House Health Subcommittee Am. #1

Amendment No._____

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Signature of Sponsor

AMEND Senate Bill No. 2582 House Bill No. 2779*

by deleting all language after the enacting clause and substituting:

SECTION 1. This act is known and may be cited as the "Human Life Protection Act."

SECTION 2. Tennessee Code Annotated, Title 39, Chapter 15, Part 2, is amended by adding the following new sections:

39-15-220. Definitions.

(a) As used in §§ 39-15-220 – 39-15-228:

(1) "Abortion" means the use of an instrument, medicine, drug, or 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) "Fertilization" means that point in time when a male human sperm penetrates the zona pellucida of a female human ovum;

(3) "Pregnant" means the human reproductive condition of having a living unborn child within one's body throughout the entire embryonic and fetal stages of the unborn child from fertilization until birth;

(4) "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 until birth; and

(5) "Woman" and "women" include any person whose biological sex is female, including a person with XX chromosomes and a person with a uterus, regardless of any gender identity that the person attempts to assert or claim.

39-15-221. Abortion prohibited.

(a) A person shall not knowingly perform or attempt to perform an abortion except as provided in subsections (b) and (c) and § 39-15-222.

(b) The prohibition in subsection (a) does not apply if:

(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. An abortion is not deemed authorized under this subdivision (b)(2) if performed on the basis of a claim or a diagnosis that the woman will engage in conduct that would result in her death or substantial and irreversible impairment of a major bodily function or for any reason relating to her mental health; and

(3) The physician performs or attempts to perform the abortion in the manner which, in the physician's good-faith medical judgment, based upon the facts known to the physician at the time, provides the best opportunity for the unborn child to survive, unless in the physician's good-faith medical judgment, termination of the pregnancy in that manner would pose a greater risk of the death of the pregnant woman or substantial and irreversible impairment of a major bodily function. No such greater risk 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.

(c) The prohibition in subsection (a) does not apply to medical treatment provided to the pregnant woman by a licensed physician which results in the accidental death of or unintentional injury to or death of the unborn child.

(d) This section does not subject the pregnant woman upon whom an abortion is performed or attempted to civil liability or criminal conviction or penalty.

(e) The exception described in subsection (b) is an affirmative defense, and a defendant sued under § 39-15-224 has the burden of pleading and proving the elements of that defense by a preponderance of the evidence.

39-15-222. Exemption for preemption and intergovernmental immunity.

The prohibition in § 39-15-221 does not apply to an abortion performed at the behest of federal agencies, contractors, or employees that are carrying out duties under federal law, if a prohibition on that abortion would violate the doctrines of preemption or intergovernmental immunity.

39-15-223. Limitations on public enforcement.

Notwithstanding another law, the requirements of § 39-15-221 are enforced exclusively through the private civil actions described in § 39-15-224. No direct or indirect enforcement of § 39-15-221 may be taken or threatened by the state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person or entity, in any manner whatsoever, except as provided in § 39-15-224, and no violation of § 39-15-221 may be used to justify or trigger the enforcement of another law or any type of adverse consequence under another law, except as provided in § 39-15-224. However, this section does not preclude enforcement of another law or rule against conduct that independently violates such other law or rule.

39-15-224. Civil liability.

(a) Any person, other than this state, its political subdivisions, and any officer or employee of a state or local governmental entity in this state, may bring a civil action against any person or entity that:

(1) Performs or induces an abortion in violation of § 39-15-221;

(2) Knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of § 39-15-221, regardless of whether the person or entity knew or should have known that the abortion would be performed or induced in violation of § 39-15-221; or

(3) Intends to engage in the conduct described by subdivision (a)(1) or (a)(2).

(b) If a claimant prevails in an action brought under this section, the court shall award:

(1) Injunctive relief sufficient to prevent the defendant from violating § 39-15-221 or engaging in acts that aid or abet violations of § 39-15-221;

(2) Statutory damages in an amount of not less than ten thousand dollars ($10,000) for each abortion that the defendant performed, induced, aided, or abetted in violation of § 39-15-221;

(3) Nominal and compensatory damages if the plaintiff has suffered harm from the defendant's conduct, including, but not limited to, loss of consortium and emotional distress; and

(4) Costs and attorney's fees.

(c) Notwithstanding subsection (b), a court shall not award relief under subdivision (b)(2) or (b)(4) in response to a violation of subdivision (a)(1) or (a)(2) if the defendant demonstrates that the defendant previously paid or has been ordered to pay the full amount of statutory damages under subdivision (b)(2) in a previous action for that particular violation of § 39-15-221, or for the particular conduct that aided or abetted an abortion performed or induced in violation of § 39-15-221.

(d) Notwithstanding another law, a person may bring an action under this section no later than six (6) years after the date the cause of action accrues.

(e) Notwithstanding another law, the following are not a defense to an action brought under this section:

(1) Ignorance or mistake of law;

(2) A defendant's belief that the requirements or provisions of § 39-15-221 are unconstitutional or were unconstitutional;

(3) A defendant's reliance on a court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant violated subsection (a);

(4) A defendant's reliance on a state or federal court decision that is not binding on the court in which the action has been brought;

(5) Non-mutual issue preclusion or non-mutual claim preclusion;

(6) The consent of the unborn child's mother to the abortion; or

(7) A claim that the enforcement of § 39-15-221 or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by § 39-15-225.

(f)

(1) It is an affirmative defense if a person or entity sued under subdivision (a)(2) or (a)(3) reasonably believed, after conducting a reasonable investigation, that the individuals and organizations involved with performing or facilitating the abortion would comply with § 39-15-221.

(2) The defendant has the burden of proving an affirmative defense under subdivision (f)(1) by a preponderance of the evidence.

(g) This section shall not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States supreme court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Article I, Section 19 of the Constitution of Tennessee.

(h)

(1) Notwithstanding another law, this state, a political subdivision of this state, a district attorney general or county attorney, and an executive or administrative officer or employee of this state or a political subdivision shall not:

(A) Act in concert or participation with a person who brings suit under this section;

(B) Establish or attempt to establish any type of agency or fiduciary relationship with a plaintiff who brings suit under this section;

(C) Make an attempt to control or influence a plaintiff's decision to bring suit under this section or the plaintiff's conduct of the litigation; or

(D) Intervene in an action brought under this section.

(2) This subsection (h) does not prohibit a person or entity described in subdivision (h)(1) from filing an amicus curiae brief in the action, as long as that person or entity does not act in concert or participation with the plaintiff or plaintiffs who bring suit under this section, or violate another provision of subdivision (h)(1).

(i)

(1) Notwithstanding another law, a court shall not award costs or attorney's fees to a defendant in an action brought under this section unless the court finds that the plaintiff's claim that the defendant violated subsection (a) is frivolous, malicious, or brought in bad faith.

(2) A court shall not find that an action brought under this section is frivolous, malicious, or brought in bad faith within the meaning of subdivision (i)(1) if the plaintiff:

(A) Reasonably believed that the defendant performed or induced an abortion in violation of § 39-15-221, engaged in conduct that aided or abetted the performance or inducement of such an abortion, or intended

to engage in such conduct, regardless of whether a previous court decision declared unconstitutional a requirement or provision of § 39-15-221; or

(B) Brings suit to seek the overruling of a previous court decision that pronounced unconstitutional a requirement or provision of § 39-15-221, or another law that regulates or restricts abortion.

(j) Notwithstanding another law, a civil action under this section is not subject to the Tennessee Public Participation Act, compiled in title 20, chapter 17, and is not subject to § 4-1-107.

(k) Notwithstanding another law, a civil action under this section may not be brought:

(1) Against the woman upon whom an abortion was performed or induced, or attempted to be performed or induced, in violation of § 39-15-221, or against a pregnant woman who intends or seeks to abort her unborn child in violation of § 39-15-221;

(2) Against a person or entity that performs, aids, or abets, or attempts to perform or aid or abet an abortion at the behest of federal agencies, contractors, or employees that are carrying out duties under federal law, if a prohibition on that abortion would violate the doctrines of preemption or intergovernmental immunity;

(3) Against a common carrier that transports a pregnant woman to an abortion provider, if the common carrier is unaware that the woman intends to abort her unborn child; or

(4) By a person who impregnated a woman seeking an abortion through an act of rape, sexual assault, or incest.

39-15-225. Civil liability - Defenses.

(a)

(1) A defendant against whom an action is brought under § 39-15-221 may assert an affirmative defense to liability under this section if:

(A) The defendant has standing to assert the rights of a woman or group of women seeking an abortion under the tests for third-party standing established by the supreme court of the United States; and

(B) The imposition of civil liability on the defendant will result in an undue burden on a woman or group of women seeking an abortion.

(2) The defendant bears the burden of proving the affirmative defense in subsection (a) by a preponderance of the evidence.

(b) The affirmative defense under subsection (a) is not available if the supreme court of the United States overrules *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under § 39-15-224 occurred before the supreme court overruled either of those decisions.

(c) Sections 39-15-220 – 39-15-228 do not limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under § 39-15-224, and a court shall not award relief under § 39-15-224 if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

(d) Sections 39-15-220 – 39-15-228 do not limit or preclude a defendant from asserting the unconstitutionality of any provision or application of §§ 39-15-220 – 39-15-228, or another provision of state law, as a defense to liability under § 39-15-224.

39-15-226. Civil liability - Venue.

(a) Notwithstanding another law, including title 20, chapter 4, a civil action brought under § 39-15-224 may be brought in:

(1) The county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

(2) The county of residence for one (1) or more of the natural person defendants at the time the cause of action accrued;

(3) The county of the principal office in this state of one (1) or more of the defendants that is not a natural person; or

(4) The county of residence for the plaintiff if the plaintiff is a natural person residing in this state.

(b) If a civil action is brought under § 39-15-224 in one (1) of the venues described in subsection (a), then the action shall not be transferred to a different venue without the written consent of all parties.

39-15-227. Sovereign, governmental, and official Immunity preserved - Limits on jurisdiction.

(a) Notwithstanding another law, this state has sovereign immunity, each political subdivision of this state has governmental immunity, and each officer and employee of this state or a political subdivision of this state has official immunity in an action, claim, counterclaim, or other type of legal or equitable action that challenges the validity of a provision or application of §§ 39-15-220 – 39-15-228, on constitutional grounds or otherwise, or that seeks to prevent or enjoin this state, a political subdivision of this state, or an officer or employee of this state or a political subdivision from enforcing a provision or application of §§ 39-15-220 – 39-15-228, unless that immunity has been abrogated or preempted by federal law in a manner consistent with the Constitution of the United States.

(b) Notwithstanding another law, another law of this state shall not be construed to waive or abrogate the immunity described in subsection (a) unless the provision expressly waives or abrogates immunity with specific reference to this section.

(c) Notwithstanding another law, an attorney representing this state, a political subdivision of this state, or an officer or employee of this state or a political subdivision is

not authorized or permitted to waive an immunity described in subsection (a) or take an action that would result in a waiver of that immunity.

(d) Notwithstanding another law, a court of this state does not have jurisdiction to consider an action, claim, or counterclaim that seeks declaratory or injunctive relief to prevent this state, a political subdivision of this state, an officer or employee of this state or a political subdivision, or another person from enforcing a provision or application of this part, or from filing a civil action under § 39-15-224.

(e) Sections 39-15-220 – 39-15-228 do not prevent a litigant from asserting the invalidity or unconstitutionality of a provision or application of §§ 39-15-220 – 39-15-228, or another provision of state law, as a defense to an action, claim, or counterclaim brought against that litigant.

39-15-228. Severability.

(a) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the supreme court of the United States held that an explicit statement of legislative intent is controlling, it is the intent of the general assembly that every provision, section, subsection, subdivision, sentence, clause, phrase, or word in §§ 39-15-220 – 39-15-228, and every application of §§ 39-15-220 – 39-15-228 to every person, group of persons, or circumstance, are severable.

(b) If the application of any provision of §§ 39-15-220 – 39-15-228 to a person, group of persons, or circumstance is found by a court to be invalid, preempted, unconstitutional, or to impose an undue burden on a woman or group of women seeking an abortion, then the remaining applications of that provision to all other persons and circumstances are severed and preserved, and remain in effect. All constitutionally valid applications of the provisions in §§ 39-15-220 – 39-15-228, and every application of those provisions that can be enforced without imposing an undue burden on women seeking abortions, are severed from applications that a court finds to be invalid,

preempted, unconstitutional, or to impose an undue burden on women seeking abortions, and the valid applications remain in force, because it is the general assembly's intent and priority that every valid application be allowed to stand alone. Even if a reviewing court finds a provision of §§ 39-15-220 – 39-15-228 to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden are severed from the remaining applications and remain in force, and are treated as if the general assembly enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not impose an undue burden.

(c) The general assembly further declares that it would have enacted §§ 39-15-220 – 39-15-228, and each provision, section, subsection, subdivision, sentence, clause, phrase, or word, and all constitutional applications of the provisions of §§ 39-15-220 – 39-15-228, irrespective of the fact that any provision, section, subsection, subdivision, sentence, clause, phrase, word, or applications of §§ 39-15-220 – 39-15-228 were to be declared invalid, preempted, unconstitutional, or to impose an undue burden.

(d) If any provision of §§ 39-15-220 – 39-15-228 is found by a court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems are severed and remain in force, consistent with the severability requirements of subsections (a)–(c).

(e) A court shall not decline to enforce the severability requirements of subsections (a)–(d) on the grounds that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoin a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) Is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different

understanding of the requirements of the Constitution of Tennessee or United States Constitution;

(2) Is not a formal amendment of the language in a statute; and

(3) No more rewrites a statute than a decision by the executive branch not to enforce a duly enacted statute in a limited and defined set of circumstances.

(f) If a state or federal court disregards the severability requirements of subsections (a)–(e), and declares or finds a provision of §§ 39-15-220 – 39-15-228 facially unconstitutional, when there are discrete applications of that provision that can be enforced against a person, group of persons, or circumstance without violating federal law, the federal or state constitutions, or imposing an undue burden on women seeking abortions, then the court shall interpret that provision, as a matter of state law, as if the general assembly enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate federal law, the federal or state constitutions, or impose an undue burden on women seeking abortions, and every court shall adopt this saving construction of that provision until the court ruling that pronounced the provision facially unconstitutional is vacated or overruled.

(g)

(1) If § 39-15-213 takes effect and is enforceable, then except as provided in subdivisions (g)(2) and (3), §§ 39-15-220 – 39-15-228 are repealed and remain unenforceable while § 39-15-213 remains in effect and enforceable.

(2) If, after taking effect, § 39-15-213 is rendered wholly unenforceable by a court, then §§ 39-15-220 – 39-15-228 are revived and enforceable on the thirtieth day following the date § 39-15-213 is rendered wholly unenforceable, and remain in effect and enforceable until such time that § 39-15-213 again becomes effective and enforceable.

(3) The repeal or unenforceability of §§ 39-15-220 – 39-15-228 pursuant to subdivision (g)(1) does not affect the validity of a civil action filed pursuant to § 39-15-224 that alleges a violation of § 39-15-221 during the period of time that §§ 39-15-220 – 39-15-228 were in effect and enforceable.

SECTION 3. This act takes effect upon becoming a law, the public welfare requiring it.