

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
500 CHARLOTTE AVENUE
NASHVILLE, TENNESSEE 37243

May 3, 2005

Opinion No. 05-071

Abortion Laws/Status

QUESTIONS

1. In the aftermath of the Tennessee Supreme Court's *Planned Parenthood v. Sundquist* ruling on rights to abortion under the Tennessee Constitution, does the Legislature have any authority to restrict abortion rights or make any laws concerning abortion?

2. Are the laws on the books at this time null and void due to the ruling?

OPINIONS

1. Yes. However, each proposed restriction or law must satisfy the strict scrutiny standard imposed by the Tennessee Supreme Court. Under this 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 narrowly tailored to achieve that interest.

2. In *Planned Parenthood*, the Supreme Court struck down the second trimester hospitalization requirement set out at Tenn. Code Ann. § 39-15-201(c)(2). It also struck down Tenn. Code Ann. § 39-15-202(b), (c), (d) and (g)'s provisions setting out physician-only counseling (consent) requirements, a mandatory two-day waiting period and medical emergency exceptions.

ANALYSIS

1. 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 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 U.S. Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (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 narrowly tailored to achieve that interest. *Id.* at 18.

In *Planned Parenthood v. Sundquist*, the Court struck down the second trimester hospitalization requirement set out at Tenn. Code Ann. § 39-15-201(c)(2). *Id.* at 18-19. It also

struck down Tenn. Code Ann. § 39-15-202(b), (c), (d) and (g)'s provisions setting out physician-only counseling (consent) requirements, a mandatory two-day waiting period and medical emergency exceptions. *Id.* at 21-22, 24.

In response to your question whether the *Planned Parenthood* decision leaves the Legislature with any authority to restrict abortion rights or make any laws concerning abortion, we note that each proposed restriction or law will require analysis under the strict scrutiny standard imposed by the Tennessee Supreme Court. In Op. Tenn. Att'y Gen. No. 04-068 (April 21, 2004), we recently engaged in such analysis. We were asked whether House Bill 3592, which would have imposed certain restrictions upon the right to obtain an abortion, was constitutionally defensible. The proposed restrictions included: requiring that the attending physician or other appropriate health care professional inform a pregnant woman of certain facts and have her sign a consent form acknowledging that she has been so informed; imposing a waiting period of twenty-four (24) hours after the information has been provided before an abortion may be performed; and allowing an exemption from the above requirements in situations where a licensed physician certifies that an abortion is necessary to preserve the life or health of the pregnant woman.

We opined that the proposed requirement for informed consent did not seem to run afoul of the *Planned Parenthood* decision because it did not, as opposed to the statutory provision struck down in the decision, require that the physician must personally impart the required information to the woman. Moreover, the required information was truthful and thus should be unobjectionable. We were also of the opinion that the required 24-hour waiting period was likely defensible, as it was shorter than that struck down in *Planned Parenthood*, was expressly for purposes of facilitating reflection and did not require the pregnant woman to make two trips. Finally, we opined that the medical exception in House Bill 3592 was constitutional because it permitted immediate abortions necessary to protect the life or health of a pregnant woman.

2. As noted above, the second trimester hospitalization requirement set out at Tenn. Code Ann. § 39-15-201(c)(2) and Tenn. Code Ann. § 39-15-202(b), (c), (d) and (g)'s provisions setting out physician-only counseling (consent) requirements, a mandatory two-day waiting period and medical emergency exceptions were held unconstitutional by the Tennessee Supreme Court in the *Planned Parenthood* decision. The Court remanded the case to the trial court for entry of a permanent injunction stating that the defendant state officials are permanently restrained and enjoined from enforcing those statutory provisions. *Planned Parenthood, supra*, 38 S.W.3d at 25. Thus, the provisions are null and void.

Other Tennessee statutory restrictions upon a woman's right to obtain a legal abortion are constitutional, and thus enforceable, only if they satisfy review under the strict scrutiny standard.¹

¹For example, the Tennessee Court of Appeals ruled in *Tenn. Dep't. of Health v. Boyle*, 2002 WL 31840685 (Tenn. App. 2002), that aspects of Tenn. Code Ann. § 68-11-201(3) are unconstitutional. The Court held that this statute, which requires all private physicians' offices that perform a "substantial number" of abortions to acquire a certificate of need and an ambulatory surgical treatment center license, is unconstitutionally vague and adversely impacts the constitutionally protected right to obtain an abortion without a compelling state reason to justify it. *Id.* at *6, 8.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

SUE A. SHELDON
Senior Counsel

Requested by:
The Honorable Mike Turner
State Representative
108 War Memorial Building
Nashville, TN 37243-0151