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, et al.,
Defendants-Appellants

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

PLAINTIFFS-APPELLEES' BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument, as this case concerns important constitutional issues with serious consequences for the rights and health of Tennesseans.

INTRODUCTION

Tennesseans seeking abortion care have been forced to wait more than five years to exercise their fundamental right to access abortion free from the burdensome, unnecessary, and "gratuitously demeaning" strictures of Tennessee's mandatory delay law. After a four-day bench trial in which the district court received testimony from twelve witnesses, the Honorable Bernard A. Friedman issued detailed Findings of Fact and Conclusions of Law in a 136-page decision (the "Order"), permanently enjoining enforcement of the mandatory waiting period requirement of Tenn. Code Ann. §§ 39-15-202(a)-(h) (the "Delay Law").

On appeal, Defendants-Appellants request that this Court throw out more than a hundred pages of well-founded findings of fact developed after a comprehensive bench trial. They offer several arguments to support that gambit, none of which can prevail. First, Defendants-Appellants complain that the district court applied the wrong legal standard. *See* Appellants' Br. at 39, 41, 63-64. It did not, but in any event, the district court already explained that its factual findings satisfy *both* versions of the "undue burden" test, including the version championed

by Defendants-Appellants. The Panel for this case, employing sound reasoning, reached the same conclusion. Defendants-Appellants' argument on this point is thus a red herring.

Second, Defendants-Appellants repeatedly lambaste the district court for supposedly defying Supreme Court and Sixth Circuit precedent, arguing that because *other* delay laws in *other* states have been upheld, Tennessee's Delay Law must, as a matter of law, be upheld as well. *See, e.g.*, *id*. at 10-11, 12, 38, 42-43; State's Stay Mot., Doc. 20, 7-8, 18-19. But *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992), and its progeny make clear that the "undue burden" analysis is context-specific and record-dependent, and that waiting periods in other states with different records very well may affront due process. This is one of those cases. Defendants-Appellants mischaracterize *Casey*'s holding, insisting that under *Casey* and this Court's decision in *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006), any mandatory delay law must be constitutional—no matter what. The trial record does not matter to Defendants-Appellants; indeed, they dismiss the record evidence as "irrelevant." Appellants' Br. at 38. But the district court rigorously reviewed that record and carefully explained how Plaintiffs-Appellees made a clear showing of an undue burden. In other words, the district court faithfully followed the Supreme Court's instruction to consider the evidence before it.

Recognizing their bid to jettison the record wholesale may fail, Defendants-Appellants alternatively attempt to re-litigate the facts found at trial by claiming many of the district court's findings were "immaterial," *id.* at 11, and challenging the court's credibility determinations, *id*. at 45-46. But Defendants-Appellants cannot distract from the high burden they face on appeal: the district court's Order cannot be disturbed unless Defendants-Appellants demonstrate that the court's factual findings—which are subject to strong deference on appeal—constituted clear error. Despite all the dust Defendants-Appellants kick up attempting to obscure the district court's sound analysis and credibility determinations, they do not show that the district court's factual findings are in any way erroneous.

The district court's rigorous findings and conclusions cannot be discarded simply because Defendants-Appellants prefer it that way; accordingly, the district court's judgment must be affirmed.

STATEMENT OF THE CASE

Defendants-Appellants' statement of the case misconstrues Supreme Court and Sixth Circuit authority and misstates the district court's factual findings. Plaintiffs-Appellees provide the following statement of the case, which corrects Defendants-Appellants' numerous inaccuracies.

I. Tennessee's Delay Law

Tenn. Code Ann. § 39-15-202 has three components: (1) it requires that an abortion patient receive certain information "orally and in person" prior to her procedure; (2) it requires that the information be provided by "the attending physician who is to perform the abortion" or "the referring physician"; and (3) it delays the patient from having an abortion "until a waiting period of forty-eight (48) hours has elapsed after the attending physician or referring physician has provided the information required by [the statute]." Tenn. Code. Ann. § 39-15-202(b), (d)(1). The law contains a narrow exception for "medical emergencies," defined as "a condition that, on the basis of the physician's good faith medical judgment, so complicates a medical condition of a pregnant woman as to necessitate an immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function." *Id.* § 39-15-202(f)(1). A physician who fails to comply is subject to criminal penalties and loss of licensure. *Id.* § 39-15-202(h). The statute took effect on July 1, 2015.

Plaintiffs-Appellees comprise medical providers operating six of the eight abortion care clinics in the state of Tennessee. Order, R.275, PageID#6598-99. Plaintiff-Appellee Planned Parenthood of Tennessee and North Mississippi

("PPTNM") [1] has health centers in Knoxville, Memphis, and Nashville, *id.*, PageID#6522; Plaintiff-Appellee Memphis Center for Reproductive Health runs CHOICES Memphis, a health care clinic that provides abortion care, *id.*, PageID#6538; and Adams & Boyle, P.C. n/k/a Bristol Regional Women's Center runs a clinic in Bristol, *id.*, PageID#6612.

Plaintiffs-Appellees sued the State of Tennessee and certain of its representatives ("Defendants-Appellants" or the "State") on behalf of themselves and their patients on June 25, 2015, alleging the Delay Law was unconstitutional and asking the district court to enjoin its enforcement. Compl., R.1, PageID#18-22; Second Am. Compl., R.70, PageID#423-47.

II. District Court's Extensive Factual Findings

A. Plaintiffs-Appellees' Witnesses

At trial, Plaintiffs-Appellees introduced testimony from eleven witnesses concerning the unique burdens imposed on Tennessee patients by the Delay Law. Among these witnesses were three administrators and/or medical professionals from Plaintiffs-Appellees' clinics: (1) Dr. Sarah Wallett, an obstetrician/gynecologist and the former Chief Medical Officer of PPTNM, Order,

[1] In June 2018, Plaintiffs Planned Parenthood Greater Memphis Region ("PPGMR") and Planned Parenthood of Middle and East Tennessee ("PPMET") merged to form PPTNM. Prior to the merger, PPGMR operated two health centers in Memphis, Tennessee, and PPMET operated health centers in Nashville and Knoxville, Tennessee.

R.275, PageID#6522; (2) Dr. Jessica Young, an obstetrician/gynecologist who previously served as associate medical director at PPTNM and as a physician in PPTNM's Nashville office, *id.*, PageID#6547; and (3) Rebecca Terrell, who served as Executive Director of CHOICES, *id.*, PageID#6538. The parties also stipulated to admit the deposition testimony of Dr. Wesley Adams, a physician and director of Bristol Regional Women's Center. *Id.*, PageID#6612; Joint Stip., R.190, PageID#3148.

The district court found Drs. Wallett, Young, and Adams and Ms. Terrell to be credible and gave their testimony "great weight." Order, R.275, PageID#6531, 6546, 6565, 6618. As set forth below, these witnesses testified extensively concerning the types of abortion procedures their clinics provide, the makeup of patients who seek care at their clinics, the comprehensive informed consent protocols employed by the clinics before the Delay Law was enacted, and the devastating impact of the Delay Law on patients seeking abortion care in Tennessee. *Id.*, PageID#6523-31, 6538-41, 6542-50, 6554-64, 6612-14, 6617-18.

Plaintiffs-Appellees also introduced by designation the deposition testimony of two individuals who appeared as Rule 30(b)(6) witnesses for the State: (1) Valerie Nagoshiner, the Chief of Staff of the Tennessee Department of Health, Nagoshiner Dep., R.140-1, 140-2; and (2) Ann Reed, the Tennessee Department of Health's Director of Licensure and Board for Licensing Health Care Facilities, Reed

Dep., R.140-3, 140-4. Their testimony reflected that the Department of Health has never identified any State interests served by the Delay Law and is not aware of any evidence that the law protects, promotes, or improves the health of Tennesseans or the ability of Tennessee patients to make competent decisions concerning abortion care. Nagoshiner Dep., R.140-1, PageID#796, 805, 808-12, 90:7-20, 100:10-13, 103:8-107:6; Reed Dep., R.140-4, PageID#874, 32:5-22.

Plaintiffs-Appellees additionally offered the testimony of expert witnesses who detailed the lack of benefits and immense burdens imposed by the law: (1) Dr. Sheila Katz, a sociologist, testified that the Delay Law created significant hardships for the half million poor women in Tennessee living below the federal poverty guideline as well as the hundreds of thousands more who live under 200% of the federal poverty guideline, Order, R.275, PageID#6569-78, 6633-34; (2) Dr. Kenneth Goodman, a medical ethicist, testified that there is no benefit to delaying a procedure where the patient has already provided informed consent and that, in fact, the Delay Law undermined the informed consent process, further harming patients, *id.*, PageID#6532-38, 6635; and (3) Dr. Sara McClelland, a psychologist and researcher focused on gender, politics, and women's health, testified that the Delay Law contributed to the stigmatization of women as incapable decision-makers and psychologically harmed women, *id.*, PageID#6566-69, 6634. The district court found Drs. Goodman, McClelland, and Katz credible and afforded

their testimony "great weight." *Id.*, PageID#6537, 6569, 6577. Plaintiffs-Appellees additionally presented the testimony of two expert witnesses to rebut Defendants-Appellants' expert witnesses (described *infra* pp. 9-13): (1) Dr. Jeffrey Huntsinger, a social psychologist who studies the science of decision-making, refuted testimony regarding supposed benefits of the Delay Law to patients' decision-making process, *id.*, PageID#6589-94; and (2) Dr. Antonia Biggs, a reproductive healthcare researcher, refuted Defendants-Appellants' assertion that the Delay Law would benefit women's decision-making and prevent mental health harms, *id.*, PageID#6601-12. The Court found Drs. Huntsinger and Biggs "fully credible," "convincing," and worthy of "great weight." *Id.*, PageID#6594, 6611.

B. Defendants-Appellants' Witnesses

Defendants-Appellants introduced testimony from one fact witness: Dr. Vanessa Lefler, the Director of Vital Statistics of the Tennessee Department of Health, who testified regarding abortion statistics data. *Id.*, PageID#6598-6601. Dr. Lefler testified that abortions at less than or equal to six weeks LMP[2] and in the seven- to eight-week LMP range decreased from 2013 onward. *Id.*, PageID#6600. The district court found Dr. Lefler's testimony to be "fully credible" and gave it "great weight." *Id.*, PageID#6600. Defendants-Appellants did not present testimony

[2] LMP is the standard measure of gestational age used by medical professionals, based on the first day of a pregnant woman's last menstrual period. Order, R. 275, PageID#6523 n.9.

from anyone involved in the creation or implementation of the Delay Law—or from any other fact witnesses.

Defendants-Appellants offered testimony from two expert witnesses about the supposed benefits of the Delay Law, but the district court did not find those witnesses' testimony credible. Defendants-Appellants did not offer testimony from *any* witnesses to refute Plaintiffs-Appellees' extensive evidence of burdens imposed by the Delay Law. Defendants-Appellants' first expert witness, Dr. Priscilla Coleman, opined that the Delay Law benefited women by enabling them to decide whether to terminate a pregnancy "in a way that is fully informed," and claimed that "time is needed to maximize human decisional processes." *Id.*, PageID#6578 (citation omitted). Defendants-Appellants' other expert witness, Dr. Michael Podraza, opined on the purported benefits of the Delay Law based on his own OB/GYN practice, which does not offer abortion care. *Id.*, PageID#6594-98. The court dedicated over a dozen pages of its opinion to its analysis concerning the credibility of these two witnesses. *Id.*, PageID#6578-98.

The district court concluded that Dr. Coleman's testimony was not credible for several reasons. First, the court found that the research on which she relied in forming her opinions has "serious methodological flaws." *Id.*, PageID#6589. Dr. Coleman relied in large part on non-peer-reviewed materials, including a newspaper article and a survey of anonymous letters written to a pastor

in Florida. *Id.*, PageID#6584. Another study she cited was published in a journal with a strikingly low impact factor (measuring a journal's quality) and had been, by Dr. Coleman's own admission, "severely criticized" by other experts in the field who concluded that the study "lack[ed] transparency and plausibility." *Id.*, PageID#6585, 6585 n.38. Critically, Dr. Coleman relied heavily on her own meta-analysis, but that meta-analysis, as pointed out by Plaintiffs-Appellees' expert witness Dr. Biggs and numerous other experts in the field, was rife with methodological flaws that "deprived [it] of all credibility." *Id.*, PageID#6606, 6606 n.44. Specifically, Dr. Coleman co-authored half of the studies reviewed in her meta-analysis and did not have an independent researcher review her meta-analysis inclusion criteria. *Id.*, PageID#6586-87. As Dr. Biggs testified, this introduces significant bias into Dr. Coleman's meta-analysis; plus, the meta-analysis has been widely criticized by other researchers in the field, many of whom have found her methods to be so opaque that her analysis cannot be replicated. Tr. Vol. 4, R.222, PageID#5332-41, 123:5-132:18.

Second, the district court found that Dr. Coleman mischaracterized the literature she relied on in forming her opinions. Order, R.275, PageID#6590. For example, many of the studies she cited to support her opinions did not apply to decision-making in the abortion or medical context. *Id.*, PageID#6591. As Plaintiffs-Appellees' expert witness Dr. Huntsinger explained, the research Dr.

Coleman cited involved subjects who performed "rapid-fire" and "low stakes" decision-making; such studies are not applicable to decision-making concerning abortion. *Id.* (citation omitted). And as the district court noted, Dr. Coleman even mischaracterized research seminal to the decision-making field by citing it for "the complete opposite conclusion" of that "reached by the researchers themselves." *Id.*, PageID#6591-92 (citation omitted).

Third, the district court observed that Dr. Coleman's opinions contradicted the "general consensus in the scientific community," including the conclusions of the American Psychological Association, the Academy of Medical Royal Colleges in the United Kingdom, and the National Academies of Sciences, Engineering, and Medicine, all leading organizations in science and medicine. *Id.*, PageID#6603-04. For her part, Dr. Coleman insisted with no basis that major medical journals suffer from "political bias" and "ignore the foundation and methods of science." *Id.*, PageID#6588.

Fourth, Dr. Coleman offered numerous concessions that severely undercut her opinions. She conceded, contrary to her other testimony, that the majority of women will not regret their decision to have an abortion. *Id.*, PageID#6584. She acknowledged that she is not an expert in the brain's physiological functions in connection with decision-making, and that she lacks research experience in the psychology of decision-making. *Id.*, Page#ID6580. Dr.

Coleman also conceded that none of the studies she identified concerning stress and decision-making "directly apply" or are even analogous to the waiting period imposed by the Delay Law, and that her conclusions "require[] a, quote, leap." *Id.*, Page#ID6581 (citation omitted). And she admitted that many of her own studies she relied on in this case were co-authored by "political" figures who were "not good at statistics and writing." *See*, *e.g.*, *id.*, Page#ID6585 (citation omitted).

In finding Dr. Coleman's testimony not credible, the district court noted that her testimony contained generalizations and broad ranges of percentages, she relied on work by authors she herself acknowledged were "too political," and that Plaintiffs-Appellees presented "persuasive evidence that Dr. Coleman's opinions lack support and that her work has serious methodological flaws." *Id.* (citation omitted). The district court concluded that Dr. Biggs' opinions "thoroughly impeached Dr. Coleman." *Id.*, PageID#6629.

The district court likewise found that Defendants-Appellants' other expert witness, Dr. Podraza, lacked credibility. Dr. Podraza opined that the Delay Law was "a reasonable law" to "prevent coercion and regret" among women contemplating abortion, but conceded on cross-examination that patients can give informed consent without a mandatory waiting period, and that forcing abortion patients to delay may increase the risks of the procedure. *Id.*, PageID#6594-95 (citation omitted). The district court concluded that Dr. Podraza's testimony was

"largely irrelevant" to the issues before the court given his lack of relevant experience and expertise, and because in his own practice he performs only "medical procedures for which there is no mandatory waiting period." *Id.*, PageID#6598.

C. Evidence Establishing Burdens

The district court also made detailed, well-founded findings regarding a number of severe burdens imposed on patients by the Delay Law and found that those burdens were "exacerbated" for patients traveling long distances—which "most patients must do . . . because of the small number and geographical distribution of abortion providers in the state." *Id.*, PageID#6630-32; *see also id.*, PageID#6530, 6532, 6544, 6555-56, 6574.

1. Wait Times and Delayed Procedures

Plaintiffs-Appellees' witnesses and experts "presented clear evidence" that the Delay Law has led to severe and burdensome delays—with some patients forced to wait up to four weeks between their first and second visit. *Id.*, PageID#6630-31. At Planned Parenthood health centers, wait times increased after the Delay Law went into effect from 1-2 weeks at the Memphis health centers for an abortion appointment to 2-3 weeks for the initial counseling appointment, and an additional 1-2 weeks for the second appointment to obtain an abortion. *Id.*, PageID#6528. Wait times at the Nashville and Knoxville Planned Parenthood clinics likewise increased from a week to up to three weeks for the first appointment,

and an additional 2-4 weeks for the second appointment. *Id.*, PageID#6556-57. At CHOICES, about half of patients waited up to 6 days between their initial visit and procedure appointment, and roughly 10% of patients waited more than two weeks between appointments. *Id.*, PageID#6542. This is in addition to the wait times for the first appointment, which are up to a week at CHOICES. *Id.*; *see also id.*, PageID#6615 (quoting Dr. Adams describing how his patients repeatedly expressed frustration with the Delay Law). These delays occurred despite extensive measures taken by each of the clinics to reduce wait times and to accommodate more patients. *Id.*, PageID#6523, 6530-31, 6545, 6564-65, 6618.

Consistent with this clear evidence of significant delay, the district court found that the Delay Law led patients to have abortion procedures at later gestational ages. Data presented at trial by Defendants-Appellants corroborates this point—following the Delay Law's enactment, there was an increase in second trimester procedures statewide: from 2014, the last full year before the Delay Law went into effect, to 2016, the first full year after the Delay Law went into effect, the percentage of abortions in the 13-14 week range increased nearly twofold, and the percentage of abortions in the 15-20 week range more than doubled. *Id.*, PageID#6558. Tennessee Department of Health data further reflected that, following the Delay Law's enactment, the percentage of patients obtaining early abortion procedures declined: from 2014 to 2016, the percentage of abortions

obtained before 8 weeks, 6 days of pregnancy decreased significantly, by almost 15%. *Id.*, PageID#6559.

Many patients who sought a medication abortion, which is only available up to 11 weeks LMP, were prevented from having one by the Delay Law. *Id.*, PageID#6630-32; *see also id.*, PageID#6523-24, 6532, 6544, 6557-60. Planned Parenthood witnesses testified that they "[f]requently" saw patients wishing to have a medication abortion who were ineligible by the time they were seen for their procedure appointment. *Id.*, PageID#6559; *see also id.*, PageID#6528-29, 6532, 6557. And at CHOICES, dozens of patients who were near the gestational cutoff and sought a medication abortion in 2018 were pushed past this cutoff by the Delay Law. *Id.*, PageID#6544.

As Plaintiffs-Appellees' witnesses testified at trial, being forced to remain pregnant and to delay necessary and wanted care after a patient has already made the decision to end a pregnancy can cause anxiety, mental anguish, and psychological harm. *Id.*, PageID#6603, 6608, 6618, 6632. Patients pushed past the medication abortion cutoff by the Delay Law were "incredibly distraught" after learning they were ineligible. *Id.*, PageID#6545 (citation omitted). And for some patients, medication abortion is medically indicated and safer than a surgical abortion. *Id.*, PageID#6523, 6560, 6566, 6631. The district court further found that, while abortion is very safe, having an abortion later in pregnancy increases the cost

of the procedure, subjects patients to increased medical risks, and makes the procedure lengthier and more painful, particularly for patients with certain health conditions. *Id.*, PageID#6524, 6528-29, 6543, 6547-48, 6558-59, 6631-32. For some patients, being delayed to a later point in pregnancy necessitates referral to a hospital for an inpatient surgical procedure, which costs between $6,000 and $12,000, or referral to an out of state provider. *Id.*, PageID#6558-59.

Alarmingly, the Delay Law pushed some patients beyond the limit for receiving an abortion at all in Tennessee. *Id.*, PageID#6631, 6532, 6544, 6557. As explained by the district court, "abortion is a time-sensitive procedure, and the window during which it can be performed is narrow." *Id.*, PageID#6631. Most patients who missed the cutoff continued the pregnancy even though that is not what they wanted. *Id.* Some patients were forced to travel further, to one of the two clinics in Tennessee where surgical abortions are available past 14 weeks, 6 days LMP. *Id.*, PageID#6557. And as Plaintiffs-Appellees' trial evidence showed, when there are barriers making it difficult for patients to access legal abortion, they are more likely to seek an abortion outside of the medical system, which can be unsafe, including trying to obtain medications over the internet or attempting to induce a miscarriage. *Id.*, PageID#6516, 6560, 6631.

2. Travel, Cost and Logistical Burdens

Tennessee is one of the poorest states in the nation. *Id.*, PageID#6571. Approximately 75% of women seeking abortions nationally are poor or low-income, and two-thirds of Tennessee women who seek abortions already have at least one child. *Id.*, PageID#6573. Citing this and other unrefuted data, the district court found that an "overwhelming majority" of Tennessee women seeking abortions are already mothers and are either poor or low-income. *Id.* (citation omitted). Moreover, as Dr. Katz explained at trial, the literature concerning access to abortion services has universally found that poor and low-income women are disproportionately burdened by the kind of increased travel that the Delay Law imposes. *Id.*, PageID#6573-77.

For some Tennesseans, these travel burdens can be insurmountable. *Id.*, PageID#6632, 6639. 96% of Tennessee counties do not have an abortion clinic, and 63% of Tennessee women live in a county where there are no abortion providers. *Id.*, PageID#6555 (citation omitted). Planned Parenthood sees many patients who travel long distances to reach a health center; data presented at trial showed approximately 3252 patients traveled 50-100 miles to reach a Planned Parenthood health center over the three-and-a-half-year period from July 2015 through December 2018, and approximately 2463 traveled more than 100 miles each way over the same time period. *Id.*, PageID#6530, 6556. A significant number of

CHOICES' patients similarly faced long travel distances: 15-16% traveled between 50 and 99 miles to reach the clinic, and 12% traveled over 100 miles. *Id.*, PageID#6544; *see also id.*, PageID#6616-17 (describing how at Bristol Regional Women's Center, there are "a not insignificant number of patients driving four and a half hours each way" for three separate visits to receive abortion care). As Ms. Terrell explained, these distances and the associated costs mean the Delay Law "pushed [patients' access to care] farther out of reach," and some patients "just can't do it." *Id.*, PageID#6544 (citation omitted).

Evidence presented at trial demonstrated how the transportation and related cost burdens imposed on Tennesseans by the Delay Law were particularly severe. For example, the cost of an abortion at CHOICES "almost doubled" after the Delay Law took effect. *Id.*, PageID#6545. And sample calculations performed by Dr. Katz showed that for a patient living in a county with no abortion provider and lacking private transportation, making a roundtrip visit to a clinic by private bus service can be costly and burdensome. *Id.*, PageID#6575-76. Further, due to inflexible schedules and bus timetables, a single roundtrip visit to a clinic might involve an overnight stay, which can significantly increase costs, especially if a woman needed to secure overnight accommodations and/or overnight childcare. *Id.* Poor and low-income women face a variety of other logistical burdens compounded by the Delay Law, including lack of paid time off or sick leave, lack of safe, reliable

childcare, and lack of credit card and internet access for booking transportation and accommodations. *Id.*, PageID#6634.

Dr. Katz's trial testimony also described how the logistical and financial hurdles imposed by the Delay Law reverberate through the already challenging life circumstances of Tennessee women seeking abortion. For example, because an abortion costs approximately $600 to $2,000 and most patients do not have insurance coverage for the procedure, *see id.*, PageID#6571, paying for an abortion out-of-pocket would cost a woman earning minimum wage a significant portion of her entire monthly income. Factoring in the added travel costs, lost wages, childcare, and other associated expenses, the Delay Law pushes abortion care even further out of reach for poor patients. For many, obtaining abortion care under the Delay Law means sacrificing basic needs to come up with the required funds—*i.e.*, not paying full rent, cutting back on basic utilities like heat, going without food, or foregoing other medical care. *Id.*, PageID#6571. In addition, poor and low-income women also often "borrow[] money from abusive partners" or accept predatory loans, jeopardizing their safety or putting them at risk of spiraling debt. *Id.*, PageID#6577, 6634. Dr. Katz described at trial how any unanticipated expense "throws [into question] the already . . . precarious balance that [low-income women are] trying to maintain to not be evicted, to not have utilities shut off, to make sure the children have food and basic medical needs are met." *Id.*, PageID#6571-72

(citation omitted). In light of Dr. Katz's testimony, the district court concluded that the logistical and financial obstacles imposed by the Delay Law were particularly burdensome for low-income women, who make up 60-80% of abortion patients in Tennessee. *Id.*, PageID#6633, 6639. As Dr. Katz observed, the transportation, childcare, financial, and employment barriers imposed by the Delay Law may compel Tennessee women to put themselves or their families at "grave risk." *Id.*, PageID#6571, 6577, 6633. For these patients, the costs and barriers created by the Delay Law are "either insurmountable or surmounted with great difficulty." *Id.*, PageID#6639.

3. Medical Conditions

The record demonstrated that the Delay Law was particularly harmful for women with medical conditions that can worsen as pregnancy progresses, but who do not meet the statute's extremely narrow "medical emergency" exception. *Id.*, PageID#6632. For example, hypertension can worsen as pregnancy progresses, increasing the risks to a patient's health, even though it does not rise to the level of creating a "medical emergency" under the statute. *Id.*, PageID#6529, 6548, 6563. Similarly, patients with prior uterine surgery may be at increased risk at later gestational ages, whether they continue the pregnancy or ultimately obtain an abortion. *Id.*, PageID#6548. Other patients may be suffering from pregnancy-related conditions like hyperemesis gravidarum (severe nausea and vomiting), which

can require multiple hospitalizations, *id*., PageID#6563-64; the Delay Law forces patients to endure these conditions for days, and often weeks longer.

Planned Parenthood saw approximately 4,350 patients between July 2015 and December 2018 with an underlying medical condition for whom a delay in obtaining abortion care put them at increased medical risk. Tr. Vol. 1, R.219, PageID#4588-90, 95:8-97:16 (Wallett); Tr. Vol. 2, R.220, PageID#4917-19, 125:1-127:20 (Young); App. at 294a-95a (JX53 at 4-5); App. at 309a-10a (JX54 at 4-5); JX56 (at 7-8); JX57 (at 4-5); *see also* Order, R.275, PageID#6548. CHOICES also regularly sees abortion patients with health conditions that can increase their medical risks, such as hypertension, hematologic disorders, and diabetes. Order, R.275, PageID#6543. In sum, and as the district court concluded, "[a]s gestational age increases, an abortion becomes lengthier, more invasive, more painful, and riskier for the patient"; moreover, "[d]elays in abortion care negatively affect the health of patients with certain medical conditions and cause patients to suffer emotionally and psychologically." *Id.*, PageID#6632.

4. Rape, Intimate Partner Violence, and Fetal Condition

The district court also heard testimony that the Delay Law caused abortion patients "significant stress and anxiety" and could be especially "distressing and traumatizing" for patients in abusive relationships, who are rape survivors, or who have a fetal diagnosis. *Id.*, PageID#6561-62 (citations omitted). The district

court reviewed evidence showing survivors of rape, incest, and intimate partner violence were among Plaintiffs-Appellees' patients, and that there may be many more patients who did not disclose their status to Plaintiffs-Appellees. *Id.*, PageID#6562, nn.27-28. The district court received data at trial estimating that 6-22% of women seeking abortions report experiencing intimate partner violence, findings consistent with Dr. Katz's experience interviewing survivors of intimate partner violence in Tennessee. Tr. Vol. 2, R.220, PageID#5038-39, 246:18-247:15 (Katz). Planned Parenthood regularly sees patients who experience intimate partner violence, and the numbers reflected in Planned Parenthood's data are likely an underestimate because some patients choose not to disclose intimate partner violence. Order, R.275, PageID#6562 n.27.

Dr. Katz explained at trial that for patients who have been raped, terminating the pregnancy as quickly as possible may be critical to their psychological health and well-being. Tr. Vol. 2, R.220, PageID#4912, 120:2-11 (Katz). Based on the record evidence, the trial court concluded that "[v]ictims of rape or incest, as well as women who have a fetal anomaly, find it particularly traumatizing that, because of the mandatory waiting period, they must remain pregnant for days or weeks longer than they wish." Order, R.275, PageID#6632. And for victims of intimate partner violence, the Delay Law's requirement that patients make at least two separate trips to the health center increases the risk of their

abuser learning they are seeking an abortion. *Id.*, PageID#6530. As the trial evidence demonstrated, it can be difficult for these patients to schedule even one appointment because of an abusive partner's surveillance of their phone or travel, and it can similarly be hard for them to gather necessary funds because abusive partners often control their income. *Id.*, PageID#6555. Having to travel multiple times and gather even more funds may well put an abortion entirely out of reach. Further, victims of intimate partner violence forced to carry a pregnancy to term because they were unable to access abortion face an elevated risk that physical abuse will continue. *Id.*, PageID#6530, 6561, 6632.

5. The Patient-Physician Relationship

The district court also heard testimony that the Delay Law negatively impacts the physician-patient relationship and undermines patient autonomy. *Id.*, PageID#6562-63. As Dr. Adams testified, patients are understandably averse to "someone else telling them how to manage their lives on something that they consider so personal." *Id.*, PageID#6615 (quoting Dr. Adams). And Plaintiff-Appellees' expert witness Dr. Goodman explained that while the informed consent process respects patient autonomy by allowing patients to make decisions on their own timeline, the Delay Law defied this principle by imposing additional unnecessary requirements that infringe on the wishes of patients who have carefully considered their decision and are ready to proceed. *Id.*, PageID#6534-35. Based on

Dr. Goodman's expert testimony, the district court found there is no benefit to delaying medical procedures where patients are already prepared to provide informed consent, and therefore the Delay Law "undermines patient autonomy," "self-determination," and "the doctor-patient relationship." *Id.*, PageID#6537, 6635.

6. Stigma

Plaintiffs-Appellees' expert Dr. McClelland presented testimony at trial demonstrating that the Delay Law was harmful to women, as it perpetuates negative stereotypes of women as "irrational, overly emotional, and incapable decision-makers." *Id.*, PageID#6569. By further entrenching these stereotypes, the law promotes stigma against women and may increase gender-based discrimination, both of which are harmful to women's health and well-being. *Id.*, PageID#6567-68. Dr. McClelland presented evidence of findings across a broad body of research, supported by hundreds of studies, that experiencing stigma has a "wear and tear" effect on both psychological and physical health, which leads to negative health outcomes, including, but not limited to, high blood pressure, increased rates of cardiovascular disease, increased cortisol secretions, depression, anxiety, and increased substance abuse. *Id.*, PageID#6568 (citation omitted).

D. Evidence Concerning the State's Asserted Interests

The district court also carefully considered the State's evidence that the Delay Law furthered two state interests: "(1) protecting fetal life 'by offering prospective abortion patients an opportunity to make a different choice,' and (2) benefitting women's mental and emotional health 'by allowing for more . . . [decisional] certainty.'" *Id.*, PageID#6622 (citation omitted). On careful consideration of the record, the district court concluded that the Delay Law did not advance either of these interests. *Id.*

At trial, the State argued the Delay Law advanced the protection of fetal life by relying on data from Plaintiffs-Appellees' records. The State claimed that, since the Delay Law's enactment, more than 2,000 patients had a first appointment and provided informed consent but did not return for an abortion. Appellants' Br. at 22. According to the State, this demonstrated that women decided not to return for an abortion after giving it more thought during the mandated delay. However, as the district court noted, there are many reasons why a patient may not attend a second appointment, including "an inability to return to the clinic because of logistics, a scheduling conflict, and ineligibility for abortion care (due to miscarriage, ectopic pregnancy, no pregnancy, or too advanced pregnancy)." Order, R.275, PageID#6623.

The State's "scant" evidence to the contrary included a study on Utah's 72-hour waiting period. *Id.*, PageID#6624. But Plaintiffs-Appellees' expert Dr. Biggs explained that in fact, this study demonstrated that Utah's 72-hour waiting period "burden[ed] women with financial costs, logistical hassles, and extended periods of dwelling on decisions they had already made." *Id.*, PageID#6610 (quoting Dr. Biggs). The testimony of Plaintiffs-Appellees' fact witnesses supported the district court's finding, for they observed that there did not appear to be any correlation between the number of patients who express uncertainty at a first appointment and do not return for a second. *Id.* Even Defendants-Appellants' expert, Dr. Podraza, conceded there are "multiple reasons" why it might be a difficult for patients to return for an additional appointment, and that a patient's failure to return does not mean she did not want to have the procedure. *Id.*, PageID#6623 (quoting Dr. Podraza). Analyzing all the evidence in the record, the district court rejected the State's claim that the Delay Law caused patients to change their minds and concluded that "the most likely reason [patients] do not appear for a second appointment is that they cannot overcome the financial and logistical barriers the 48-hour waiting period imposes." *Id.*, PageID#6624.

The State also contended that the Delay Law promotes its interest in enhancing patient decision-making concerning abortion care and informed consent, Appellants' Br. at 18, and presented evidence at trial that supposedly supported that

contention. But the district court carefully considered this evidence and found it unpersuasive. Order, R.275, PageID#6622-30. To make its point, the State relied almost exclusively on the testimony of Dr. Coleman. But as noted *supra* at pp. 9-12, the district court found Dr. Coleman's testimony was unsupported and lacked credibility for a number of reasons. And the district court further found that the vast majority of Plaintiffs-Appellees' patients were already "quite certain" in their decision to have an abortion on their first visit. *Id.*, PageID#6625, 6527-28, 6539-40, 6550-52, 6615, 6627. Indeed, none of the provider witnesses had ever had a patient express that the Delay Law benefitted them. *Id.*, PageID#6562-63, 6615-17.

The district court considered Dr. Coleman's opinion that abortion "increases the risk" of negative mental health outcomes but did not credit that testimony because Dr. Coleman conceded there is no evidence of a causal relationship between the two, and because the research presented by Dr. Biggs refutes this theory. *Id.*, PageID#6584, 6589, 6511. Dr. Biggs testified that certain factors may increase the risk of negative mental health outcomes for patients who have abortions, including a prior history of mental health issues. *Id.*, PageID#6605-06. For that reason, as Dr. Biggs explained, it is essential that researchers *control* for these factors and follow established criteria for proper study design. *Id.* The research cited and performed by Dr. Biggs bears these hallmarks of legitimacy, while the studies cited and performed by Dr. Coleman do not. *Id.*, PageID#6602 n.41,

6605-06. Even Dr. Coleman conceded that it would require a "leap" to infer from the studies she reviewed that patients benefitted from a mandatory waiting period. *Id.*, PageID#6581.

While Defendants-Appellants insist "many women regret their [abortion] decision," Appellants' Br. at 19, the district court concluded based on the evidence presented at trial that regret following abortion is extremely rare. Dr. Coleman herself acknowledged that "many women will not regret their decision to have an abortion" and conceded that she had relied on non-peer reviewed articles, including "a newspaper poll" and "a survey of anonymous letters written to a pastor at a church in Florida," in forming her opinion that abortion leads to regret. Order, R.275, PageID#6584 (citations omitted). Dr. Biggs testified that women experience diverse emotions around abortion, but rigorous research shows women who receive a wanted abortion actually report lower levels of regret over time as compared to women denied a wanted abortion. *Id.*, PageID#6611-12. This is consistent with the experience of Dr. Wallett, who testified that she has treated thousands of abortion patients and has never had a patient express regret after an abortion. *Id.*, PageID#6528. 6532. Dr. Biggs further testified that there is no evidence that regret or mental health harm following abortion is common, nor is there any evidence that the Delay Law would reduce or prevent regret. *Id.*, PageID#6601-02, 6604-05, 6607-08, 6628.

Not only did Dr. Coleman's testimony fail to demonstrate that the Delay Law advanced the state's interest in decisional certainty, but Plaintiffs-Appellees also presented compelling testimony from their fact witnesses demonstrating the opposite. Plaintiffs-Appellees' fact witnesses testified that, both before and after the Delay Law, the vast majority of patients seeking abortions in Tennessee were clear and confident about their decision to have an abortion, and patients took their decision-making very seriously before they came into the health center. For example, among Planned Parenthood's patients, between 96% and 99% of patients (depending on the time period) were clear and certain in their decision. *Id.*, PageID#6528, 6531, 6552-53, 6627 n.51; *see also id.*, PageID#6540 (CHOICES).

The district court also heard testimony reflecting that most patients are familiar with and understand what an abortion is, and have begun to think about their options long before their appointment and often even before they were pregnant. *Id.*, PageID#6527-28, 6552. Prior to their appointment many had already consulted with their partners, families, friends, gynecologist or other physician, or religious leaders. *Id.*, PageID#6520, 6527, 6552. And before the Delay Law took effect, patients seeking abortion had sufficient time to consider their options before they came in for their appointment. *Id.*, PageID#6527-28, 6552, 6627.

The district court additionally reviewed testimony from Plaintiffs-Appellees' witnesses reflecting that prior to passage of the Delay Law, Tennessee's abortion care providers had already employed robust patient education and informed consent processes consistent with state law requiring informed consent for any medical procedure and Plaintiffs-Appellees' ethical obligations as medical providers. *Id.*, PageID#6537. As the district court heard, PPTNM educators discussed with every patient her decision to have an abortion, including asking the patient her feelings about the decision, if she felt confident in her decision, whether the partner in the pregnancy was aware of her decision, if she had support, and whether anyone was forcing or coercing her to make the decision, as well as assessing patients' demeanor. *Id.*, PageID#6525-26, 6548-50. If an educator did not feel comfortable with the patient's level of confidence in her decision, the educator would have further discussions with the patient to ensure her decision was her own and that she was clear in her decision, and also ask the physician to do additional screening. *Id.*, PageID#6526; *see also id.*, PageID#6539-41 (describing similar protocols at CHOICES and testifying that any patient who remained uncertain after additional screening with a clinic coordinator would not have procedure performed that day); Adams Dep., R.216-1, PageID#4229-31, 151:21-153:5 (describing similar screening for decisional certainty and informed consent at Bristol Regional Women's Center). Plaintiffs-Appellees' expert Dr. Goodman confirmed in his trial

testimony that the Delay Law did not improve upon these existing informed consent processes already mandated in Tennessee and practiced by Plaintiffs-Appellees. Order, R.275, PageID#6535, 6537.

After considering this record evidence from both parties, the district court determined that "women's mental and emotional health is not benefitted because the mandatory waiting period does nothing to increase the decisional certainty among women contemplating having an abortion," and "the evidence demonstrates that at least 95% of women are certain of their decisions, post-abortion regret is uncommon, and abortion does not increase women's risk of negative mental health outcomes." *Id.*, PageID#6630.

III. The District Court's Ruling

After carefully considering the robust trial record and offering exhaustive findings of fact and conclusions of law in its 136-page opinion, the district court ruled that the Delay Law unconstitutionally burdened patients' right to abortion care and permanently enjoined its enforcement.

Applying *Casey*'s "undue burden" test, the district court weighed the burdens and benefits of the Delay Law and concluded that the statute "substantially burdens women seeking an abortion in Tennessee." *Id.* The district court ruled that Plaintiffs-Appellees' evidence "demonstrated conclusively that the statute causes increased wait times, imposes logistical and financial burdens, subjects patients to

increased medical risks . . . stigmatizes and demeans women," and "undermines the doctor-patient relationship[,] and imposes operational and financial burdens on abortion providers." *Id.* The district court determined that the logistical and financial obstacles imposed by the Delay Law were particularly burdensome for low-income women, who make up the majority of abortion patients in Tennessee. *Id.*, PageID#6633. And the district court noted that, despite Plaintiffs-Appellees' efforts to mitigate these burdens by "open[ing] . . . additional clinic[s], expand[ing] the clinics' schedules, modify[ing] the counseling and informed consent process, hir[ing] additional physicians and staff, [and] increas[ing] gestational age cut offs," patients were still severely burdened by the Delay Law. *Id.*, PageID#6635.

The district court also determined that the Delay Law did not serve the State's asserted interests. *Id.*, PageID#6622, 6625. No record evidence supported the State's theory that patients who did not return for a second appointment did so because they changed their minds. *Id.*, PageID#6625-27. The district court credited, instead, the evidence showing that cancelled appointments likely resulted from the logistical burdens imposed by the law. *Id.*, PageID#6623-24. Likewise, no evidence supported the State's suggestion that the Delay Law increased decisional certainty among women contemplating abortion or reduced the risk of negative mental health outcomes. *Id.*, PageID#6630. Dr. Coleman's testimony that the Delay Law served these state interests was "flatly contradicted by the credible record evidence" and

was supported only by studies that "are irrelevant or deeply flawed and deserve no serious consideration." *Id.*, PageID#6626.

As a result, the district court determined that the purpose or effect of the Delay Law was to place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, PageID#6636. The district court found that the evidence showed at least 95% of women who attend an appointment at an abortion clinic fall within the category of women who are certain of their decision when they seek abortion services, and that for this relevant category of women, the Delay Law unduly burdened their access to abortion care. *Id.*, PageID#6639. The district court, distinguishing *Casey*, further concluded that this case has "what was lacking in *Casey*: a fully developed record that clearly shows the extent to which the mandatory waiting period places a substantial obstacle in the way of women who seek an abortion." *Id.*, PageID#6638. The district court also pointed out that when *Casey* was decided, Pennsylvania had 81 abortion providers, "fully ten times as many as Tennessee has currently," despite the comparable sizes of the states. *Id.* Indeed, this distinction "helps to explain why the burdens in this case are more severe than those established in *Casey*." Stay Op. at 16 n.10.[3]

[3] While Defendants-Appellants denounce the trial court's consideration of this evidence because it is not mentioned in the *Casey* decision, Appellants' Br. at 56, the district court's determination was based on record evidence and clearly illustrates how "abortion services were far less available in Tennessee than in Pennsylvania when the Court decided *Casey*," Stay Op. at 16 n.10.

Three weeks after the district court's ruling, Defendants-Appellants moved for a stay pending appeal, arguing the district court should have applied the "undue burden" test articulated by the Chief Justice in his concurrence in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). Mem. of Law in Supp. of Stay Mot., R.281, PageID#6661. The district court denied the motion, finding Defendants-Appellants were unlikely to succeed on appeal. Opinion & Order Denying Stay Mot., R.287, PageID#6720. In response to the claim that the district court had applied the wrong legal standard, the court held that:

> [W]ith or without [the *Whole Woman's Health*] balancing test, the Tennessee statute constitutes a "substantial obstacle to a woman seeking an abortion" and, thus, an undue burden. As this Court stated in its opinion, "the waiting period . . . significantly delays this time sensitive medical procedure, and also makes it so time-consuming, costly, and inconvenient to obtain that the predominately low-income population seeking the service must struggle to access it, if they can access it at all."

Id., PageID#6721 (quoting Order, R.275, PageID#6638).

Defendants-Appellants next moved for a stay pending appeal before this Court. On February 19, 2021, a panel of this Court denied Defendants-Appellants' motion. In response to Defendants-Appellants' renewed argument that the district court applied the wrong standard, the Court found that "the district court has already made the relevant findings of fact" that likely satisfied Defendants-Appellants' preferred iteration of the *Casey* test. *Bristol Reg'l Women's Ctr, P.C. v. Slatery*, No. 20-6267, slip op. at 10 (6th Cir. Feb. 19, 2021) ("Stay Op.").

Defendants-Appellants then sought to bypass this Court's normal appellate process to obtain their desired result, filing multiple motions directed at the en banc Court. *See* Doc. No. 39; Doc. No. 42; Doc. No. 43. Although the State's motion for an administrative stay and petition for initial hearing en banc remain pending, on March 31, 2021, the State, unwilling to give this Court any further time to consider its motions, filed a notice stating that it intends to seek a stay of the district court's judgment and injunction from the Supreme Court no later than April 5, 2021. Doc. No. 60.

SUMMARY OF ARGUMENT

The district court appropriately applied the undue burden standard and its order enjoining the Delay Law should be affirmed.

First, the district court conducted an exhaustive analysis of the factual record and correctly concluded, based on the record as a whole, that the Delay Law "severely burdens the majority of women seeking an abortion." Order, R.275, PageID#6638. The district court considered extensive evidence of patient burdens including increased costs, logistical hurdles, extreme delays, increased medical risks, and emotional and psychological harms. Record evidence also showed that some patients missed the cutoff for a medication abortion due to the Delay Law, and others were delayed beyond the cutoff for receiving an abortion altogether. This evidence amply supports the district court's determination that the Delay Law is

unconstitutional under *Casey*'s undue burden standard, as reaffirmed in *Whole Woman's Health* and *June Medical*'s plurality opinion, as well as the undue burden analysis articulated in the Chief Justice's *June Medical* concurrence and advanced here by Defendants-Appellants.

Second, this Court must defer to the district court's rigorous analysis of the factual record, which confirmed that the Delay Law conferred *no actual benefits*. Thus, not only did the Delay Law's purported benefits fail to outweigh its burdens, but the law did not even bear a reasonable relationship to the State's asserted interests, as Defendants-Appellants' iteration of the "undue burden" test would require.

Third, the district court appropriately applied the large fraction test in granting facial relief, correctly concluding that a large fraction of women impacted by the Delay Law would be unduly burdened. Defendants-Appellants' arguments to the contrary mischaracterize the legal authorities on this point.

Fourth, Defendants-Appellants have not and cannot demonstrate that the district court's thorough, well-supported findings of fact were clear error—an extraordinarily high hurdle.

For these reasons, and as set forth more fully below, the district court's ruling should be affirmed.

STANDARD OF REVIEW

The Sixth Circuit reviews a district court's factual findings for clear error and legal conclusions de novo. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625 (6th Cir. 2016). As the Supreme Court's recent decision in *June Medical* makes clear, a district court's factual findings are entitled to substantial deference by appellate courts and must be followed unless clearly erroneous. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2141 (Roberts, C.J., concurring) (clear error review follows from a "candid appraisal of the comparative advantages of trial courts and appellate courts"). Under the clear error standard, if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals will not reverse it even if it would have ruled differently. *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 990 F.2d 865, 870 (6th Cir. 1993) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985)). "Where two logically permissive interpretations of the evidence exist, the trial judge's selection cannot be adjudged clearly erroneous on appeal." *Franklin Cnty. Convention Facility v. Am. Premier Underwriters*, 240 F.3d 534, 541 (6th Cir. 2001) (citation omitted) (no clear error in district court's decision to afford more credibility to some witnesses than others).

While interpretation of the undue burden standard is a legal question, findings of facts relevant to this standard—the burdens imposed and the state

interests furthered—are reviewed for clear error, with deference to the trial court's fact-finding. In other words, when the relevant factors "are properly considered, and supporting factual findings are not clearly in error, the district court's judgment of how opposing considerations balance should not lightly be disturbed." *Duha v. Agrium, Inc.*, 448 F.3d 867, 883 (6th Cir. 2006) (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)) (affording deference to trial court's evaluation of *forum non conveniens* factors). Even if this Court rules that *Whole Woman's Health*'s balancing test has been supplanted in this Circuit by a test that does not directly weigh burdens against benefits, the district court's ruling must be upheld so long as its factual findings were not clearly in error and support affirmance under the alternative legal analysis. *See* Stay Op. at 10 ("[I]n constitutional cases where the issuance of injunctive relief turns largely on the merits and the district court has already made the relevant findings of fact, a remand may well be unnecessary."); *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F. 3d 700, 712 (3rd Cir. 2004) (finding remand unnecessary despite district court's application of incorrect legal standard "if application of the correct standard could support only one conclusion").

ARGUMENT

I. The Trial Court Appropriately Held, Based on Well-Supported Findings of Fact Entitled to Deference, that the Delay Law Imposes an Undue Burden.

The trial court correctly applied the undue burden analysis articulated by the Supreme Court. Under that test, an abortion regulation must be struck down if it imposes an "undue burden"—meaning it has "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." Order, R.275, PageID#6641 (citing *June Med. Servs. L.L.C.*, 140 S. Ct. at 2112 (plurality opinion)); *see also June Med. Servs. L.L.C.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting *Casey*, 505 U.S. at 877 (plurality opinion)). Applying this standard, the court found that the Delay Law "serv[es] no legitimate purpose" and "severely burdens the majority of women seeking an abortion." Order, R.275, PageID#6638. Ultimately, the district court concluded the Delay Law imposed an undue burden under the articulation of the *Casey* test prescribed by *Whole Woman's Health* and the *June Medical* plurality as well as the version advanced by Defendants-Appellants based on Chief Justice Roberts' *June Medical* concurrence.

A. The District Court Correctly Found that the Delay Law Imposes Severe Burdens on Abortion Patients in Tennessee.

The district court concluded, based on the "overwhelming evidence," that the Delay Law "burdens the majority of abortion patients with significant, and often insurmountable, logistical and financial hurdles," Order, R.275, PageID#6632,

6638, hurdles far greater than those presented in *Casey* or *Taft*, *id.*, PageID#6637-38. Specifically, the district court found that that the Delay Law "severely burdens the majority of women seeking an abortion," imposing "significant[] delays" that push patients into later procedures and make the procedure more "time-consuming, costly, and inconvenient," and for some, eliminating options, significantly increasing their medical risk, or preventing them from receiving care at all. *Id.*, PageID#6638.

The trial court's extensive analysis of the factual record resolutely supports these conclusions. Plaintiffs-Appellees' witnesses testified at length as to the significant burdens faced by their patients and clinics following the Delay Law. Crediting their testimony, the district court concluded that the Delay Law caused protracted waiting times, affected patients' eligibility for different—and in some cases, safer procedures—and caused patients to experience significant logistical and financial hurdles. *See, e.g.*, *id.*, PageID#6630-32, 6635.

Contrary to the State's arguments, *see* Appellants' Br. at 48, the burdens and harms described by the trial court are legally cognizable. The Supreme Court has recognized that a broad range of harms may impose an undue burden, including the need for additional travel; increased costs; the law's impact on vulnerable populations; the risks posed to a patient's privacy, especially in the context of domestic abuse; and protracted wait times and overcrowding at clinics.

See June Med. Servs. L.L.C., 140 S. Ct. at 2128-30 (plurality opinion) (holding that, "keep[ing] in mind the geographic distribution of the doctors and their clinics," after the implementation of Louisiana's requirement that doctors have admitting privileges, even patients "not altogether prevented from obtaining an abortion would face other burdens" including "longer waiting times," "increased crowding," "delays," and "increased driving distances" (citations omitted)); *id.*, 140 S. Ct. at 2140 (Roberts, C.J., concurring) (listing burdens cited by the district court including "longer waiting times for appointments, increased crowding and increased associated health risk," "difficulty affording or arranging for transportation and childcare on the days of their clinic visits," and "[i]ncreased travel distance[s]" (citations omitted)); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312-13, 2318 (2016); *Casey*, 505 U.S. at 885-86, 893-94 (plurality opinion).

Numerous courts have recognized that burdens like those at stake here—delay, increased travel and cost, and stigma—may impose an unconstitutional undue burden. *See, e.g.*, *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1326-27 (11th Cir. 2018) (affirming injunction against state law imposing outsized burdens including increased "costs of travel and lodging for women who do not live near the plaintiff clinics," which are "especially burdensome for low-income women"), *cert. denied sub nom. Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606, (June 28, 2019) (Mem.); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908,

919 (7th Cir. 2015) (affirming permanent injunction against state law imposing burdens, including requiring some patients to travel 90 miles each way, and noting these travel burdens may be insurmountable for some low-income patients), *cert. denied*, 136 S. Ct. 2545 (2016); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1356-60 (M.D. Ala. 2014) (considering broad range of burdens, including socioeconomic factors and logistical challenges of arranging child care, transportation, and time off work); *Whole Woman's Health v. Smith,* 338 F. Supp. 3d 606, 637 (W.D. Tex. 2018) (considering burdens such as increased grief, stigma, shame, and distress on "those women" affected by the regulation), *appeal stayed sub nom. Whole Woman's Health v. Phillips,* No. 18-50730 (5th Cir. Sept. 7, 2018); *Planned Parenthood of Ariz., Inc. v. Humble,* 753 F.3d 905, 915 (9th Cir. 2014) (considering a law's "stigmatizing" effects in applying the undue burden standard). Defendants-Appellants argue these are not independent burdens, but rather the "predictable *effects* of moderate delay." Appellants' Br. at 50. However, this attempt to recast Plaintiffs-Appellees' evidence of burdens as mere byproducts of the waiting period flies in the face of Supreme Court jurisprudence and this Court's own precedent. *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 799 (6th Cir. 2020) (recognizing patient burdens including "expos[ing] themselves to the negative consequences to their health," having "to invest additional time in the procedure," and "subject[ing] themselves to an additional

invasive and potentially experimental procedure"), *reh'g en banc dismissed*, 831 F. App'x 748 (6th Cir. 2020), *cert. granted in part sub nom. Cameron v. EMW Women's Surgical Ctr.*, No. 20-601, 2021 WL 1163735 (U.S. Mar. 29, 2021). Defendants-Appellants are also incorrect that the undue burden standard demands evidence of specific women impacted by abortion restrictions. *See* Appellants' Br. 30, 58-59. Neither the Supreme Court nor the Sixth Circuit have ever required such evidence, and instead have recognized a range of evidence to show burden, placing particular weight on credible expert analysis. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2310 ("[T]he Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings."); *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 511-12 (6th Cir. 2006) (relying on district court's analysis of expert and rebuttal testimony to conclude evidence was sufficient to support the necessity of a health or life exception).

Defendants-Appellants next posit that Plaintiffs' evidence of burdens falls short because "the Constitution does not protect a woman's preferred method of abortion." Appellants' Br. at 51. But this argument ignores record evidence showing that access to medication abortion is not merely a matter of personal preference—surgical abortion is more invasive, is not offered at all health centers, may have longer wait times, and can be more expensive than medication abortion.

See Order, R.275, PageID#6523, 6545, 6547-48, 6556-57, 6559, 6560, 6566, 6631. Moreover, as the district court explained, for some patients with particular health conditions, surgical abortion is medically inadvisable. *Id.*, PageID#6523-24, 6631.

Finally, Defendants-Appellants contend that these burdens are not undue because they were caused by the providers. Appellants' Br. at 55. This argument flouts Supreme Court precedent establishing that the undue burden analysis requires courts to examine the impact of a challenged law in its real-world context. *See Whole Woman's Health*, 136 S. Ct. at 2302, 2313; *see also Humble*, 753 F.3d at 915 (explaining undue burden analysis includes consideration of "the ways in which an abortion regulation interacts with women's lived experience, socioeconomic factors, and other abortion regulations"). Thus, courts analyzing the impact of laws affecting abortion access do so based on the landscape of abortion provision at the time of the litigation, not based on hypothetical scenarios about whether an abortion clinic could relocate, open new locations, hire additional staff, offer care for more hours on more days, or provide abortion later in pregnancy. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2128 (plurality opinion) (emphasizing that "the [geographic] distribution of doctors and clinics at the time of the District Court's decision" is relevant in analyzing the burdens of an abortion restriction); *id.* at 2133-34 (Roberts, J., concurring) (crediting district court's factual findings regarding decrease in abortion access created by challenged law); *Whole Woman's Health*, 136

S. Ct. at 2313, 2318 (finding Texas abortion restrictions unconstitutional based on closures of clinics as well as congestion at remaining clinics, and the resulting harms to patients). Defendants-Appellants' speculation that a provider could theoretically open more clinics or alter the services it provides has never been relevant to the undue burden analysis.[4]

For these reasons, under settled Supreme Court precedent, the burdens identified by the district court are numerous and legally significant; moreover, these burdens amount to substantial obstacles that warrant upholding the district court's order under either articulation of the "undue burden" test.

B. The State Failed to Demonstrate That the Delay Law Furthers or Is Reasonably Related to a Valid State Interest.

The district court's factual findings concerning the purported benefits of the Delay Law satisfy both articulations of the "undue burden" test—either the version set forth in *Whole Woman's Health* and the *June Medical* plurality on the

[4] Besides, the State has been the one passing a slew of other restrictions to make it even more difficult to provide abortion care, including prohibitions on coverage for abortion by Medicaid and the Affordable Care Act exchanges, Tenn. Code. Ann. § 56-26-134; a requirement that only physicians may administer medication abortion, Tenn. Code Ann. § 39-15-201(c); a prohibition against nurse practitioners and physician assistants prescribing or dispensing medication abortion drugs, Tenn. Code Ann. § 53-10-104(c); a prohibition against the use of telemedicine in abortion care, Tenn. Code Ann. § 63-6-241; and signage requirements that impose liability on both clinics and physicians, Tenn. Code Ann. § 39-15-202(i). At some point, Defendants-Appellants must acknowledge that abortion providers are not the ones to blame for the burdens the State's abortion restrictions impose.

one hand, or Defendants-Appellants' rendition on the other. Under Defendants-Appellants' version, the Delay Law must be "reasonably related to a legitimate state interest." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020) (quoting *June Med. Servs. L.L.C.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring)). However, the Delay Law does not pass constitutional muster even under Defendants-Appellants' iteration of the test, because the district court concluded that the Delay Law does not actually confer any benefits.[5]

At minimum, the State must show an actual "problem 'at hand for correction,'" and that the legislature "thought that the particular legislative measure was a rational way to correct it." *Id.* at 438 (quoting *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955)). Contrary to the State's claim, *EMW Women's* does not forbid courts from considering factual evidence to determine whether a state's asserted rationales are reasonably related to a legitimate state interest. Though rational basis review is deferential to the legislature, it does not prohibit a court from considering the record evidence in determining whether a state interest is legitimate and reasonably served by a regulation. *See*, *e.g.*, *Craigmiles v. Giles*, 312

[5] Defendants-Appellants urge this Court to apply the undue burden analysis articulated by Chief Justice Roberts, wherein a law imposing severe burdens is invalid, regardless of any benefits it confers. Yet if Defendants-Appellants had actually demonstrated any benefits conferred by the Delay Law, they would be more likely to prevail under the balancing test, wherein a law's benefits might outweigh even significant burdens.

F.3d 220, 223-27 (6th Cir. 2002) (rejecting Tennessee's proffered public health and consumer protection rationales for law prohibiting sale of caskets by anyone not licensed as a "funeral director," and examining legislative history along with record evidence presented at trial). Indeed, the Supreme Court has expressly acknowledged that courts have an independent duty to review factual findings and should not "place dispositive weight" on legislative fact-finding. *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

The State asserts that the Delay Law serves two interests—protecting potential life and ensuring informed decision-making. Appellants' Br. at 42-43. But these contentions are not supported by the evidence and rely solely on testimony that was refuted at trial and deemed lacking in credibility.

For example, the State points to record evidence that after the Delay Law took effect, some patients received state-mandated information at the first appointment but did not return for a second appointment. *See supra* pp. 25-26. However, nothing in the record supports the State's argument that patients who failed to return had changed their minds as a result of the Delay Law. Rather, the record evidence demonstrated there are multiple reasons a patient would not return for a follow-up appointment. Order, R.275, PageID#6623-24. The district court concluded the most likely explanation for missed second appointments was the burdens imposed by the Delay Law. *Id.* That makes the Delay Law unconstitutional.

See Casey, 505 U.S. at 877 (plurality opinion) (explaining that a law which purports to "further the [state's] interest in potential life must be calculated to *inform* the woman's free choice, not *hinder* it").

Nor has the State demonstrated that the Delay Law served its purported goal of improving decision-making and informed consent. The district court reviewed the record evidence demonstrating that Plaintiffs-Appellees already had, prior to the Delay Law, robust informed consent procedures in place, as would be required for *any* medical procedure in the state of Tennessee. *Supra* pp. 29-30. The district court further considered the testimony of Defendants-Appellants' witness Dr. Coleman, who opined that the Delay Law would enhance decision-making and prevent regret, together with the testimony of Plaintiffs-Appellees' rebuttal expert Dr. Huntsinger, who demonstrated the flaws in Dr. Coleman's testimony and opined that research on the decision-making process did not support Dr. Coleman's conclusions. *See supra* pp. 9-12. The court found Dr. Huntsinger's rebuttal credible and did not credit Dr. Coleman's testimony on the topic. Order, R.275, PageID#6588, 6594. In addition, the district court considered testimony from Plaintiffs-Appellees' expert Dr. Goodman, who explained that the Delay Law did not improve the informed consent process. *See supra* p. 30. Citing this evidence and the other evidence set forth above (*see supra* pp. 24-31), the district court correctly concluded that "women's mental and emotional health is not benefitted

because the mandatory waiting period does nothing to increase the decisional certainty among women contemplating having an abortion." Order, R.275, PageID#6630.

In sum, the district court carefully searched the record for evidence that the Delay Law actually furthered the State's interests in some way—and found none. Based on that finding, owed "clear error" deference by this Court, Defendants-Appellants cannot satisfy even the low rational basis threshold they favor.

II. The District Court Properly Applied *Casey's* Undue Burden Test and Did Not Commit a "Grave" Legal Error.

The district court appropriately weighed the burdens and benefits of the Delay Law, consistent with the undue burden analysis prescribed by *Casey* and reinforced by *Whole Women's Health* and the plurality opinion in *June Medical*. But as the foregoing findings demonstrate, the district court's findings concerning the burdens imposed by the Delay Law more than satisfy Defendants-Appellants' recitation of the undue burden standard as well.

The undue burden analysis "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Women's Health*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887-98 (plurality opinion)). When a law fails to confer "benefits sufficient to justify the burdens," the burdens are "undue," and thus unconstitutional. *Id.* at 2300.

This balancing test, Defendants-Appellants contend, has been supplanted in this Circuit by Justice Roberts' concurrence in *June Medical*. *See* Appellants' Br. at 63 (citing *EMW Women's*, 978 F.3d at 433 and *June Med. Servs., L.L.C.*, 140 S. Ct. at 2112). But for all the sturm und drang Defendants-Appellants raise in their brief about *EMW Women's* recent interpretation of *June Medical*, Defendants-Appellants "may well have overstated the precedential value" of that case. Stay Op. at 10.

In *June Medical*, a four-justice plurality of the Supreme Court affirmed the injunction of a nearly identical law to the one considered in *Whole Woman's Health*, applying the same balancing test. *June Med. Servs., L.L.C.*, 140 S. Ct. at 2112 (plurality opinion) (quoting *Whole Woman's Health,* 136 S. Ct. at 2300). The Chief Justice joined the majority on *stare decisis* grounds, but also criticized the balancing test applied by the plurality. *Id.* at 2134-36 (Roberts, C.J., concurring). The Sixth Circuit's recent decision in *EMW Women's*, which considered a Kentucky law restricting abortion, included an analysis of *June Medical* and reasoned that the Chief Justice's *June Medical* concurrence was controlling law. *EMW Women's,* 978 F.3d at 434. However, as Judge Clay noted in his dissent, the Chief Justice's critique of the *June Medical* balancing test was dicta, because his concurrence was based on *stare decisis*. *Id.* at 455 (Clay, J., dissenting). Although the majority in *EMW Women's* followed the Chief Justice's opinion on the basis that it was the narrower

opinion, *id.* at 431, 433, its reasoning on this point was also dicta because the majority ultimately decided that the law would have been invalid under either approach, *id.* at 454 n.2; *see United States v. Hardin,* 539 F.3d 404, 410-11, 413 (6th Cir. 2008) (a panel's choice between the two standards is dicta if it is not "necessary to the determination of the issue on appeal"). The Panel for this case reiterated Judge Clay's reasoning in its decision to deny the State's request for a stay pending appeal. Stay Op. at 9, 11.

Whatever the analysis, the Supreme Court's decision to uphold a 24-hour waiting period in *Casey* does not mean, as Defendants-Appellants would have it, that any such restriction—no matter how lengthy the delay, or how burdensome its effects—is per se reasonable. *See* Appellants' Br. at 43. The undue burden test outlined in *Casey* is context-specific and dependent on the record. Shortly after *Casey* was decided, Justice Souter, who co-authored the opinion of the Court in *Casey*, explained that other litigants were "free to challenge similar restrictions" to the 24-hour waiting period upheld in *Casey*. *Planned Parenthood of Se. Pa. v. Casey,* 510 U.S. 1309, 1313 (1994) (Souter, J., in chambers); *see also Karlin v. Foust,* 188 F.3d 446, 485 (7th Cir. 1999) ("While a twenty-four hour waiting period . . . has been found not to impose an undue burden on Pennsylvania women based on the circumstances of that state at the time the Court decided *Casey,* a similar provision in another state[ ] . . . could well be found to impose an undue burden on

women in that state depending on the interplay of factors . . . ."). Indeed, the Panel observed that the *Casey* court:

> Took pains to avoid a categorical ruling on the constitutionality of waiting period laws—it is not for an intermediate court such as ours to write such a holding into that case over a quarter-century later. If *Casey* stood for the proposition that waiting period laws are always constitutional, then it would have said so.

Stay Op. at 16-17. Consistent with that precedent, the district court correctly concluded that, regardless of which iteration of the "undue burden" test it applied, the record in this case had "what was lacking in *Casey*: a fully developed record that clearly shows the extent to which the mandatory waiting period places a substantial obstacle in the way of women who seek an abortion." Order, R.275, PageID#6638.

III. Given the Substantial Obstacles Imposed by the Delay Law, the District Court Appropriately Granted Facial Relief Under the Large Fraction Test.

An abortion regulation is facially unconstitutional "if 'it will operate as a substantial obstacle to a woman's choice to undergo an abortion' in 'a large fraction of the cases in which [it] is relevant.'" *Id.*, PageID#6620 (quoting *June Med. Servs. L.L.C.*, 140 S. Ct. at 2132 (plurality opinion) (citations omitted)). The large fraction inquiry is "more conceptual than mathematical." *Id.*, PageID#6620, 6639 (quoting *Taft*, 468 F.3d at 374).

The State argues that, in order for a court to facially invalidate the Delay Law, it must find that the Delay Law operates as a *de facto* ban on abortion.

Appellants' Br. at 47. But this extreme and unduly narrow articulation of the large fraction test, requiring that practically all women seeking abortion be essentially prohibited from receiving care, finds no support in the case law. As the district court correctly recognized, citing Sixth Circuit precedent, "a challenged restriction need not operate as a *de facto* ban for all or even most of the women actually affected" in order to be held facially unconstitutional. Order, R.275, PageID#6638-39 (quoting *Taft*, 468 F.3d at 374).

Instead, courts, including the Supreme Court, have consistently recognized a wide range of burdens when determining whether an abortion restriction is facially unconstitutional. *See supra* p. 40-43. Facial relief is warranted where, as here, the challenged provision will act as a substantial obstacle for a large fraction of patients who seek abortion care. *See June Med. Servs. L.L.C.*, 140 S. Ct. at 2132 (plurality opinion) (quoting *Casey*, 505 U.S. at 895 (plurality opinion)). "That standard, not an 'every woman' standard, is the standard that must govern in this case." *Id.* at 2133 (plurality opinion); *see also* Stay Op.at 16 n.11 (explaining that in *Whole Woman's Health*, the Supreme Court ruled that the "severe financial and logistical burdens" imposed by Texas' admitting privileges law "were enough to render the law invalid, despite the fact that women could still (though with great difficulty) receive an abortion with the law in place").

The Supreme Court clarified in *Whole Woman's Health* that when applying the test, "the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'" 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895 (plurality opinion)); *Casey*, 505 U.S. at 894-95 (plurality opinion) (invalidating law that imposed an undue burden on a large fraction of the one percent of abortion patients who are married and do not voluntarily notify their spouses of the abortion); *EMW Women's*, 960 F.3d at 809 (holding that the relevant denominator consists of women to whom the restriction "actually applies"). In other words, this determination involves a "class narrower than 'all women,' 'pregnant women,' or even 'the class of women seeking abortions identified by the State.'" *Whole Woman's Health*, 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 894-95 (plurality opinion)); *see also Taft,* 468 F.3d at 374.

Here, the district court correctly held that the vast majority of Tennessee patients—over 95%—are harmed by the Delay Law, which subjects them to "increased medical risks; lengthier, more painful, and more expensive procedures; and stigma, which has harmful health consequences" and prevents some patients from receiving a particular method of abortion or from having an abortion in Tennessee at all. Order, R.275, PageID#6639. The district court further found that low-income patients, who make up 60 to 80% of Tennessee abortion patients, experience overwhelming burdens in terms of cost and logistical challenges,

resulting in even greater difficulties accessing care. *Id.* Thus, the district court's meticulous factual findings strongly support its conclusion that the Delay Law is facially unconstitutional.

IV. This Court Should Not Disturb the District Court's Factual Findings.

The State not only criticizes the district court's sound and thorough application of the law to the facts, but also repeatedly argues that the court's factual findings were clearly erroneous and therefore subject to remand. The State's "clear error" burden is a heavy one, which has not been met here. Given the deference owed to district court fact-finding, this Court should reject the State's invitation to reevaluate the district court's fact and credibility findings. *See June Med. Servs. L.L.C.*, 140 S. Ct. at 2141 (Roberts, C.J., concurring) (clear error review follows from a "candid appraisal of the comparative advantages of trial courts and appellate courts").

While Defendants-Appellants take great pains to rehabilitate the credibility of their expert witnesses, factual findings based on the credibility of fact and expert witnesses are entitled to special deference on appeal. *See Harrison v. Monumental Life Ins. Co.*, 333 F.3d 717, 723 (6th Cir. 2003) (upholding district court's decision where district court's "credibility judgment regarding the competing expert witnesses . . . dictated the outcome of the trial"); *Smoot v. U.S. Transp. Union*, 246 F.3d 633, 642 (6th Cir. 2001) (upholding district court where decision was based

on weight afforded to conflicting testimony). When a trial judge's finding is based on his decision to "credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Bradley J. Delp Revocable Trust v. MSJMR 2008 Irrevocable Trust*, 665 F. App'x 514, 525 (6th Cir. 2016) (quoting *Anderson*, 470 U.S. at 573-75).

The trial court's determination that Drs. Coleman and Podraza were not credible was not clear error. *See* Appellants' Br. at 45-46. To begin with, the district court found that both Drs. Coleman and Podraza were testifying to matters in which they had no expertise. *See supra* pp. 9-13. The trial court conducted an extensive analysis of Dr. Coleman's testimony, the studies she relied on, academic criticism of her work, and the fact that she relied on studies from other researchers she herself acknowledged were biased. *See supra* pp. 9-12. The district court additionally heard rebuttal testimony against Dr. Coleman and concluded this testimony "thoroughly impeached" her opinions. Order, R.275, PageID#6629. The district court likewise found that Dr. Podraza's expert testimony was largely irrelevant and unsupported. *See supra* pp. 12-13.

The State complains that the district court inconsistently evaluated the State's experts' views on abortion as compared to Plaintiffs-Appellees' experts' views. Appellants' Br. at 46. This grievance is easily discredited. The district court

noted that Drs. Coleman and Podraza's pro-life views *had influenced their opinions*; that is what undermined their credibility. Order, R.275, PageID#6588 (Dr. Coleman's "views as a social scientist are heavily influenced, if not entirely overridden by, her personal views"); *id.*, PageID#6598 (Dr. Podraza's "strong personal and religious views on abortion . . . have influenced his medical practice"). The district court made no factual findings, and there is no evidence in the record, that any of Plaintiffs-Appellees' expert witnesses held views on abortion that impacted the accuracy or credibility of their testimony, and the State points to nothing suggesting otherwise.

Nor can the State point to any other factual findings by the district court that meet the exceptionally high "clear error" hurdle. *See, e.g.*, Appellants' Br. at 53, 56. Defendants-Appellants argue that it was clear error to conclude any patients were pushed past the cutoff to obtain an abortion in Tennessee. *Id.* at 53. But it was not clear error for the district court to find that a patient was prevented from obtaining an abortion where no providers are available to perform the procedure beyond a certain gestational age. Order, R.275, PageID#6544, 6547. Moreover, it was not clear error to conclude that missing the medication abortion cutoff would be burdensome for some patients. *See* Appellants' Br. at 56. At bottom, there is no basis to overturn these or any of the other extensive factual findings contained in the district court's 136-page decision.

CONCLUSION

The district court's conclusion that the Delay Law unduly burdens access to abortion in Tennessee withstands any articulation of the "undue burden" test and is well supported by its extensive factual findings. This Court should affirm the judgment of the district court enjoining enforcement of Tennessee's Delay Law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 12,961 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

/s/ Autumn Katz
Autumn Katz

CERTIFICATE OF SERVICE

I, Autumn Katz, counsel for Plaintiffs-Appellees and a member of the Bar of this Court, hereby certify that on April 1, 2021, I electronically filed a copy of the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit through the appellate CM/ECF system. I further certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Autumn Katz
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DESIGNATION OF DISTRICT COURT DOCUMENTS

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140-3	Deposition Designations of Ann Reed (Part 1)	847-867
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