S T A T E O F T E N N E S S E E
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Opinion No. 04-055

Abortion

QUESTIONS

1. If Senate Joint Resolution 127, as filed and as amended by Amendment No. 7, were to become law, would the provisions of law ruled unconstitutional in *Planned Parenthood of Middle Tennessee, Inc. v. Sundquist*, 38 S.W.2d 1 (Tenn. 2000), if re-enacted, violate the state's constitution, as such would be amended, if applied only to victims of rape or incest, assuming the identity of such victims would be defined constitutionally?

2. Is an absolute requirement that consent from a family member be obtained in order for a minor to obtain an abortion (and correspondingly, an abolition of any judicial by-pass procedure) consistent with the United States Constitution and the judicial determinations and interpretations with respect thereto?

3. Is an absolute ban on the "partial-birth abortion" procedure consistent with the United States Constitution and the judicial determinations and interpretations with respect thereto?

OPINIONS

1. Senate Joint Resolution 127 as amended removes the Tennessee Constitution's protection for a right to an abortion, except in three circumstances: when a victim is pregnant as a result of incest, when a victim is pregnant as a result of rape and to save the woman's life. Since the right to an abortion remains in those circumstances, we presume that the Tennessee Supreme Court would treat it as a fundamental right, as the right was treated in the *Planned Parenthood* case, and review laws which place restrictions on that right under the strict scrutiny standard. The result would be the same as in the *Planned Parenthood* case --- the statutes would be found unconstitutional.

2. No. Under *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality) ("*Bellotti II*") and subsequent judicial decisions, imposition of a mandatory parental consent requirement upon a pregnant minor's ability to obtain an abortion, without allowing a judicial by-pass procedure, is unconstitutional under the United States Constitution.

3. No. *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), provides that a ban upon "partial-birth abortion" is unconstitutional if it does not contain an

exception for preservation of the health of the mother. Moreover, if the ban applies to the more commonly-used dilation and evacuation (D&E) procedure as well as to the dilation and extraction (D&X) procedure and thus imposes an undue burden on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose an abortion itself, it is unconstitutional.

ANALYSIS

1. In 2000, the Tennessee Supreme Court decided *Planned Parenthood of Middle Tennessee v. Sundquist* 38 S.W.3d 1 (Tenn. 2000). In that case, a number of state statutes were challenged as being unconstitutional under the Tennessee Constitution --- the second trimester hospitalization requirement, Tenn. Code Ann. § 39-15-201(c)(2), the physician-only informed consent requirements, Tenn. Code Ann. § 39-15-202(b) & (c), the waiting period, Tenn. Code Ann. § 39-15-202(d)(1) and the medical emergency exceptions, Tenn. Code Ann. § 39-15-202(d)(3) & (g). The Tennessee Supreme Court held that a woman's right to legally terminate her pregnancy was a part of the right to privacy protected by the Tennessee Constitution. *Id.* at 15. Since the right to privacy is a fundamental right, the Court reasoned, statutes restricting that right are evaluated under the strict scrutiny standard. *Id*. at 16-17. This is the highest, most difficult standard of review. The Tennessee Supreme Court determined that these statutory provisions failed to satisfy the strict scrutiny standard and were therefore unconstitutional under the Tennessee Constitution.

Senate Joint Resolution 127, as amended by amendment 7, provides:

> Nothing in this Constitution secures or protects a right to abortion or the funding thereof, except that government shall not interfere with or prevent a woman from obtaining an abortion when she is the victim of incest and has become pregnant as a result of such incest; when she is the victim of rape and has become pregnant as a result of such rape; or to save her life. The government shall not interfere with the decision of the family of a child rape victim to terminate that pregnancy. For the purpose of construing this section, rape and incest shall be defined as such terms are defined in the criminal laws of this state. No person shall perform a partial-birth abortion.

You have asked whether, if Senate Joint Resolution 127 as amended became part of the Tennessee Constitution and if the provisions struck down in the *Planned Parenthood* case were re-enacted, these provisions would be constitutional under the Tennessee Constitution if applied only to victims of rape or incest. Currently, the Tennessee Constitution, as interpreted by the Tennessee Supreme Court, establishes a right of privacy, which is deemed fundamental. The right to have an abortion is part of this right of privacy. Senate Joint Resolution 127 as amended removes the Tennessee Constitution's protection for a right to an abortion, except in three circumstances: when a victim is pregnant as a result of incest, when a victim is pregnant as a result of rape and to save the

woman's life. Since the right to an abortion remains in those circumstances, we presume that the

Tennessee Supreme Court would treat it as a fundamental right, as the right was treated in the *Planned Parenthood* case, and review laws which place restrictions on that right under the strict scrutiny standard. The result would be the same as in the *Planned Parenthood* case --- the statutes would be found unconstitutional.

Your question uses the word "only" in such a manner as to suggest that the re-enacted statutes might be applied to the rape and incest situations, but not in other instances of pregnancy terminations. This would raise equal protection concerns. When a classification interferes with the exercise of a fundamental right, strict scrutiny analysis applies. *State v. Robinson*, 29 S.W.3d 476 (Tenn. 2000). Since it appears that under Senate Joint Resolution 127 as amended, the right to an abortion in instances of incest and rape would remain fundamental, the statutes would be found unconstitutional under the strict scrutiny analysis as a violation of equal protection.

2. In *Bellotti v. Baird*, 443 U.S. 622, 643, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality) ("*Bellotti II*"), the United States Supreme Court held that if a state decides to require a pregnant minor to obtain one or both parents' consent to an abortion, the state also must provide an alternative procedure under which authorization for the abortion can be obtained. A pregnant minor is entitled in such a proceeding to show that either: (1) she is mature enough and well-informed enough to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) even if she is not able to make this decision independently, the desired abortion would be in her best interests. *See id*. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. *See id.*

In subsequent cases, the Supreme Court has repeatedly affirmed *Bellotti II*'s holding. *See Lambert v. Wicklund*, 520 U.S. 292, 295, 117 S.Ct. 1169, 137 L.Ed.2d 464 (1997); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) ("*Akron II*"); *Hodgson v. Minnesota*, 497 U.S. 417, 461, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) (plurality opinion); *Planned Parenthood Ass'n. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 491 n. 16, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983). Recently, the Sixth Circuit Court of Appeals reversed the Middle District Court of Tennessee's grant of a preliminary injunction preventing the state from enforcing its Parental Consent for Abortion by Minors Act and Rule 24 of the Rules of the Supreme Court of Tennessee. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456 (6th Cir. 1999). The Court of Appeals held that the district court had erred in enjoining the judicial bypass procedures set out in the statutes and Supreme Court Rule. *Id.* at 467.

Under the controlling judicial precedents set out above, imposing a mandatory parental consent requirement upon a pregnant minor's ability to obtain an abortion, without allowing a judicial by-pass procedure, would be unconstitutional under the United States Constitution.

3. In *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), the United States Supreme Court considered the constitutionality of a Nebraska statute banning "partial birth abortion." The statute, Neb. Rev. Stat. Ann. § 28-328(1) (Supp. 1999), read as follows:

> No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

The Nebraska statute defined "partial birth abortion" as:

> an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.

Neb. Rev. Stat. Ann. § 28-326(9). It further defined "partially delivers vaginally a living unborn child before killing the unborn child" to mean:

> deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Id.

The Supreme Court held that the statute was unconstitutional for two reasons: (1) it lacked any exception for preservation of the health of the mother; and (2) it applied to the more commonly-used dilation and evacuation (D&E) procedure as well as to the dilation and extraction (D&X) procedure,[1] and thus imposed an undue burden on a woman's ability to choose a D&E abortion,

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[1]The Court noted that approximately 10% of all abortions are performed during the second trimester of pregnancy (12 to 24 weeks). The most commonly used procedure is "dilation and evacuation" (D&E), which, together with a modified form of vacuum aspiration used in the early second trimester, accounts for about 95% of all second-trimester abortions. The D&E procedure involves dilation of the cervix, removal of at least some fetal tissue using nonvacuum instruments, and, after the 15th week, the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus. A variation of the D&E procedure, known as intact D&E, is used after 16 weeks at the earliest, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. If the fetus presents head first, the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the

thereby unduly burdening the right to choose an abortion itself. *Id.* at 929-30, 120 S.Ct. at 2608-09.

We conclude, therefore, that an absolute ban on "partial-birth abortion" which contains the defects set out in *Stenberg* would be unconstitutional under the United States Constitution.[2]

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fetus through the cervix. *Id.* at 923-925, 927, 120 S.Ct. at 2605-2607.

The breech extraction version of the intact D&E procedure is also known commonly as "dilation and extraction," or D&X. *Id.* at 927, 120 S.Ct. at 2607.

[2]We note that in 2003, President Bush signed the Partial-Birth Abortion Act, 18 U.S.C. § 1531. This federal statute prohibits physicians from performing "partial-birth abortion[s]," as defined by the Act, unless "necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."

This Act has been challenged as unconstitutional under the U.S. Constitution in several states, including New York and California. *See, e.g., Nat'l. Abortion Federation v. Ashcroft*, 287 F. Supp. 2d 525 (S.D.N.Y. 2003) (granting a temporary restraining order enjoining the U.S. Attorney General from enforcing the statute). The litigation remains pending.

Requested by:

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