Chairman Bell and Members of the Committee,

My name is David Fowler. I am president of Family Action Council of Tennessee and a 1983 graduate of the University of Cincinnati.

I support the version of the bill that is before you, though I now think the "whereas" clauses could actually be strengthened. I strongly concur in professor MacLeod's testimony.

I will spend my time today responding to what I think you might hear from the bill's opponents. My purpose is not to cast or have anyone else cast aspersions upon them, but to narrow the issue, because I suspect that some will be talking about *Roe* and *Casey's* 14th Amendment oranges analysis while the Senate version is based on a Ninth Amendment apples argument.

The bill is very clear that it is grounded in the Ninth, not the 14th, Amendment:

> 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 of "personal security"** that "consists in the uninterrupted enjoyment of [one's] life."

Thus, the Senate version creates a conflict between two constitutional provisions that the U.S. Supreme Court *has never ruled on in the context of its abortion jurisprudence.* So, a 14th Amendment "oranges argument" against this bill misses the point of the bill's Ninth Amendment "apples argument."

But, even the Supreme Court's 14th Amendment jurisprudence offers good reasons to stand behind the Ninth Amendment basis for this bill. Let me demonstrate.

In *Planned Parenthood v. Casey*, the Court's opinion begins as follows:

> O'Connor, Kennedy, and Souter, JJ., announced the **judgment** of the Court and delivered the **opinion** of the Court with respect to Parts I, II, III, V—A, V—C, and VI, in which Blackmun and Stevens, JJ., joined, **an opinion** with respect to Part V—E, in which Stevens, J., joined, and **an opinion** with respect to Parts IV, V—B, and V—D.

In other words, five justices agreed on the result, but they did not agree on why, which is the *opinion*.

Let's make this distinction and its import clearer:

"*The opinion* of an appellate court is the *explanation* of what the court is deciding; ***it is not a***

legally operative instrument." Daniel J. Meador & Jordana S. Bernstein, *Appellate Courts in the United States*, 75-76 (1994).

In other words, **a court opinion is not the law**. It is not the exercise of the judicial power. So why should the legislative branch give deference to any Supreme Court opinion?

It is because of this: Until some new evidence, some new understanding of the law or history, or some new legal argument or theory comes before the legislature that would undermine the opinions held by a *majority* of the justices, what's the point of doing the same thing? Why fly directly in the face of opinions *in which the majority agrees*?

That appears to be what opponents of this bill are saying: That none of those things apply.

However, ask if they can point to an opinion in which the Court resolved the tension between its 14th Amendment abortion jurisprudence and an abortion law based on the Ninth amendment and whether the "other rights" to which it refers apply to the common law understanding of a person, which included the child in the mother's womb. I didn't find such a case.

Thus, the constitutional grounding for this bill *is* that something is new or different, and it distinguishes it from all **the other heartbeat bills *and* the rulings against them that you will hear about.**

But even if this key point is disregarded, look at what *Casey* is telling you. As far back as 1992, a *majority* of the justices *could not agree* on the *reason* for their judgment.

This is what Justice O'Connor said about *Roe* in the part of her opinion that Justice Blackmun and Justice Stevens would not join. Keep in mind that *Roe* held that the state's interest in potential life was not sufficiently compelling to put *any* prohibitions on abortion until the third trimester.

> The trimester framework . . . does not fulfill *Roe's* own promise that the State has an interest in protecting fetal life or potential life. ***Roe* began the contradiction** by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. . . . This treatment is . . . incompatible with the recognition that **there is a substantial state interest in potential life *throughout pregnancy.*** Cf. *Webster,* 492 U. S., at 519 (opinion of Rehnquist, C. J.); ***Akron I, supra,* at 461 (O'Connor, J., dissenting).**

And why did she write this last sentence and why did I highlight her dissent in *Akron I*? Because she wrote this even as far back as 1983:

> **The <u>choice of viability</u> as the point at which the state interest in potential life becomes compelling <u>*is no less arbitrary* than choosing any point *before* viability or any point *afterward*</u>.** Accordingly, I believe that the State's interest in protecting potential human life exists **throughout the pregnancy**.

Basing the potential for the unborn "becoming" a constitutionally recognizable person based on the odds of surviving outside the womb is arbitrary. But basing an abortion ban on when fetal pain is felt or a heartbeat is detected is no less arbitrary. *Arbitrary is arbitrary, and arbitrary is the antithetical to the rule of law. I don't care about the optics of bumper sticker politics or jurisprudence—abortion stops a beating heart—but the rule of law.*

The Senate version put this question to the Court, "Do you want to continue with arbitrary measures of life and personhood and the state's interest in it or finally allow abortion *policy* into conformity with all other areas of law—criminal, tort, and property—so that there is uniformity of understanding regarding when the power of the state *may* declare the unborn to be persons in the eyes of the law and treat them as such?

This uniformity is what the rule of law requires, and *Roe* is an arbitrary exception to the uniformity that otherwise exists as to when the state can declare the unborn a person in the eyes of the law. If the Supreme Court does not care about the rule of law, then heaven help us; we are lawless.

Consequently, I submit that saying that *Roe* and *Casey,* 14th Amendment opinions*,* tell us how the Court will rule on a law based on the Ninth Amendment is speculative.

Moreover, look at the Supreme Court's 2007 opinion in *Gonzales v. Carhart* in which the federal ban on partial birth abortion was upheld. Like *Casey*, there was not agreement about *Roe and there wasn't even agreement about Casey.*

In writing the majority opinion there, Justice Kennedy, acknowledged the problem: "The **principles** set forth in the joint **opinion** in [*Casey*] **did not find support** from all those who join the instant **opinion**."

Those *four other* persons who formed the majority were Chief Justice Roberts, and Justices

Scalia, Thomas, and Alito, three of whom are still on the Court.

They could only agree on this: "We ***assume*** the following principles [from *Casey*] for the purposes of this opinion."

Justice Ginsburg's strong dissent tells you what the majority actually did agree on that bolsters the Ninth Amendment argument:

> 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. . . . 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. . . .

The Senate bill draws upon these considerations and adds to it a constitutional grounding for the unborn child's right to life and the state's interest in protecting it—the Ninth Amendment, not the 14th.

To be fair, the Court's 2016 decision in *Whole Woman's Health v. Hellerstedt* slowed the Court's march toward abandoning its *14th* Amendment abortion jurisprudence, but it is not determinative of a Ninth Amendment argument. Here is how the five-member majority tried to distinguish *Gonzales*:

> Unlike 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** (namely, protecting women's health).

In other words, the factors and propositions undergirding the judgment in *Gonzales still exist and can be used by you as authority in making a Ninth Amendment argument.*

But the Senate version of this bill leaves nothing to inference. It lays a Ninth Amendment axe to the root of the constitutionally diseased roots of the Court's 14th amendment abortion jurisprudence. It is time to cut *Roe* down.