Testimony of David Fowler in Support of Amendment to SB 1236

Chairman Bell and members of the Judiciary Committee,

My name is David Fowler. I am a 1983 graduate of the University of Cincinnati College of Law, taught an introductory course in the philosophy of government and jurisprudence at Bryan College, and was a member of this Committee from 1994 until 2006. Since then I have served as the president of both Family Action of Tennessee and The Family Action Council of Tennessee.

The proposed amendment rests on two legal arguments. The first challenges prevailing abortion precedents in regard to what constitutes viability. It offers not only a commonsense understanding of viability, but also a scientifically objective measure of viability that does not make rights dependent on advances in modern medicine. When infanticide is being applauded and the Court's precedents appear to make such constitutionally permissible, I think it is time the Supreme Court re-examine the question of viability and consider using a diagnostic measure of viability instead of a prognostic one. This amendment would allow that issue to be considered.

But I would also like to commend to you a constitutional argument in support of this bill based on the question, *what* rights and *whose* rights *are* protected by the Constitution? This argument puts at issue *for the first time* in the abortion context whether the rights possessed by individuals depend *for their existence in the first instance* only upon positive legal enactments and judicial pronouncements and whether, if belief in such "inalienable" or "absolute" rights still exists, the people have authorized state governments to protect and make more secure those rights.

If our rights come only from decisions of the United States Supreme Court, then our great Republic will die from ingesting an understanding of judicial supremacy that our Founding Fathers feared. The only antidote—given Congress' abdication of its duties—is for you to exercise the counterbalancing powers of federalism and dual sovereignty established by our Constitution to assert *not just* the state's interest in life, but on behalf of unborn human beings *their rights* protected and preserved by the Ninth Amendment[1] and put *their rights* at juxtaposition against an expansive view of liberty that goes beyond the clear intent of our Constitution[2] and is manufactured by judicial pronouncements.

The importance of this argument was driven home by three things in the 6th Circuit's decision last week upholding Kentucky's ultrasound law. First, that is the Court to which any appeal concerning the constitutionality of this bill would go. Second, by its use of the words "unborn child" or "unborn life" a total of 30 times in the first 17 pages of its opinion, the Court

appeared to signal to those with ears to hear that it knows abortion takes the life of a child, another human being. And this bears on the third reason the *Beshear* case is important.

Beshear cites with approval and describes in the following way the 8th Circuit's en banc approval of a North Dakota informed consent law,

> 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" . . . .*[3]

Our Circuit knows we are speaking not only of a "whole . . . human being," but one who is also a "separate . . . human being" from his or her mother.

Either the Ninth Amendment, which protects unenumerated common law rights, needs to protect the right to life of a child *en ventra se mere*, as the common law put it, or the Supreme Court needs to say, as the late Justice Antonin Scalia said about where the balance should be drawn between liberty and life in right to die cases:

> It is quite impossible . . .that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely . . . that they will decide upon a line less reasonable.[4]

Urging the Court to leave the issue of abortion to the states actually restores one of the "blessings of liberty"[5] that was lost in *Roe*. As Justice Kennedy wrote in 2011 on behalf of a *unanimous* Court in *Bond v. United States*,[6] "'freedom is enhanced by the creation of two governments, not one,'" because it 'secures to citizens the liberties that derive from the diffusion of sovereign power.'"[7]

In my opinion, for this Body and the Courts to disregard *fundamental* rights at common law—here the right to life—in favor of *only* positively declared rights and then *only in abortion-related decisions* would be to do what we were all forbidden to do by the very last words in *Casey v. Planned Parenthood*, "retreat from interpreting the *full* meaning of [our Constitution] in light of *all* of our precedents."[8]

I conclude by paraphrasing only slightly what *Obergefell's* majority said when it was presented with a *new* rights claim, as I'm here suggesting,[9] "When new insight reveals discord between the Constitution's *central* protections and a *received legal stricture* [which I submit *Roe* and *Casey* are], a claim to [life in relation to] liberty must be addressed."[10]

Making that claim, as *de facto* guardian ad litem on behalf of the voiceless human beings killed by abortion, is exactly what I submit this bill does.

I would urge you to vote for this bill.

[1] "The Enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
[2] "If the Fifth Amendment uses 'liberty' in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado* v. *California,* 110 U. S. 516, 534-535 (1884). Indeed, this Court has previously commented, 'The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent.' *Ibid.* And this Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using 'liberty' to mean freedom from physical restraint. . . . That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses." *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584, 2632 (Thomas, J., dissenting)
[3] Case No. 17-6151/6183, p. 16.
[4] *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S 261, 293, 110 S. Ct. 2841, ___(1990) (Scalia, J., dissenting)
[5] Preamble, United States Constitution
[6] 564 U.S. 21, 131 S.Ct. 2355 (2011)
[7] *Bond*, 131 S.Ct. at 2364
[8] *Casey v. Planned Parenthood*, 505 U.S. 833, 901, 112 S. Ct. 2791, ___ (1992). This is the full context for the quotation: "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 retre*at from interpreting the *full* meaning of the covenant in light of *all* of our precedents." (emphasis added)
[9] The quote that follows is remarkably similar to what Blackstone said about the historical swings between protecting and undermining the fundamental law: "The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger." William Blackstone, *Commentaries on the Laws of England*, 119-120, 125-129 (Philadelphia: J.B. Lippincott Co., 1893)
[10] *Obergefell,* 135 S. Ct. at 2598.