

Amendment No. 1 to SB1236

Bell
Signature of Sponsor

AMEND Senate Bill No. 1236

House Bill No. 77*

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

WHEREAS, the Preamble to the United States Constitution of 1787 declares as a primary purpose for the establishment of the Constitution to be to "secure the blessings of liberty to ourselves and our posterity"; and

WHEREAS, according to the contemporary definition of the word, at the time the Constitution was drafted, "posterity" was widely understood to mean a person's children and succeeding generations of children; and

WHEREAS, the Fourteenth Amendment to the United States Constitution declares that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and

WHEREAS, at the time the Fourteenth Amendment was drafted by Congress and submitted to the States in 1866, numerous States already had laws in effect that restricted abortion, thus indicating Congressional awareness of such State limitations on the practice; and

WHEREAS, Congress nevertheless made no attempt to distinguish persons born from those unborn in the language of the Fourteenth Amendment, and instead established protections against deprivation of life or denial of equal protection for all persons, born and unborn; and

WHEREAS, the United States Supreme Court has held on numerous occasions that a woman's right to an abortion is not absolute and that the Court disagrees with the assertion that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses" (*Roe v. Wade*, 1973); and

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WHEREAS, the United States Supreme Court has upheld one of the key holdings in *Roe*, which is a confirmation of "the State's power to restrict abortions after fetal viability" (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992); and

WHEREAS, the United States Supreme Court has upheld another key holding from *Roe* of "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child" (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992); and

WHEREAS, the United States Supreme Court has stated that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992); and

WHEREAS, 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 (*Novak's Gynecology*, 12th Edition; Mitchell, Stenchever, Droeggemueller, and Herbst, *Comprehensive Gynecology*, 3rd Edition; and *ACOG Practice Bulletin, Number 3*, December 1998); and

WHEREAS, it is established and accepted science that, within the framework of human existence, life begins at conception (Dr. Keith L. Moore, *The Developing Human: Clinical Oriented Embryology*, 2nd Edition); and

WHEREAS, it is established and accepted science that the beginning of human life is the fertilization of the egg by the sperm (Dr. Bradley M. Patten, *Human Embryology*, 3rd Edition); and

WHEREAS, 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 pregnancy viability (*Novak's Gynecology*, 12th Edition; *William's Obstetrics*, 21st Edition); and

WHEREAS, 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 66% in a forty-eight-hour period (*ACOG Practice Bulletin, Number 3*, December 1998); and

WHEREAS, viability, as it relates to pregnancy, exists and can be determined very early in the pregnancy of an unborn child (*ACOG Practice Bulletin, Number 3*, December 1998; *Novak's Gynecology*, 12th Edition); and

WHEREAS, 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 weeks of gestation through a consistent increase of the pregnancy-specific hormone HCG (Dr. Emil Novak, *Novak's Gynecology*, 12th Edition); and

WHEREAS, viability is clearly established and confirmed once a human heartbeat has been detected within the gestational sac at approximately six weeks gestation (*Williams Obstetrics*, 21st Edition, 2001); and

WHEREAS, once the viability of an unborn child has been confirmed by a heartbeat, that unborn child is both an individual and a person with an inalienable and fundamental right to life; and

WHEREAS, the State has a compelling interest in protecting the life of an unborn child with all the rights of personhood; and

WHEREAS, if the "suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the

[Fourteenth] Amendment" (United States Supreme Court Justice Harry Blackmun, *Roe v. Wade*, 1973); 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 desires to accept the aforesaid 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...When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed" (*Obergefell v. Hodges*, 2015); and

WHEREAS, the Ninth Amendment to the United States Constitution expressly contemplates that civil government will continue to give legal recognition to the rights and duties that the people enjoy as a matter of fundamental law by noting that even enumerated rights in the Constitution, much less such rights as are not enumerated therein, "shall...be construed to deny or disparage others retained by the people"; and

WHEREAS, this General Assembly believes that there is a "discord between the Constitution's central protections and [the] received legal stricture" articulated in *Roe v. Wade* and *Planned Parenthood v. Casey* with respect to the central protection of the Ninth

Amendment and the "absolute right" at common law right of "personal security" that "consists in the uninterrupted enjoyment of [one's] life," and the understanding of liberty that *Planned Parenthood v. Casey* ascribed to "human autonomy," which is far different from the absolute right of liberty at common law and protected by the Ninth Amendment that "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law"; and

WHEREAS, the Tennessee Supreme Court, in *Powell v. Hartford Accident and Indemnity Co.*, 398 S.W.2d 727, 730-31 (1966), 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 law recognizes that there are laws or rules of action founded in those relations of justice that existed in the nature of things antecedent to any positive precept of enacted civil law; and

WHEREAS, these laws or rules of action are referred to by William Blackstone and other common law commentators as "superior" or "fundamental" law; and

WHEREAS, the common law recognizes and emphasizes an antecedent source of obligations upon officials, which legislators and judges declare but do not generate; and

WHEREAS, it was said by William Blackstone in his Commentaries on the Laws of England that at common law "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, in explication of the aforesaid right of personal security and the persons to whom that right extended, Blackstone said, "Life is 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...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...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, the Declaration of Independence through which our "covenant" was eventually born, recognized this right to life, noting its "self-evident" nature and its inalienability as that which is endowed by "our Creator"; and

WHEREAS, the Constitution of the United States does not deprive the States of their power to declare and make more secure natural rights and duties inhering in this fundamental law; and

WHEREAS, the Fourteenth Amendment provides that Tennessee cannot "make or enforce any law which...shall...deprive any person of life...without due process of law; nor deny to any person...the equal protection of the laws"; and

WHEREAS, abortion is the unilateral decision of one person to end the life of one who was considered a person at the common law and thus having rights secured by the Ninth Amendment, particularly in the absence of any legal due process; 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:

(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 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) A person shall not purposely perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman when a viable pregnancy is presumed to exist or has been confirmed.

(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 shall be 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 of the death of the pregnant woman or substantial and irreversible impairment of a major bodily function. No such greater risk shall be 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 results in the accidental death of or unintentional injury to or death of the unborn child is not a violation of this section.

(e)

(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) A 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.

(f)

(1) Except in a medical emergency that prevents compliance with this subsection (f), 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 (f)(1), the physician shall use a test that is consistent with standard medical practice.

(g) Except in a medical emergency that prevents compliance with this subsection (g), a physician making a determination under subdivision (f)(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.

(h)

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

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

(i)

(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 (e) or (f) 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 (e) or (f) in a criminal prosecution.

(j) 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;

(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; and

(6) "Viable" and "viability" mean the point in time at which it can be determined, according to standard medical practice, that a male human sperm has penetrated the zona pellucida of the female ovum, which includes, but is not limited to, serial human chorionic gonadotropin (HCG) determinations or the detection of a heartbeat in an unborn child.

(k) This section does not repeal or limit §§ 39-15-202 - 39-15-210.

SECTION 2. This act shall take effect July 1, 2019, the public welfare requiring it, and applies only to actions occurring on or after that date