**August 12, 2019**

**WRITTEN TESTIMONY OF SENIOR COUNSEL, CECE HEIL**
**REGARDING TN SB 1236**

For the reasons set forth herein, the American Center for Law & Justice ("ACLJ"), on behalf of over 81,901 concerned citizens, including 2,017 from Tennessee, who have signed our Petition to Protect Babies and Defend Heartbeat Bills, urges that TN legislators support SB 1236.

By way of introduction, the ACLJ is a non-profit law firm dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued and participated as counsel of record in numerous cases involving constitutional issues before the Supreme Court of the United States. *See Summum v. Pleasant Grove*, 555 U.S. 460 (2009); *NOW v. Scheidler*, 547 U.S. 9 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb's Chapel v. Center Moriches Sch. Dist*., 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

You are going to hear quite a bit of testimony today and tomorrow on many different topics. However, I would suggest that the fate of this bill really rests on the answer to one question. When are rights protected and more specifically when is the right to life protected? Although this question has been debated since the highly contested opinion in *Roe v. Wade*[1], even Justice Blackmun himself concedes that *Roe* fails if it is ever established that an unborn baby has the right to life.[2] I wholly concur, although I believe that *Roe* fails for many more reasons as well. Blackmun goes on to state, as a matter of fact, that the right to life would absolutely trump the judicially fabricated right to abortion created in the majority opinion. So the author of one of the most controversial Supreme Court decisions to date, literally sets the path to invalidate that same decision. Although the opinion tries to claim that there is no historical argument to support an unborn baby's right to life, this conclusion is completely erroneous, with the most condemning rebuttal found in The Declaration of Independence itself.

We are all familiar with the language that says "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[3] However, the opinion of *Roe*, and anyone who supports the killing of unborn children, clearly has missed the meaning of those words. It unmistakably declares that all men are *created* equal and endowed by their

[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Id.* at 157.
[3] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Creator with certain unalienable rights. So when are we endowed with unalienable rights? At creation. Our founders did not declare that we are *born* equal and endowed with rights, but that we were *created* equal and endowed with rights. Thus, although Blackmun tried so hard to argue that we were never given any indication of when rights attach, I wholeheartedly disagree. The Declaration could not be more clear that rights attach at creation. Furthermore, the following language in the Declaration is equally important, as it states that governments were specifically created to secure those unalienable rights, of which life is of upmost importance. Therefore, the government of Tennessee absolutely not only has the right to secure the right to life from creation, but the duty to do so.

That may seem too simple, as abortion has torn our country apart for 46 years. And I realize that the opponents of this bill (both right to life opponents and pro-abortion opponents) will be relying on *Roe*, arguing that the bill won't survive constitutional scrutiny and/or it will place an undue burden on a woman's judicially fabricated right to abortion. However, I believe their faith in *Roe* is overstated.

The simple summary of the *Roe* opinion is that it judicially fabricated a constitutional right to abortion. However, the rest of the opinion cannot simply be ignored. Additionally, subsequent Supreme Court abortion cases merely assume this right, then address its faults and limit its reach.[4] This is what makes the opponents unsure of how the current Supreme Court will handle this faulty precedent - and rightfully so. Although no one can predict what any justice on the Supreme Court will do, there is absolutely a clear path to validating the bill before this Tennessee legislature, even with *Roe v. Wade*, *Casey* and *Gonzales* in play.

In *Roe*, Justice Blackmun concludes that, "a State may properly assert important interests in…protecting potential life."[5] However, the opinion goes on to develop some arbitrary point that this interest becomes "sufficiently compelling" to regulate the abortion decision, which he admits is not an unqualified right and must be considered against state interests.[6] The court then develops the approach that the right to abortion "is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life,

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[4] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992). Importantly, the Supreme Court in *Casey* overturned the part of *Roe* that applied different levels of judicial scrutiny to abortion regulations, depending on the trimester. *Casey*, *Id.* at 872–74. Under this set of rules,

> almost no regulation at all [was] permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, [were] permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions [were] permitted provided the life or health of the mother is not at stake.

*Id.* at 872. *Casey* replaced this "elaborate but rigid construct" with a simpler test which allows regulation of abortion so long as it does not impose an "undue burden" on the woman's right to have an abortion. *Id.* at 874–76. This test, the Court concluded, places sufficient weight on the State's interest in protecting potential human life and balances it with the woman's right to abort. *Id.* at 876. *See also* Gonzales v. Carhart, 550 U.S. 124, 158 (2007). The Court had previously struck down a ban on partial birth abortions in Stenberg v. Carhart, 530 U.S. 914 (2000). In upholding the Partial-Birth Abortion Ban Act in *Gonzales*, the Court also lowered the standard of abortion regulation even further by adding a "rational basis" test (the lowest level of protection under the Constitution) to the undue burden standard outlined in *Casey*. *Id.*

[5] *Roe v. Wade*, 410 U.S. 113, 154 (1973).

[6] *Id.*

become dominant."[7] Here Blackmun himself admits to prenatal life, which is defined by the medical dictionary as life between conception and birth. Then in a complete turnaround Blackmun says that the court doesn't need to resolve the difficult question of when life begins, a contradictory statement he had to make in order to justify the majority opinion of the court. Obviously, the two statements are incompatible, he cannot declare that a state has an interest to protect prenatal life and then say they don't know when life begins, as by definition prenatal life begins at conception. But that inconsistency is just the beginning of *Roe*'s problems.

The court states that "it is reasonable and appropriate for a *State* to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved."[8] Unfortunately, they don't follow their own conclusion and take it upon *themselves* to decide for the State what that point is. So, after judicially fabricating the right to abortion, denying the existence of prenatal life, but acknowledging a State's interest in protecting it, an arbitrary point where that interest became "compelling" also had to be judicially fabricated. Thus, the court concluded that perhaps after the first trimester a state's interest could be compelling as to the mother and at viability as to the unborn baby.

Here's the problem with those arbitrary conclusions. They no longer hold water. The compelling interest for the mother was based upon "present medical knowledge."[9] The sole argument for the first trimester distinction was based on an alleged fact of the then current medical knowledge that abortion was safer than childbirth. Unfortunately for *Roe*, present medical knowledge no longer justifies that conclusion. Published research strongly indicates that abortion, rather than being safer than childbirth, is in fact more dangerous.

In Finland, for example, researchers drew upon national health care data to examine the pregnancy history of all women of childbearing age who died, for any reason, within one year of childbirth, abortion, or miscarriage, between the years of 1987 and 1994 (a total of nearly 10,000 women). The study found that, adjusting for age, women who had abortions were 3.5 times more likely to die within a year than women who carried to term.[10]

A subsequent study based upon Medicaid records in California likewise found significantly higher mortality rates after abortion. The study linked abortion and childbirth records in 1989 with death certificates for the years 1989-97. This study found that, adjusting for age, women who had an abortion were 62% more likely to die from any cause than women who gave birth.[11]

Yet another study, this one of nearly a half million Danish women, found that the risk of death after abortion was significantly higher than the risk of death after childbirth.[12] The study specifically examined both early (before 12 weeks gestation) and late (after 12 weeks gestation)

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[7] *Id.* at 155.
[8] *Id.* at 159.
[9] *Id.* at 163.
[10] Mika Gissler, et al., Pregnancy-associated deaths in Finland 1987-1994-definition problems and benefits of record linkage, 76 Acta Obstetrica et Gynecologica Scandinavica 651 (1997).
[11] David C. Reardon, et al., *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, 95 SO. MED. J. 834 (2002).
[12] David C. Reardon & Priscilla K. Coleman, *Short and Long Term Mortality Rates Associated with First Pregnancy Outcome: Population Register Based Study for Denmark 1980-2004*, 18 MED. SCI. MON. 71 (2012).

abortions, and found statistically significantly higher death rates for both groups as compared to mortality after childbirth.

A more recent meta-analysis of nearly 1000 studies concluded that a woman's risk of premature death increases by 50% after having an abortion, and that this lethal effect lasts at least ten years.[13]

The Finland and California studies mentioned above both showed, *inter alia*, a heightened risk of suicide after abortion.[14] (The Danish study did not examine this aspect.) A British study found the same thing.[15] All these studies are consistent with the many studies documenting adverse emotional consequences after abortion.[16]

Of course, abortion can also cause physical harm, beyond the harm (*i.e.*, death) to the unborn child. This can result directly from the procedure itself (*e.g.*, perforation of the uterus, laceration of the cervix), from the deprivation of the health benefits of continuing pregnancy (*e.g.*, eliminating the protective effect of a full-term pregnancy against breast cancer),[17] or by masking other dangerous symptoms (*e.g.*, a woman with an infection or an ectopic pregnancy may believe her symptoms are merely normal after-effects of abortion, leading her to delay seeking medical help).[18]

In short, the tragic and inhuman downsides of abortion have become more obvious, while the previously assumed advantages have failed to materialize. Abortion has proven to be, to say the least, a harmful social experiment.

Furthermore, the compelling interest in protecting the unborn baby only after viability was supposedly based upon logical and biological justifications. Unfortunately for *Roe*, the logic and biology no longer justify that conclusion (if they ever did). Professor David Forte has suggested that the high statistical correlation between detection of a heartbeat and ultimate live birth of that child make the presence of a detectable heartbeat a more useful and reliable marker of ultimate "viability" than the current understanding of viability as the capacity to survive, immediately, outside the womb. Prof. Forte argues that the pertinent medical facts therefore make the onset of heartbeat an attractive substitute for, and improvement upon, the Supreme Court's previous understanding of "viability" as the point at which abortion can generally be proscribed consistent

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[13] David C. Reardon & John M. Thorp, *Pregnancy Associated Death in Record Linkage Studies Relative to Delivery, Termination of Pregnancy, and Natural Losses: A Systematic Review with a Narrative Synthesis and M*eta-analysis, 5 *Sage Open Medicine* 1 (2017).

[14] *See also* Mika Gissler, *et al., Suicides after Pregnancy in Finland: 1987-94: Register Linkage Study*, 313 BRITISH MED. J. 1431 (1996) (suicide rate after induced abortion was six times higher than suicide rate after childbirth).

[15] Christopher L. Morgan, et al., Mental Health may Deteriorate as a Direct Effect of Induced Abortion, 314 BRITISH MED. J. 902 (Mar. 22, 1997) (letters section) (found suicide attempts more than four times as frequent after abortion than after childbirth).

[16] *See* David C. Reardon, *Abortion Decisions and the Duty to Screen: Clinical, Ethical and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL'Y 33, 39 n.14 (2003) (citing nearly three dozen sources).

[17] *See* Justin D. Heminger, *Big Abortion: What the Antiabortion Movement Can Learn from Big Tobacco*, 54 CATH. U.L. REV. 1273, 1288-89 & nn.119 & 121 (2005).

[18] *See generally Physical effects of abortion: Fact sheets, news, articles, links to published studies and more*, The UnChoice, www.theunchoice.com/physical.htm (listing sequelae and referencing sources).

with the federal Constitution.[19] Indeed, the current understanding of "viability," as a capacity to survive outside the womb, is not just indeterminate and changeable (because it's dependent on time, place, and the progress of medical technology), but perverse It's like saying the state can only make it a crime to throw someone overboard from a ship if they can swim, because if they *cannot* swim they are not "viable" in the sea!

*Roe* isn't in danger simply because the bases for all of its faulty conclusions no longer exist, the entire opinion is being completely discredited. In fact, *Roe*'s opinion has been limited and attacked repeatedly over the years, from scholars on both sides of the abortion issue. It may be important to highlight that some of those attacks have come from current Supreme Court Justices.

Justice Clarence Thomas has repeatedly criticized *Roe* as "grievously wrong" and stated that Casey is as illegitimate as *Roe*.[20] Justice Kavanaugh has praised Justice Rehnquist's dissent in *Roe* at length and has condemned judicial legislation.[21] Justice Alito stated that he clearly disagrees with *Roe v. Wade* and would welcome the opportunity to brief the issue.[22] Justice Gorsuch has made his support of life abundantly clear,[23] and Chief Justice Roberts, who most would claim to be perhaps the new Justice Kennedy of the court, has stated that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled. . . . the Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution."[24]

As previously stated, that although no one can ever predict how a Supreme Court justice may decide an issue, the Supreme Court, certainly has the wherewithal to reject the judicially fabricated right to abortion and uphold the constitutionality of bill such as this one, that protects all innocent life, especially the most defenseless. And I would once again submit that Tennessee not only has the right, but the duty to make sure defenseless unborn babies are protected.

Respectfully submitted,

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[19] David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121 (2013).
[20] *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting). *See also Timbs v. Indiana*, No. 17-1091 (Feb. 20, 2019), slip op. at 2 (Thomas, J., concurring in judgment) (describing *Roe* as "notoriously incorrect").
[21] *See generally*, Judge Brett Kavanaugh, U.S. Court of Appeals for the D.C. Circuit, Remarks at American Enterprise Institute on the Constitutional Statesmanship of Chief Justice William Rehnquist (Sept. 18, 2017) (transcript available at https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf).
[22] Memorandum from Samuel A. Alito to the Solicitor General (June 3, 1985), *available at* https://www.npr.org/documents/2005/nov/alito/alitothornburgh.pdf.
[23] *See generally*, NEIL M. GORSUCH, THE FUTURE: ASSISTED SUICIDE AND EUTHANASIA (2006).
[24] Brief for the Respondent United States, *Rust v. Sullivan* (Nos. 89-1391, 89-1392).