch by fourteen weeks gestational age. Peripheral cutaneous sensory receptors, which are the receptors that feel pain, develop in an unborn child at around seven to eight weeks gestational age. Sensory receptors develop in the palmar regions during the tenth week of gestational age, growing throughout the unborn child's body by sixteen weeks gestational age. An unborn child's nervous system is established by six weeks gestational age. At this stage, the basic patterning of the early nervous system is in place and is the basis for tremendous growth and increased complexity built upon this basic pattern. The earliest neurons of the cortical brain, responsible for thinking, memory, and higher level functions, are established by the fourth week. Synapses are formed in the seventh week, and the neural connections for the most primitive responses to pain are in place by ten weeks gestation; and

WHEREAS, Substance P, a peptide functioning as a neurotransmitter in the transmission of pain, is present in the spinal cord of an unborn child at eight weeks gestational age, while enkephalin peptides, which serve as neurotransmitters in pain modulation, are present at twelve to fourteen weeks gestational age. There is significant evidence, based on

peer-reviewed scientific studies, that unborn children are capable of experiencing pain by no later than twenty weeks gestational age. Pain receptor nerves are already present throughout the human body by twenty weeks gestation, and the cortex, which begins development at eight weeks, has a full complement of neurons at twenty weeks. There is evidence that an unborn child is capable of feeling pain as early as twelve to fifteen weeks gestational age. The scientific evidence shows that significant cortical neuronal connections are in place by ten to twelve weeks gestation, and that connections between the spinal cord and thalamus are nearly complete by twenty weeks gestation. A growing body of medical evidence and literature supports the conclusion that an unborn child may feel pain from around eleven to twelve weeks gestational age, or even as early as five and one-half weeks. At only eight weeks gestation, an unborn child exhibits reflexive movement during invasive procedures resulting from spinal reflex neuro pathways, showing that the unborn child reacts to noxious stimuli with avoidance reactions and stress responses. By sixteen weeks gestational age, pain transmission from a peripheral receptor to the cortex is possible. Significant evidence also shows hormonal stress responses by unborn children as early as eighteen weeks; and

WHEREAS, mothers considering abortion express concern over the medical information on fetal neurological development and an unborn child's ability to feel pain while in utero, and providing this information to mothers who are considering abortion is an important part of empowering mothers to make a fully informed choice on whether or not to seek an abortion; and

WHEREAS, medical evidence shows that younger infants are hypersensitive to pain. Neuronal mechanisms that inhibit or moderate pain sensations do not begin to develop until thirty-four to thirty-six weeks gestation and are not complete until a significant time after birth. The recognition of fetal pain has led to improvements and changes in how physicians approach fetal surgery and fetal anesthesia. The presence of neural connections and the ability to feel pain as early as the fifteenth week now necessitate treating the unborn child as a separate patient from the mother for purposes of utilizing direct analgesia to fetal patients, who clearly elicit stress responses to pain. Fetal surgeons at specialized units in St. Louis, Nashville,

Cincinnati, Kansas City, Boston, and elsewhere, in response to their recognition of fetal pain, routinely use anesthesia and analgesia for unborn and premature infants undergoing surgery as young as eighteen weeks gestation; scientific advances and advances in neonatal care have lowered the gestational limits of survivability well into the second trimester; and

WHEREAS, the age at which a preterm infant can survive has decreased from twenty-eight weeks to less than twenty-two weeks. Survival of preterm infants has increased significantly over time assuming physicians provide active care for the young infants, lowering the age of survival from twenty-eight weeks to twenty-four weeks. Moreover, infants born as early as twenty-two weeks can survive with the provision of care and treatment. The youngest preterm infant to survive was born at only twenty-one weeks and four days. In 1978, the first infants weighing less than seven hundred fifty grams were successfully ventilated. By the 1990s, survival of infants born weighing between five hundred and seven hundred grams, roughly between twenty-four to twenty-six weeks, became possible. Technological developments in the 1980s and 1990s, such as improved tracheal instillation of surfactant for respiratory distress syndrome and antenatal corticosteroids, resulted in survival of infants born between twenty-three to twenty-four weeks. In recent years, resuscitation and survival of infants born weighing less than four hundred grams, or approximately twenty-two to twenty-three weeks gestational age, has further decreased the age of viability. The provision of active prenatal and postnatal care has significantly increased the number of prematurely born children who survive until hospital discharge; and

WHEREAS, the leading textbook on clinical anesthesia recognizes the significant body of evidence indicating the importance of mitigating fetal stress responses to pain stimuli. It is presumed that an unborn child's ability to fully experience pain occurs between twenty and thirty weeks, and that the fetal experience of pain may be even greater than that of term neonate or young children due to the immaturity of neurodevelopment that helps inhibit pain; and

WHEREAS, the infliction of unnecessary pain upon a living being is generally prohibited by state and federal law. The legislature has prohibited the unnecessary infliction of pain on

living beings in a variety of circumstances in an effort to protect the innocent from harm. The life of an unborn child is recognized and protected from violence by federal law and by the laws of most states. The killing of an unborn child is considered homicide in thirty-eight states, with at least twenty-eight of those states criminalizing the act from conception. Nearly every state and the District of Columbia have wrongful death statutes that allow for liability and recovery for the death of an unborn child or subsequent death of an infant who is born and later dies because of injuries caused while in utero; and

WHEREAS, the General Assembly believes that, notwithstanding the foregoing scientific facts regarding the onset of a human organism's biological life, science cannot answer the question of what status or value that biological life has and, under the Ninth Amendment, that determination was reserved to the people of the State of Tennessee for them to make in accord with the common law concept that is deeply rooted in this Nation's history and tradition, *Moore v. City of East Cleveland*, 431 US. 494, 503 (1977) (plurality opinion) and "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); and

WHEREAS, the United States Supreme Court's interpretation of liberty and the supposed liberty a woman has to have a third party end the life of her child is also in direct conflict with the conception of law and liberty embodied by the Ninth Amendment under which "natural life ... cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority"; and

WHEREAS, in *Washington v. Glucksberg*, 521 U.S. 702 (1997) the United States Supreme Court recognized this conception of law and liberty; and

WHEREAS, the majority in *Glucksberg* noted that its substantive due process jurisprudence protects those fundamental rights and liberties which are, objectively, "'deeply rooted in this Nation's history and tradition,' [*Moore v. City of East Cleveland*, 431 U.S.], at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the

concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)"; and

WHEREAS, the Court in *Glucksberg* said, "Our Nation's history, legal traditions, and practices thus provide the crucial 'guide posts for responsible decision making,' *Collins*, supra, at 125, that direct and restrain our exposition of the Due Process Clause"; and

WHEREAS, in *Glucksberg*, the Court examined Blackstone's Commentaries and the common law to decide that liberty as a matter of substantive due process did not extend to one's use of a third-party physician to take his or her own life; and

WHEREAS, in *Glucksberg*, after reviewing the writings of Bracton and Blackstone regarding the common law and commenting that "the early American Colonies adopted the common-law approach," the Court found that "the movement away from the common law's harsh sanctions" for suicide "did not represent an acceptance of suicide"; and

WHEREAS, the analysis in *Glucksberg* that a change in the common law's treatment of the sanctions associated with suicide did not mean there was a right to have a third party take one's own life in 1997 is in conflict with the earlier analysis in *Roe* by which the majority interpreted the movement away from abortion as a "homicide" at common law to it being, "at most, a lesser offense" as meaning "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today"; and

WHEREAS, the understanding of a liberty "right" as that which arises not out of a duty owed to the holder of that right by others or to God but out of a reduction in criminal penalties imposed on third parties to whom the asserted right does not even belong is inimical to the understanding of rights at common law and such "rights" can only be abstract in their foundations and can only be derived by positive law enactments, which are not within the constitutional province of the federal judicial power; and

WHEREAS, with respect to individual liberty and due process, a matter in which the whole body politic has an interest, Justice Stevens, in concurring in the judgment in *Glucksberg*, wrote:

There is truth in John Donne's observation that 'No man is an island.' The State has an interest in preserving and fostering the benefits that every human being may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories, and humorous incidents, as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life; and

WHEREAS, this same sentiment regarding the interest of the whole body politic in due process vis-a-vis individual rights and liberty was expressed by the United States Supreme Court as far back as 1884 in *Hopt v. People of the Territory of Utah*, 110 U.S. 574, when the Court recognized that the individual was not autonomous relative to the disposition of his or her rights in criminal proceedings, because such a view of due process requirements reflects a "mistaken view of the relations" that the individual "holds relative to the public" and the public's interest in the rights being foregone by the individual; and

WHEREAS, in *Hopt*, the Court held that "it was not within the power of the accused or his counsel to dispense with ... his personal presence at the trial ... upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty," because of the public's own interest "in proceedings involving the deprivation of life or liberty"; and

WHEREAS, this due process limit on what was essentially an individual liberty interest was said to be grounded on the common law view that "[t]he natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.'" (emphasis supplied); and

WHEREAS, even as the United States Supreme Court has held that due process does not grant persons the "liberty" to destroy or dispose of their own life or liberty "upon their own authority" either by seeking the assistance of a physician to take their own life or by choosing to eschew aspects of due process in criminal matters because due process rights pertain to the whole body politic, the body politic in Tennessee has an interest in whether "the natural life"

belonging to one's "fellow creatures" can "legally be disposed of or destroyed" by another "merely upon their own authority" without any due process of law, let alone by a third-party physician who is devoted to the healing arts; and

WHEREAS, in 2014, the body politic in Tennessee spoke to this issue by adopting the following amendment to the Tennessee Constitution that effectively reversed the Tennessee Supreme Court in *Planned Parenthood v. Sundquist* holding that there was a "fundamental right to abortion" in the State's Constitution:

Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother; and

WHEREAS, the people of Tennessee have determined that it is for its elected representatives, not the judicial branch, to declare and protect the pre-political absolute rights at common law of unborn persons in relation to the taking of their lives by physicians licensed by the State of Tennessee, and whose practices are to be regulated and governed so as to promote the integrity and ethics of the medical profession which should be directed toward the health and life of all natural persons; and

WHEREAS, nothing in the Fourteenth Amendment took away the power of the states to regulate the medical profession as it is practiced within its borders and upon its residents and citizens; and

WHEREAS, in regard to Section 5 of the Fourteenth Amendment, the United States Supreme Court said in *Ex Parte Virginia*, 100 U.S. 339 (1880) that "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective" and "It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed"; and

WHEREAS, depending on the gestational age of the pregnancy, the General Assembly believes the provision here regarding ultrasounds is consistent with the standard medical practice of performing an ultrasound during the evaluation of a patient in consideration of an abortion. Determining accurate information regarding gestational development is important for purposes of informed consent, as well as making essential preparation for the procedure itself; in this State, ultrasounds are regularly provided to women seeking an abortion to determine if they are eligible for a medication abortion, and to review other factors related that cannot be determined prior to an examination of the patient; and

WHEREAS, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justices O'Connor, Kennedy, Souter, Blackmun, and Stevens also wrote, "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents"; and

WHEREAS, this General Assembly, by the preceding recitations, has attempted to accept its aforesaid covenantal responsibility by considering not just "all" of the United States Supreme Court's "precedents," but all the law that informs and undergirds that "covenant" whereby it is indeed made a "coherent succession" of "ideas and aspirations" running from the first generation of Americans...to future generations, without becoming myopically lost in concerns only for the present generation; and

WHEREAS, as recently as 2015, the United States Supreme Court, in overruling precedent established in 1972 without even mentioning the doctrine of stare decisis, wrote, "The nature of injustice is that we may not always see it in our own times" and acknowledged that "new insight" can "reveal discord between the Constitution's central protections and a received legal stricture," *Obergefell v. Hodges*, 2015; and

WHEREAS, there is an obvious "discord between the Constitution's central protections" under the Ninth Amendment's recognition of "other rights," elucidated in the common law as including the "absolute right" to "the uninterrupted enjoyment of [one's] life" and the "received legal stricture" in the majority and plurality opinions in *Roe v. Wade* and *Planned Parenthood v. Casey*, respectively; and

WHEREAS, the General Assembly further believes that there is a "discord between ... the received legal stricture" in *Planned Parenthood v. Casey* that ascribed "liberty" to "human autonomy" and the more limited nature of that right under the "central protections" of the Ninth Amendment; and

WHEREAS, it is obvious from that portion of Justice O'Connor's opinion in *Casey*, joined by Justices Kennedy and Souter, that the foundational legal premises on which the majority in *Roe* decided which natural persons or human beings qualify as "any persons" under the United States Constitution, constitutional "person" was not there reconsidered, because she wrote, "the immediate question is not the soundness of *Roe*, but the precedential force that must be accorded to its holding"; and

WHEREAS, the General Assembly believes that it is past time for the United States Supreme Court to revisit the foundational question of whether only postnatal persons are within the understanding of the word "person" as it was understood and used at the time of the Constitution and of adoption of the Fourteenth Amendment; and

WHEREAS, based on all of the above, this General Assembly desires to exercise the powers belonging to it by virtue of the Tenth Amendment and the rights belonging to the "people" of Tennessee under the Ninth Amendment, which people it represents; recognize the balance of priorities between the life of unborn persons and abortion set forth in the State's Constitution; and fulfill its fundamental duty to declare and make more secure the absolute right of all natural persons within its sovereign jurisdiction to life; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 39, Chapter 15, Part 2, is amended by adding the following new section:

The general assembly hereby declares that it finds all of the following:

(1) The jurisprudence of the United States supreme court relative to the fourteenth amendment is flawed and contrary to the language of the United States Constitution rightly understood because it is:

(A) In derogation of the common law understanding of the person as encompassing the unborn child in the mother's womb, and, therefore, prevents "the people" of the state of Tennessee from having their duly elected representatives make secure the absolute right at common law of all natural persons to life;

(B) In derogation of the common law understanding that framed the United States Constitution by treating the word "person" in the fourteenth amendment as only an artificial person whose status as a person is not based on the natural creation of life but is imputed by law, because the law only allows the life of a natural person to be protected at that point in which, based strictly on positive law, the natural person is able to survive outside the womb independent of the mother, which artificial status logically puts in doubt the meaning of the word "person" with respect to born children who remain dependent on their mothers, and their rights to have their natural lives secured from termination by third parties on the wishes of their mothers; and with respect to disabled persons dependent upon others, including those who have a mental disability; and the elderly, whose rights to life should not depend upon the wishes of third parties;

(C) Inconsistent in its treatment of the intersection between life and liberty expressed in other cases and controversies;

(D) Dismissive of the relation between individuals and the public and the interest of the whole body of our citizens as to who constitutes a constitutional "person" for the purpose of being accorded due process of law, because their rights can be subjugated under a "living constitution" by being classified as "insubordinate and inferior beings" by those justices to whom they have only delegated, not alienated, their power;

(E) Violative of the rule of law, because the court's current interpretation of when a natural person is a constitutional person lacks permanence, uniformity, and universality, making its interpretation arbitrary and inconsistent with the understanding of persons in all other areas of civil law; and

(F) Violative of the normal canons of constitutional interpretation, because its interpretation of person is equivocal relative to rights found in the same sentence pertaining to persons, namely, life and property;

(2) The terms "viable" or "viability" and "nonviable" are accepted and published scientific medical terms applicable to the normal development of an unborn child, even in the first trimester;

(3) It is established and accepted science that:

(A) Within the framework of human existence, life begins at conception; and

(B) The beginning of human life is the fertilization of the egg by the sperm;

(4) The use of serial human chorionic gonadotropin (HCG) determinations and sonographic evaluation to document the presence or absence of cardiac activity is standard medical practice outlined in standard medical texts which instruct medical providers in the proper determination of a pregnancy's viability;

(5) When a pregnancy is evaluated before the heartbeat is detectable, the accepted medical science within obstetrics presumes that the pregnancy is viable when there is an increase in the HCG of at least sixty-six percent (66%) in a forty-eight-hour period;

(6) Viability, as it relates to pregnancy, exists and can be determined very early in the pregnancy of an unborn child;

(7) Within the framework of the pregnancy of an unborn child, it is established and accepted medical science that the viability of the fetus, unborn child, human individual, or person is determined during the first six (6) weeks of gestation through a consistent increase of the pregnancy-specific hormone HCG;

(8) The viability of a pregnancy is clearly established and confirmed once a human heartbeat has been detected within the gestational sac at approximately six (6) weeks gestation;

(9) Abortion terminates the life of a whole, separate, unique, living human being; and

(10) The dilation and evacuation technique which usually requires the use of grasping forceps to remove the fetus through the cervix and vaginal canal and usually causes dismemberment of the unborn human being as he or she is pulled through the cervix is inhumane, diminishes society's valuation of human life, and is contrary to the public policy objective of promoting medicine as a healing art.

SECTION 2. Tennessee Code Annotated, Title 39, Chapter 15, Part 2, is amended by adding the following new section:

(a)

(1) Notwithstanding §§ 39-15-201, 39-15-211, and 39-15-212, this section governs abortion. Sections 39-15-201, 39-15-211, and 39-15-212 shall not be enforced unless this section is temporarily or permanently restrained,

enjoined, or otherwise unenforceable and then only in compliance with subdivision (a)(2); provided, any conduct committed shall be prosecuted pursuant to § 39-11-112.

(2)

(A) Except as otherwise provided in subdivision (a)(2)(B), §§ 39-15-201, 39-15-211, and 39-15-212 are revived and shall be enforced if:

(i) This section or its application to any person or circumstance is held invalid or unconstitutional by judicial order;

(ii) This section is temporarily or permanently restrained or enjoined by judicial order;

(iii) This section is not otherwise enforceable for any reason during the pendency of litigation challenging this section's validity or constitutionality; or

(iv) The attorney general does not defend the validity or constitutionality of this section pursuant to § 8-6-109(b) or agrees not to enforce this section during the pendency of any litigation challenging this section.

(B) Whenever a temporary or permanent restraining order or injunction is stayed, dissolved, or otherwise ceases to have effect, this section shall have full force and effect and govern abortion.

(b) No person shall intentionally perform or induce an abortion on a pregnant woman if the physician determines, in the physician's good faith medical judgment, that the unborn human individual the pregnant woman is carrying has a detectable heartbeat, or there is an otherwise viable pregnancy, determined according to standard medical practice, including, but not limited to, serial human chorionic gonadotropin (HCG) or other determinations listed in subsection (f).

(c) It is an affirmative defense to prosecution under subsection (b), which must be proven by a preponderance of the evidence, that:

(1) The abortion was performed or attempted by a licensed physician;

(2) The physician determined, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman. No abortion is deemed authorized under this subdivision (c)(2) if performed on the basis of a claim or a diagnosis that the woman will engage in conduct that would result in her death or substantial and irreversible impairment of a major bodily function or for any reason relating to her mental health; and

(3) The physician performs or attempts to perform the abortion in the manner which, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, provides the best opportunity for the unborn child to survive, unless in the physician's good faith medical judgment, termination of the pregnancy in that manner would pose a greater risk to the pregnant woman of death or substantial and irreversible impairment of a major bodily function. No such greater risk is deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or substantial and irreversible impairment of a major bodily function or for any reason relating to her mental health.

(d) Medical treatment provided to the pregnant woman by a licensed physician that is intended to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman where the death or injury of the unborn child is not intended, including, but not limited to,

treatment for ectopic pregnancy, or treatment that results in the accidental death of or unintentional injury to or death of the unborn child is not a violation of this section.

(e) A pregnant woman on whom an abortion is performed or induced in violation of this section is not guilty of violating this section; is not guilty of attempting to commit, conspiring to commit, or complicity in committing a violation of this section; and is not subject to a civil penalty based on the abortion being performed or induced in violation of this section.

(f)

(1) A pregnancy is presumed to exist and to be viable upon finding the presence of human chorionic gonadotropin (HCG) using a test that is consistent with standard medical practice.

(2) A pregnancy is confirmed to be viable upon detection of a heartbeat in an unborn child using a test that is consistent with standard medical practice.

(3) Once a pregnancy has been confirmed to be viable, the pregnancy is not viable only if a test that is consistent with standard medical practice indicates:

(A) Decreasing levels of HCG; and

(B) The absence of a heartbeat in an unborn child.

(g)

(1) Except in a medical emergency that prevents compliance with this subsection (g), a physician shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman, unless, prior to the performance or inducement of the abortion, or the attempt to perform or induce the abortion, the physician determines, in the physician's good faith medical judgment, that the pregnancy is not viable.

(2) In making a determination under subdivision (g)(1), the physician shall use a test that is consistent with standard medical practice.

(h) Except in a medical emergency that prevents compliance with this subsection (h), a physician making a determination under subdivision (g)(1) shall record in the pregnant woman's medical record the estimated gestational age of the unborn child, the test used to determine viability, the date and time of the test, and the results of the test.

(i)

(1) A violation of subsection (b) is a Class C felony.

(2) A violation of subsection (g) or (h) is a Class A misdemeanor.

(j)

(1) The applicable licensing board shall revoke the license of any person licensed to practice a healthcare profession in this state who violates subsection (b) in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, without regard to whether the person has been charged with or has been convicted of having violated subsection (b) in a criminal prosecution.

(2) The applicable licensing board shall suspend, for a period of not less than six (6) months, the license of any person licensed to practice a healthcare profession in this state who violates subsection (g) or (h) in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, without regard to whether the person has been charged with or has been convicted of having violated subsection (g) or (h) in a criminal prosecution.

(k) As used in this section:

(1) "Abortion" means the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus;

(2) "Gestational age" or "gestation" means the age of an unborn child as calculated from the first day of the last menstrual period of a pregnant woman;

(3) "Pregnancy" and "pregnant" mean the human female reproductive condition of having a living unborn child within her body throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth;

(4) "Standard medical practice" means the use of ultrasound technology or serial human chorionic gonadotropin (HCG) determinations or the detection of a heartbeat in an unborn child; and

(5) "Unborn child" means an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth.

(l) This section does not repeal or limit §§ 39-15-202 - 39-15-210 or § 39-15-213. If § 39-15-213 becomes effective, then this section ceases to be effective while § 39-15-213 remains in effect.

SECTION 3. Tennessee Code Annotated, Title 39, Chapter 15, Part 2, is amended by adding the following new section:

(a)

(1) Prior to a pregnant woman giving informed consent to have an abortion, as required by § 39-15-202, the physician who is performing or inducing, or attempting to perform or induce, an otherwise lawful abortion, shall:

(A) Determine the gestational age of the unborn child in accordance with generally accepted standards of medical practice;

(B) Inform the pregnant woman the gestational age of the unborn child;

(C) Perform an obstetric ultrasound applicable to the gestational age of the unborn child, using medical technology and methodology

current at the time the ultrasound is performed, and reasonably calculated to determine whether a fetal heartbeat exists;

(D) Auscultate the fetal heartbeat of the unborn child, if any, so that the pregnant woman may hear the heartbeat if the heartbeat is audible;

(E) Provide a simultaneous explanation of what the ultrasound is depicting, which must include the presence and location of the unborn child within the uterus, the dimensions of the unborn child, the presence of external members and internal organs if present and viewable, the number of unborn children depicted, and, if the ultrasound image indicates that fetal demise has occurred, inform the woman of that fact;

(F) Display the ultrasound images so that the pregnant woman may view the images;

(G) Record in the pregnant woman's medical record the presence or absence of a fetal heartbeat, the method used to test for the fetal heartbeat, the date and time of the test, and the estimated gestational age of the unborn child; and

(H) Obtain from the pregnant woman prior to performing or inducing, or attempting to perform or induce, an abortion, a signed certification that the pregnant woman was presented with the information required to be provided under this subsection (a), that the pregnant woman viewed the ultrasound images or declined to do so as permitted in subsection (c), and whether the pregnant woman listened to the heartbeat if the heartbeat was audible or declined to do so as permitted in subsection (c). The signed certification must be in addition to any other documentation requirements under this chapter and must be on a form

prescribed by the commissioner of health that is retained in the woman's medical record.

(2) The requirements of this subsection (a) shall be separate and do not substitute for any of the requirements set out in § 39-15-202.

(b)

(1) A physician may delegate the responsibility to perform the obstetric ultrasound, as required in subdivision (a)(1)(C), to an ultrasound technician who is qualified and permitted by law to perform an obstetric ultrasound that complies with the requirements of subdivision (a)(1)(C). An ultrasound technician performing an obstetric ultrasound under this subdivision (b)(1) must perform the obstetric ultrasound in a manner that complies with subsection (a), and the physician may rely on the signed certification obtained by the qualified technician under subdivision (a)(1)(C) to establish that an ultrasound was performed in compliance with this section, unless the physician knows, or in the exercise of reasonable care should know, that an ultrasound was not performed in accordance with this section.

(2) A physician who is to perform or induce, or attempt to perform or induce, an abortion may accept a certification from a referring physician that the referring physician has performed an obstetric ultrasound that complies with the requirements of subsection (a). The referring physician performing an obstetric ultrasound under this subdivision (b)(2) must perform the obstetric ultrasound in a manner that complies with subsection (a), and the physician may rely on the signed certification obtained by the referring physician under subdivision (a)(1)(H) to establish that an ultrasound was performed in compliance with this section, unless the physician knows, or in the exercise of reasonable care should know, that an ultrasound was not performed in accordance with this section.

(c) It is not a violation of this section for a physician or ultrasound technician to allow a pregnant woman to avert her eyes from the ultrasound images or request the volume of the heartbeat be made inaudible. It is not a violation of this section if the pregnant woman refuses to look at the displayed ultrasound images or to listen to the heartbeat if the heartbeat is audible.

SECTION 4. This act shall take effect upon becoming a law, the public welfare requiring it.