No. 20-6267

In the United States Court of Appeals for the Sixth Circuit

Bristol Regional Women's Center, P.C., et al.,
Plaintiffs-Appellees,

v.

Herbert H. Slatery III, Attorney General of Tennessee, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee, No. 3:15-cv-00705

BRIEF FOR THE STATES OF LOUISIANA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINA, AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF *AMICI*

Amici curiae are the States of Louisiana, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia. Approximately 28 states, including the *amici* States, require a waiting period before abortions.[1] The waiting periods range from 18 hours, *see* Ind. Code § 16-34-2-1.1(a), to 72 hours excluding weekends and holidays, *see* S.D. Codified Laws § 34-23A-56. Many States have had waiting-period laws for decades. *See, e.g.*, La. Rev. Stat. § 40:1061.16(B)(1) (enacted 1995); Ohio Rev. Code § 2317.56(B)(1) (enacted 1991); 18 Pa. Stat. and Cons. Stat. Ann. § 3205 (enacted 1989). And none of these States' laws are enjoined as an undue burden by federal courts—except for Tennessee's. The decision below is thus an outlier

[1] *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. § 36-2153(A); Ark. Code § 20-16-1703(b); Fla. Stat. § 390.0111(3)(a)(1); Ga. Code § 31-9A-3; Idaho Code § 18-609; Ind. Code § 16-34-2-1.1(a); Iowa Code § 146A.1(1); Kan. Stat. § 65-6709; Ky. Rev. Stat. § 311.725(1); La. Rev. Stat. § 40:1061.16(B)(1); Mich. Comp. Laws § 333.17015(3); Minn. Stat. § 145.4242; Miss. Code § 41-41-33(1); Mo. Ann. Stat. § 188.027(1); Mont. Code Ann. § 50-20-106; Neb. Rev. Stat. § 28-327.10; N.C. Gen. Stat. § 90-21.82(1); N.D. Cent. Code § 14-02.1-04(4); Ohio Rev. Code § 2317.56(B)(1); Okla. Stat. tit. 63, § 1-738.2 (B) (1); 18 Pa. Stat. and Cons. Stat. § 3205; S.C. Code § 44-41-330(C); S.D. Codified Laws § 34-23A-56; Tex. Health & Safety Code § 171.012(a)(4), (b); Utah Code § 76-7-305(2); W. Va. Code § 16-2I-2(a); Wis. Stat. § 253.10(3)(c)(1).

that conflicts with longstanding Supreme Court precedent. Because they have similar laws and also regulate abortion to further their interest in protecting maternal health and unborn life, the *amici* States have an interest in ensuring that courts scrutinize such regulations under the appropriate legal standards, consistent with Supreme Court precedent and with the State legislature's role as policymaker.

SUMMARY OF THE ARGUMENT

The district court's conclusion that the waiting-period law imposes an undue burden contradicts longstanding precedent. *Planned Parenthood of Southeastern Pennsylvania v. Casey* made clear almost thirty years ago that the State's interest in protecting women's health and the life of the unborn justified a 24-hour waiting period. 505 U.S. 833, 885-87 (1992).[2] The same result should obtain here.

Casey and later cases confirm that the district court erred when it required Tennessee to prove its waiting-period law had medical benefits. *See* Part I.A.1 *infra*. Where the State acts rationally to further a legitimate purpose, weighing risks and benefits of abortion regulations is the proper role of legislatures, not courts. *See* Part I.A.2 *infra*. Tennes-

[2] All citations to *Casey* in this brief are to the controlling joint plurality opinion.

see's waiting-period law is a rational way to serve the State's recognized and legitimate interests in protecting both women's health and protecting unborn life. *See* Part I.B.1 *infra*. Requiring a waiting period for abortion—an irreversible, life-changing decision—tracks the way States regulate other important life decisions, such as giving up a child for adoption, sterilization, and divorce. *See* Part I.B.2 *infra*. But even if it did not, the unique nature of abortion as a medical procedure that takes another's life would justify special regulation and is not "gratuitously demeaning" to women, as the district court erroneously concluded. *See* Part I.B.3 *infra*.

The district court erred when it held, contrary to *Casey*, that Tennessee's law imposed an undue burden. The district court's attempt to distinguish *Casey* based on the record is unconvincing because the record in *Casey* contained very similar evidence. *See* Part II.A. And the district court incorrectly included burdens resulting from private choices and burdens on the clinics themselves in its undue-burden analysis. *See* Part II.B *infra*.

Had the district court adhered to *Casey* as it should have, the result is clear: Tennessee's waiting period law, and others like them, are con-

stitutional means of regulating abortion and protecting both women's health and unborn life.

ARGUMENT

I. TENNESSEE'S WAITING PERIOD LAW SERVES THE STATE'S LEGITIMATE INTERESTS IN PROTECTING MATERNAL HEALTH AND UNBORN LIFE.

The district court applied the now-defunct balancing test from *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), in concluding that Tennessee's waiting-period law imposes an undue burden. *See Adams & Boyle, P.C. v. Slatery*, No. 3:15-CV-00705, 2020 WL 6063778, at *56-64 (M.D. Tenn. Oct. 14, 2020). The district court analyzed the evidence through the lens of that balancing test, concluding that the law is unconstitutional because the State did not prove it has benefits and because it imposes burdens.[3] *Id.* Applying the wrong test allowed the district court to evade *Casey*'s holding that a waiting-period does not present a substantial obstacle to abortion access and is therefore not an

[3] Because the district court applied the wrong legal standard, its factfinding is entitled to no deference. *See City of Alexandria v. Brown*, 740 F.3d 339, 350 (5th Cir. 2014) ("Should the district court apply the wrong legal standard in making its factual findings, this court then reviews the district court's factual findings de novo."); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018) ("[W]hen a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand.").

undue burden. Two days after the district court issued its opinion, this Court affirmed that *Hellerstedt* balancing no longer applies and that Chief Justice Roberts' concurring opinion in *June Medical Services v. Russo* controls and provides clarification on the governing standard of review in abortion cases. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431-37 (6th Cir. 2020). This Court should now reverse the district court's judgment and align this Court's precedent with the Supreme Court's, which supports the constitutionality of Tennessee's law.

A. The District Court Erred by Requiring Tennessee to Prove the Waiting-Period Law Provided Medical Benefits and Second-Guessing the Legislature's Policy Choice.

In *Casey*, the plaintiffs challenged a Pennsylvania law that required a woman to wait 24 hours after receiving informed consent before obtaining an abortion. 505 U.S. at 885. But the Supreme Court did not require the State to prove the waiting period created tangible medical benefits, as the district court did here. Rather, *Casey* concluded that abortion regulations need not have proven health benefits for the woman, though it pointed out that there are "devastating psychological consequences" for a mother who aborts her child and later comes to regret

the decision. *Id.* at 882-83; *see also id.* at 886 ("[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.").

Like *Casey*, later cases have confirmed that the State need not prove that abortion regulations carry a medical benefit. As Chief Justice Roberts noted in the controlling opinion from *June Medical*,[4] *Casey* upheld a 24-hour waiting period "notwithstanding the District Court's finding that the law did 'not further the state interest in maternal health.'" *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment) (quoting *Casey*, 505 U.S. at 886). That is because in the abortion context, the State not only has a strong interest in protecting public health. The Supreme Court has also recognized that the State has a distinct interest in "protecting the life of the fetus that may become a child." *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *see Casey*, 505 U.S. at 846; *Roe v. Wade*, 410 U.S. 113, 162 (1973) ("[T]he State does have an important and legitimate interest in preserv-

[4] All citations to *June Medical* in this brief are to the controlling opinion concurring in the judgment.

ing and protecting the health of the pregnant woman . . . and [] it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct.").

When the risks and benefits of an abortion regulation are unclear, States—not courts—must weigh those risks and benefits and make policy judgments. As the Court held in *Gonzales*, the "traditional rule" is that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. 124, 163 (2007); *see also June Med.*, 140 S. Ct. at 2136. Otherwise, courts would have to "'serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *Gonzales*, 550 U.S. at 163-64 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989)). And "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Gonzales*, 550 U.S. at 164; *cf. Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam) (upholding a restriction on the performance of abortions to licensed physicians despite the plaintiffs' conten-

tion that "all health evidence contradicts the claim that there is any health basis" for the law.").

So long as "the regulation is rational and [pursues] legitimate ends," balancing risks is "within the legislative competence." *Gonzales*, 550 U.S. at 130; *see also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.") By contrast, legally weighing the State's interest in protecting unborn life and the health of the woman against the woman's liberty interest is beyond *judicial* competence. "There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. . . . Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an unanalyzed exercise of judicial will in the guise of a neutral utilitarian calculus." *June Med.*, 140 S. Ct. at 2136 (citation omitted).

The district court erred in looking to see whether Tennessee's law had "enough" benefit. *See id.* at 2137 (noting that *Casey* upheld a re-

quirement that only physicians provide the information necessary for informed consent for abortions "'even if an objective assessment might suggest that those same tasks could be performed by others,' meaning the law had little if any benefit." (quoting *Casey*, 505 U.S. at 885)). The district court's only task was to determine whether Tennessee's waiting-period law is a rational way to furthering the State's legitimate interests. *Casey*, *Gonzales*, and *June Medical* confirm that it is, and the district court erred in concluding otherwise.

B. Tennessee's Waiting Period Is Rational and Tracks the Way States Regulate Similarly Important Decisions.

By ensuring adequate time exists for the abortion decision to be made carefully, the State serves its recognized interest in protecting the unborn child. The State has a legitimate interest "from the outset of the pregnancy in protecting the health of the woman *and the life of the fetus that may become a child*." *Casey*, 505 U.S. at 846 (emphasis added); *see also Gonzales*, 550 U.S. at 145 ("[T]he government has a legitimate and substantial interest in preserving and promoting fetal life"); *id.* at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.").

Casey affirmed that the State has a legitimate interest in ensuring that the abortion decision is well informed, sure, and free from coercion for the woman's benefit as well: "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.*at 882. Abortion is a life-changing, irreversible decision. States have a significant interest in ensuring that a woman has all relevant information before making the weighty decision to have an abortion. It is legitimate and rational for a State to require a waiting or "cooling off" period to ensure such a grave decision is made carefully. Nor is it "stigmatizing" or "gratuitously demeaning" to women, *Adams & Boyle*, 2020 WL 6063778, at *63. Indeed, the Supreme Court has repeatedly recognized the gravity of the abortion decision and the State's interest in ensuring it is fully informed: "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976). "Whether to have an

abortion requires a difficult and painful moral decision. . . . The State has an interest in ensuring so grave a choice is well informed." *Gonzales*, 550 U.S. at 159 (citation omitted).

The Supreme Court has recognized that "some women come to regret their choice to abort the infant life they once created and sustained," finding that conclusion "unexceptionable," and may experience "devastating psychological consequences," "[s]evere depression," "loss of esteem," "grief," and "sorrow." *Gonzales*, 550 U.S. at 159-60; *Casey*, 505 U.S. at 882. "[T]hus the State legitimately may seek to ensure that [the abortion decision] has been made 'in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient.'" *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 443 (1983) (quoting *Colautti v. Franklin*, 439 U.S. 379, 394 (1979)). The district court's disregard for this precedent in concluding that Tennessee's law "serv[es] no legitimate purpose" is clear error. *Adams & Boyle*, 2020 WL 6063778, at *64.

At a minimum, abortion may be regulated to the same extent as other medical procedures. *Casey,* 505 U.S. at 884; *Gonzales*, 550 U.S. at 163-64. Just as a majority of States have chosen to require a waiting

period for abortions, *see* p.1 n.1 *supra*, many States have also chosen to require waiting periods for tubal ligations and vasectomies—some as long as 30 days. *See, e.g.*, Code Ark. R. 016.06.49-217.231(E); Cal. Code Regs. tit. 22, § 70707.1(a)(4)(A); Ky. Rev. Stat. Ann. § 212.347; Mich. Admin. Code r. 400.7703; N.Y. Comp. Codes R. & Regs. tit. 18, § 505.13; Ky. Rev. Stat. Ann. § 212.347; 55 Pa. Code § 1163.60(c)(1). Many States also require a waiting or separation period before marriage or divorce. *See, e.g.*, Cal. Fam. Code § 2339 (six months); Mich. Comp. Laws § 552.9f (60 days); Neb. Rev. Stat. § 42-363 (60 days); N.J. Stat. Ann. § 37:1-4 (72 hours); Or. Rev. Stat. § 106.077 (three days); Tex. Fam. Code § 2.204 (72 hours).

Many States, including Tennessee, require a 72-hour waiting period before consent can be given for adoption. *See, e.g.,* Ariz. Rev. Stat. § 8-107(B); 750 Ill. Comp. Stat. 50/9(B); Iowa Code § 600A.4(2)(g); Ky. Rev. Stat. § 199.500(5); Minn. Stat. § 259.24, Subd. 2a(a); Miss. Code. § 93-17-5(1); Mont. Code Ann. § 42-2-408(1)(b); Nev. Rev. Stat. § 127.070; N.H. Rev. Stat. § 170-B:8(I); N.J. Stat. § 9:3-41(e); Ohio Rev. Code Ann. § 3107.08(A); 23 Pa. Stat. and Cons. Stat. § 2711(c); Tenn. Code § 36-1-111(d)(3); Va. Code § 63.2-1233; W. Va. Code § 48-22-302; *see also* La.

Child. Code art. 1122(B)(1) (three days for agency adoption). Several others require a 48-hour waiting period. *See, e.g.*, Conn. Gen. Stat. § 45a-715(d); Fla. Stat. § 63.082(4)(b); Mo. Stat. § 453.030(5); Neb. Rev. Stat. § 43-104(1); N.M. Stat. § 32A-5-21(G); Tex. Fam. Code § 161.103(a)(1); Wash. Rev. Code § 26.33.160(4)(d). Some states require an even longer waiting period. *See, e.g.*, La. Child. Code art. 1122(B)(1) (five days for private adoption); Mass. Gen. Laws ch. 210, § 2 (four days after birth of the child); 15 R.I. Gen. Laws § 15-7-6 (fifteen days after the birth of the child).

These laws confirm the legitimacy of legal waiting periods for irreversible or significant life decisions.

Even if waiting periods were unique to abortion, they are still justified because abortion is unlike other medical procedures: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). As *Casey* explained:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human

> life; and, depending on one's beliefs, for the life or potential life that is aborted.

505 U.S. at 852. Even before *Casey*, a plurality of the Court held that the decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment." *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (plurality op.).

The Supreme Court's decisions reflect the recognized benefits to women of a complete understanding of the abortion procedure. The harms that result if such an important decision is impulsively made or coerced are also clear. *Casey* also shows that the State's interest in potential life cannot be lightly set aside. The State may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. Tennessee's waiting-period law therefore falls squarely within the parameters of valid laws under *Casey*.

II. TENNESSEE'S WAITING-PERIOD LAW DOES NOT IMPOSE AN UNDUE BURDEN ON ABORTION.

That an abortion regulation "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'" *Gonzales*, 550 U.S. at 157–58 (quoting *Casey*,

505 U.S. at 874) (alteration omitted). So long as an abortion regulation does not amount to a substantial obstacle, it survives the undue burden analysis. And a "substantial obstacle" is not just an inconvenience or additional cost—it deprives the woman of "the ultimate decision" of whether to abort her child. *Casey*, 505 U.S. at 875. "Under the law of [this] circuit, a woman faces a substantial obstacle when she is 'deterred from procuring an abortion as surely as if the [government] has outlawed abortion in all cases.'" *EMW*, 978 F.3d at 434 (quoting *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 370 (6th Cir. 2006) (alteration in original) (quoting *Casey*, 505 U.S. at 894)). The plaintiffs' evidence here cannot meet this high standard. The district court recounted many of the supposed burdens of Tennessee's waiting-period law, but they are no greater than those already found not to be substantial obstacles by *Casey*. The district court erred by not following *Casey*, and further erred by incorrectly attributing some "burdens" it identified to the State instead of private choices.

A. The Alleged Burdens Caused by Tennessee's Waiting-Period Law Do Not Create a Substantial Obstacle Under *Casey*.

In *Casey*, the Supreme Court found the waiting period to be a "reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden." 505 U.S. at 885. Plaintiffs made arguments like those adopted by the district court here, but the Supreme Court rejected them. *Casey* expressly overruled its previous decision in *City of Akron*, 462 U.S. 416. Discussing that decision's determination that a 24-hour waiting period does not actually result in any benefit, the Court stated, "[w]e consider that conclusion to be wrong." *Casey*, 505 U.S. at 885. Instead, *Casey* treated the idea that a waiting period could help make sure that the abortion decision is well informed as a given: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Id.* Thus, the Court found that "the waiting period is a reasonable measure to implement the State's interest in pro-

tecting the life of the unborn, a measure that does not amount to an undue burden." *Id.*

The district court sought to excuse its disregard of *Casey* by asserting that *Casey* was not dealing with a "fully developed record." *Adams & Boyle*, 2020 WL 6063778, at *64. But that assertion is false. Again, *Casey* expressly contradicted and overruled *City of Akron*'s conclusion that a 24-hour waiting period was unconstitutional. But the Supreme Court's description of the trial record in *City of Akron* is indistinguishable from the district court's description of burdens allegedly imposed by Tennessee's law here:

> The District Court found that the mandatory 24-hour waiting period increases the cost of obtaining an abortion by requiring the woman to make two separate trips to the abortion facility. Plaintiffs also contend that because of scheduling difficulties the effective delay may be longer than 24 hours, and that such a delay in some cases could increase the risk of an abortion. Akron denies that any significant health risk is created by a 24-hour waiting period, and argues that a brief period of delay—with the opportunity for reflection on the counseling received—often will be beneficial to the pregnant woman.
>
> We find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course.

City of Akron, 462 U.S. at 450–51 (citation omitted); *see also Casey*, 505 U.S. at 885-86 (describing district court findings of fact on burdens imposed by the waiting-period law). *Casey* rejected that exact conclusion, *Casey*, 505 U.S. at 885, and determined that *Akron* went "too far, [is] inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and [is] overruled." *Id.* at 882.

The record before the Court in *Casey* is also materially indistinguishable from this record. *See Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1378-79 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992) (discussing evidence that few women are ambivalent about the abortion decision, delays of more than 24 hours, increased risk to the patient, increased costs, two trips to the clinic, childcare expenses, and time off work). The trial record in *Casey* was developed after a week-long trial and included "a comprehensive stipulation of uncontested facts" as well as "the evidence presented at trial, and the evidence presented at the hearing on plaintiffs' motion for a preliminary injunction." *Id.* at 1325-26. Thus, the *Casey* plurality was fully aware of the burdens the plaintiffs here claim are unconstitutional. 505 U.S. at 885-87.

Despite evidence that the 24-hour waiting period would "often" result in a "delay of much more than a day because [it] requires that a woman seeking an abortion make at least two visits to the doctor," *id.* at 885-86, that the waiting period would be "particularly burdensome" to poor women and those who must travel long distances, *id.* at 886, and that the waiting period would "increas[e] the cost and risk of delay of abortions," the Court determined that this evidence "do[es] not demonstrate that the waiting period constitutes an undue burden." *Id.*; *see also June Med.,* 140 S. Ct. at 2136 (2020) (*Casey* "recognized that Pennsylvania's 24-hour waiting period for abortions 'has the effect of increasing the cost and risk of delay of abortions,' but observed that the District Court did not find that the 'increased costs and potential delays amount to substantial obstacles.'" (citation omitted)). If the *Casey* record was "sparse," *Adams & Boyle*, 2020 WL 6063778, at *64 (quoting *Taft*, 468 F.3d at 372), it only shows that the record here is also insufficient to prove an undue burden because it is so similar.[5]

[5] With respect, the Supreme Court's *summary* of the trial record related to the 24-hour waiting period in *Casey* does not represent the "sum" of that evidence, *Taft*, 468 F.3d at 372.

B. The District Court Incorrectly Attributed Burdens to the State that Result from Private Choices.

It is hard to see how a 48-hour waiting period imposes a greater burden on women than a 24-hour waiting period approved by *Casey* despite resulting in delays much longer than 24 hours. But the district court also tried to distinguish this case from *Casey* by adopting plaintiffs' contention that the Tennessee law results in some women being pushed past a certain gestational age, causing some women to be unable to receive a medication abortion, or an abortion at certain clinics in the State. *Adams & Boyle*, 2020 WL 6063778, at *29. Even if true, that does not mean the waiting-period law imposes an undue burden.

To begin, there is no constitutional right to the abortion procedure of one's choice. *See Gonzales*, 550 U.S. at 158 ("[T]he State may use its regulatory power to bar certain procedures and substitute others."). Thus, even if the Tennessee law pushes a large fraction of women past the point at which they can receive a medication abortion, that does not amount to an undue burden under current precedent. And the burdens related to gestational age are more closely related to the choices of individual clinics as to what procedures they will perform and at what gestational ages they will perform them. The State has nothing to do with

determining the number of abortion providers in the State that elect to perform to offer surgical abortions, or that only two of those clinics offer abortions up to 19 weeks 6 days when the legal limit in Tennessee is viability. *Adams & Boyle*, 2020 WL 6063778, at *29. Those are business decisions of the clinic.

If a woman experiences longer travel to an abortion clinic because closer clinics do not offer the legally permissible procedure she requires at that stage of her pregnancy, it is not a burden attributable to the State. It is also not a state-imposed burden that a woman may have to travel, as *Casey* already recognized that added travel caused by the requirement of two trips to the clinic was not an undue burden. 505 U.S. at 885-86. The district court failed to explain how the 48-hour waiting period would impose any burdens beyond those imposed by a constitutional 24-hour waiting period.

The district court also noted that the waiting-period law "imposes operational and financial burdens on abortion providers." *Adams & Boyle*, 2020 WL 6063778, at *61. But the Supreme Court has never held that burdens on an abortion clinic equate to or can substitute for proof of an undue burden on a substantial fraction of women seeking an abor-

tion. Clinics and abortion doctors do not have a right to perform abortions under the Due Process Clause, nor do they have the right to perform abortions however they see fit. *See, e.g.*, *Gonzales*, 550 U.S. at 163 ("The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."); *Harris*, 448 U.S. at 314 ("The doctrine of *Roe v. Wade*, the Court held in *Maher*, 'protects *the woman* from unduly burdensome interference with *her freedom* to decide whether to terminate her pregnancy,'" (emphasis added) (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)); *see also Casey*, 505 U.S. at 846 (*Roe*'s "essential holding" "is a recognition of *the right of the woman* to choose to have an abortion before viability,") (emphasis added); *id.* at 884 (in the context of abortion, the constitutional status of the doctor-patient relation is "*derivative of the woman's position*. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified.") (emphasis added). The notion that a business's preferences override a State's authority to encourage respect for human life by ensuring a woman has adequate

time before she makes an irrevocable decision to terminate the life of her baby has no precedent.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted.

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I hereby certify that on February 16, 2021, this brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send a notice of electronic filing to all parties.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 4,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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Dated: February 16, 2021