S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO Box 20207
NASHVILLE, TENNESSEE 37207-0207

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Opinion No. 08-40

Constitutionality of Partial Birth Abortion Statute and Parental Consent Law

QUESTIONS

1. Would the partial birth abortion statute recently upheld by the United States Supreme Court be constitutional under the Tennessee Supreme Court's decision in *Planned Parenthood of Middle Tennessee, Inc. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000)?

2. Would state statutory provisions regarding parental consent, *i.e.*, Tenn. Code Ann. §§ 37-10-301, *et seq.*, be constitutional under the decision?

OPINIONS

1. The federal Partial Birth Abortion Act, 18 U.S.C. § 1531, that was upheld by the United States Supreme Court in *Gonzalez v. Carhart*, 127 S.Ct. 1610 (2007), against facial constitutional challenges makes it a federal crime for any physician to deliberately and intentionally perform an intact dilation and extraction procedure. If the Tennessee legislature were to adopt an identical statute that would also criminalize performance of the procedure under state law, it is our opinion that the statute would be constitutionally suspect under the Tennessee Constitution as interpreted by the Supreme Court in *Planned Parenthood*.

2. We believe that the Parental Consent for Abortion by Minors Act is defensible under the Tennessee Constitution, although the matter is not free from doubt.

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 unconstitutional under the Tennessee Constitution. The Tennessee Supreme Court held that a woman's right to legally terminate her pregnancy is 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 most rigorous standard of review. The Court determined that the challenged

statutory

provisions failed to satisfy the strict scrutiny standard and were therefore unconstitutional under the Tennessee Constitution.

You have asked whether the partial birth abortion statute recently considered by the United States Supreme Court would be constitutional under the decision in *Planned Parenthood*. We understand your question as an inquiry about a hypothetical Tennessee state statute that, if adopted by the Tennessee legislature, would be identical to the federal Partial Birth Abortion Act, 18 U.S.C. § 1531, that was recently at issue in *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007). This federal criminal statute prohibits physicians from intentionally performing "partial-birth abortion[s]," as defined by the legislation, 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." In pertinent part, the statute provides:

> (a) Any physician who . . . knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined . . . or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is 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. . .
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> (b) As used in this section --
> (1) the term "partial-birth abortion" means an abortion in which the person performing the abortion —
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> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus;
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> . . .
>
> (d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

> (2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.
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> . . .

As construed by the U.S. Supreme Court, the statute would prohibit only the so-called "intact Dilation and Evacuation" ("intact D & E") or "intact Dilation and Extraction" ("intact D & X") procedure that is used in late-term pregnancies. *Gonzales*, 127 S.Ct. at 1621, 1629. In this procedure, the cervix is dilated and the doctor extracts the live fetus in a way conducive to pulling out its entire body. *Id.* at 1622. As noted by the Court, the statute's prohibition has limited application. For example, between 85 and 90 percent of the abortions performed each year in the United States take place in the first three months of pregnancy, and the most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage). *Id.* at 1620. Of the remaining abortions that take place each year, most occur in the second trimester. The usual abortion method in the second trimester is "Dilation & Evacuation ("D & E"), in which the fetus is removed in pieces. *Id.* Performance of D & E is not prohibited by the statute. *Id.* at 1631.

In *Gonzales*, the United States Supreme Court applied the "undue burden" test established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992), and concluded that the statute's omission of an exception for the preservation of the health of the woman did not render it facially invalid. The Court reached this conclusion because of its finding that there was uncertainty whether the banned procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives. 127 S.Ct. at 1637.[1] However, the Court left open the possibility that successful "as-applied" challenges might be made to the statute – upon a showing that in discrete and well-defined instances a particular condition has or is likely to occur in which the prohibited procedure must be used. *Id.* at 1638.

In our judgment, if the Tennessee legislature were to adopt an identical statute that would criminalize the same procedure under state law, the statute would be constitutionally suspect under the Tennessee Supreme Court's interpretation of the Tennessee Constitution in its *Planned Parenthood* decision. We reach this conclusion because of the conflicting medical proof, the Tennessee Court's rejection of the "undue burden" test in favor of the "strict scrutiny" constitutional standard of review announced in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), and the Court's

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[1]The Court discussed the conflicting evidence presented in the trial courts and before Congress upon this question. There was evidence that intact D & E may be the safest method of abortion because it requires fewer passes into the uterus with surgical instruments and thus decreases the risk of cervical laceration or uterine perforation. There was also evidence that the procedure is safer for women with certain medical conditions or women with fetuses that have certain anomalies. 127 S.Ct. at 1635. On the other hand, the Attorney General presented expert witnesses who contested such claims, testifying that they were theoretical or false. *Id*. at 1636.

particular emphasis upon the state's interest in protecting the woman's health after the first trimester of pregnancy. In *Planned Parenthood*, the Court approved *Roe*'s trimester framework for reviewing states' abortion regulations:

> According to the Court [in *Roe v. Wade*], medical evidence indicates that before the end of the first trimester, childbirth presents greater risks to a woman's health than does abortion. Thus, the Court reasoned that *the State's interest in maternal health becomes compelling after the first trimester, when the State may regulate abortion practice in ways reasonably related to protecting maternal health*. The Court reasoned further that at viability, the fetus is capable of sustaining life independent of the mother. Accordingly, the Court held that the State's interest in potential life becomes compelling "at viability." The Court held that the State "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or *health* of the mother."

Planned Parenthood, 38 S.W.3d at 8 (emphasis added) (internal citations omitted). *See also id.* at 23-24 (striking down two-day waiting period because the medical emergency exception thereto omitted any provision for the protection of the health of the woman).

We conclude, therefore, that a state statute identical to the federal Partial Birth Abortion Act would be constitutionally suspect under the Tennessee Constitution because of its lack of an exception for the preservation of the woman's health.

2. You have also asked whether Tennessee's statutory provisions regarding parental consent, *i.e.*, Tenn. Code Ann. §§ 37-10-301, *et seq.*, would be constitutional under the *Planned Parenthood* decision. In a decision issued before *Planned Parenthood*, the Sixth Circuit Court of Appeals reversed the district court's grant of a preliminary injunction that had prevented 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). In examining whether or not Tennessee's procedures comported with federal constitutional guarantees, 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. The Court of Appeals applied the "undue burden" standard set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992) for analyzing regulations placed by the state on abortion prior to viability.

The Court of Appeals also applied the requirements of *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035 (1979) ("*Bellotti II*"), for analyzing state restrictions upon the ability of minors to obtain abortions. In *Bellotti II*, the United States Supreme Court ruled that the federal constitution extends substantive due process protections to minors as well as adults. 443 U.S. at 633. However, the constitutional rights of children are not co-extensive with those of adults because of "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner;

and the importance of the parental role in child rearing." 443 U.S. at 634. In reconciling these principles, the Supreme Court in *Bellotti II* held that while a state may require the consent of one or both parents before allowing a minor to obtain an abortion, it must provide a way for the minor to bypass the consent requirement and obtain the abortion. *Id*. at 643. The Court established the following guidelines for determining whether a state's bypass procedure violates the minor's right to an abortion:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. 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.

Id. at 643-44.

Based upon the above decisional law, the Sixth Circuit ruled that the district court had erred in enjoining enforcement of the following challenged provisions of the Act: (1) the requirement that a notice of appeal of the juvenile court's decision be filed within twenty-four hours of the decision, Tenn. Code Ann. § 37-10-304(g); (2) the requirement that the minor seeking to judicially bypass the consent requirement state in her petition "whether the applicant is of sound mind and has sufficient intellectual capacity to consent to the abortion," Tenn. R. Sup. Ct. 24(5)(a)(iv); (3) the differing venue provisions of the Act and Supreme Court Rule, Tenn. Code Ann. § 37-10-303(b) and Tenn. R. Sup. Ct. 24(4); (4) the requirement that review of an adverse decision by the juvenile court of a minor's bypass petition shall be *de novo* by the circuit court, Tenn. Code Ann. § 37-10-304(g); and (5) the requirement, contained in the model petition appended to Tenn. R. Sup. Ct. 24, that the minor swear in her petition that she has consulted with a physician concerning the abortion. 175 F.3d at 462-466.[2]

In subsequent cases that predated its adoption of the "undue burden" standard in *Planned Parenthood v. Casey*, the U.S. Supreme Court repeatedly affirmed *Bellotti II*'s holding. *See*, *e.g.*, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510, 110 S.Ct. 2972 (1990) ("*Akron II*"); *Hodgson v. Minnesota*, 497 U.S. 417, 461, 110 S.Ct. 2926 (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 (1983).

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[2]In 2000, the Supreme Court adopted several amendments to Rule 24. Similarly, the legislature enacted several amendments to the Act in 2006. These amendments included provisions that apparently were intended to address alleged deficiencies raised by the plaintiffs in the *Memphis Planned Parenthood* litigation. For example, the Supreme Court amended Tenn. R. Sup. Ct. 24(4) so that it no longer contains a venue provision that is different from that set out at Tenn. Code Ann. § 37-10-303(b).

The Tennessee Supreme Court has not had occasion to review the constitutionality of the Parental Consent for Abortion by Minors Act. However, as the provisions of the Act appear to be generally consistent with the requirements of *Bellotti II*, we believe that the Act is defensible under the Tennessee Constitution, although the matter is not free from doubt.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

SUE A. SHELDON
Senior Counsel

Requested by:

Honorable Diane Black
State Senator
306 War Memorial Bldg.
Nashville, Tennessee 37243