No. 20A155

In the Supreme Court of the United States

HERBERT H. SLATERY, III. ATTORNEY GENERAL AND REPORTER OF THE STATE OF TENNESSEE, *ET AL.*,
Applicants,

v.

BRISTOL REGIONAL WOMEN'S CENTER, P.C., *ET AL.*,
Respondents.

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

COMBINED MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF KENTUCKY, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING THE APPLICANTS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Proposed *amici* respectfully request leave of the Court to file the *amici curiae* brief included in this booklet and to do so without providing 10 days' notice to the parties.

The Proposed *amici* are the Commonwealth of Kentucky and the States of Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia. The parties have consented to this Motion and the filing of the proposed *amici curiae* brief.

As explained in the brief, the proposed *amici* have a strong interest in ensuring that enforcement of the statute at issue in this case not be enjoined.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

The *amici* States are sovereign entities possessing the power to legislate for the welfare of their citizens. Many have exercised that prerogative by requiring waiting periods before a woman has an abortion. And all of them support the ability of sovereign states to enact such measures. The Supreme Court put its seal of approval on waiting-period laws nearly 30 years ago, and such laws have been repeatedly upheld since then. Taking a cue from these precedents, many States have enacted waiting-period laws during that time. But those otherwise well-settled expectations might now be thrown into chaos because of the Sixth Circuit's published decision refusing to stay a district court's injunction against Tennessee's waiting-period law.

The *amici* States have multiple interests in preserving the *status quo ante* and avoiding the chaos that the Sixth Circuit's decision threatens. First, the *amici* States have an interest in preserving their sovereign law-making prerogatives. Further, the *amici* States share a commitment to promoting the States' interests in life, protecting the health and well-being of pregnant women, and ensuring that any woman's decision to undergo an abortion is a decision that is fully

[1] Due to the timeline of this matter, *amici* were not able to provide notice of 10 days or more to the parties before the response was due. However, all parties have consented to the filing of this brief.

informed. Tennessee's waiting-period law helps advance those interests, and any judicial decision that prevents that law from being enforced not only wrongfully deprives Tennessee of its ability to vindicate those interests, but also threatens the *amici* States' abilities to pursue the same interests. The district court's injunction should be stayed because it irreparably harms Tennessee's ability—and, by extension, the *amici* States' abilities—to protect these interests.

SUMMARY OF THE ARGUMENT

A stay is warranted here because this Court upheld a materially identical statute—on a materially identical record—nearly 30 years ago in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 885–86 (1992). The district court's injunction in this case—and the Sixth Circuit's refusal to stay that injunction—cannot be reconciled with *Casey*.

In the nearly 30 years since this Court upheld Pennsylvania's waiting-period law in *Casey*, many states have relied on that holding to pass their own waiting-period laws. And in all that time, no authoritative federal court of appeals decision has ever invalidated or hindered the enforcement of an abortion waiting-period law. Until now, that is. The Sixth Circuit's decision is not only an outlier, but an outlier that fails to respect binding precedent from this Court.

Tennessee's waiting-period law is materially identical to the one that this Court upheld in *Casey*. Underscoring this point is the striking similarity between the district court's findings here and the district court's findings in *Casey*. Simply put, the district court here found that Tennessee's law imposes essentially identical burdens as the waiting-period law at issue in *Casey*. Yet the Pennsylvania law from *Casey* is in effect while Tennessee's is not because a district court found Tennessee's law to be unconstitutional, and the Sixth Circuit has refused to stay that ruling. This is inconsistent with *Casey*.

Given the normal presumption that statutes are constitutional, and the significant federalism interests at stake whenever a federal court evaluates the validity of a state statute, this Court should be especially vigorous in staying a lower court decision that enjoins the enforcement of a statute that is materially indistinguishable from one upheld by this Court on a similar record. A State is irreparably harmed when a federal court prohibits one of the State's duly enacted statutes from being enforced, and that harm is accentuated when the statute at issue is materially identical to one that this Court has found to be constitutional. Such is the case here. To ensure that like cases continue to be treated alike, *see June Med. Servs. L.L.C. v. Russo*, __ U.S. __, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment), and to avoid irreparable harm to Tennessee, this Court should stay the injunction.

ARGUMENT

I. The statute and record at issue in this case are materially indistinguishable from *Casey*, and therefore the statute should not be enjoined.

Tennessee's waiting-period law is neither novel nor unique. Many other States—including many *amici* States—have long had materially identical waiting-period laws. And in the nearly three decades "[s]ince *Casey*, no federal appellate court has successfully struck down an abortion waiting period. Why? Because the Supreme Court says that waiting periods are constitutional." *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 344 (6th Cir. 2021) (Thapar, J., dissenting). Simply put, the Sixth Circuit's refusal to stay the injunction against Tennessee's waiting-period law is an outlier than cannot be squared with *Casey*.

Yet the Tennessee abortion providers who brought this suit argue that *Casey* is not dispositive here. In their view, this case should produce a different result because it involves very different circumstances. But this argument is belied by the striking similarities between the district court's factual findings in *Casey* and the district court's factual findings here. *Compare Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990), *aff'd in part, rev'd in part by*

947 F.2d 682 (3d Cir. 1991), *with Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, 2020 WL 6063778, at *61–*63 (M.D. Tenn. Oct. 14, 2020). Notably, the *Casey* district court found that:

> 197. The mandatory 24–hour waiting period would force women to double their travel time or stay overnight at a location near the abortion facility. This will necessarily add either the costs of transportation or overnight lodging or both to the overall cost of her abortion. Additionally, many women may lose additional wages or other compensation as a result of the mandatory 24–hour delay, if forced to miss work on two separate occasions. Two trips to the abortion provider may cause the women to incur additional expenses for food and child care.
>
> 198. The costs incident to obtaining an abortion, excluding the actual cost of the procedure itself, will be greater if the 24–hour waiting period were to go into effect.
>
> 199. The mandatory 24–hour waiting period will be particularly burdensome to those women who have the least financial resources, such as the poor and the young, those women that travel long distances, such as women living in rural areas, and

> those women that have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave.
>
> 200. In some cases, the delays caused by the 24–hour waiting period will push patients into the second trimester of their pregnancy substantially increasing the cost of the procedure itself and making the procedure more dangerous medically.
>
> 201. A delay of 24 hours will have a negative impact on both the physical and psychological health of some patients, as well as increase the risk of complications.

Casey, 744 F. Supp. at 1352 (record citations omitted). Those findings are almost exactly the same as the district court's findings in this case. In fact, they are almost verbatim.

For example, the district court here found that Tennessee's waiting period will "negatively affect the health of patients with certain medical conditions and cause patients to suffer emotionally and psychologically." *Slatery*, 2020 WL 6063778, at *62. And, like the *Casey* district court, the district court here also relied heavily on perceived "logistical and financial hurdles" posed by a waiting period, noting that "by having to attend two in-person appointments at least 48 hours apart, patients must take time off from work,

arrange childcare, and find transportation on two different occasions. These hurdles are exacerbated for those patients who must travel long distances . . . ." *Id.*[2] In this same vein, the district court here also found that a waiting period will cause women seeking abortions to "lose wages" and "face significant financial barriers to accessing care because the waiting period requires patients to visit a clinic twice and to therefore pay twice for travel and (for the two-thirds of patients who have at least one child already) childcare." *Id.* As in *Casey*, the district court here observed that these "logistical and financial obstacles . . . are particularly burdensome for low-income women . . . ." *Id.* And, also like the *Casey* district court, the district court here found that "[i]t is especially difficult for victims of intimate partner violence to attend two appointments and doing so jeopardizes their safety." *Id.*

The bottom line is this: When this Court decided *Casey*, it reviewed district court findings that were almost precisely the same as the district court findings in this case. And after reviewing those findings, this Court rejected any notion that Pennsylvania's waiting-period law was unconstitutional. *See Casey*, 505 U.S. at 885–87. The same result must follow here. This case simply cannot be reconciled with *Casey* otherwise. And

[2] The district court here largely discussed the perceived burdens of the 48-hour waiting period required by the Tennessee law, but it apparently saw no difference between that period and the statute's alternative 24-hour waiting period as it declared both unconstitutional. *See Slatery*, 2020 WL 6063778, at *67.

that makes a stay of the injunction appropriate because the conflict with *Casey* creates a strong possibility that the Court will grant certiorari and reverse the judgment below. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

One final point bears mentioning: Because the injunction against Tennessee's waiting-period law conflicts with *Casey*, allowing that injunction to continue would result in an expansion of the abortion right recognized in *Casey* and *Roe v. Wade*, 410 U.S. 113 (1973). Such an expansion would be inappropriate because that right is not one that appears in the text of the Constitution. *See Hester v. United States*, 139 S. Ct. 509, 509 (2019) (Alito, J., concurring in the denial of certiorari). Questions about the scope of Supreme Court precedent should be resolved "in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing *Bowsher v. Synar*, 478 U.S. 714, 724–26 & n.4 (1986); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S. Ct. 2553, 2571–72 (2007)), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010); *see also Texas v. Rettig*, __ F.3d __. No, 18-10545, 2021 WL 1324382, at *9–*10 (5th Cir. April 9, 2021) (Ho, J., dissenting from denial of rehearing en banc) (observing that courts should not extend precedent that is not supported by the text of the Constitution). And the constitutional text and history give no basis for expanding the right

recognized in *Casey* and *Roe* to the point that it would allow waiting-period laws to be declared unconstitutional.

II. The principle of treating like cases alike applies here, where this Court has already found a materially identical statute to be constitutional on a similar record.

This Court's holdings are binding on lower courts. *See* U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one *supreme* Court, and in such *inferior* Courts as Congress may from time to time ordain and establish." (emphasis added)); *see also Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) ("But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those court may think it to be."). That much is elementary—or at least it should be. But lower courts sometimes reach conclusions that are irreconcilable with this Court's precedents. When that happens, this Court is not shy about correcting the lower courts' errors to ensure that its precedents are followed and like cases are treated alike—even in abortion cases.

In *Mazurek v. Armstrong*, for example, this Court encountered a non-final injunction against a Montana "statute restricting the performance of abortions to licensed physicians." 520 U.S. 968, 969 (1997) (per curiam). The Ninth Circuit found that the parties

challenging the statute "had shown a 'fair chance of success on the merits.'" *Id.* at 970 (quoting 94 F.3d 566, 567–68 (9th Cir. 1996)). But this Court rejected that conclusion. It observed that enjoining the Montana statute would be "inconsistent with our treatment of the physician-only requirement at issue in *Casey*." *Id.* at 971. And the Court also noted that the Ninth Circuit's decision was "contradicted by our repeated statements in past cases . . . that the performance of abortions may be restricted to physicians." *Id.* at 974. Thus, even though a final judgment had not yet been entered in the lower courts, this Court summarily reversed the Ninth Circuit's ruling to preserve consistency in the law and to prevent the validity of similar laws in other states from being drawn into question. *Id.* at 975–76.

More recently, this Court reversed the Fifth Circuit's decision in *June Medical*. Comparing the Louisiana statute at issue in *June Medical* and the Texas statute at issue in *Whole Woman's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292 (2016), and finding the statutes and the records to be materially the same, the Court reversed the Fifth Circuit's decision in *June Medical*. The Chief Justice concluded that "[t]he Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons." *June Med.*, 136 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment). Thus, because "[s]tare decisis instructs [the Court] to treat like cases alike," *id.* at 2141, "[t]he result in this case is controlled

by our decision four years ago invalidating a nearly identical Texas law [in *Hellerstedt*]," *id.* at 2141–42.[3]

Because this Court already upheld a 24-hour waiting period in *Casey*, the plaintiffs in this case had the burden to prove that Tennessee's similar law imposed greater burdens than those found to fall short of an undue burden in *Casey*. They failed to do so, instead producing an evidentiary record nearly identical to the record in *Casey*, meaning that the law should be upheld for the same reasons. *See June Med.*, 136 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment). The truth is that this case was never really an attempt by plaintiffs to show that the waiting-period law is unconstitutional under *Casey*. Instead, it was an attempt to lean on a less demanding standard—the pure balancing standard rejected by the Chief Justice in *June Medical*—to try to get a different result. But as the Chief Justice's opinion makes clear, the *Casey* standard still applies. *See id.* at 2135–38 (Roberts, C.J.,

[3] Because no opinion in *June Medical* commanded a majority of the justices, the Chief Justice's concurrence is the controlling opinion under *Marks v. United States*, 430 U.S. 188 (1977), as it represents the narrowest line of reasoning that supports the Court's judgment. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020); *Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020) (per curiam). *But see Planned Parenthood of Ind. & Ky., Inc. v. Box*, __ F.3d __, No. 17-2428, 2021 WL 940125, at *10 (7th Cir. Mar. 12, 2021) (rejecting the argument that the Chief Justice's concurrence is the controlling opinion in *June Medical*); *Whole Woman's Health v. Paxton*, 978 F.3d 896, 903–04 (5th Cir. 2020) (same), *vacated by* 978 F.3d 974 (5th Cir. 2020).

concurring in the judgment). And because the *Casey* standard still applies, cases evaluating materially identical statutes on similar records must reach the same result. The district court's misguided balancing adventure must be stopped here in order to properly respect this Court's precedent. Treating like cases alike means doing so no matter which party that commitment favors.

III. The Court should grant the stay because Tennessee is suffering irreparable harm.

Enjoining the enforcement of a duly enacted state statute is no small matter. After all, there is a general presumption that statutes are constitutional. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661 (2003) (Stevens, J.) (citing *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944)). And any time a federal court enjoins a state statute, there are profound implications for the delicate balance of power between the federal and state governments. In fact, a State is irreparably harmed any time one of its duly enacted statutes is enjoined. *See Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

That harm is only accentuated when it is coupled with a situation in which the State enacted the law after this Court has already upheld a materially identical law. States justifiably rely on such rulings in

passing similar laws of their own. To pull the rug out from under them would punish them for their justifiable reliance and undermine confidence in this Court's authority. This would essentially make States feel duped, thereby harming the legitimacy of one part of our federal system in the eyes of another part, not to mention further disrupting the delicate balance of power in our federal system. *See June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment) (discussing the importance of fostering "reliance on judicial decisions" and maintaining "the actual and perceived integrity of the judicial process").

All of this is precisely the harm that Tennessee is suffering here as it is being wrongfully deprived of a part of its sovereign power to legislate and enact reasonable measures regulating abortion. *See id.* at 2135 (Roberts, C.J., concurring in the judgment) ("The State's freedom to enact such rules is 'consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.'" (quoting *Casey*, 505 U.S. at 873)). The existence of this harm further warrants a stay here. *See Hollingsworth*, 558 U.S. at 190 (holding that an applicant for a stay must show "a likelihood that irreparable harm will result from the denial of a stay").

CONCLUSION

This Court should reject the Sixth Circuit's reasoning and stay the district court's injunction, which

fails to treat like cases alike. Tennessee has already suffered irreparable harm as a result of the wrongful injunction, and that harm will continue unabated without astay.

Respectfully submitted,

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