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 and Reporter of the State 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 OF DEFENDANTS-APPELLANTS

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Oral Argument Requested

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STATEMENT REGARDING ORAL ARGUMENT

The district court permanently enjoined Defendants from enforcing an abortion waiting-period law that is materially indistinguishable from laws the Supreme Court and this Court have upheld. That decision warrants careful review, including an opportunity for oral argument, because it contravenes binding precedent and infringes on Tennessee's sovereignty.

STATEMENT OF JURISDICTION

The district court's subject matter jurisdiction rested on 28 U.S.C. § 1331. The district court entered judgment and issued a permanent injunction on October 14, 2020. Judgment, R.276, PageID#6645. Defendants filed a notice of appeal on November 4, 2020. Notice of Appeal, R.279, PageID#6651-53. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in (1) holding that a Tennessee law requiring a waiting period of 48 or 24 hours for abortions, Tenn. Code Ann. § 39-15-202(a)-(h), violates a woman's Fourteenth Amendment right to obtain a previability abortion, and (2) permanently enjoining the law's enforcement.

INTRODUCTION

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that Pennsylvania's 24-hour abortion waiting period was not an undue burden, even though in practice it caused "delay[s] of much more than a day" and was "particularly burdensome" for "those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others." *Id.* at 885-86 (joint opinion) (quotation marks omitted). This Court held the same with respect to Ohio's 24-hour waiting period, even though it "could . . . delay[] abortions up to two weeks" and deterred a small percentage of women from obtaining an abortion altogether. *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361, 366, 373 (6th Cir. 2006).

One would think those binding precedents preordain the outcome in this case. Tennessee's waiting-period law is materially identical to the laws upheld in *Casey* and *Taft*. The only difference is the length of the waiting period, but Tennessee's legislature eliminated even that potential distinction by providing that a 24-hour Fwaiting period should apply if the 48-hour period is enjoined. Tenn. Code Ann. § 39-15-202(d)(2).

Rather than adhere to *Casey* and *Taft*, the district court held Tennessee's waiting period unconstitutional based on purported differences in the factual record.

But those purported differences are either illusory or immaterial. The record in this case, like the records in *Casey* and *Taft*, fails to establish an undue burden.

As this Court recently reiterated, an abortion regulation is facially unconstitutional only if it "deter[s]" a large fraction of affected women "from procuring an abortion as surely as if the [State] ha[d] outlawed abortion in all cases." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 434 (6th Cir. 2020) (quoting *Taft*, 468 F.3d at 370). Here, the record establishes that the number of abortions performed in Tennessee decreased only slightly after the waiting period took effect. And that decrease began *before* the waiting period took effect and mirrors nationwide declines that occurred for reasons unrelated to waiting-period laws.

That record evidence alone forecloses Plaintiffs' facial challenge to Tennessee's waiting period because it conclusively establishes that the waiting period has not deterred a large fraction of affected women from obtaining abortions. The district court concluded otherwise by relying on evidence that is not materially different from the proof presented in *Casey* and *Taft* and that in any event falls far short of satisfying Plaintiffs' heavy burden in this facial challenge. There was no basis for the district court to depart from *Casey* and *Taft*. Those precedents control and require reversal of the decision below.

Tennessee is now the only State that cannot enforce its waiting-period law because of a federal-court injunction. Fourteen other States have similar laws that impose waiting periods of 18 to 72 hours and generally require two trips to an abortion provider. Although some of these laws have been challenged, the State is unaware of any successful federal constitutional challenge to a waiting-period law that has survived federal appellate review since *Casey* was decided. Federal courts have instead consistently upheld those laws. This Court should do the same.

STATEMENT OF THE CASE

I. Statutory Background

Tennessee first enacted a 48-hour waiting period for abortions in 1978, *see* 1978 Tenn. Pub. Acts, ch. 847, § 1, but it was soon enjoined from enforcing the law based on precedent that predated *Casey*. *See Planned Parenthood of Middle Tenn. v. Sundquist*, No. 01A01-9601-CV-00052, 1998 WL 467110, at *2-3 (Tenn. Ct. App. Aug. 12, 1998) (discussing earlier injunctions). After *Casey*, the Tennessee Supreme Court held Tennessee's waiting period unconstitutional under *state law*, and the State was again enjoined from enforcing it. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 25 (Tenn. 2000).

Tennesseans amended their state constitution to make clear that it does not protect a right to abortion. Tenn. Const. art. I, § 36; *see also George v. Hargett*, 879 F.3d 711, 714, 730 (6th Cir. 2018). In 2015, in direct response to that historic

amendment, the legislature enacted a new waiting-period law modeled after Tennessee's earlier law and the Pennsylvania law that *Casey* upheld. 2015 Tenn. Pub. Acts, ch. 473, § 1 (codified at Tenn. Code Ann. § 39-15-202(a)-(h)); *see also* Final Order, R.275, PageID#6515; Defs.' Proposed Findings and Conclusions, R.227, PageID#5635. The legislature heard testimony that "abortion is a serious and irreversible medical procedure with physical and psychological health risks" and that a mandatory waiting period would ensure that a woman's decision is informed and reduce the risk of coerced abortions. Final Order, R.275, PageID#6516-17.

Tennessee's waiting-period law prohibits the performance of an abortion unless the woman "provide[s] her informed written consent" to the procedure at least 48 hours after a physician has provided certain required information. Tenn. Code Ann. § 39-15-202(a), (d)(1).[1] To ensure that a woman's consent "is truly informed consent," the "attending physician who is to perform the abortion" or "the referring physician" must give the woman the required information "orally and in person." *Id.* § 39-15-202(b). As in *Casey*, the information the physician must disclose includes the probable gestational age of the unborn child, the risks and benefits of both continuing the pregnancy to term and undergoing an abortion, and the availability of resources to assist the woman "during her pregnancy and after the

[1] The law establishes an alternative 24-hour waiting period in the event the 48-hour period is enjoined. Tenn. Code Ann. § 39-15-202(d)(2).

birth of her child" if she decides against having an abortion. *Id.*; *cf. Casey*, 505 U.S. at 881 (joint opinion).

The law does not prohibit the performance of an abortion if a "medical emergency . . . prevents compliance" with the waiting period. Tenn. Code Ann. § 39-15-202(a)-(d). A "medical emergency is 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).

At present, abortion remains lawful in Tennessee until viability.[2] An intentional or knowing violation of the waiting-period law is a Class E felony, *id.* § 39-15-202(h)(1), and may subject a physician to professional discipline, *id.* § 39-15-202(h)(3).

[2] When the waiting-period law was enacted, and at the time of trial, Tennessee law permitted abortions until viability. *See* Tenn. Code Ann. § 39-15-211(b)(1). In 2020, the legislature enacted a law prohibiting abortions after the unborn child has a fetal heartbeat. *See id.* § 39-15-216(c)(1). Because the State is currently enjoined from enforcing that law, *see Memphis Ctr. for Reprod. Health v. Slatery*, No. 3:20-cv-00501, 2020 WL 4274198, *14-16 (M.D. Tenn. July 24, 2020), *appeal pending*, No. 20-5969 (6th Cir.), abortion remains available in Tennessee until viability. There is a rebuttable presumption that an unborn child of at least 24 weeks' gestational age, as measured from the date of the woman's last menstrual period ("LMP"), is viable. Tenn. Code Ann. § 39-15-211(a)(2), (b)(5). A doctor may not perform an abortion after 20 weeks without first determining that the unborn child is not viable. *Id.* § 39-15-212(a).

Tennessee's waiting-period law is hardly unique. Fourteen other States have similar laws that impose waiting periods of 18 to 72 hours and generally require two trips to an abortion provider.[3] Although some of those laws have been successfully challenged on *state law* grounds, Defendants are unaware of any successful *federal* constitutional challenge to a waiting-period law that has survived federal appellate review since *Casey* was decided.

II. Procedural and Factual Background

A. Plaintiffs' claims

Plaintiffs are three abortion providers that operate six of the eight abortion clinics in Tennessee. Final Order, R.275, PageID#6598-99. Bristol Regional Women's Center, P.C. ("BRWC") operates a clinic in Bristol; Memphis Center for Reproductive Health ("Choices Memphis") operates a clinic in Memphis; and Planned Parenthood of Tennessee and North Mississippi ("PPTNM") operates one clinic in Knoxville, one clinic in Nashville, and two clinics in Memphis. *Id.* at

[3] Ariz. Rev. Stat. Ann. § 36-2153(A) (24 hours); Ark. Code Ann. § 20-16-1703(b) (72 hours); Fla. Stat. Ann. § 390.0111(3)(a)(1) (24 hours); Ind. Code Ann. § 16-34-2-1.1(a) (18 hours); Iowa Code Ann. § 146A.1(1) (24 hours); Ky. Rev. Stat. Ann. § 311.725(1) (24 hours); La. Stat. Ann. § 40:1061.16(B)-(C) (72 hours; 24 hours if patient lives one hundred fifty miles or more from an abortion facility); Miss. Code Ann. § 41-41-33(1) (24 hours); Mo. Ann. Stat. § 188.027 (72 hours); Ohio Rev. Code Ann. § 2317.56(B)(1) (24 hours); S.D. Codified Laws § 34-23A-56 (72 hours); Tex. Health & Safety Code Ann. § 171.012(a)(4), (b) (24 hours); Utah Code Ann. § 76-7-305(2) (72 hours); Wis. Stat. Ann. § 253.10(3)(c)(1) (24 hours).

PageID#6599.[4] Before merging in June 2018, Planned Parenthood of Middle and East Tennessee ("PPMET") operated the Knoxville and Nashville clinics, and Planned Parenthood Greater Memphis Region ("PPGMR") operated the Memphis clinics. *Id.* at PageID#6511 n.3, 6522.

This litigation began in June 2015 when several abortion providers sued Tennessee officials alleging that the waiting-period law violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Compl., R.1, PageID#3-5, 18-19.[5] The complaint sought a declaratory judgment and a permanent injunction but did not seek preliminary relief. *Id.* at PageID#20-21. The waiting-period law took effect about a week later, on July 1, 2015, and it remained in effect throughout the litigation. 2015 Tenn. Pub. Acts, ch. 473, § 4.

In August 2017, a slightly different group of plaintiffs filed a second amended complaint asserting the same constitutional challenges to the waiting-period law. Second Am. Compl., R.70, PageID#443-44.[6] That complaint was the operative

[4] The other two clinics are in Mount Juliet (near Nashville) and Knoxville. Final Order, R.275, PageID#6599.

[5] Defendants are the Attorney General of Tennessee; the Commissioner of the Tennessee Department of Health; the President of the Tennessee Board of Medical Examiners; and the District Attorneys General of Metropolitan Nashville and Davidson County, Shelby County, Sullivan County, and Knox County, all in their official capacities. Second Am. Compl., R.70, PageID#428-29.

[6] When the second amended complaint was filed, the plaintiffs were Adams & Boyle, P.C.; PPGMR; PPMET; and Knoxville Center for Reproductive Health ("KCRH").

complaint at the time of trial.

B. Bench trial

The district court held a four-day bench trial on Plaintiffs' claims in September 2019. *See* Trial Tr. Vol. I-IV, R.219-22, 224, PageID#4494-5445, 5451-5529. The evidence presented at trial focused on the interests the waiting period furthers and the burdens it allegedly imposed.

Defendants presented three witnesses: Dr. Priscilla Coleman, an expert in "the psychology of abortion," Trial Tr. Vol. IIIA, R.221, PageID#5111; Dr. Michael Podraza, an expert in "obstetrics and gynecology in Tennessee," Trial Tr. Vol. IV, R.222, PageID#5227; and Dr. Vanessa Lefler, the director of vital statistics for the Tennessee Department of Health, *id.* at PageID#5269.

Plaintiffs presented eight witnesses: Dr. Sarah Wallett, the former medical director of PPGMR and former chief medical officer of PPTNM, Trial Tr. Vol. I, R.219, PageID#4525-27; Rebecca Terrell, the executive director of Choices Memphis, *id.* at PageID#4738; Dr. Jessica Young, the former medical director of PPMET and an expert in "the provision of abortion care and the burdens faced by patients attempting to access abortion care, including in Tennessee," Trial Tr. Vol.

Second Am. Compl., R.70, PageID#426-28. PPTNM was substituted for PPGMR and PPMET after the merger. Final Order, R.275, PageID#6511 n.3, 6522. BRWC was substituted for Adams & Boyle after that entity dissolved in 2019. *Id.* at PageID#6511 n.2. KCRH was voluntarily dismissed. *Id.* at PageID#6511 n.3.

II, R.220, PageID#4838-40; Dr. Kenneth Goodman, an expert in "medical ethics and informed consent," Trial Tr. Vol. I, R.219, PageID#4651-52; Dr. Sara McClelland, an expert in "stigma and its effect on the health and well-being of women," Trial Tr. Vol. II, R.220, PageID#4967; Dr. Sheila Katz, an expert in "the sociology of gender and . . . poverty," *id.* at PageID#5002; Dr. Jeffrey Huntsinger, a rebuttal expert in "the psychology of decision-making," Trial Tr. Vol. IIIB, R.224, PageID#5464; and Dr. Antonia Biggs, a rebuttal expert in "social psychology and . . . the mental health effects of abortion," Trial Tr. Vol. IV, R.222, PageID#5302.

1. The State's interests

Tennessee's legislature enacted the waiting-period law to further the State's interests in protecting unborn life and ensuring that a woman's irrevocable decision to have an abortion is informed. *See* Final Order, R.275, PageID#6516-17. The Supreme Court held in *Casey* that Pennsylvania's similar waiting period was rationally related to these interests. 505 U.S. at 885 (joint opinion). The evidence presented at trial further supported the law's rational basis.

Dr. Coleman, a Ph.D. in developmental psychology and author of dozens of peer-reviewed publications on abortion decision-making and the psychological correlates of abortion, *see* Trial Tr. Vol. IIIA, R.221, PageID#5097, testified that a significant percentage of women—between 25 and 50 percent—view abortion as a decision with "moral implications," *id.* at PageID#5114. Roughly the same

percentage of women experience ambivalence or "decisional distress" regarding abortion, *id.* at PageID#5124-25, and many women regret their decision, *id.* at PageID#5131-32. A metanalysis by Dr. Coleman that was peer reviewed and published in the *British Journal of Psychiatry* concluded that women who obtain an abortion have an 81 percent increased risk of experiencing a mental health problem compared to those who do not. *Id.* at PageID#5148-49. Dr. Coleman was unable to confirm a causal relationship between abortion and adverse mental health outcomes, but that is because random assignment is not feasible in the abortion context. *See id.* at PageID#5143. Dr. Coleman explained that women who are more certain of their abortion decision are less likely to experience adverse outcomes. *Id.* at PageID#5157. And based on research about the impact of stress on decision-making, Dr. Coleman opined that providing women additional time to decide whether to have an abortion would increase decisional certainty and reduce adverse outcomes. *Id.* at PageID#5122-26. Plaintiffs' experts agreed that abortion is a difficult decision with moral implications for some women, Trial Tr. Vol. II, R.220, PageID#5066, and that the waiting period could benefit at least some women, Trial Tr. Vol. IIIB, R.224, PageID#5520.

Dr. Podraza, a practicing obstetrician and gynecologist in Memphis, Trial Tr. Vol. IV, R.222, PageID#5217, explained that it is common for patients undergoing elective medical procedures to experience a delay between receiving information

about the benefits and risks of the procedure and undergoing the procedure. *Id.* at PageID#5230-34. Many elective procedures are preceded by both an initial consultation and a pre-op appointment. *Id.* at PageID#5230-31, 5267. In Dr. Podraza's experience, patients who have an opportunity to do their own research, reflect, and ask follow-up questions are more confident in their decision to have a procedure. *Id.* at PageID#5233. Based on personal experiences, Dr. Podraza was aware that some women regretted their abortions. *Id.* at PageID#5238-39.

Plaintiffs presented their own experts to challenge the State's interests.

Dr. Goodman, who had no experience with abortion patients, opined that the waiting period "undermin[es]" the informed consent process and infringes on the physician-patient relationship and patient autonomy, while providing no benefit to patients. Trial Tr. Vol. I, R.219, PageID#4681, 4695-97. He acknowledged, however, that abortion is a "unique procedure" because it terminates a fetal life. *Id.* at PageID#4699. He also acknowledged that the specific features of the waiting-period law—the required disclosures, the requirement that a physician make those disclosures, and the waiting period—do not negate the three elements he deemed necessary for informed consent. *Id.* at PageID#4708-17.

Dr. Biggs acknowledged that "there are a lot of studies on both sides" regarding the mental health outcomes of abortion and that "many studies," including those discussed by Dr. Coleman, have concluded that abortion increases the risk of

adverse outcomes. Trial Tr. Vol. IV, R.222, PageID#5318-19, 5398. Dr. Biggs criticized the methodology of those studies, *id.* at PageID#5319-31, and discussed studies and literature reviews that reached the opposite conclusion, such as the Turnaway Study, *id.* at PageID#5306, 5308. But Dr. Biggs acknowledged that the Turnaway Study, which compared outcomes for women who obtained abortions near the gestational-age cutoff with outcomes for women who were turned away because they were past the cutoff, *id.*, suffered from participant attrition, *id.* at PageID#5401, did not recruit participants from Tennessee, *id.* at PageID#5402, and did not include women who changed their mind about obtaining an abortion, *id.* at PageID#5428-30. Moreover, the Turnaway Study found that "95 percent of women" who obtained abortions felt that "abortion was the right decision for them," leaving five percent who felt otherwise. *Id.* at PageID#5343; *see also id.* at PageID#5433 (agreeing that "[t]here are some people who regret their abortions"). Dr. Biggs also acknowledged that a study of Utah's 72-hour waiting period found that eight percent of women changed their mind about obtaining an abortion, and she agreed that the results of this study "could be" applicable in Tennessee. *Id.* at PageID#5380-83.

Dr. Huntsinger disagreed with Dr. Coleman that the waiting period increases decisional certainty for women seeking abortions and benefits their decision-making process. Trial Tr. Vol. IIIB, R.224, PageID#5491. In Dr. Huntsinger's view, the laboratory studies that Dr. Coleman cited were not relevant to decision-making in

the abortion context. *Id.* at PageID#5473-76. Yet Dr. Huntsinger had never studied decision-making in the abortion context and had expertise only in decision-making more generally. *Id.* at PageID#5492-94.

Although Plaintiffs' fact witnesses did not believe the waiting-period law benefited their patients, Trial Tr. Vol. I, R.219, PageID#4563-64; Trial Tr. Vol. II, R.220, PageID#4876, the data Plaintiffs provided suggested otherwise. After the waiting period took effect, a significant number of women who attended the initial informed-consent appointment did not return for the second appointment. For example, from July 2015 through December 2018, approximately 2,365 women who had initial appointments at PPGMR or PPMET did not return for second appointments. Trial Tr. Vol. I, R.219, PageID#4618-20; *see also* Final Order, R.275, PageID#6622 & n.50. And from December 2017 through December 2018, nearly 300 women who had initial appointments at Choices Memphis did not return for second appointments. Trial Tr. Vol. II, R.220, PageID#4803-08.

Before the waiting period took effect, significantly fewer women who had appointments with abortion providers ultimately did not obtain abortions from those providers. During a roughly two-year period from June 2013 through June 2015, only 765 women who received ultrasounds from PPGMR or PPMET did not obtain abortions. Trial Tr. Vol. I, R.219, PageID#4606-07; Trial Tr. Vol. II, R.220, PageID#4926.

Plaintiffs' witnesses claimed that the "vast majority" of patients were certain of their decision to abort at their initial appointment. *See, e.g.*, Trial Tr. Vol. II, R.220, PageID#4870. But they acknowledged that the number of women who reported feeling "conflicted" about the decision to abort—114—was "far less" than the 2,365 women who did not return to obtain an abortion. Trial Tr. Vol. I, R.219, PageID#4631.

Plaintiffs do not collect information about their patients' reasons for not returning for a second appointment, so they could only speculate about them. Trial Tr. Vol. I, R.219, PageID#4579-80, 4607-08, 4772; Trial Tr. Vol. II, R.220, PageID#4799, 4922. But they acknowledged that some women may have "changed their mind" about having an abortion. Trial Tr. Vol. I, R.219, PageID#4772; *see also* Adams Depo., R.216-1, PageID#4188.

2. Alleged burdens

Defendants' evidence proved that the waiting period did not deter women from obtaining abortions in Tennessee or reduce the number or location of abortion providers in Tennessee. Plaintiffs' evidence at best established that the waiting period delayed some women from obtaining abortions and increased logistical challenges.

a. Number of abortions in Tennessee

The Tennessee Department of Health publishes annual reports about the number of abortions performed in Tennessee and on Tennessee residents. Trial Tr. Vol. IV, R.222, PageID#5273; *see also* App. at 49a-144a (DX70-75) (reports for 2008-2013); App. at 145a-208a (JX19-22) (reports from 2014-2017).[7] Those reports show that the number of abortions performed annually in Tennessee decreased only slightly after the waiting period took effect in July 2015, and that those decreases were comparable to annual decreases seen from 2008 to 2015:

Abortions in Tennessee from 2008 to 2017

Year	Number of abortions	Decrease from prior year	Percent decrease from prior year
2008	18,253	---	---
2009	17,474	779	4.3%
2010	16,373	1,101	6.3%
2011	16,115	258	1.6%
2012	15,859	256	1.6%
2013	14,216	1,643	10.4%
2014	12,373	1,843	13%
2015	11,411	962	7.8%
2016	11,235	176	1.5%
2017	10,810	425	3.8%

Source: App. at 49a-144a (DX70-75); App. at 145a-208a (JX19-22)[8]

[7] All trial exhibits cited in this brief are included in Defendants-Appellants' Appendix.

[8] The number of abortions performed *in Tennessee* (as opposed to *on Tennessee residents*) appears at the bottom of the first page of each report.

Plaintiffs' witnesses acknowledged that the nationwide abortion rate declined during the same period. Trial Tr. Vol. I, R.219, PageID#4620; Trial Tr. Vol. II, R.220, PageID#4826, 4884. They also agreed that the nationwide decline is generally attributed to better access to birth control, lower fertility rates, and less sexual activity, not the enactment of waiting-period laws. Trial Tr. Vol. I, R.219, PageID#4620-21; Trial Tr. Vol. II, R.220, PageID#4826; Trial Tr. Vol. IV, R.222, PageID#5353-55.

The four clinics operated by PPTNM performed roughly 6,500 abortions per year at the time of trial. Trial Tr. Vol. I, R.219, PageID#4532. The Nashville and Knoxville clinics previously operated by PPMET performed roughly 2,500 to 3,000 of those abortions annually. Trial Tr. Vol. II, R.220, PageID#4921. The record does not reflect the number of abortions performed annually at the other clinics.

b. Delayed abortions

Plaintiffs presented evidence that, after the waiting period took effect, the time between a woman's initial call to the clinic to schedule an appointment and performance of the abortion increased at PPGMR, PPMET, and Choices Memphis. At PPGMR, the wait was one to two weeks before the waiting period and increased to three to five weeks. Trial Tr. Vol. I, R.219, PageID#4566-67. At PPMET, the wait was around one week before the waiting period and increased to between nine days and four weeks, depending on the type of abortion. Trial Tr. Vol. II, R.220,

PageID#4890-91. At Choices Memphis, the wait was one to two weeks before the waiting period and at least two weeks after the law took effect. Trial Tr. Vol. I, R.219, PageID#4758, 4764-65.

PPGMR and PPMET reported slight increases in the number of women obtaining abortions at later gestational ages. The number of abortions performed by PPGMR after 14 weeks increased by 139 in 2016 and 77 in 2017. App. at 223a (JX49 at 14). But PPGMR also increased its gestational-age cutoff three times during that period: the cutoff was 14 weeks, 6 days when the waiting period took effect and increased to 15 weeks, 6 days in May 2016; to 17 weeks, 6 days in October 2017; and to 19 weeks, 6 days in December 2017. *Id.*; *see also* Trial Tr. Vol. I, R.219, PageID#4587. Dr. Wallett testified that the waiting period sometimes pushed women past the cutoff for obtaining a medication abortion. Trial Tr. Vol. I, R.219, PageID#4568-69. But the data revealed that the PPGMR's percentage of medication abortions actually *increased* slightly in 2015, declined by only three percentage points in 2016, and then increased by over ten percentage points in 2017. App. at 223a (JX49 at 14).[9] The share of medication abortions also declined by over 15

[9] PPGMR increased the cutoff for medication abortions from 9 weeks to 10 weeks in September 2016 and opened a second facility in Memphis in May 2017 that performed only medication abortions. App. at 223a (JX49 at 14); *see also* Trial Tr. Vol. I, R.219, PageID#4531.

percentage points between 2013 and 2014, before the waiting period took effect. *Id.*; Trial Tr. Vol. I, R.219, PageID#4633.

Dr. Young testified that the percentage of abortions performed at PPMET after 14 weeks increased from 3.94 percent in fiscal year 2015 (which ended on June 30, 2015, before the waiting period took effect) to 6.2 percent in 2016 and 9.5 percent in 2017. Trial Tr. Vol. II, R.220, PageID#4902-03; *see also* Trial Tr. Vol. II, R.220, PageID#4903 (PPMET's fiscal years run from July 1 through June 30). Before October 2016, however, PPMET did not offer overnight dilation and thus had to refer some patients who were past 16 weeks to other providers. *Id.* at PageID#4923; App. at 264a (JX50 at 14). PPMET's percentage of medication abortions remained roughly 75 percent from 2014 to 2016 and declined to 63.5 percent in 2017. App. at 264a (JX50 at 14).[10]

State-level data from the Tennessee Department of Health showed that, from 2013 to 2017, the majority of abortions performed on Tennessee residents occurred before 10 weeks. Trial Tr. Vol. IV, R.222, PageID#5283. The share of abortions performed before 10 weeks declined slightly during that period (including in 2013 and 2014, before the waiting period) relative to the share performed between 11 and 14 weeks, but the number of abortions that occurred after 16 weeks remained

[10] PPMET's Nashville clinic increased the cutoff for medication abortions from 9 weeks to 10 weeks in February 2015; the Knoxville clinic increased the cutoff in July 2015. Trial Tr. Vol. II, R.220, PageID#4909.

"exceedingly small" in each of these years. *Id.* at PageID#5282-84; *see also* App. at 130a (DX75 at 1), 146a (JX19 at 1), 162a (JX20 at 1), 178a (JX21 at 1), 194a (JX22 at 1).

Witnesses from PPGMR, PPMET, and Choices Memphis testified that some women were unable to obtain abortions *at their clinics* after the waiting period took effect. At PPGMR, the number of women who visited the clinic but were unable to obtain an abortion because they were beyond the clinic's gestational-age cutoff was 58 in both fiscal years 2016 and 2017. Trial Tr. Vol. I, R.219, PageID#4631-32. But PPGMR's gestational-age cutoff during that period was well under viability. App. at 223a (JX49 at 14).[11] And Dr. Wallett acknowledged that the women who were unable to obtain an abortion from PPGMR could still legally obtain an abortion in Tennessee. Trial Tr. Vol. I, R.219, PageID#4632.

At PPMET, the number of women who visited the clinic and were referred elsewhere because they were beyond the clinic's cutoff increased from nine in fiscal year 2015 to 20 and 33 in fiscal years 2016 and 2017, respectively. Trial Tr. Vol. II, R.220, PageID#4899. The gestational-age cutoff at PPMET during that period was 17 weeks, 6 days; it did not increase to 19 weeks, 6 days until August 2017. *Id.* at

[11] The record does not reflect the precise date ranges for PPGMR's fiscal years. PPGMR's cutoff for surgical abortions was 14 weeks, 6 days until May 2016 and increased incrementally until it reached 19 weeks, 6 days in December 2017. *See* p. 18, *supra*.

PageID#4923; App. at 264a (JX50 at 14). And the clinic did not offer overnight dilation until October 2016. Trial. Tr. Vol. II, R.220, PageID#4923.

At Choices Memphis, from December 2017 through December 2018, 41 patients who had an initial appointment were unable to obtain a medication abortion because they were past the clinic's cutoff after the 48-hour waiting period. Trial Tr. Vol. I, R.219, PageID#4783. During the same period, 14 women were past the clinic's 15-week cutoff for surgical abortions. *Id.* at PageID#4783. Ms. Terrell did not know whether women who were unable to obtain an abortion at Choices obtained them elsewhere. Trial Tr. Vol. II, R.220, PageID#4807.

Plaintiffs' witnesses agreed that, while certain risks of abortion increase as gestational age increases, abortion is a safe procedure at all gestational ages. *See* Trial Tr. Vol. I, R.219, PageID#4535 (even later in pregnancy, surgical abortion "remains a very, very safe procedure in women"); Trial Tr. Vol. II, R.220, PageID#4849 ("Abortion is very safe."); *id.* at PageID#4923 (abortion is "safe" at 20 weeks). Plaintiffs' witnesses testified that delay could adversely affect the health of women with certain underlying health conditions, such as hypertension. Trial Tr. Vol. I, R.219, PageID#4590-92; Trial Tr. Vol. II, R.220, PageID#4915-16. They reported seeing more than 3,000 such patients in a roughly three-year period after the waiting period took effect. *See* App. at 294a-95a (JX53 at 4-5) and Trial Tr. Vol. I, R.219, PageID#4588 (1,329 patients at PPGMR from July 2015 through January

2018); Trial Tr. Vol. II, R.220, PageID#4917-18 (1,657 patients at PPMET from July 2015 to May 2018); Trial Tr. Vol. I, R.219, PageID#4788-89 (343 patients at Choices Memphis after the waiting period took effect). But they were unable to identify any woman who experienced health complications because of the waiting period or who was denied an abortion because the risk of performing the procedure was too great. Trial Tr. Vol. I, R.219, PageID#4634-35.

Drs. Young and Katz opined that delaying abortions could put victims of domestic violence and rape or incest at risk of psychological or physical harm. Trial Tr. Vol. II, R.220, PageID#4950, 5038. But few of Plaintiffs' patients were in those categories. From July 2015 through January 2018, only 17 women who received abortion services from PPGMR indicated they were domestic violence victims. Trial Tr. Vol. I, R.219, PageID#4615. And only five indicated their pregnancies were the result of rape or incest. *Id.* at PageID#4614-15. During the same period, 40 women who received abortions from PPMET indicated they were domestic violence victims, and 15 women indicated they were victims of rape or incest. App. at 311a-12a (JX54 at 6-7); Trial Tr. Vol. II, R.220, PageID#4927.

Dr. McClelland opined that requiring women to delay their abortions "exacerbate[s] existing stereotypes of women as irrational or overly emotional" and "contributes to the stigmatization of women," which she said could negatively affect psychological and physical health. Trial Tr. Vol. II, R.220, PageID#4969-71. Yet

she was aware of no studies concerning the health effects of abortion waiting periods. *Id.* at PageID#4984-85.

c. Logistical challenges

Dr. Katz opined that the waiting period created "financial," "logistical" and "social-psychological burdens" for low-income women. *Id.* at PageID#5005. She indicated that 75 percent of women seeking abortions nationwide have incomes under 200 percent of the federal poverty line. *Id.* at PageID#5018-19. She relied largely on this nationwide data to surmise that the "overwhelming majority of women seeking an abortion in Tennessee are already mothers and are either poor or near low-income." *Id.* at PageID#5019, 5052. Based on her research on poverty more generally and studies regarding the effects of abortion waiting periods on women in other States, Dr. Katz opined that the waiting period "will delay [low-income women] from accessing" abortion by making it more expensive and logistically challenging to obtain. *Id.* at PageID#5040. But she did not identify any women in Tennessee who could not obtain an abortion after the waiting period took effect. *Id.* at PageID#5070-71. Dr. Young provided similar testimony about the waiting period's effects on low-income women. *Id.* at PageID#4848-49.

Dr. Wallett indicated that "abortion is more common among women with lower income levels" at PPGMR but did not specify what percentage of PPGMR patients are low income. Trial Tr. Vol. I, R.219, PageID#4539. About 60 to 70

percent of patients at PPMET "live below or close to the poverty line." Trial Tr. Vol. II, R.220, PageID#4883. And about 80 percent of patients at Choices Memphis are at or below 110 percent of the federal poverty level. Trial Tr. Vol. I, R.219, PageID#4743, 4781.

Drs. Katz and Young testified that travel presents a barrier to abortion access for some women. Trial Tr. Vol. II, R.220, PageID#4882, 4887, 5018, 5020-23. At PPGMR, from July 2015 through January 2018, 1,161 women who received services from PPGMR lived between 50 and 99 miles from the clinic, and 670 patients lived 100 or more miles away. Trial Tr. Vol. I, R.219, PageID#4616-17; App. at 299a (JX53 at 9). At PPMET, from July 2015 through May 2018, roughly 1,500 patients lived between 50 and 99 miles from the clinic, and roughly 1,300 patients lived 100 or more miles away. Trial Tr. Vol. II, R.220, PageID#4887, 4928. At Choices Memphis, approximately 15 percent of women resided between 50 and 99 miles from the clinic, and 12 percent resided 100 or more miles away. Trial Tr. Vol. I, R.219, PageID#4778. But Plaintiffs do not track whether their patients are seeking services from their closest abortion provider, *id.* at PageID#4617-18; Trial Tr. Vol. II, R.220, PageID#4809, 4928, and they acknowledged that women may visit a more distant clinic to avoid being seen or to obtain a service that is not offered at a closer clinic. Trial Tr. Vol. I, R.219, PageID#4636-37; Trial Tr. Vol. II, R.220, PageID#4809, 4887, 5056-57.

The price of obtaining an abortion at PPGMR and Choices Memphis increased after the waiting period took effect. PPGMR increased its prices by about $125, Trial Tr. Vol. I, R.219, PageID#4583-84, while Choices Memphis increased prices by roughly $275. *Id.* at PageID#4767-69; Trial Tr. Vol. II, R.220, PageID#4824. Both providers acknowledged that they also increased prices for reasons unrelated to the waiting period. Trial Tr. Vol. I, R.219, PageID#4585; Trial Tr. Vol. II, R.220, PageID#4831. And there is no evidence that prices at other abortion providers increased because of the waiting period.

C. District court's findings and conclusions

Following trial, the district court declared Tennessee's waiting period facially unconstitutional and permanently enjoined the State from enforcing either the 48-hour waiting period or the alternative 24-hour waiting period. Final Order, R.275, PageID#6644. Quoting the plurality opinion in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), the court held that the undue burden standard required it "independently to review the legislative findings upon which" the waiting-period law rests "and to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Id.* at PageID#6620 (quotation marks omitted); *see also id.* at PageID#6635. The court concluded that "[t]he mandatory waiting period is unconstitutional because it clearly imposes an undue burden on women's right to

obtain a pre-viability abortion . . . and has no countervailing benefit." *Id.* at PageID#6636.

As to benefits, the court concluded that the waiting period "provides no appreciable benefit to fetal life or women's mental and emotional health"—indeed, that the law has "no legitimate purpose." *Id.* at PageID#6636, 6638. Although the court acknowledged that over 2,000 women who complied with the waiting period did not return for their second appointment, the court found "scant" evidence that the waiting period caused these women to change their minds. *Id.* at PageID#6622-24 & n.50. The court concluded that the law did not increase decisional certainty because "at least 95%" of women in Tennessee who seek an abortion are already certain of their decision. *Id.* at PageID#6625. It also discounted empirical studies about the effect of Utah's 72-hour waiting period because the State "ha[d] not shown that" the studies could be "applied to women in Tennessee." *Id.* at PageID#6625. Finally, the court agreed with Plaintiffs' experts that "post-abortion regret is uncommon" and that "abortion does not increase women's risk of negative mental health outcomes." *Id.* at PageID#6630. The court found Dr. Coleman's contrary testimony "not credible," in part because her personal views are "strongly anti-abortion." *Id.* at PageID#6588-89. The court similarly refused to give Dr. Podraza's testimony "any significant weight" because of his "strong personal and religious views on abortion." *Id.* at PageID#6598. On the other hand, the court deemed all

of Plaintiffs' witnesses credible, notwithstanding their pro-choice views. *Id.* at PageID#6531, 6537, 6546, 6565, 6569, 6577, 6594, 6600, 6611, 6618.

As to burdens, the court found that the waiting-period law "causes increased wait times, imposes logistical and financial burdens, subjects patients to increased medical risks, and stigmatizes and demeans women." *Id.* at PageID#6630. Specifically, the court found that the law:

- Increased wait times for abortion "significantly" and often by "much greater than 48 hours." *Id.* at PageID#6630.

- Sometimes caused "patients to miss the short cutoff date for a medication abortion . . . , thereby requiring them to undergo a more invasive and undesirable surgical abortion" and "face the increased costs and difficulties" of traveling to one of the "five providers" that perform surgical abortions. *Id.* at PageID#6631.

- Sometimes caused women to "miss the cutoff date" of "19 weeks and 6 days LMP" to obtain a surgical abortion. *Id.*

- Caused women to obtain abortions at later gestational ages, which is "more invasive, more painful, and riskier for the patient" and "negatively affect[s] the health of patients with certain medical conditions and cause[s] patients to suffer emotionally and psychologically." *Id.* at PageID#6631-32.

- Burdened "abortion patients with significant, and often insurmountable, logistical and financial hurdles" that are "exacerbated for those patients who must travel long distances," for "victims of intimate partner violence," and for "low-income women, who make up the majority of abortion patients in Tennessee." *Id.* at PageID#6632-33.

- Increased the "cost of an abortion." *Id.* at PageID#6633.

- "[G]ratuitously demean[s] . . . women who have decided to have an abortion" and "undermines patient autonomy and self-determination, the

doctor-patient relationship, and the informed consent process." *Id.* at PageID#6634-35.

- "[P]lace[d] significant burdens on the clinics themselves" by causing them to modify schedules and hire additional staff. *Id.* at PageID#6635.

The court summarily concluded that these burdens were "undue" because they had the "purpose or effect" of placing "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at PageID#6636 (quotation marks omitted). The court did *not* find that the waiting period actually deters women from obtaining abortions. *Id.* Instead, it concluded that "[w]hether the abortion regulation makes it 'nearly impossible' for a woman to obtain an abortion is irrelevant" under the undue burden standard. *Id.*

The district court acknowledged that the Supreme Court and this Court have previously upheld similar waiting-period laws. *Id.* at PageID#6636-38 (citing *Casey*, 505 U.S. at 885-87 and *Taft*, 468 F.3d at 372). But it surmised that this case is different because Tennessee's waiting period "severely burdens the majority of women seeking an abortion" by "significantly delay[ing]" abortions and making abortions "so time-consuming, costly, and inconvenient to obtain that the predominantly low-income population seeking the service must struggle to access it, if they can access it at all." *Id.* at PageID#6638. The court also found it significant that "[w]hen *Casey* was decided, Pennsylvania had eighty-one [abortion] providers, fully ten times as many as Tennessee has currently." *Id.*

To determine whether Plaintiffs were entitled to facial relief, the district court conducted two alternative large-fraction analyses. *Id.* at PageID#6639. It first defined the denominator as the 95 percent of women in Tennessee who purportedly "are certain of their decisions" when they seek abortions. *Id.* And it concluded that the waiting period unduly burdens *all* such women because the law provides them "no benefit" and instead "subjects them to increased medical risks; lengthier, more painful, and more expensive procedures; and stigma, which has harmful health consequences." *Id.* Alternatively, the court concluded that the law unduly burdens "all low-income women who seek an abortion" by "requir[ing] them to make a second trip to a provider," and that low-income women make up 60 to 80 percent of abortion patients in Tennessee. *Id.*

The district court rejected Plaintiffs' challenges to the requirements that women receive certain information and that a physician deliver the information. *Id.* at PageID#6639-42. And the court found it unnecessary to address Plaintiffs' claim that the waiting-period law violates the Equal Protection Clause. *Id.* at PageID#6642-43.

Defendants appealed and simultaneously moved for a stay pending appeal. Notice of Appeal, R.279, PageID#6651-53; Mot. for Stay Pending Appeal, R.280, PageID#6654-58. After the district court denied the stay motion, Order Denying

Stay, R.287, PageID#6718-23, Defendants sought a stay pending appeal from this Court. That motion remains pending.

SUMMARY OF ARGUMENT

This Court should reverse the district court's judgment and vacate the permanent injunction because Tennessee's abortion waiting period is constitutional. Alternatively, and at a minimum, this Court should vacate the judgment and injunction and remand for application of the correct legal standard.

I. Tennessee's waiting period is constitutional. Since the Supreme Court upheld Pennsylvania's waiting period in *Casey*, this Court and others have consistently held that waiting periods do not impose an undue burden on the right to abortion. Nothing about this case justifies a different result.

Tennessee's law is rationally related to two legitimate state interests: protecting unborn children and ensuring that a woman's decision to abort is informed. Those are the same interests that the Supreme Court held were reasonably served by Pennsylvania's waiting period in *Casey*. Plaintiffs cannot avoid *Casey*'s holding by relying on record evidence about the efficacy of Tennessee's waiting period. Record evidence is irrelevant on rational basis review. And even if it were relevant, the record reveals medical and scientific uncertainty about the efficacy of waiting periods, and legislatures have wide latitude to legislate in the face of conflicting evidence.

Tennessee's waiting period does not place a substantial obstacle in the path of any woman seeking a previability abortion, let alone a large fraction of women. The number of abortions performed in Tennessee since the waiting period took effect conclusively establishes that the waiting period has *not* deterred a large fraction of women from obtaining abortions. The district court did not conclude otherwise, relying instead on other supposed "burdens" that either have already been deemed insufficient by the Supreme Court and this Court or do not affect abortion access at all. Although the district court found that the waiting period causes some women to miss the cutoff date for a surgical abortion in Tennessee, that finding was clearly erroneous. Regardless, the number of women who purportedly missed the cutoff do not constitute a *large fraction* of the women who are subject to the waiting period. The district court therefore erred by facially invalidating Tennessee's law, and this Court should reverse its judgment and vacate the permanent injunction.

II. The district court also erred by applying the wrong legal standard. To determine whether the waiting period imposed an undue burden, the court weighed the benefits of the law against its burdens. The Supreme Court and this Court have rejected that balancing test. At a minimum, this Court should vacate the district court's judgment and injunction and remand for application of the correct standard.

STANDARD OF REVIEW

In an appeal from a final judgment and permanent injunction, this Court "review[s] factual findings for clear error, legal conclusions de novo, and the scope of injunctive relief for abuse of discretion." *EMW*, 978 F.3d at 428 (quoting *Lee v. City of Columbus*, 636 F.3d 245, 249 (6th Cir. 2011)). Whether the burdens an abortion law imposes are "undue" is a legal conclusion that is reviewed de novo. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 n.1 (6th Cir. 1999). And a district court necessarily abuses its discretion when it applies an incorrect legal standard. *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 230 (6th Cir. 2003).

"A finding of fact is clearly erroneous when, after reviewing the full record," this Court is "left with the definite and firm conviction that a mistake has been committed." *EMW*, 978 F.3d at 428 (quoting *June Med. Servs.*, 140 S. Ct. at 2141 (Roberts, C.J., concurring in the judgment)). Although deferential, clear-error review "is not nugatory," and this Court may reverse an erroneous factual finding "even though the record contains some evidence in support of the finding." *Indmar Prod. Co. v. Comm'r of Internal Revenue*, 444 F.3d 771, 778 (6th Cir. 2006) (quotation marks omitted). Clear-error review "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding

of the governing rule of law." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984).

To obtain the "extraordinary remedy" of permanent injunctive relief, Plaintiffs "must make a clear showing that the challenged provisions 'actually' violate their patients' constitutional rights"; it is not enough to show a "possibility" or "likelihood" of a violation. *EMW*, 978 F.3d at 429 (alteration adopted) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 55 U.S. 7, 21-22, 32 (2008)).

ARGUMENT

Because Tennessee's waiting period is constitutional under controlling precedent, this Court should reverse the district court's judgment and vacate the permanent injunction. *See EMW*, 978 F.3d at 437, 446, 448. Alternatively, because the district court applied the wrong legal standard, the Court should at a minimum vacate the judgment and injunction and remand for application of the correct standard. *See Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020) (per curiam).

I. Tennessee's Waiting Period Is Constitutional.

An abortion law is facially constitutional if it (1) is reasonably related to a legitimate state interest and (2) does not pose a substantial obstacle to previability abortion for a large fraction of affected women. *EMW*, 978 F.3d at 433-34. Tennessee's waiting period satisfies this test.

A. The law is reasonably related to legitimate state interests.

To determine whether an abortion law reasonably advances a legitimate state interest, courts must apply "traditional rational-basis review." *Id.* at 440. This highly deferential standard "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993) (quotation marks omitted). The Supreme Court describes this standard as "a paradigm of judicial restraint," *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), and "the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny," *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

An abortion law has a rational basis "if there is a problem 'at hand for correction' and 'it might be thought that the particular legislative measure was a rational way to correct it.'" *EMW*, 978 F.3d at 438 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)). Because this standard is "highly deferential," an abortion law "may serve a legitimate purpose even if a court were to determine it 'has little if any benefit.'" *Id.* (alteration adopted) (quoting *June Med. Servs.*, 140 S. Ct. at 2137 (Roberts, C.J., concurring in the judgment)). All that matters is whether the State had "a rational basis to act." *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007)).

Tennessee's waiting period easily clears this low bar. The Supreme Court has already held that abortion waiting periods are reasonably related to *two* legitimate

state interests. In *Casey*, the Court held that a waiting period was "a reasonable measure to implement the State's interest in protecting the life of the unborn." 505 U.S. at 885 (joint opinion). It also concluded 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." *Id.* (quotation marks omitted). Although *Casey* involved a 24-hour waiting period, a 48-hour period serves both these interests at least as well. *Cf. Hodgson v. Minnesota*, 497 U.S. 417, 448 (1990) (opinion of Stevens, J.). The district court's conclusion that the waiting period serves "no legitimate purpose," Final Order, R.275, PageID#6638, directly contradicts *Casey*.

For two reasons, the district court's factual findings about the benefits of Tennessee's waiting period provide no basis to depart from *Casey*. *First*, *Casey*'s holding did not rest on any findings about whether the waiting period actually served the asserted state interests. 505 U.S. at 885. All that mattered was whether the law had a rational basis "[i]n theory." *Id.* That approach accords with longstanding principles of rational basis review. A court's findings about the efficacy of a law are simply not relevant to deciding whether the law is rational. *Beach Commc'ns*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom fact-finding[.]"). A law will survive rational basis review even if it is "based on rational speculation unsupported by evidence or empirical data." *Id.* And a State "has no obligation to produce evidence to sustain the rationality" of legislation. *Heller*, 509 U.S. at 320.

These principles apply fully in the abortion context. *See EMW*, 978 F.3d at 438-39. In *Gonzales*, the Supreme Court held that a law designed to prevent post-abortion regret served a legitimate interest even though the Court found no "reliable data to measure the phenomenon." 550 U.S. at 159. The law had a rational basis because it "seem[ed] unexceptionable to conclude" that some women would regret their abortions, and it was "self-evident" that those women would experience greater anguish if they later learned about the "brutal" nature of partial-birth abortion. *Id.* at 159-60. And in *EMW*, this Court asked only whether "it might be thought" that the challenged abortion regulation rationally advances a legitimate interest, and it stressed that a court may not "weigh[] the conflicting evidence and mak[e] its own scientific and medical findings" to decide whether a law is rational. 978 F.3d at 438 (quotation marks omitted).

If it was rational for the Pennsylvania legislature to conclude that a short waiting period advances the State's interests in protecting unborn children and ensuring informed decision-making, *Casey*, 505 U.S. at 885 (joint opinion), then it was rational for the Tennessee legislature to do the same, regardless of what the record in this case established. Plaintiffs can argue otherwise only by "refusing to apply anything resembling rational basis review." *Trump*, 138 S. Ct. at 2421.

Second, even if the record evidence were relevant, it demonstrates that there is at least "medical and scientific uncertainty" about the law's efficacy. *EMW*, 978

F.3d at 438 (quotation marks omitted). And legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* (quotation marks omitted).

Dr. Coleman, an expert in the psychology of abortion and the author of numerous peer-reviewed publications on abortion decision-making, testified that many women are conflicted about whether to have an abortion and experience stress related to that decision. *See* pp. 10-11, *supra*. She opined that Tennessee's waiting period would benefit these women by increasing their decisional certainty and reducing the risk of regret and adverse mental health outcomes. *See* p. 11, *supra*. Dr. Podraza agreed that patients are generally more confident in their decisions after they have time to reflect and process the information provided by a physician. *See* pp. 11-12, *supra*. To be sure, Plaintiffs' experts disputed some of these opinions and offered competing studies. *See* pp. 12-14, *supra*. But that simply underscores that, at best for Plaintiffs, this is an area of medical and scientific uncertainty in which the legislature has "wide discretion to pass legislation." *EMW* 978 F.3d at 438 (quotation marks omitted).

Finally, even if it were appropriate for the district court to weigh in on this debate, the district court clearly erred by discrediting the testimony of Drs. Coleman and Podraza. The district court wrongly assumed that their opinions could not be trusted because of their "strong" pro-life views, Final Order, R.275, PageID#6589,

6598, while simultaneously crediting the testimony of Plaintiffs' witnesses, many of whom were obviously strongly pro-choice. *See* pp. 26-27, *supra*.[12] The district court faulted Dr. Coleman for focusing her research too narrowly on abortion, Final Order, R.275, PageID#6588, while simultaneously faulting Dr. Podraza for having published no articles on abortion, *id.* at PageID#6597.[13] And the court discounted Dr. Coleman's research because of "serious methodological flaws," notwithstanding that her research was published in reputable peer-reviewed journals and has never been retracted. *Id.* at PageID#6589; Trial Tr. Vol. IIIA, R.221, PageID#5098, 5148. The district court's disparate treatment of similarly situated witnesses demonstrates that it did not review their testimony neutrally. If this Court finds it necessary to review these credibility determinations, it should reverse them.

B. The law is not a substantial obstacle to abortion for any women, let alone a large fraction of women.

"Under the law of our circuit, a woman faces a substantial obstacle when she is 'deterred from procuring an abortion as surely as if the government has outlawed

[12] For example, Dr. Biggs works for a pro-choice research program that has "never informed policy in a pro-life way." Trial Tr. Vol. IV, R.222, PageID#5298, 5357; *see also* Abortion, ANSIRH.org, https://www.ansirh.org/abortion (last visited Feb. 8, 2021) ("Abortion is an essential part of reproductive health care.").

[13] The district court overlooked similar flaws in Plaintiffs' witnesses. *See, e.g.*, Trial Tr. Vol. IIIB, R.224, PageID#5493-94 (testimony of Dr. Huntsinger acknowledging that he had no abortion-related research or publications); Trial Tr. Vol. I, R.219, PageID#4695-97 (same for Dr. Goodman).

abortion in all cases.'" *EMW*, 978 F.3d at 434 (alteration adopted) (quoting *Taft*, 468 F.3d at 370). Plaintiffs failed to prove that Tennessee's waiting period is a substantial obstacle for any woman, let alone a large fraction of women.

1. The record evidence forecloses any claim that the law deters a large fraction of women from procuring an abortion.

Plaintiffs' facial challenge to the waiting period fails as a matter of law for a simple reason: during the five years the waiting period was in effect, the number of abortions performed in Tennessee decreased only slightly—a trend that mirrored a nationwide decline in abortions caused by factors unrelated to the waiting period. *See* pp. 16-17, *supra*. Given that undisputed evidence, Plaintiffs cannot prove that the waiting period deters a large fraction of affected women "from procuring an abortion as surely as if the government has outlawed abortion in all cases." *EMW*, 978 F.3d at 434 (alteration adopted) (quotation marks omitted). The record conclusively establishes that it does not. Even if the entire decline in annual abortions from 2014 to 2017—roughly 1,500 abortions—were attributable to the waiting period,[14] the share of women deterred from obtaining an abortion *still* would not qualify as a "large fraction" under *Taft*. 468 F.3d at 374 (holding that a large fraction means "something more than . . . 12 out of 100 women").

[14] As explained above, it is not. *See* p. 17, *supra*.

Significantly, the district court did not find that that the waiting period deters women from obtaining abortions. The court concluded that Defendants had "misstate[d] the applicable legal test" by arguing that women were not "being denied abortions" by the waiting period. Final Order, R.275, PageID#6636 (quotation marks omitted). In the district court's view, "[w]hether the abortion regulation makes it 'nearly impossible' for a woman to obtain an abortion is irrelevant." *Id.*

But it is the district court that misstated the applicable legal test. *See Taft*, 468 F.3d at 373 ("[A] large fraction exists when a statute renders it nearly impossible for the women actually affected by an abortion restriction to obtain an abortion."). Plaintiffs were required to prove that the waiting period deters a large fraction of women from procuring abortions. Plaintiffs did not carry their burden, and the decision below must be reversed for that reason alone.

2. The burdens the district court identified are not substantial obstacles as a matter of law.

The district court concluded that the waiting period imposed an undue burden not because it deters women from procuring abortions, but because it purportedly makes it more difficult to obtain one. But, as a matter of law, the "burdens" the district court attributed to the waiting period are not substantial obstacles. The Supreme Court and this Court have already considered many of those burdens and held them insufficient, and others do not affect abortion access at all.

Delay. The Supreme Court and this Court have repeatedly held that moderate delay in obtaining an abortion does not constitute a substantial obstacle. *Casey* upheld Pennsylvania's waiting period even though the law "often" caused "delay[s] of much more than a day" between a woman's first and second appointments. 505 U.S. at 885-86 (joint opinion). *Taft* upheld Ohio's waiting period even though it "could have the effect of delaying abortions up to two weeks." 468 F.3d at 366. And the Supreme Court has consistently upheld other laws, such as parental consent laws, that could delay abortions by several weeks. *See Garza v. Hargan*, 874 F.3d 735, 755-56 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (collecting cases), *cert. granted, judgment vacated sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018). For example, the Supreme Court held that the possibility of a 22-day delay to obtain a judicial bypass was "plainly insufficient to invalidate the statute on its face." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990). This Court upheld a similar judicial bypass procedure despite evidence that it could take weeks to successfully navigate it. *Sundquist*, 175 F.3d at 459-60, 462; *id.* at 473, 479 (Keith, J., dissenting).

The district court's findings about delay are no different from the findings in *Casey* and other cases. Like the district court in *Casey*, 505 U.S. at 885-86 (joint opinion), the district court here found that the delay between a first and second

appointment is "often much greater than" the statutory waiting period. Final Order, R.275, PageID#6630; *see also id.* at PageID#6630-31.

Plaintiffs cannot avoid these longstanding precedents by characterizing the many predictable *effects* of moderate delay as new and different burdens on the right to abortion. All waiting periods necessarily cause women to have abortions at later gestational ages and could cause some women to miss the cutoff date for an abortion entirely if they wait long enough to seek the procedure. That was also true of the waiting periods in *Casey* and *Taft*, which like Tennessee's law could delay abortions for days or weeks. *Casey*, 505 U.S. at 885-86 (joint opinion); *Taft*, 468 F.3d at 366. The district court's gestational-age findings identify not a new *burden* that was not present in *Casey*, *Taft*, and other cases, but merely one of the many predictable effects of a single burden—moderate delay—that the Supreme Court has repeatedly deemed insufficient to invalidate an abortion law.

Even if the various effects of moderate delay are viewed as distinct burdens on the abortion right, they still would not amount to a substantial obstacle. These "burdens"—such as having to undergo a surgical abortion instead of a medication abortion, or "remain[ing] pregnant for days or weeks longer" than desired, Final Order, R.275, PageID#6631-32—do not "deter[]" any woman "from procuring an abortion." *EMW*, 978 F.3d at 434 (quotation marks omitted). Finding these delays to be "burdens" rests on the false premise that a woman "is entitled to terminate her

pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Consider the main effect of delay the district court identified: the prospect that some patients will become ineligible for medication abortions and will instead have to receive surgical abortions. Final Order, R.275, PageID#6631. This effect is not an undue burden because the Constitution does not protect a woman's preferred method of abortion. *See Gonzales*, 550 U.S. at 166-67 (upholding ban on one method of abortion because "other abortion procedures that are considered to be safe alternatives" were available). This Court has applied that principle to uphold a ban on all medication abortions between 50 and 63 days LMP. *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 514-16 (6th Cir. 2012) (upholding the ban because surgical abortions were still available and the Supreme Court "has not extended constitutional protection to a woman's preferred method . . . of terminating a pregnancy"). And the Supreme Court implicitly reiterated this principle just weeks ago, when it stayed a preliminary injunction prohibiting the federal government from requiring providers to dispense an abortion-inducing drug in person. *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021). As the dissent pointed out, that requirement could cause some women "to miss the 10-week window for a medication abortion altogether." *Id.* at 582 (Sotomayor, J., dissenting).

The only effect of delay that could conceivably deter a woman from procuring an abortion is causing a woman to miss the legal cutoff for abortion. But the district court's finding that the waiting period causes some women to "miss the cutoff date in Tennessee" for a surgical abortion cannot withstand review. Final Order, R.275, PageID#6631.

For one thing, that finding is "predicated on a misunderstanding of the governing . . . law" and is therefore entitled to no deference. *Bose Corp.*, 466 U.S. at 501. The district court wrongly conflated the cutoff of 19 weeks, 6 days that some Plaintiffs were using at the time of trial with the *legal* cutoff for abortion in Tennessee. *See* Final Order, R.275, PageID#6631. As explained above, abortions are lawful in Tennessee until viability. *See* p. 6 & n.2, *supra*. If women were unable to obtain abortions because they were pushed past the gestational-age cutoff imposed by *providers*, that burden is attributable to the providers' own business decisions, not the waiting period. *Cf. Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509 (1989) (rejecting the argument that a *private* hospital's refusal to allow abortions could invalidate a law banning only *public* facilities from performing abortions).

Moreover, any finding that the waiting period caused women to miss *Tennessee's* cutoff for obtaining an abortion would be clearly erroneous. At best for Plaintiffs, the record establishes that, when the waiting period was in effect, a small number of women were unable to obtain abortions from specific providers because

they were past the *provider's* cutoff for performing surgical abortions. *See* pp. 20-21, *supra*. But during the time periods for which Plaintiffs provided data, *none* of the Plaintiffs performed surgical abortions up to Tennessee's legal limit of viability, or even up to the cutoff of 19 weeks, 6 days that the district court considered. Choices Memphis performed them only until 15 weeks. *Id.* at PageID#4800-01. PPMET performed them only until 17 weeks, 6 days. Trial. Tr. Vol. II, R.220, PageID#4922-23. And PPGMR's cutoff began at 14 weeks, 6 days and did not increase to 19 weeks, 6 days until December 2017. App. at 223a (JX49 at 14). Plaintiffs' witnesses acknowledged that these women may have been able to obtain abortions elsewhere. Trial Tr. Vol. I, R.221, PageID#4632; Trial Tr. Vol. II, R.220, at PageID#4807. There is thus no evidence to support a finding that women were pushed past the point of viability.

Costs and logistics. The Supreme Court and this Court have made clear that laws that make it more expensive or logistically difficult to obtain an abortion do not impose an undue burden unless they actually deter women from obtaining an abortion. *See Casey*, 505 U.S. at 874, 893-94 (joint opinion); *EMW*, 978 F.3d at 434; *Taft*, 468 F.3d at 370, 372-73. When an abortion law serves a valid purpose, the fact that it "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874 (joint opinion).

Accordingly, the Supreme Court and this Court have upheld a wide array of laws—including waiting periods—that made it more costly and difficult to obtain abortions. The waiting period in *Casey* "increas[ed] the cost" of abortions and made them more difficult to obtain for women with limited "financial resources" and those who needed to "travel long distances" or "explain[] their whereabouts to husbands, employers, or others." 505 U.S. at 886 (joint opinion). But the Court held that "[t]hese findings" did not establish "an undue burden." *Id.* The judicial bypass procedure in *Sundquist* imposed numerous "added difficulties" on minors seeking abortions and could even have the effect of "preclud[ing]" some minors from obtaining abortions. 175 F.3d at 463 n.3; *id.* at 472 (Keith, J., dissenting) (describing difficulties from "logistical demands," "time spent away from home, work, or school," and lack of "transportation"). Still, this Court held that these burdens were not "undue." *Id.* at 463 n.3 (majority opinion). Even laws that cause abortion clinics to close are not necessarily a substantial obstacle if patients can travel to other clinics. *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 605 (6th Cir. 2006) (increased travel "may be burdensome but it is not a substantial obstacle"). The costs and logistical difficulties the district court identified are not materially different in kind or magnitude from those at issue in *Casey*, *Sundquist*, *Baird*, and similar cases.

The district court made several additional errors in concluding that increased costs and logistical difficulties sufficed to show an undue burden. To begin, it erroneously concluded that these costs and difficulties render the waiting period unconstitutional because they are "particularly burdensome" for some women. Final Order, R.275, PageID#6633. The district court in *Casey* made the same mistake, and the Supreme Court reversed because a "particular burden is not of necessity a substantial obstacle." *Casey*, 505 U.S. at 886-87 (joint opinion); *see also Baird*, 438 F.3d at 605.

The district court also erred in concluding that the waiting period *caused* these increased costs and difficulties, when in fact many were attributable to the providers themselves. As one example, the district court concluded that women who missed the deadline for a medication abortion would have to travel farther to obtain a surgical abortion. Final Order, R.275, PageID#6631. But even if that were true, and setting aside that increased travel distance is not an undue burden, *Baird*, 438 F.3d at 605, that "burden" would exist only because of providers' own decisions about where to operate and what services to provide. *Cf. Webster*, 492 U.S. at 509 (refusing to rely on the actions of private parties to invalidate an abortion law where the challenged law "place[d] no *governmental* obstacle in the path of a woman who chooses to terminate her pregnancy" (quotation marks omitted) (emphasis added)).

In any event, the district court's finding that missing the cutoff for a medication abortion would increase travel was also clearly erroneous. Final Order, R.275, PageID#6631. Both clinics that offer only medication abortions (Carafem in Mount Juliet and PPTNM's Knoxville clinic) are located near clinics that offer surgical abortions (PPTNM's Nashville clinic and the Knoxville Center for Reproductive Health, respectively). *See id.* at PageID#6523, 6599; Second Am. Compl., R.70, PageID#428.

Relatedly, the district court tried to distinguish *Casey* by contrasting the number of abortion providers in Pennsylvania when *Casey* was decided with the number currently in Tennessee. Final Order, R.275, PageID#6638. But that statistic appears nowhere in *Casey*, and "what matters [are] the [facts] the Court considered as the basis for its decision, not any latent [facts] not alluded to by the Court." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 n.4 (2020). In any event, the number of abortion providers is irrelevant where, as in *Casey* and here, the government has not limited that number. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016) (considering burdens imposed by clinic closures only after concluding that the challenged law *caused* the closures).

Finally, the distinction between the 24-hour waiting periods in *Casey* and *Taft* and Tennessee's 48-hour waiting period is immaterial. Even Plaintiffs agree that 48 hours is no more burdensome than 24. Pls.' Proposed Findings and Conclusions,

R.226, PageID#5575-76, 5589. And the district court enjoined the State from enforcing a waiting period of either length. Final Order, R.275, PageID#6644.

Medical risks. The district court also invoked "increased" medical risks as a basis for invalidating the waiting period. Final Order, R.275, PageID#6630, 6639. For two reasons, it erred in doing so.

First, the waiting-period law has a medical-emergency exception, Tenn. Code Ann. § 39-15-202(d), (f)(1), and *Casey* held that a materially identical medical-emergency exception eliminated any undue burden concerns based on significant health risks. 505 U.S. at 879-80 (opinion of the Court); *id.* at 885 (joint opinion). So even assuming delay could present a significant health risk for certain women with underlying conditions, the medical-emergency exception would eliminate that risk.

Second, only "*significant* health risk[s]" qualify as a substantial obstacle. *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 511 (6th Cir. 2006); *see also Gonzales*, 550 U.S. at 161. Plaintiffs do not contend that delaying an abortion for a few days or weeks creates *significant* health risks for any women—only "increased" risks. Pls.' Proposed Findings and Conclusions, R.226, PageID#5585. Understandably so: their consistent position is that the abortion procedure is *always* "very, very safe," even if marginally riskier later in pregnancy.

See p. 21, *supra*. Surely it is not an undue burden for women to have access only to "very safe" abortions.

Domestic violence. The district court stated that complying with the waiting period "is especially difficult for victims of intimate partner violence." Final Order, R.275, PageID#6632. But it made no finding about how many of those women, if any, the waiting period has deterred from obtaining an abortion. The record suggests that domestic violence victims comprise an extremely small percentage of Plaintiffs' patients, and Plaintiffs presented no evidence that these patients were unable to obtain abortions. *See* p. 22, *supra*. Thus, the record evidence about domestic violence victims is even less compelling than in *Taft*, where the plaintiffs demonstrated that "approximately 6 to 12.5 women out of every 1000 women seeking an abortion" would be deterred from obtaining abortions by Ohio's waiting period. 468 F.3d at 373.

Burdens on clinics. The district court also reasoned that the waiting period "places significant burdens on the clinics themselves." Final Order, R.275, PageID#6635. But burdens on abortion providers are irrelevant unless they affect a woman's ability to access abortion, and the district court did not find that the waiting period has caused any abortion clinic to close or reduce services. *See EMW*, 978 F.3d at 446.

Psychological harm. The district court found that the waiting period can "cause patients to suffer emotionally and psychologically." Final Order, R.275, PageID#6632. Even if that were true, the Supreme Court has never recognized psychological harm as a substantial obstacle. And Plaintiffs failed to identify a single patient who suffered discernible psychological harm from the waiting period, let alone one who was deterred from obtaining an abortion. *See, e.g.*, Trial Tr. Vol. II, R.220, PageID#4986-87.

Policy disagreements. The district court found that the waiting period is "gratuitously demeaning to women" and that it "undermines patient autonomy and self-determination." Final Order, R.275, PageID#6634-35. But these "findings" are policy disagreements that are irrelevant to whether the law presents a substantial obstacle to the "abortion of a nonviable fetus." *EMW*, 978 F.3d at 434 (quotation marks omitted). And "it matters not at all whether the district court or [this Court] believe the [waiting period] to be sound policy." *Id.* at 438.

In sum, neither the law nor the record provided any basis for the district court to hold Tennessee's waiting-period law facially unconstitutional. Where, as here, "the hardships of which plaintiffs complain are generally no different than those the Court in *Casey* held did not amount to an undue burden," federal courts have consistently rejected challenges to waiting periods. *Karlin v. Foust*, 188 F.3d 446, 486 (7th Cir. 1999) (collecting cases); *see also, e.g.*, *Tucson Women's Ctr. v. Ariz.*

Med. Bd., 666 F. Supp. 2d 1091, 1099 (D. Ariz. 2009) (collecting cases). The district court's contrary decision is an extreme outlier and should be reversed.

3. Plaintiffs are not entitled to facial relief.

Even if it were true that Tennessee's waiting period deters *some* women from obtaining an abortion, there is no evidence that it deters a *large fraction* of women from obtaining abortions. *See EMW*, 978 F.3d at 434. Plaintiffs' facial challenge fails for that reason alone.

The standard for facial relief in the abortion context is a demanding one: it "requires courts to determine whether a large fraction of [affected] women . . . will be 'deterred from procuring an abortion as surely as if the government has outlawed abortion in all cases.'" *Taft*, 468 F.3d at 370 (alteration adopted) (quoting *Casey*, 505 U.S. at 894). In *Taft*, the Court facially invalidated one abortion regulation because it satisfied that test and rejected a facial challenge against another because it did not. *Id.* at 370-71, 373-74. And this Court stressed that a law must operate "as a *de facto* ban" for at least *some* women to be facially invalid—not for "all or even most" affected women, but for at least a "large fraction" of them, which means "something more than . . . 12 out of 100 women." *Id.* at 374. Because *Taft*'s rule for deciding whether an abortion law is facially valid was necessary to its judgment, it is a holding that binds later panels of this Court. *Wright v. Spaulding*, 939 F.3d 695, 700-02 (6th Cir. 2019).

Plaintiffs did not satisfy that demanding standard. Even if some of the burdens the district court identified rise to the level of substantial obstacles, the record does not establish that those burdens exist for a *large fraction* of women. Take, for example, women who were past a clinic's gestational-age cutoff for surgical abortions. The record established that only 169 women were past the applicable cutoffs at PPGMR and PPMET in fiscal years 2016 and 2017—out of the roughly 13,000 women who obtained abortions at those clinics during the same period. *See* p. 17, *supra*. That fraction is far smaller than the "12 out of 100" women this Court found insufficient in *Taft*. 468 F.3d at 374.

Both of the district court's large-fraction analyses were erroneous. It first concluded that the waiting period "unduly burdens all women who are certain of their decisions at the time they access abortion care" because those women will be forced to endure additional delay that, in the district court's view, has "no benefit." Final Order, R.275, PageID#6639. But "the undue burden standard is not a balancing test," so a court's views about the law's benefits are irrelevant to whether the law imposes an undue burden. *EMW*, 978 F.3d at 437. Nor did the district court find, or the record establish, that the 95 percent of women who purportedly are certain of their decision to abort will be deterred from procuring abortions. *See id.* at 434; *Taft*, 468 F.3d at 370, 373-74.

The district court also concluded that the waiting period unduly burdens "all low-income women who seek an abortion" and that these women make up 60 to 80 percent of abortion patients in Tennessee. Final Order, R.275, PageID#6639. It asserted that the costs and inconvenience of attending the second appointment are "*either* insurmountable *or* surmounted with great difficulty" for low-income women, without indicating what share of low-income women falls within each category. *Id.* (emphasis added). But an abortion regulation that can be "surmounted with great difficulty" is not an undue burden. *See Karlin*, 188 F.3d at 481 ("[I]nconvenience, even severe inconvenience, is not an undue burden."). The district court did not find that the waiting period actually deterred the 60 to 80 percent of abortion patients in Tennessee who are low-income from obtaining an abortion. Nor could it have. Abortions in Tennessee have not decreased by 60 to 80 percent since the waiting period took effect. *See* p. 16, *supra*. The district court here made the same mistake as the district court in *Casey*: it failed to appreciate that "[w]hether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Casey*, 505 U.S. at 887 (joint opinion); *cf.* Final Order, R.275, PageID#6633.

II. At a Minimum, This Court Should Vacate and Remand for Application of the Correct Legal Standard.

Because Tennessee's waiting-period law is constitutional, this Court should reverse the district court's judgment and vacate its injunction. In the alternative, if this Court does not reverse, it should at least vacate the judgment and injunction and remand to allow the district court to apply the correct legal standard.

In declaring Tennessee's waiting period unconstitutional, the district court applied the benefits-and-burdens balancing test first articulated in *Whole Woman's Health*, 136 S. Ct. 2292, and later used by the four-Justice plurality opinion in *June Medical Services*. Final Order, R.275, PageID#6619-20. Under that standard, the district court weighed the benefits of the waiting period against its burdens to determine whether it imposed an undue burden. *Id.* at PageID#6635-36.

The district court applied the wrong legal standard, and in doing so abused its discretion. *See Hamad*, 328 F.3d at 230. As this Court recently held, the Chief Justice's separate opinion in *June Medical Services*—not the plurality opinion—is controlling under *Marks v. United States*, 430 U.S. 188 (1977), and it supplies the governing standard for evaluating abortion regulations. *EMW*, 978 F.3d at 433. As in *EMW*, "[b]ecause the controlling opinion in *June Medical Services* clarified that the undue burden standard is not a balancing test, the district court erred in attempting to weigh the benefits of [the waiting period] against [its] burdens." *Id.* at 437.

If this Court does not reverse the decision below, it should vacate the judgment and injunction and remand for application of the correct legal standard. That is the minimum an appellate court must do when a lower court applies the wrong legal standard. *See, e.g.*, *Hopkins*, 968 F.3d at 916 (vacating injunction and remanding "for reconsideration in light of Chief Justice Roberts's separate opinion in *June Medical*, which is controlling"). Here, remand is unnecessary because the record is sufficient to allow this Court to apply the correct legal standard in the first instance and reverse the decision below on that basis, as it did in *EMW*. But if this Court declines to reverse, vacatur and remand would be appropriate.

CONCLUSION

The Court should reverse the district court's judgment and vacate its injunction. Alternatively, the Court should vacate the judgment and injunction and remand for application of the correct legal standard.

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 12,999 words, excluding the parts of the brief 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.

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February 9, 2021

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on February 9, 2021, a copy of the Brief of Defendants-Appellants was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
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DESIGNATION OF DISTRICT COURT DOCUMENTS

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