IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE

PLANNED PARENTHOOD ASSOCIATION OF NASHVILLE, INC., ET AL., Plaintiffs-Appellants, v. DON SUNDQUIST, ET AL., Defendants-Appellees.	)	Supreme Court No. Davidson Chancery No. 92C-1672

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR THE TENNESSEE SUPREME COURT TO ASSUME JURISDICTION

INTRODUCTION

This memorandum supports plaintiffs' motion that the Tennessee Supreme Court assume jurisdiction over this case pursuant to T.C.A. § 16-3-201. The underlying action is predicated upon the right of Tennessee women to reproductive choice. The action was brought under the Constitution of the State of Tennessee and the Constitution of the United States. The complaint alleges that Tennessee's criminal abortion laws, T.C.A. §§ 39-15-201 and -202, are in many respects violative of constitutional guarantees. Those criminal abortion laws, *inter alia*, require that physicians performing abortions provide biased and often misleading "counseling" to women seeking abortions, impose a three-day waiting period between the "counseling" and the time the abortion can be performed, and, with no medical justification, prohibit abortions after the first trimester of

pregnancy from being performed except in a hospital -- where they are prohibitively expensive, if available at all. The laws further prohibit abortions for nonresidents and condition abortions for minors on notice to their parents, without providing any bypass except for emergencies. The obvious intent and effect of these laws is to discourage or altogether prevent women from exercising their constitutionally protected right to choose to have an abortion.

This action thus far has been characterized by unprecedented rulings that have engendered lengthy delay, including the participation of two doctors ideologically opposed to abortion as parties, *amici*, court-appointed experts, and witnesses for the State (all at the same time) and the trial court's recent *sua sponte* judgment upholding a newly enacted parental consent statute that no party had challenged. Since the trial court's permanent injunction was entered more than three years ago, the case has been up to the Tennessee Court of Appeals three times, once on plaintiffs' Rule 10 extraordinary appeal, and twice more on direct appeal as of right. It is on its way again: plaintiffs and the State defendants have both appealed from the final judgment entered on August 23, 1995.

For several reasons, this Court should now assume jurisdiction of the case pursuant to T.C.A. § 16-3-201. First, there are serious constitutional rights at stake in this case. Indeed, the case is on appeal because the statutes as upheld and interpreted by the trial court *still* violate the rights of women to exercise reproductive choice.[1] Second, the unprecedented course of events in this case has delayed the case considerably, putting those rights at jeopardy far longer than ought to be the case when constitutional rights are at stake and sending troubling messages about the hospitality of Tennessee courts to constitutional litigation. Third, the issues in this case are such that they will inevitably have to be resolved

---

[1] For instance, women are still forced to listen to biased "counseling" designed to dissuade them from having an abortion, and women are still forced to have certain second trimester abortions (those performed after eighteen weeks from the first day of the woman's last menstrual period) in hospitals.

in this Court. Fourth, requiring an additional tier of judicial review will serve to cost the plaintiffs and the State considerable resources beyond those already expended.

In reaching down and assuming jurisdiction of this case, this Court will not be acting alone. Two other state supreme courts, confronted with state constitutional challenges to abortion restrictions, have in recent months assumed jurisdiction of cases under statutes similar to T.C.A. § 16-3-201. *See New Mexico Right to Choose/NARAL v. Danfelser*, No. 23,239 (N.M. Oct. 23, 1995) (App. Exh. 1); *Doe v. Childers*, No. 95-SC-783-T (Ky. Nov. 22, 1995) (App. Exh. 2).[2]

Given the gravity of the rights at stake, the departure from settled practice to which plaintiffs have already been subjected in the assertion of their rights, the extraordinary resources required by the unprecedented course of litigation thus far, and the uncertain road ahead, it is both just and appropriate for this Court to take jurisdiction. By so doing, this Court will assure that final judgment over questions of vital constitutional right is rendered expeditiously and with only those resources of time and money absolutely necessary. These questions are destined for this Court; now is the appropriate time to resolve them.

STATEMENT OF THE CASE AND FACTS

In July of 1992, following the decision of the United States Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), plaintiffs brought suit asserting that Tennessee's criminal abortion statutes violate the constitutions of Tennessee and the United States. *See* Amended Complaint. Previously, every section of Tennessee's criminal abortion statutes had been held unconstitutional;

---

[2] Copies of the orders of these courts assuming jurisdiction, as well as particularly relevant pleadings and documents cited in this memorandum, are included in the appendix of exhibits filed with the motion and are cited as "App. Exh. __." The trial transcript is cited as "Tr. ___"; trial exhibits are cited as "Trial Exh. ___." The trial transcript and exhibits and much of the record in this case were transmitted to the Court of Appeals in the prior appeals, and remain in the clerk's office. On January 3, 1996, the Court of Appeals gave the State defendants permission to withdraw the record.

the ruling in *Casey* suggested that at least portions of these statutes might now survive federal constitutional scrutiny. Plaintiffs' fear that the laws would be enforced after *Casey* proved well-founded when criminal proceedings unrelated to this case were brought almost immediately in Knox County.

Plaintiffs filed their complaint in the Circuit Court of Davidson County on July 14, 1992.[3] Two weeks after the complaint was filed, the court granted a temporary restraining order enjoining enforcement of the statutes. Order of July 31, 1992 (granting TRO); Order of Aug. 7, 1992 (certifying defendant class to which TRO applied); Order of Aug. 17, 1992 (extending TRO to district attorney of Knox County).

Trial on the merits commenced on October 26, 1992; the trial court issued its written opinion and permanent injunction on November 19, 1992. In its opinion and judgment, the trial court struck some provisions of the statutes, upheld others, and -- in an unprecedented departure from its judicial role that plaintiffs intend to challenge on appeal as violative of the separation of powers -- substantially rewrote a good portion of the statutes.[4] Opinion, Permanent

---

[3] In the suit, plaintiffs challenged the constitutionality of five requirements of the criminal abortion statutes: (1) that a woman prove she is a bona fide resident of Tennessee in order to have an abortion here, Tenn. Code Ann. § 39-15-201(d); (2) that both of a minor's parents be notified before her abortion, with no bypass and an exception only for emergencies, *id.* § 39-15-202(f); (3) that a woman listen to biased counseling designed to dissuade her from having an abortion, *id.* § 39-15-202(b), (c); (4) that the physician require that a woman wait three days from the time of counseling until the abortion, *id.* § 39-15-202(d); and (5) that abortions after the first trimester of pregnancy be performed only in hospitals, *id.* § 39-15-201(c)(2).

[4] For instance, the trial court rewrote the section of the statutes making abortion a crime if performed after three months of pregnancy unless the procedure is done in a hospital, upholding the provision only after interpreting the word "hospital" to mean "ambulatory surgical center" if the procedure was performed up to eighteen weeks from the first day of the woman's last menstrual period (LMP), at which point it meant "hospital" again. Opinion at 4, 22-24. Similarly, the court upheld the parental notice portion of the law -- despite the State's admission that the law was unconstitutional -- only after rewriting the provision to require notice to only one parent and to permit the physician to waive the requirement where the abortion is necessary for the minor's health. *Id.* at 4, 25-36. The trial court also:

- struck the provision making it a crime for a physician to provide an abortion to any woman not a bona fide resident of Tennessee, *id.* at 3, 4;
- struck the provision making it a crime to provide an abortion unless the procedure is delayed at least three days after a woman receives counseling designed to dissuade her from having an abortion, *id.* at 4, 17-21; and

Injunction, and Restraining Order of Nov. 19, 1992 (hereinafter "Opinion") (App. Exh. 3). Plaintiffs filed a motion to alter or amend the judgment on December 18, 1992, and on February 5, 1993 the trial court modified the injunction in minor respects. Memorandum Opinion of Feb. 5, 1993 (App. Exh. 4).

In the normal course of events the case would at this point have proceeded swiftly to the Court of Appeals and ultimately to this Court. In this case, however, this normal course of events was altered by an extraordinary series of decisions and events that prevented plaintiffs and the State from having an appeal on the merits for over two years.

The first sign that this case would not proceed along expected procedural lines occurred shortly after suit was filed, when two doctors -- Anthony M. Trabue and Betty K. Neff -- moved to intervene to defend the constitutionality of the challenged provisions of the statutes. The doctors have a strong ideological opposition to abortion.[5] The trial court properly denied the motion to intervene, but then *sua sponte* appointed the same two doctors to serve both as *amici* and as "court-appointed experts." Order of Sept. 2, 1992 (App. Exh. 5); Order of Sept. 10, 1992 (App. Exh. 6). The court's September 10 order permitted the doctors, through their counsel, to file briefs, participate at oral arguments, and question witnesses during discovery and at trial.[6] Reading that order broadly, the doctors (through their counsel) filed a barrage of motions and other papers at every

---

- upheld in significant part those provisions of the law mandating biased "counseling," including those provisions requiring doctors to tell all women about the benefits and risks of childbirth and about assistance available to them after birth, even if, for instance, the woman has decided on abortion because the fetus has a fatal anomaly, continuation of the pregnancy could endanger the woman's life or health, or the woman is pregnant as a result of rape or incest, *id.* at 4, 7-16.

5 Dr. Neff, for instance, testified that abortion "violates normalcy," Tr. 91; *see also* Tr. 911; that the challenged statutes were designed to protect women from "unscrupulous abortioneers," Tr. 934-35; and that abortion "compromises our humanity" and "cheapens women's health care," Tr. 796. Dr. Trabue testified, similarly, that abortion was "destroying a child." Tr. 568-70.

6 Although the court's order required that the doctors' conduct be at the direction and under the control of the Attorney General, the State in fact never exercised such direction and control.

juncture of the pre- and post-trial proceedings, even submitting evidentiary affidavits.[7] Plaintiffs objected, repeatedly, to the orders appointing the doctors and to their conduct, while the State took no position on their conduct and the trial court encouraged it by allowing the doctors an ever-widening role.

The doctors' participation and the trial court's actions engendered significant delay, which prevented both plaintiffs and the State from expeditiously litigating and appealing the case. The delay was particularly evident in the trial court's actions and the doctors' conduct regarding plaintiffs' challenge to the parental notice provision, T.C.A. § 39-15-202(f).[8] In light of the State's concession in its answer that the provision was unconstitutional and the Attorney General's decision not to defend it (*see* Notice of Intent Not to Defend the Constitutionality of T.C.A. § 39-15-201(d) and (f); Answer of Defendants to Amended Complaint ¶ 28), the trial court notified counsel there would be no trial as to the parental notice provision and announced several times before trial that it was holding the provision unconstitutional. *See* Order of Sept. 2, 1993 (App. Exh. 5); Order of Sept. 10, 1992 (App. Exh. 6) ("[t]his case . . . is restricted to the questions and issues relating to the three provisions of the Tennessee Abortion

---

7 "Barrage" may put the matter mildly. *See, e.g.,* Motion for Permission to Conduct Inspections and to Set Inspections (doctors' motion to inspect Planned Parenthood's facility); Motion for a Protective Order and Sanctions (motion for sanctions against plaintiffs' counsel for serving written discovery requests on doctors); Amicus Brief of Anthony E. Trabue, M.D.; Offer of Proof of Anthony E. Trabue, M.D. and Betty K. Neff, M.D. on the Constitutionality of T.C.A. 39-15-202(f)(1) and (2); Letter of November 4, 1992 (letter from doctors' counsel to trial court submitting proposed order relating to the parental notice and in-state residency sections of the statutes); Supplemental Amicus Brief of Anthony E. Trabue, M.D.; Second Supplemental Amicus Brief of Anthony E. Trabue, M.D.; Post-Ruling Amicus Brief of Anthony E. Trabue, M.D.; Findings of Fact and Conclusions of Law Concerning T.C.A. § 39-15-202(f) (doctors' proposed findings on parental notice); [Doctors'] Notice of Filing Supplemental Exhibits to Offer of Proof; Letter of Nov. 17, 1992 (letter from doctors' counsel to court regarding interpretation of the words "attending physician" in T.C.A. § 39-15-202(b)); [Doctors'] Motion to Alter or Amend and/or to Make Additional Findings of Fact; Response of Drs. Trabue and Neff to Plaintiffs' Motion to Alter or Amend Judgment and/or to Make Additional Findings of Fact; Letter of February 26, 1993 (providing court with affidavits of doctors and their counsel requesting award of fees and costs); Memorandum of Doctors Trabue and Neff in Response to Plaintiffs' Motion to Supplement Record; [Doctors'] Motion for Leave to Amend and File Cross-Claim Against Defendants.

8 This provision was repealed in 1995 by a parental consent law, T.C.A. §§ 37-10-301 through -307.

Statutes chosen to be defended by the Attorney General"); Letter of Oct. 1, 1992 (App. Exh. 7) (letter from the Honorable Hamilton V. Gayden, Jr. to doctors' counsel); Letter of Oct. 7, 1992 (App. Exh. 8) (letter from the Honorable Hamilton V. Gayden, Jr. to counsel for plaintiffs).

Despite these pretrial rulings, the trial court just minutes before trial permitted the doctors, over plaintiffs' objections, to put on evidence and cross examine witnesses on parental notice. Tr. 207. Then, following the trial, the trial court took two remarkable steps. First, it *upheld* the parental notice provision, as construed, even though it had already declared the provision unconstitutional and despite the fact that plaintiffs, in reliance on the court's prior orders and letters, had put on no proof on the issue. Opinion at 4, 25-36. Second, the trial court *sua sponte* appointed the doctors as *parties* on appeal to defend the trial court's ruling on parental notice. *Id.* at 36-37. The doctors were now in the unprecedented position of being, simultaneously, parties, *amici*, court-appointed expert witnesses, and the chief witnesses for the State.

The trial court having ruled on all pending business, plaintiffs filed a notice of appeal on February 10, 1993. On May 11, 1993, the plaintiffs filed a motion asking the Court of Appeals to hold that the doctors were not proper parties to the appeal and to bar their further participation. The motion was denied without prejudice, and plaintiffs were permitted to include the claim in their brief on the merits. Court of Appeals, No. 01A01-9305-CV-00213, Order of May 27, 1993. Then, on June 18, 1993, plaintiffs' appeal was dismissed because no formal final order had been entered disposing of the motions to alter or amend filed by plaintiffs and Drs. Trabue and Neff. Court of Appeals, No. 01A01-9305-CV-00213, Order of June 18, 1993.[9]

[9] The trial court had, however, ruled on these two motions. On December 8, 1992, the trial court had sent a letter to counsel declining to consider the doctors' motion, on the ground they were not parties to the case in the trial court. Letter of Dec. 8, 1992 (App. Exh. 9) (letter from the Honorable Hamilton V. Gayden, Jr. to doctors' counsel). On February 5, 1993, the trial court decided the plaintiff's motion to alter or amend, modifying its judgment slightly. Memorandum Opinion of Feb. 5, 1993 (App. Exh. 4).

Hoping to proceed with the appeal as quickly as possible, plaintiffs and the State promptly submitted an agreed amended final judgment to the trial court.[10] Matters would not be resolved so sensibly, however. On the same day as plaintiffs and the State submitted the agreed judgment, the doctors filed a document denominated "Motion For Leave To Amend And File Cross-Claim Against Defendants." By letter, the doctor's counsel also asked the court not to sign the final judgment until the doctors' motion was heard, a request the court indulged. Letter of June 28, 1993 (App. Exh. 10) (letter from doctors' counsel to the Honorable Hamilton V. Gayden, Jr.); Affidavit of Elizabeth B. Thompson (App. Exh. 11).

Plaintiffs *and* the Attorney General opposed the doctors' motion for leave to amend and file a cross-claim. After all, the doctors were not even parties in the trial court, and trial had been concluded more than six months before. Nonetheless, the trial court granted the doctors' motion, and entered an order that (a) made the doctors parties at trial (effectively *nunc pro tunc*) to defend the parental notice provision; (b) permitted the doctors to file their cross-claim against the State defendants; (c) permitted (in effect, required) the State defendants to answer the cross-claim; and (d) made the doctors *amici* at trial and on appeal to defend *all* provisions of the statutes. Order of July 20, 1993 (App. Exh. 12).

Only after plaintiffs successfully petitioned the Court of Appeals to grant an extraordinary appeal from this latest unprecedented trial court order did the doctors relinquish their role as parties in the case. Court of Appeals, No. 01A01-9308-CV-00338, Order of Sept. 10, 1993 (granting plaintiffs' motion for Tenn.R.App.P. 10 appeal). Eventually, faced with the threat of litigation in the Court of Appeals over their role, the doctors agreed to bow out of the case and

---

[10] The order was submitted within the ten day period during which a petition to the Court of Appeals to reinstate the appeal based on the agreed amended final judgment could have been filed.

settle the Rule 10 appeal. Court of Appeals, No. 01A01-9308-CV-00338, Order of Dismissal, Dec. 21, 1993 (App. Exh. 13) (consent order dismissing the Rule 10 appeal, barring the doctors' future participation, and excising the proof they had offered from the record).[11]

On March 7, 1994, the court amended its previous ruling on parental notice, in response to a motion filed by plaintiffs pointing out that the evidence the doctors had offered in support of the provision had been withdrawn. Opinion of March 7, 1994 (App. Exh. 14). On June 28, 1994, the trial court entered a final order and judgment. Final Order and Judgment of June 28, 1994 (App. Exh. 15). On July 22, 1994, plaintiffs and defendants both appealed.

On November 4, 1994, the Court of Appeals dismissed those appeals -- the second time it had dismissed an appeal on the merits -- in an order that held that the trial court's judgment was not final because it reserved the issue of attorneys' fees. Court of Appeals, No. 01A01-9410-CV-00505, Order of Nov. 4, 1994. Plaintiffs *and* the State both petitioned to rehear this order, because squarely contrary United States Supreme Court cases established that a judgment reserving attorneys' fees in a civil rights case is final and appealable.[12] Nonetheless, by order of November 22, 1994, the Court of Appeals denied both petitions to rehear. Court of Appeals, No. 01A01-9410-CV-00505, Order of Nov. 22, 1994.

On December 19, 1994, plaintiffs and the State (guided by a suggestion

---

11 Even after this agreement, however, the doctors continued to participate in this case, filing briefs and appearing at oral argument, and the trial court permitted them to do so. *See* Amicus Brief of Anthony E. Trabue in Response to Motion to Reconsider Parental Notification Ruling; Response of Amicus, Anthony E. Trabue, M.D. to Motion to Amend Order of June 28, 1994; Order of Feb. 1, 1994. Indeed, the doctors asked for and received an award of attorneys' fees and costs from the State in recompense for their participation during this period. *See* Affidavit of J. Russell Heldman, filed June 28, 1995; Final Order of July 6, 1995.

12 *See, e.g., White v. New Hampshire Dep't of Emp. Security*, 455 U.S. 445, 452-53 n. 14 (1982) (dicta); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200-01 (1988); *Morgan v. Union Metal Manuf.*, 757 F.2d 792, 794 (6th Cir. 1985); *Smillie v. Park Chem. Co.*, 710 F.2d 271, 273 (6th Cir. 1983); *Maryland-National Capital Park and Planning Comm'n v. Crawford*, 511 A.2d 1079 (Md. 1986). Because attorneys' fees only are awarded to the "prevailing" party, resolution of the fee question should be deferred until the litigation, including appeals, is complete, because it is otherwise impossible to know who prevailed and to what extent. *See ACLU v. Thompson*, 455 N.W.2d 268, 271 (Wis. Ct. App. 1990).

from the Court of Appeals) filed a joint motion to alter or amend the trial court's final order, to certify those matters treated in the order as ready for appeal pursuant to Rule 54, Tennessee Rules of Civil Procedure. Joint Motion to Alter or Amend Order of June 28, 1994; Court of Appeals, No. 01A01-9410-CV-00505, Order of Nov. 4, 1994. On January 13, 1995, the trial court denied that motion in open court, stating it did not want to give the Court of Appeals any additional reason to dismiss another appeal, and directed the parties to proceed to litigate attorneys' fees.

At this point, the trial court again departed substantially from precedent and its proper judicial role, by its *sua sponte* actions with regard to Tennessee's newly enacted parental consent statute. While the parties were litigating attorneys' fees -- the last possible issue in the case -- the legislature was considering a parental consent bill. At oral argument on attorney's fees, the trial court suggested that it should delay entering a final judgment until the legislature acted on the bill, because it had some duty to consider the new law. Plaintiffs objected, because the parental consent statute was not yet law and they did not intend to challenge it in this action even if it were enacted. Transcript of Proceedings before the Honorable Hamilton V. Gayden, Jr., May 26, 1995, at 16-18 (App. Exh. 16); *see also* Plaintiffs' Notice to Court Regarding Parental Consent Law (formal written notice that plaintiffs would not amend their pleadings to challenge the parental consent statute). Nonetheless, the trial court waited for the legislature to act on the new law rather than issuing a final order. Then, after the statute became effective, it immediately entered an order resolving the pending fee application *and* ostensibly upholding the parental consent statute. The order was entered without evidence, briefing, or argument. Final Order of July 6, 1995 (App. Exh. 17).

On August 23, 1995, the trial court entered final judgment. Amended Final

Order and Judgment of Aug. 23, 1995 (App. Exh. 18). On July 14, 1995, the State filed a notice of appeal; it renewed its notice on September 19, 1995. On September 20, 1995, plaintiffs filed their notice of appeal.

ARGUMENT

Under T.C.A. § 16-3-201 this Court may take jurisdiction over this appeal so long as it involves (a) constitutional issues; (b) of unusual public importance; and (c) there is a special need for expedited decision. Those factors are met here.

This case now is on appeal (on the merits) for the third time. Over three years have passed since suit was filed and the trial was completed. The case is ripe for decision. To say the issues are important is to understate matters considerably. Undoubtedly, moreover, the issues will ultimately have to be decided by this Court. Thus, plaintiffs urge this Court to exercise its discretion and set the case for orderly proceedings in this Court.

If it chooses to hear this case now, this Court will not be alone. In recent months, appeals of challenges to abortion regulation under state constitutions reached the state Courts of Appeal of Kentucky and New Mexico. The Supreme Courts of both states, under statutes similar to T.C.A. § 16-3-201, reached down and assumed jurisdiction of the vital constitutional questions at stake. *See New Mexico Right to Choose/NARAL v. Danfelser*, No. 23,239 (N.M. Oct. 23, 1995) (App. Exh. 1); *Doe v. Childers*, No. 95-SC-783-T (Ky. Nov. 22, 1995) (App. Exh. 2). This Court, for the reasons set forth below, should do likewise.

A. The Issues are Constitutional and of Unusual Public Significance

This case unquestionably presents constitutional questions, under the state as well as the federal constitution. The complaint alleges, among other things, that the criminal abortion statutes place such burdens on a woman's right to choose as to deprive Tennessee women of their rights under the Tennessee and federal

constitutions to liberty, privacy, procreational autonomy, and due process. Amended Complaint ¶ 29. Under the statutes as enacted, women's rights are violated as they are (*inter alia*) forced to delay their abortions for at least three days, T.C.A. 39-15-202(d)(1); denied access to clinics and ambulatory surgical centers for abortions after the first trimester, a requirement that serves no purpose other than to make abortions difficult if not impossible to obtain, *id.* § 39-15-201(c)(2); and required to listen to a scripted set of irrelevant and misleading information designed to bias women to make the decision not to have an abortion and imposed without regard to the health of a woman or her individual circumstances, *id.* § 39-15-202(b), (c).

The constitutional questions presented, moreover, are of enormous public significance. At stake are the rights of all women in this state to reproductive choice -- "the right to procreate and the right not to procreate" -- which this Court has held is "a vital part of an individual's right to privacy" under the Tennessee and United States Constitutions. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992). Every day Tennessee women seek abortions, at plaintiffs' clinics and elsewhere, and every day those women's constitutional right to choose whether to have an abortion is jeopardized by the statutes, as enacted and as upheld and interpreted by the trial court.

The protection afforded individual rights under the federal constitution is waning. This country, however, is undergoing a renaissance of state constitutional law, and this Court has been part of that renaissance.[13] In this renaissance

---

[13] *See, e.g., Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992) (adopting strict scrutiny of infringement on privacy rights involved in reproductive choice); *Doe v. Norris*, 751 S.W.2d 834 (Tenn. 1988) ("In the interpretation of the Tennessee Constitution, this Court is always free to expand the minimum level of protection mandated by the federal constitution."); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (strict scrutiny of state invasion of right of privacy, including parental rights; recounting "wealth of rights" protected by the Tennessee Constitution that evidence protection of privacy); *State v. Smith*, 834 S.W.2d 915 (Tenn. 1992) (rejecting United States Supreme Court jurisprudence limiting the consequences of failing to give Miranda warnings; following earlier federal decision that were more in keeping with the "spirit and principles" of the Tennessee Constitution); *State v. Crump*, 834 S.W.2d 265 (Tenn. 1992), *cert. denied*, 113 S. St. 298 (1992); *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989) (rejecting a United States Supreme Court decision that had weakened individual's privacy rights by loosening the

federalism finds its full voice as *state* courts move in their own directions to protect the liberty of their citizens.

State constitutional protections are particularly vital in the area of reproductive freedom, which has been the subject of great controversy and great flux. The very statutes at issue in this action had at one time been struck as inconsistent with the federal constitution.[14] Now, however, the United States Supreme Court's decision in *Planned Parenthood v. Casey* offers some basis upon which to argue that provisions of the statutes are federally constitutional. *See Casey*, 505 U.S. at 833 (upholding Pennsylvania's biased counseling and waiting period requirements). The question remains whether Tennessee's constitution will remain a guarantor of individual rights generally and, in this case, of reproductive choice specifically.

This Court, ultimately, will decide this question, and should join the Supreme Courts of Kentucky and New Mexico in reaching down and assuming jurisdiction to assure that the question reaches this Court expeditiously. Such review is all the more appropriate in this case, given the lengthy delays and the nature of the rights still at stake. It is lamentable that this litigation of crucial constitutional questions has met the obstacles it has in the courts of this state. Plaintiffs have tried repeatedly for more than two years to appeal the trial court's decision. This case began with a request for a preliminary injunction to avoid injury to vital rights. Because of an almost unbelievable set of events, the nature

---

standard for probable cause for issuance of search warrants; following the reasoning of and adopting the holding of an earlier, more rights-protective decision); *State v. Lakin*, 588 S.W.2d 544, 548 (Tenn. 1979) ("decisions applying the state constitution [to invalidate police searches] have been somewhat more restrictive than comparable federal cases"); *Miller v. State*, 584 S.W.2d 758 (Tenn. 1979) (Tennessee Constitution may afford greater protection against ex post facto laws than the federal Constitution); *State ex rel Anglin v. Mitchell*, 596 S.W.2d 779 (Tenn. 1980).

14 *See, e.g., Planned Parenthood v. Alexander*, No. 79-843-II (Tenn. Chanc. Ct. Davidson Cty. Oct. 19, 24, 1979) (waiting period, parental notice, and biased counseling); *Planned Parenthood v. Blanton*, No. 78-2310 (W.D. Tenn. July 14, 1978) (in-state residency requirement); *Planned Parenthood v. Alexander*, No. 78-2310 (W.D. Tenn. 1981) (waiting period); Op. Atty. Gen. Tenn. No 83-467 (Oct. 26, 1983) (waiting period, hospitalization, and biased counseling); Op. Atty. Gen. Tenn. No. 84-238 (Aug. 6, 1984) (all provisions of statutes); Op. Atty. Gen. Tenn. No. 84-239 (Aug. 7, 1984) (parental notice).

of those --undoubtedly, constitutional and significant -- rights remains unresolved still, affecting many Tennessee women every day. This Court should now accept jurisdiction of this case, to put an end to the questions presented once and for all.

B. There is a Special Need to Expedite These Proceedings.

While this case has followed its winding and often unprecedented course, the rights of Tennessee women have remained in jeopardy. The trial court has enjoined enforcement of the statutes except in conformity with its opinion, but that ruling is of little solace for the following reasons.

First, even when apparently ruling in plaintiffs' favor, the trial court did not strike the unconstitutional statutes. Instead the trial court *substantially rewrote* large portions of the statutes.[15] Thus, the statutes reported in the Tennessee Code bear no relationship to the statutes the court below has ordered enforced. The court's opinion appears nowhere in the statute books, is not described or cited in the Tennessee Code, is not available on electronic database services, and was never (to plaintiffs' knowledge) officially published. The rights of women seeking abortions under the rewritten statutes now depend upon their contacting a doctor who knows that that the statutes have been rewritten in the fashion that they were.[16]

To give but one example, the statutes as enacted by the Legislature entirely prohibited abortions after the first trimester unless they were performed in hospitals, a requirement that made second-trimester abortions prohibitively

---

15 Plaintiffs intend to challenge this rewriting on appeal as a violation of separation of powers. *See* Tenn. Const. art. II, §§ 1, 2 (mandating separation of powers); *Lawyers' Tax Cases*, 55 Tenn. 565, 635 (1875) ("It is a fundamental principle, that it is essential to the maintenance of republican government, that its powers should be distributed into legislative, judicial, and executive departments, and that in its administration these departments should be separate and independent in their respective spheres."). Under this doctrine, the judicial branch is only to apply and interpret laws, leaving to the legislature the task of making and repealing laws. *Richardson v. Young*, 125 S.W.2d 664, 668 (Tenn. 1910).

16 The *only* published descriptions of the trial court's opinion of which plaintiffs are aware appeared in the Tennessee Attorney's Memo, a private publication for attorneys, and in a law review article published by the Memphis State Law Review, *see* Catherine Albisa, *The Last Line of Defense: The Tennessee Constitution and the Right to Privacy*, 25 Mem. St. U.L. Rev. 3, 33-34 (1994). Needless to say, neither of these publications is generally available to Tennessee doctors or to women seeking abortions.

expensive and very difficult to obtain. T.C.A. § 39-15-201(c)(2); Tr. 68-70, 203-04, 220-21, 370-72, 552-55; Trial Exh. 17, at 15-26; Trial Exh. 22, table 6; Trial Exh. 24. Under the statutes as rewritten by the trial court, physicians *may* perform abortions in the second trimester outside a full-service hospital, *but only* until eighteen weeks LMP *and only then* in "ambulatory care facilities." Opinion at 4, 22-24 (App. Exh. 3). Under the court's interpretation, the word "hospital" in the statutes now means "ambulatory surgery center" between weeks fourteen (LMP) and eighteen of a pregnancy, after which it means "hospital" again. Now, women seeking abortions in this state in the second trimester must hope that their doctors know that a Davidson County judge has rewritten the statutes to permit procedures in ambulatory surgery centers through the eighteenth week LMP.

Second, even as rewritten, the statutes violate women's rights. For example, the trial court largely upheld the portion of the statutes that mandates that women seeking an abortion receive statutorily-prescribed information. T.C.A. § 39-15-202(b), (c); Opinion at 7-16 (App. Exh. 3). Plaintiffs proved at trial that this information is in large part irrelevant, and in some ways misleading or completely false. Tr. 74-77, 86-88, 230-36, 834-35, 848-50; Trial Exh. 12. Even under the terms of the court's opinion, women who have chosen to have an abortion must be told of the benefits of childbirth and about all the services that might be available to help care for a newborn infant, T.C.A. § 39-15-201(b)(5), (c), without regard to the woman's circumstances. Women who have carefully considered their choice will feel their judgment questioned. For others, including those seeking an abortion because the pregnancy resulted from rape or because the fetus is not viable, forcing them to listen to the mandated information will simply be cruel.

In addition, the trial court's ruling leaves in place the state's prohibition against performance of certain second-trimester abortions (after the eighteenth

week LMP) outside a hospital. Opinion at 4, 22-24 (App. Exh. 3). This restriction makes an abortion impossible for many women to obtain, and is supported by no state interest. In these and other ways, the right of women to decide whether to continue a pregnancy remains subject to interference, even with the trial court's ruling in place.

CONCLUSION

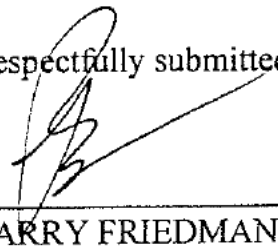
After three plus years of litigation in the trial courts of this state, the important issues presented here remain without clear answer. They are important questions that affect *real* women *every* day in this state. Each day that the challenge to the statutes remains unresolved, women's rights are infringed and their health suffers.

There comes a time when the questions are so vital and the process for resolving them so circuitous, the path behind so tortured, and the road ahead so long, that intervention is warranted. Plaintiffs believe that is precisely the case here. Given the gravity of the questions presented it is inevitable they will find their way to this Court. It is the function of this Court ultimately to resolve such questions. Plaintiffs respectfully suggest it is an appropriate time to begin that process, so that the rights of women in this state may be clear, protected, and respected.

For the reasons stated, plaintiffs request this Court take immediate

jurisdiction of the appeal.

Respectfully submitted,



BARRY FRIEDMAN (14567)
Cooperating Attorney
ACLU Foundation of Tennessee
Vanderbilt University
School of Law
[redacted]

LOUISE MELLING
CATHERINE WEISS
American Civil Liberties Foundation
Reproductive Freedom Project
[redacted]

BARBARA E. OTTEN
ROGER K. EVANS
DARA KLASSEL
Planned Parenthood Federation
of America, Inc.
[redacted]

IRWIN VENICK (4112)
Dobbins & Venick
[redacted]

ELIZABETH B. THOMPSON
(14505)
Howrey & Simon
[redacted]

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by United States Mail, postage prepaid, on this 12 day of January, 1996 to:

Michael Catalano
Andy D. Bennett
Associate Solicitors General
[redacted]

Attorneys for Defendants

with a courtesy copy sent to:

J. Russell Heldman
[redacted]

Attorney for Drs. Trabue and Neff

Irwin Venick