SENATE BILL 1780
By Bowling

HOUSE BILL 1962

By Howell

AN ACT to amend Tennessee Code Annotated, Title 39; Title 63 and Chapter 351 of the Public Acts of 2019, relative to abortion.

WHEREAS, on August 12 and 13, 2019, the Senate Judiciary Committee of the Tennessee General Assembly heard testimony from a total of twenty-one 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 testimony of those testifying in support of the amended version of Senate Bill 1236 and those opposed could be summarized as falling within two categories; and

WHEREAS, those in the first category who support the amended Senate Bill would have the General Assembly's disposition of the bill rest on the ninth amendment to the United States Constitution; its reference to "other rights" as meaning those rights recognized at common law, which law is referenced in the Bill of Rights (explicitly in the seventh amendment; implicitly in all of the others, including the second and the ninth), was made part of the law of Tennessee, and arose out of the principle referred to as the "rule of law"; and the duty of civil government envisioned by the ninth amendment to make more secure the rights of all natural persons; and

WHEREAS, those in the second category who oppose the amended Senate Bill would have the General Assembly's disposition of the bill rest on a prediction as to how federal courts will rule on its constitutionality based on language found in a variety of federal court opinions

interpreting the fourteenth amendment and decisions of the United States Supreme Court in denying certiorari in certain cases pertaining to abortion; and

WHEREAS, with respect to the place of federal judicial opinions in the exercise of the federal judicial power, 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, 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, the un-rebutted testimony of attorney Jim Bopp that lawyers opposed to *Roe v. Wade* had "good reason to believe" that, in 1992, as many as seven justices on the United States supreme court were willing or inclined to reverse *Roe v. Wade* in *Planned Parenthood v. Casey*, but that prediction proved wrong; and

WHEREAS, the General Assembly heard un-rebutted testimony that every lawsuit reaching the United States Supreme Court over the last forty-six years could have been used by the court to overrule *Roe v. Wade* and that such has not happened; and

WHEREAS, the General Assembly heard testimony that as many as twenty other pending legal actions could provide the justices with an opportunity to reverse *Roe v. Wade*, but the clear inference of the testimony was that the legislation at issue in those cases accepted as law the United States Supreme Court's fourteenth amendment abortion jurisprudence and did not directly challenge the fourteenth amendment jurisprudential foundations of *Roe v. Wade* by intentionally and purposely relying on another provision of the United States Constitution to make that challenge; and

WHEREAS, the General Assembly is not convinced that it should rely solely on predictions as to whether a majority of justices on the United States Supreme Court will overrule *Roe v. Wade* before exercising the powers reserved to it under the ninth and tenth amendments to protect the right of all natural persons within its jurisdictional boundaries against the deprivation of their lives without due process of law; and

WHEREAS, in departing from this predictive approach to constitutional adjudication, the General Assembly is mindful of what William Blackstone said in his *Commentaries on the Law of England*, "It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society"; and

WHEREAS, this General Assembly desires to hold out to the people of Tennessee and our nation the "rudiments and grounds" of the "positive" declaration of law herein made; 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, common sense as well as the un-rebutted testimony of Professor MacLeod tell us that enumerated rights 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 no "person" shall be deprived of "life, liberty, or property, without due process of law"; and

WHEREAS, no testimony was offered and no cases were cited to the effect that the intent behind or the purpose for adopting the fourteenth amendment was to repeal or negate the ninth amendment or the tenth amendment; 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, 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 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 *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 *Gamble v. United States* (2019) and *Knick v. Township of Scott* (2019) to discern the meaning of certain words and phrases in the United States Constitution. Subsequent research shows the same to be true with respect to the words "keep and bear arms," as set forth 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, William Blackstone began his explication of law in his *Commentaries* 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, the General Assembly heard un-rebutted testimony related to how a majority of the justices, even under its fourteenth amendment jurisprudence, could not agree on all parts of the opinion authored by Justice Sandra Day O'Connor in support of the judgment enjoining enforcement of certain laws in *Planned Parenthood v. Casey*, 505 US 833 (1992); and

WHEREAS, Justice O'Connor, joined by Justices Kennedy and Souter, without the concurrence of Justices Blackmun and Stevens who joined only in the judgment, wrote, "the immediate question is not the soundness of Roe, but the precedential force that must be accorded to its holding," meaning that a majority of the court did not re-examine the foundational legal premises on which the majority in Roe decided which human beings can qualify as a constitutional "person"; and

WHEREAS, the un-rebutted testimony showed that in 2007 a majority of justices in *Gonzales v. Carhart*, 550 U.S. 124 (2007) had to "assume" certain principles found in Casey in order to enter a judgment upholding the federal ban on partial birth 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, not one of the witnesses opposed to the amended Senate Bill even mentioned the majority opinion in Gonzales or attempted to rebut its relevance to constitutional considerations arising under the ninth amendment; and

WHEREAS, the testimony showed that in Gonzales, Justice Ginsburg described the fourteenth amendment jurisprudential analysis employed by the majority in upholding a federal ban on the medical procedure known as partial birth abortion as follows:

> In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. See Casey, 505 U.S., at 869-870, 112 S. Ct. 2791 (plurality opinion)...Today, the Court blurs that line, maintaining that '[t]he Act [legitimately] appl[ies] both previability and postviability because a fetus is a living organism while within the womb, whether or not it is viable outside the womb. Ante, at 1627...."
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> The Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion.
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> 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 US 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 in Gonzales can refer to a "living fetus" as an "unborn child" and yet continue to allow the dependency of a child's status, the child's location in or just outside the womb, or the means by which the child's life is ended by a third party to be sufficient justification to deprive that child of recognition at law as a constitutional rights-bearing person is, as Justice O'Connor said, an "arbitrary" understanding of the word "person"; and

WHEREAS, the history of the U.S. Supreme Court's fourteenth amendment abortion jurisprudence regarding persons demonstrates that its efforts thereunder to determine when "potential" human life exists and when that life might, if ever, become a constitutional "person" have been fluid and that viability outside the womb, the court's recent point of demarcation, was, in fact and law, irrelevant in Gonzales; and

WHEREAS, the arbitrariness of the Supreme Court's fourteenth amendment jurisprudence is made more evident in the light of the un-rebutted testimony regarding the ninth amendment and the "other rights" referenced thereunder and the un-rebutted testimony as to their foundation in common law and the absolute rights existing at common law; 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, 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 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, the general assembly heard un-rebutted testimony that the majority opinion in 2016 in *Whole Women's Health v. Hellerstedt*, 579 U.S. __ (2016) did not overrule Gonzales or repudiate the reasoning of the majority in its opinion, but simply and only distinguished the law and its context from that in Gonzales by noting that "[u]nlike in Gonzales, the relevant statute here does 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 testimony opposed to the amended Senate Bill offered no precedent to support its assertion that the principles underlying the United States Supreme Court's fourteenth amendment abortion jurisprudence would apply to state laws grounded in the ninth amendment and designed, intended, and enacted in the exercise of its duty to protect the absolute right of all natural persons in the state to life, making unfounded any assertion that the court's fourteenth amendment jurisprudential principles would be binding relative to an historically and jurisprudentially correct understanding of the ninth amendment; 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 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, the construction of the word "person" in the fourteenth amendment as the possessor of the rights therein provided so that it necessarily must take on two different meanings in the same sentence violates normal rules of grammar, as well as long-held canons of construction; and

WHEREAS, this construction also violates the rule of law itself inasmuch as the meaning of the subject in the sentence, "person," cannot be applied uniformly to all the words in the sentence applicable to the subject of the sentence; 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 other natural persons have no rights, unless those in power begin to distinguish some natural persons from other natural persons based on their own 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, the majority in Gonzales noted that opponents to the ban on partial birth abortions "accomplishes little because the standard D&E is in some respects as brutal, if not more, than [the] intact D&E," but the court was not there faced with whether a ban on the standard D&E procedure would likewise be constitutional under its fourteenth amendment jurisprudence; and

WHEREAS, the "standard D&E" is used beginning at about fourteen weeks; 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, in *Roe v. Wade*, the court's opinion said, "The Constitution does not define 'person' in so many words"; and

WHEREAS, this conclusion blatantly ignores the United States Supreme Court's own use of *Blackstone's Commentaries* and the common law to define and understand other terms in the

United States Constitution, as previously described; and

WHEREAS, the following statement in the court's majority opinion in *Roe v. Wade* also 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, "[I]n nearly all these instances [where person is used in the Constitution], the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application"; 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 was not intended to exclude the existence of "other rights" in other "people" and the recognition of those "other rights"; 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," yet the jurisprudence expressed by the majority opinion in *Roe v. Wade* and its subsequent opinions on abortion denies to the states a fixed standard applicable to all persons, singling out unborn persons for disparate treatment in regard to life and abortion inconsistent with their treatment in all other areas of law; 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, the un-rebutted testimony of Dr. Brent Boles showed that the question of when biological life begins is now 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, the General Assembly believes that science confirms the onset of a human organism's biological life, but cannot answer the question of what status or value that biological life should be given; 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; and

WHEREAS, this "double" arbitrariness relative to unborn human beings as rights-bearing persons under the fifth and fourteenth amendments 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, the law professor Adam MacLeod testified that the fourteenth amendment abortion jurisprudence underlying the judgments in Roe and Casey was not controlling authority

for legislation securing the right of all natural persons within the state to their lives, in accord with the ninth amendment; and

WHEREAS, in contradistinction to the foregoing, attorney Paul Linton testified that the canon of judicial construction holding that later enacted laws, in this case the fourteenth amendment, should control in the case of conflict with previously enacted law, in this case the ninth amendment, and that this meant the Supreme Court's fourteenth amendment abortion jurisprudence would preclude the interpretation herein given to the "other rights" under the ninth amendment; and

WHEREAS, application of this canon so as to apply to supreme court opinions rendered in particular cases and controversies between particular litigants to undermine the intended meaning of other words in the Constitution so as to render them meaningless for all persons and the whole nation "proceeds," in the words of Justice Scalia's concurring opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000), "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, application of this canon in this manner treats judicial opinions as legally operative acts by which federal judicial powers are exercised and treats opinions as equivalent to law and the United States Constitution; and

WHEREAS, application of the aforesaid canon of construction rests on the assumption that stare decisis must be applied to Roe and Casey; otherwise, the interpretations of the fourteenth amendment would not control the meaning of the words used in the ninth amendment; and

WHEREAS, in June 2019, in *Knick v. Township of Scott*, 588 U.S._ (2019), the United States Supreme Court overruled a thirty-four-year-old opinion, refusing to apply stare decisis when the earlier opinion "was not just wrong [but] [i]ts reasoning was exceptionally ill-founded

and conflicted with much of our ... jurisprudence," "[t]he decision [had] come in for repeated criticism over the years from Justices of this Court and many respected commentators," and "because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for over thirty years"; and

WHEREAS, the same can be said of *Roe v. Wade* and that such was demonstrated by the discussion during the August hearings of an article by attorney Clarke Forsythe, published last year in the *Georgetown Journal of Law and Policy*, titled, "A Hypothetical Opinion Reversing Roe v. Wade," which refutes any canon of construction urged against grounding this act in the ninth amendment; and

WHEREAS, the General Assembly concludes that the canon of construction urged upon it by opponents of the present act should not be dispositive, because its purpose for grounding this legislation in the ninth amendment is to demonstrate to the United States Supreme Court that its fourteenth amendment jurisprudence regarding the unborn as non-persons under the fourteenth amendment for the singular purpose of allowing a third party to take the unborn child's life is, in law and fact, wrong, and it undermines the express purposes of the ninth amendment and the rights referenced thereunder, which purposes were referenced above and articulated by the un-rebutted testimony of law professor Adam MacLeod; 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 a ninth amendment common law understanding that "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 addressed the intersection of life 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 US.], 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" according to "Bracton, writing early in the 13th century" to a "later and predominant view, following the great common-law scholars, ... that it was, at most, a lesser offense," and the fact that "in this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law" as somehow meaning that "at the time of the adoption of our Constitution, and throughout the

major portion of the 19th century, ... 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*, 10 U.S. 574, when the court recognized that the individual was not autonomous relative to the disposition of his or her rights 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 the 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, which means the people have 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, when asked, "When do you think that baby (in utero) had any rights?" Heather Shumaker, legal counsel for the National Women's Law Center, said, "I don't have a bright line point," and when pressed said that, as a woman, "I think that is for that pregnant person to determine"; and

WHEREAS, abortion is the unilateral decision of one person to have a third person end the life of another human being who was considered a person under the common law; and

WHEREAS, this unhindered and unilateral encroachment of one natural person's supposed liberty on the due process rights accorded another natural person is a violation of that

person's rights under the fifth and ninth amendments, and, coming as it does by means of the opinions of the United States Supreme Court, it is, in the words of *Erie Railroad v. Tompkins*, 304 U.S. 64, 79 (1938) "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct"; 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, in 2014, an amendment to the Tennessee Constitution was adopted that effectively reversed the opinion of the Tennessee Supreme Court in *Planned Parenthood v. Sundquist*, holding that there was a "fundamental right to abortion" in the state's Constitution by stating:

> 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

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 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, 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, based on the above, this General Assembly desires to exercise the powers belonging to it by virtue of the ninth and tenth amendments, 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. This act shall be known and may be cited as the "Rule of Law Life Act."

SECTION 2. 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) As used in this section, 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 3. 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 4. This act shall take effect July 1, 2020, the public welfare requiring it, and applies only to actions occurring on or after that date.