

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**February 6, 2015**

**Opinion No. 15-13**

**“Amendment No. 1” to Article I of the Tennessee Constitution**

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**Question 1**

Does the recent passage of Amendment No. 1 to Article I of the Tennessee Constitution supersede the 2000 Tennessee Supreme Court decision of *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000)?

**Opinion 1**

Adoption of Amendment No. 1 supersedes the holdings of the *Sundquist* decision that are in conflict with the provisions of the constitutional amendment.

**Question 2**

After the passage of Amendment No. 1, is there in the Tennessee Constitution a fundamental right to abortion requiring a strict scrutiny analysis of any statute affecting abortion?

**Opinion 2**

No.

**Question 3**

Would the statutes contained in Tenn. Code Ann. §§ 39-15-201 and 39-15-202 (1997) that were nullified by the Tennessee Supreme Court in *Sundquist* survive a constitutional challenge if they are re-enacted or re-codified?

**Opinion 3**

After passage of Amendment No. 1, any statute imposing restrictions upon a woman’s right to obtain an abortion must withstand scrutiny under the United States Constitution, including scrutiny under the “undue burden” standard established by the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). It is not clear whether the statutory provisions struck down by *Sundquist*, if reenacted by the General Assembly following adoption of Amendment No. 1, would survive scrutiny under this standard.

## ANALYSIS

1-2. In *Planned Parenthood v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000), the Tennessee Supreme Court ruled that a woman's right to legally terminate her pregnancy is a part of the right to privacy protected by the concept of ordered liberty that is embodied in the Tennessee Constitution. *Id.* at 11, 15. It determined that, since the right to privacy is a fundamental right, statutes restricting that right must be evaluated under the "strict scrutiny" standard rather than the "undue burden" standard adopted by the United States Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Under the strict scrutiny standard, a restriction upon a woman's right to obtain an abortion will be struck down unless the State meets its burden of showing that the regulation is justified by a compelling state interest and is narrowly tailored to achieve that interest. *Id.* at 18.

In *Sundquist*, the Supreme Court struck down the second trimester hospitalization requirement found at Tenn. Code Ann. § 39-15-201(c)(2). *Id.* at 18-19. It also struck down the provisions of Tenn. Code Ann. § 39-15-202(b), (c), (d) and (g) which set out physician-only counseling (informed consent) requirements, a mandatory two-day waiting period, and medical emergency exceptions that protected only the life, as opposed to the health, of the woman.<sup>1</sup> *Id.* at 21-22, 24. As a result of these rulings, the challenged statutory provisions were rendered null and void. *Franks v. State*, 772 S.W.2d 428, 431 (Tenn. 1989) ("... [A]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.").

On November 4, 2014, Tennessee voters approved and ratified proposed Tennessee Constitutional Amendment No. 1. The amendment adds the following new section to Article I of the Tennessee Constitution:

Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.

Adoption of this amendment to the Tennessee Constitution supersedes the holdings of the *Sundquist* decision that are in conflict with the provisions of the amendment. *See Sundquist, supra*, 38 S.W.3d at 7 (noting that the Court may only invalidate a statute when it contravenes either the federal or state constitution). As a result, the Tennessee Supreme Court's ruling that a woman's

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<sup>1</sup> The State conceded at the outset of the litigation that the residency requirement found at Tenn. Code Ann. § 39-15-201(d) was unconstitutional. *Id.* at 4, n. 1. Furthermore, the State did not appeal the lower courts' determination that the informed consent provision requiring physicians to inform their patients that "abortion in a considerable number of cases constitutes a major surgical procedure" (Tenn. Code Ann. § 39-15-202(b)(4)) is unconstitutional. *Id.* at 20, n. 10.

right to terminate her pregnancy is protected by the fundamental right of privacy found in the Tennessee Constitution – a right requiring application of the “strict scrutiny” standard of review – is no longer good law. Furthermore, the Court’s *Sundquist* rulings that struck down statutory provisions under the “strict scrutiny” standard are no longer good law.

3. After passage of Amendment No. 1, any Tennessee statute imposing restrictions upon a woman’s right to obtain an abortion must, if challenged, withstand scrutiny under the United States Constitution, including scrutiny under the “undue burden” standard established for facial challenges by the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). “[U]ndue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.” *Id.* at 877.

In *Sundquist*, the Tennessee Supreme Court interpreted and construed the requirements of the challenged statutory provisions and concluded that they are *constitutionally infirm under the federal undue burden standard* – as well as under the strict scrutiny standard. *Id.* at 19, 22, 24, 25. Accordingly, a court considering a legal challenge to the same reenacted statutory provisions might apply the doctrine of *stare decisis* and hold that the Supreme Court’s prior interpretive rulings and constitutional holdings under the undue burden standard are determinative and controlling. The doctrine of *stare decisis* embodies the principle that a judicial decision should not be lightly overruled once it has been implemented and acted under for a period of time, as long as the decision is not repugnant to some rule of law of vital importance. *Hooker v. Haslam*, 437 S.W.3d 409, 422 (Tenn. 2014) (citing *In re Estate of McFarland*, 167 S.W.3d 299, 305 (Tenn. 2005)). While the doctrine is less compelling in constitutional cases than in other cases (*id.*, citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)), *stare decisis* may require adherence to a prior decision construing the words of a statute in a later case involving the same statutory language. See *Bellar v. Nat’l Motor Fleets, Inc.*, 224 Tenn. 63, 450 S.W.2d 312, 314 (1970).

If a court determined not to apply the doctrine of *stare decisis*, but rather to reexamine the constitutional validity of the reenacted statutes, we cannot predict the outcome of that reexamination with any degree of certainty. There is no binding United States Supreme Court or Sixth Circuit precedent exactly on point, and analysis under the undue burden standard does not lead to any one conclusive result. Indeed, the Tennessee Supreme Court reflected in *Sundquist*, *supra*, 38 S.W.3d at 16, “that the undue burden approach is essentially no standard at all, and, in effect, allows judges to impose their own subjective views of the propriety of the legislation in question.”

That no reasonably certain prediction may be made as to the outcome of a judicial “undue burden” analysis is powerfully exemplified by the *Sundquist* litigation itself. The three different courts that examined the challenged statutory provisions in the *Sundquist* litigation under the undue

burden standard reached three differing conclusions as to their federal constitutional validity. Applying the undue burden standard, the trial court struck down the waiting period requirement, Tenn. Code Ann. § 39-15-202(d)(1), and the informed consent subsection requiring that physicians inform their patients that “abortion in a considerable number of cases constitutes a major surgical procedure,” § 39-15-202(b)(4). However, after construing the term “hospital” in the second trimester hospitalization requirement to include “ambulatory surgical treatment center,” the trial court upheld the second-trimester hospitalization requirement, § 39-15-201(c)(2). It further construed the medical emergency exception found at § 39-15-202(d)(3) so as to extend protection for not only the “life,” but also the “health” of the patient, and upheld the medical emergency exception. *Sundquist, supra*, 38 S.W.3d at 5, n. 2.

The Tennessee Court of Appeals, applying the same undue burden standard, concluded that the following provisions were unconstitutional: the residency requirement found at Tenn. Code Ann. § 39-15-201(d); the informed consent subsection requiring that the attending physician inform the woman that “abortion in a considerable number of cases constitutes a major surgical procedure” (§ 39-15-202(b)(4)); the medical emergency exceptions found at §§ 39-15-202(d)(3) and (g); and the attending physician counseling requirement, when combined with the waiting period requirement (§§ 39-15-202(b), (d)(1)). *Id.* at 5. The Court of Appeals upheld the following provisions as not imposing an undue burden: the waiting period requirement, based upon the facts of the case (§ 39-15-202(d)(1)); the second-trimester hospitalization requirement (§ 39-15-201(c)(2)); and the remaining informed consent provisions (§§ 39-15-202(b)(1)-(3), (b)(5)-(6), (c)). *Id.* at 6.

Although it held strict scrutiny to be the applicable standard of constitutional review, *Sundquist, supra*, 38 S.W.3d at 15-16, the Tennessee Supreme Court also examined at least some of the challenged statutory provisions under the federal undue burden standard and found them to be constitutionally infirm. It found the hospitalization requirement, the physician-only counseling requirement, the two-day waiting period, and the medical emergency exceptions all to be unconstitutional even under the less demanding federal undue burden standard. *Id.* at 19, 22, 24, 25.

In sum, if the constitutionality of the same statutory provisions struck down by *Sundquist* is challenged today after passage of Amendment No. 1, those provisions would still have to pass muster under the federal undue burden standard. Judicial review could result in invalidation of the reenacted statutory provisions as a matter of *stare decisis*. Even if the court did decide to reexamine the constitutionality of the statutory provisions, it is not clear whether they would survive an undue burden analysis under federal law. Judicial review under the undue burden standard could lead to invalidation of some or all of the statutory provisions.

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