No. _____

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

_____

APPLICATION FOR A STAY OF THE JUDGMENT AND INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

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PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Applicants (defendants-appellants below) are the following Tennessee officials, all in their official capacities: Herbert H. Slatery III, Attorney General and Reporter of Tennessee; Glenn R. Funk, District Attorney General of Davidson County; Amy P. Weirich, District Attorney General of Shelby County; Barry P. Staubus, District Attorney General of Sullivan County; Charme P. Allen, District Attorney General of Knox County; Lisa Piercey, M.D., Commissioner of the Tennessee Department of Health; and W. Reeves Johnson, Jr., M.D., President of the Tennessee Board of Medical Examiners.

Respondents (plaintiffs-appellees below) are Bristol Regional Women's Center, P.C.; Memphis Center for Reproductive Health; and Planned Parenthood of Tennessee and North Mississippi.

Planned Parenthood Greater Memphis Region; Planned Parenthood of Middle and East Tennessee; Adams & Boyle, P.C.; Knoxville Center for Reproductive Health; Wesley F. Adams, Jr.; and Kimberly Looney were plaintiffs in the district court but are not appellees in the court of appeals or respondents in this Court.

The following proceedings are directly related to this case:

1) *Slatery v. Adams & Boyle, P.C.*, No. 20-482 (U.S.) (judgment entered Feb. 26, 2021);[*]

2) *Adams & Boyle, P.C. v. Slatery*, No. 20-5408 (6th Cir.) (judgment entered Apr. 24, 2020);

3) *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, No. 20-6267 (6th Cir.) (appeal pending);

4) *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn.) (judgment entered Oct. 14, 2020).

[*] The prior proceedings that were before this Court and the court of appeals arose from an unrelated supplemental complaint in which abortion providers challenged an executive order requiring the temporary postponement of surgical procedures during the COVID-19 pandemic. The Sixth Circuit affirmed a preliminary injunction preventing the State from enforcing the order against the plaintiffs, *see Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020), and this Court granted certiorari, vacated the Sixth Circuit's judgment, and remanded with instructions to vacate the injunction as moot. *See Slatery v. Adams & Boyle, P.C.*, __ S. Ct. __, No. 20-482, 2021 WL 231544 (U.S. Jan. 25, 2021) (mem.).

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To the Honorable Brett M. Kavanaugh, Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

A federal district court permanently enjoined Tennessee from enforcing an abortion waiting-period law that is materially indistinguishable from the Pennsylvania law this Court upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The district court thought it could depart from this binding precedent because the record in this case is more "fully developed" than in *Casey*. App. 130a. The record in this case is indeed more developed: at the time of trial, Tennessee's waiting period had been in effect for *more than four years*. App. 4a. But more developed is not synonymous with materially different. Nothing about the record in this case gave the district court a license to ignore *Casey*. To the contrary, the evidence conclusively established that Tennessee's waiting period did not "prevent a significant number of women from obtaining an abortion." *Casey*, 505 U.S. at 893 (opinion of the Court). During the years the waiting period was in effect, the number of annual abortions in Tennessee declined only slightly and remained above 10,000 per year. *See* p. 12, *infra*. And no one has ever argued that this slight decline—which began years before the waiting period took effect and mirrors nationwide trends—is attributable to the waiting period.

The district court nevertheless facially invalidated Tennessee's waiting period based on its findings that the law delayed abortions and made it more expensive and logistically challenging to obtain them, without providing any countervailing benefit. App. 114a-31a. That result directly contravenes *Casey*, which upheld Pennsylvania's waiting period even though it "often" 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." 505 U.S. at 885-86 (quotation marks omitted) (plurality opinion).

A divided panel of the Sixth Circuit refused to stay the district court's judgment and injunction. App. 144a-76a. The majority concluded that it need not "follow [*Casey*] blindly," especially when faced with a law that "appears to be yet another unnecessary, unjustified, and unduly burdensome state law that stands between women and their right to an abortion." App. 145a. Judge Thapar dissented, stressing that the district court's decision "defies Supreme Court . . . precedent" and that "the majority's failure to issue a stay merits immediate correction either by our court or a higher one." App. 163a, 170a. The State sought relief from the en banc Sixth Circuit nearly six weeks ago, but the en banc Court has yet to rule on that request.

Tennessee has now been unable to enforce its waiting period for over five months. And although fourteen other States have similar waiting-period laws that generally require two trips to an abortion provider, Tennessee is the only State in the Nation that cannot enforce its law because of a federal judicial decree. *See* pp. 7-8, *infra*. Tennessee respectfully requests that this Court immediately stay the district court's judgment and injunction pending completion of further proceedings in the court of appeals and, if necessary, this Court.

In deciding whether to grant a stay in this posture, this Court considers whether an eventual petition for a writ of certiorari would likely be granted, whether there is a fair prospect that the Court would rule for the party seeking a stay, and whether irreparable harm is likely to occur if a stay is not granted. Those criteria are met here.

First, this Court would likely grant review of a decision affirming the district court's judgment and injunction. This case is materially indistinguishable from *Casey*, which upheld Pennsylvania's abortion waiting period. To affirm the district court, the Sixth Circuit would have to disregard *Casey* and refuse to treat like cases alike. Those errors would merit this Court's review. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (reaffirming that lower courts must follow this Court's abortion precedents); *Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997) (per curiam) (summarily reversing a lower court's ruling because it was "inconsistent

with . . . *Casey*"). And the district court's balancing of benefits and burdens also implicates a circuit split about the governing legal standard for assessing the constitutionality of abortion regulations.

Second, this Court would likely uphold Tennessee's waiting period and reverse any contrary judgment by the Sixth Circuit. The Court has consistently upheld waiting periods and other laws that serve legitimate state interests but have the effect of delaying abortions and making them more difficult and costly to obtain. Tennessee's modest waiting period is no different. There is no evidence that the waiting period has prevented any women from obtaining abortions, let alone enough women to justify facially invalidating the law.

Third, allowing the district court's judgment and injunction to remain in place would irreparably harm Tennessee and its citizens. In addition to preventing Tennessee from enforcing its duly enacted law, the district court's ruling undermines the vital interests that law serves. As long as the injunction remains in place, some unborn children will be aborted who might otherwise be spared that fate. Some women will choose abortion without making an informed and deliberate decision, and some will later come to regret that irreversible decision. Tennessee's waiting period was in effect for more than five years while litigation was pending in the district court. A stay will restore that status quo and ensure that Tennessee and its citizens do not suffer these irreparable harms.

OPINIONS BELOW

The Sixth Circuit's order denying a stay pending appeal is reported at *Bristol Regional Women's Center, P.C. v. Slatery*, 988 F.3d 329 (6th Cir. 2021), and is reproduced at App. 144a-76a. The district court's order denying a stay pending appeal is reproduced at App. 138a-43a. The district court's findings of fact and conclusions of law are not yet reported but are available at *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, 2020 WL 6063778 (M.D. Tenn. Oct. 14, 2020), and are reproduced at App. 1a-136a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered judgment and issued a permanent injunction on October 14, 2020. App. 137a. The State filed a notice of appeal on November 4, 2020, and simultaneously moved the district court for a stay of its judgment and injunction pending appeal. Dist. Ct. Dkt. Nos. 279, 280. After the district court denied the stay motion, App. 138a-43a, the State sought a stay from the Sixth Circuit. COA Dkt. No. 20. A divided panel of the Sixth Circuit denied the stay motion on February 19, 2021. App. 144a-76a. On February 23, 2021, the State filed a petition for initial hearing en banc or, alternatively, rehearing en banc of the panel's stay decision and asked the en banc Court to stay the judgment and injunction pending appeal. COA Dkt. No. 39. The en banc Sixth Circuit has not yet ruled on that petition. This Court has jurisdiction

to stay the district court's judgment and injunction under 28 U.S.C. §§ 1651 and 2101(f).

STATEMENT OF THE CASE

A. Legal background

Tennessee first enacted a two-day waiting period for abortions in 1978, 1978 Tenn. Pub. Acts, ch. 847, § 1, but a federal court soon enjoined enforcement of 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 federal injunctions). After *Casey* upheld Pennsylvania's similar law, the Tennessee Supreme Court held Tennessee's waiting period unconstitutional under state law, and Tennessee was again enjoined from enforcing it. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 25 (Tenn. 2000).

In 2014, 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 (6th Cir. 2018). The following year, 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* App. 7a; Dist. Ct. Dkt. No. 227, at 7.

The 2015 law requires abortion providers to give their patients important information about abortion and its alternatives at least 48 hours before performing an abortion, except in a medical emergency. Tenn. Code Ann. § 39-15-202(d)(1), (f)(1). The information must be provided orally and in person by a physician. *Id.* § 39-15-202(b)-(d). After 48 hours have passed, the provider must obtain the patient's informed consent to perform an abortion. *Id.* The law also provides that, if any court enjoins enforcement of the 48-hour waiting period, a 24-hour waiting period will apply instead. *Id.* § 39-15-202(d)(2).

As in *Casey*, the information abortion providers must disclose under Tennessee's law ensures that women are fully informed about the decision to have an abortion. Among other things, abortion providers must inform women of the health risks of abortion and childbirth, the gestational age of the unborn child, and the availability of public and private support services for women who choose to carry their pregnancies to term. *Id.* § 39-15-202(b); *cf. Casey*, 505 U.S. at 881 (plurality opinion).

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.[1] Although some of those laws have been successfully

[1] 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-

challenged under state law, the State is unaware of any successful federal constitutional challenge to a waiting-period law that has survived federal appellate review since *Casey*. Indeed, every authoritative decision of the federal courts of appeals to consider an abortion waiting period since *Casey* has upheld the law.[2]

When the waiting-period law was enacted and at the time of trial, abortion was lawful in Tennessee until viability. *See* Tenn. Code Ann. § 39-15-211(b)(1). And because the State is currently enjoined from enforcing a recently enacted law that prohibits abortions after the unborn child has a heartbeat, *id.* § 39-15-216(c)(1), abortion remains available in Tennessee until viability. *See Memphis Ctr. for*

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 or 24 hours); 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).

[2] *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 691-93 (7th Cir. 2002); *Karlin v. Foust*, 188 F.3d 446, 486 (7th Cir. 1999); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994); *Barnes v. Moore*, 970 F.2d 12, 14-15 (5th Cir. 1992). *But see Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 818-832 (7th Cir. 2018) (holding an ultrasound waiting-period law likely unconstitutional under the balancing test of *Whole Woman's Health*), *cert. granted, judgment vacated sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 184 (2020) (mem.) (vacating and remanding for further consideration in light of *June Medical Services*), *on remand sub nom. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. Dep't of Health*, 823 F. App'x 440, 441 (7th Cir. 2020) (mem.) (remanding to district court without discussing the merits).

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.).[3]

B. Procedural background

In June 2015, a group of abortion providers sued to challenge the waiting-period law shortly before it was scheduled to take effect. Dist. Ct. Dkt. No. 1, at 3-5, 7, 18-19. The abortion providers did not seek a preliminary injunction against enforcement of the waiting period. *Id.* at 20-21. The law took effect about a week later, on July 1, 2015, and it remained in force while the litigation was pending in the district court. 2015 Tenn. Pub. Acts, ch. 473, § 4.

After a bench trial—and after the law had been in effect for more than five years—the district court declared Tennessee's waiting period unconstitutional and permanently enjoined the enforcement of either the 48-hour waiting period or the alternative 24-hour waiting period. App. 136a. Quoting the plurality opinion in *June Medical Services*, the court assessed whether the law imposed an undue burden by "weighing its asserted benefits against the burdens it imposes on abortion access." App. 127a (quotation marks omitted). Because it believed the law's burdens

[3] 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).

outweighed its benefits, the court held the law facially unconstitutional. App. 127a-28a, 136a.

As to benefits, the district 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." App. 128a, 130a. It reached that conclusion even though Respondents' own expert acknowledged that "many studies" show that abortion increases the risk of adverse mental health outcomes, Dist. Ct. Dkt. No. 222, at 109-10, 189, and even though a study of Utah's waiting-period law showed that at least eight percent of women who did not return for the second appointment had changed their minds about obtaining an abortion. *See* App. 116a-17a (discounting Utah study because the State "ha[d] not shown that" the results could be "applied to women in Tennessee").

As to burdens, the district 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." App. 122a. Specifically, the court found that the law:

- Increased wait times for abortion "significantly" and often by "much greater than 48 hours." App. 122a.

- 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 a clinic that performs surgical abortions. App. 123a.

- Caused an unspecified number of women "to miss the cutoff date" for surgical abortions of "19 weeks and 6 days LMP." App. 123a.

- 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." App. 123a-24a.

- Burdened abortion patients with financial and logistical 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." App. 124a-25a.

- Increased the "cost of an abortion." App. 125a.

- "[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." App. 126a-27a.

- "[P]lace[d] significant burdens on the clinics themselves" by causing them to modify schedules and hire additional staff. App. 127a.

The district court did not find that the waiting period would "prevent a significant number of women from obtaining an abortion." *Casey*, 505 U.S. at 893 (opinion of the Court). Indeed, the record would not support such a finding. Undisputed evidence at trial established that more than 10,000 abortions were performed in Tennessee each year both before and after the waiting period took effect:

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: Defendants-Appellants' Appendix, COA Dkt. Nos. 33-1, 33-2 & 33-3, at 50a, 66a, 82a, 98a, 114a, 130a, 146a, 162a, 178a, 194a.[4]

The annual number of abortions performed in Tennessee declined only slightly after the waiting period took effect in July 2015. And no one has ever argued that this decline—which began years before the waiting period took effect and mirrors nationwide trends—is attributable to the waiting period. *See* Dist. Ct. Dkt. No. 219, at 127-28; Dist. Ct. Dkt. No. 220, at 34, 92; Dist. Ct. Dkt. No. 222, at 144-46.

The district court acknowledged that this Court upheld Pennsylvania's 24-hour waiting period in *Casey*. App. 128a-29a. But it purported to distinguish *Casey* in a single paragraph. App. 130a. It maintained that *Casey* was not controlling

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

because the record in this case is more "fully developed" than in *Casey* and because Tennessee has fewer abortion providers than Pennsylvania had when *Casey* was decided. App. 130a.

Tennessee appealed and simultaneously moved the district court for a stay pending appeal. Dist. Ct. Dkt. Nos. 279, 280. Two days after the district court denied that motion, App. 138a-43a, Tennessee moved for a stay from the Sixth Circuit. COA Dkt. No. 20.

More than two months later, a divided panel of the Sixth Circuit denied the stay motion because it concluded that Tennessee's waiting period is likely unconstitutional. App. 144a-76a. The panel majority ruled that the waiting period is likely an undue burden because it imposes "logistical, financial, and medical hurdles" to abortion access. App. 156a. It also concluded that the law is likely facially invalid under the large-fraction test because these hurdles constitute an undue burden for at least the 60 to 80 percent of women seeking an abortion who "qualify as low income." App. 161a. The majority held that *Casey* did not foreclose these conclusions because the district court made "specific and comprehensive findings as to the logistical, financial, and medical obstacles" created by Tennessee's waiting period, without explaining how these findings differed in any material respect from those this Court found insufficient in *Casey*. App. 158a.

Judge Thapar dissented. App. 163a. He explained that the district court made three errors, each of which independently entitled Tennessee to a stay. App. 165a. First, the district court applied the wrong legal standard when it balanced the benefits and burdens of Tennessee's waiting period—an approach rejected by five Justices in *June Medical Services*, including the Chief Justice in his controlling opinion. App. 165a-66a (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Second, the district court erroneously concluded that Tennessee's waiting period serves no legitimate purpose, "contraven[ing] . . . key principles of rational basis review" and binding precedent. App. 169a-70a. Third, the district court wrongly concluded that the law poses a substantial obstacle to abortion for a large fraction of women, even though the burdens the district court identified either were "the same as those rejected as insufficient in *Casey*" or fell "well short of being a substantial obstacle to abortion." App. 171a. Judge Thapar stressed that the majority's decision warranted "immediate correction" by the en banc Sixth Circuit or this Court because it "calls into question waiting-period laws in fourteen States" and "suggests that district courts (and appellate panels) have free rein to disregard controlling precedent." App. 163a, 175a-76a.

Four days later, the State petitioned the Sixth Circuit for initial hearing en banc or rehearing en banc of the stay decision and asked the full Court to stay the district court's judgment and injunction pending appeal. COA Dkt. No. 39. The

State also requested that the full Court administratively stay the judgment and injunction while it considered the en banc petition. COA Dkt. No. 42. The en banc petition has been fully briefed for more than three weeks but remains pending. The State's motion for an administrative stay likewise remains pending. On March 31, 2021, the State notified the en banc Sixth Circuit of its intent to apply for a stay in this Court given the ongoing irreparable harm the injunction is causing. COA Dkt. No. 60. If the en banc Sixth Circuit stays the district court's judgment and injunction while this stay application is pending, the State will promptly notify this Court and withdraw this application.[5]

ARGUMENT

The State respectfully requests a stay of the district court's judgment and injunction pending completion of further proceedings in the court of appeals and, if necessary, this Court. "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari;

[5] The State fulfilled its obligation to first seek a stay "in the appropriate court or courts below" by requesting a stay from the district court and a panel of the Sixth Circuit. Sup. Ct. R. 23.3; *cf.* 6th Cir. I.O.P. 40(a)(2) ("A party is not required to petition for rehearing . . . as a prerequisite to a petition for writ of certiorari in the Supreme Court of the United States."). This Court has previously granted a stay while a petition for en banc relief was pending in the court of appeals. *Husted v. Ohio State Conf. of N.A.A.C.P.*, 573 U.S. 988 (2014) (mem.); *see also Ohio State Conf. of N.A.A.C.P. v. DeWine*, No. 14-3877 (6th Cir.), Dkt. Nos. 46, 53, (reflecting that the petition for en banc relief was pending when this Court granted the stay).

(2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Those requirements are met here.

I. There Is a Reasonable Probability That This Court Would Grant Certiorari If the Court of Appeals Affirms the District Court's Judgment and Injunction.

If the court of appeals ultimately affirms the district court's judgment and injunction, there is a reasonable probability that this Court will grant a writ of certiorari. That is true for at least three reasons.

First, a decision affirming the district court's injunction would resolve "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Tennessee's waiting period and the burdens it imposes are materially indistinguishable from those at issue in *Casey*. The Court recently granted certiorari and reversed the Fifth Circuit for upholding a Louisiana abortion law that was "almost word-for-word identical" to a Texas law the Court held unconstitutional a few years earlier and that "impose[d] a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons." *June Med. Servs.*, 140 S. Ct. at 2112 (plurality opinion); *id.* at 2134 (Roberts, C.J., concurring in the judgment). The same principles will be at stake if the Sixth Circuit invalidates Tennessee's waiting period. Certiorari will be warranted to reaffirm the

principle that lower courts must follow this Court's abortion precedents and to "avoid an arbitrary discretion in the courts." *Id.* at 2134 (Roberts, C.J., concurring in the judgment) (quoting The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton)).

Second, the district court's decision implicates a circuit split about whether the benefits-and-burdens balancing test of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), supplies the governing standard for deciding whether abortion laws are constitutional. Although five Justices recently rejected that test, *see June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting), the lower courts are divided on the issue. *Compare EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 433-34 (6th Cir. 2020) (rejecting the test), and *Hopkins v. Jegley*, 968 F.3d 912, 915-16 (8th Cir. 2020) (per curiam) (same), *with Planned Parenthood of Ind. & Ky., Inc. v. Box*, __ F.3d __, No. 17-2428, 2021 WL 940125, at *1 (7th Cir. Mar. 12, 2021) (adopting the test), and *Whole Woman's Health v. Paxton*, 978 F.3d 896, 904 (5th Cir. 2020) (same), *reh'g en banc granted, opinion vacated*, 978 F.3d 974. If the Sixth Circuit ultimately affirms the district court's balancing of benefits and burdens, as the panel suggested it might notwithstanding *EMW*, App. 153a, certiorari would be warranted to resolve this circuit split.

Third, even if a decision affirming the district court would not warrant plenary review, it would at least merit summary reversal. The Court has previously

summarily reversed a decision that disregarded *Casey*. *Mazurek*, 520 U.S. at 971 (summarily reversing the Ninth Circuit because its ruling was "inconsistent with . . . *Casey*"). As in *Mazurek*, "the lower court's judgment" in this case "has produced immediate consequences for [Tennessee] . . . and has created a real threat of such consequences for the [two] other States in the [Sixth] Circuit that have [waiting-period laws]." *Id.* at 975; *see also* Ky. Rev. Stat. Ann. § 311.725(1); Ohio Rev. Code Ann. § 2317.56(B)(1). This Court "has not shied away from summarily deciding fact-intensive cases where . . . lower courts have egregiously misapplied settled law," *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam), and it is likely to do so here if it does not grant plenary review.

II. There Is a Fair Prospect That This Court Would Uphold Tennessee's Abortion Waiting Period.

Tennessee's abortion waiting period is facially constitutional. This Court is almost certain to reverse any contrary decision by the Sixth Circuit.

In *Casey*, this Court considered whether Pennsylvania's 24-hour waiting period for abortions violated a woman's right to obtain a previability abortion. 505 U.S. at 885-87 (plurality opinion). The Court held that the law was reasonably related to the State's legitimate interests in "protecting the life of the unborn" and ensuring that the decision to have an abortion is "informed and deliberate." *Id.* at 885. It then considered whether "in practice" the law posed a substantial obstacle to abortion. *Id.*

Based on the record assembled in that case, the district court in *Casey* found that Pennsylvania's waiting period had "the effect of increasing the cost and risk of delay of abortions." *Id.* at 886 (quotation marks omitted). Indeed, the district court found that, "because of the distances many women must travel to reach an abortion provider, the practical effect [of the waiting period] will often be a delay of *much more* than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor." *Id.* at 885-86 (emphasis added). The district court also found that "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," the waiting period "will be particularly burdensome." *Id.* at 886 (quotation marks omitted).

While this Court considered those findings "troubling in some respects," it nevertheless concluded that "they do not demonstrate that the waiting period constitutes an undue burden." *Id.* The Court specifically rejected the notion that the "particularly burdensome effects of the waiting period on some women require its invalidation." *Id.* at 886-87 (quotation marks omitted). "Whether a burden falls on a particular group," the Court explained, "is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Id.* at 887. And Pennsylvania's waiting period was not "such an obstacle even for the women who are most burdened by it." *Id.* The Court also explained that the law's medical-

emergency exception ensured that any health risks created by the waiting period would not pose a substantial obstacle. *Id.* at 879-80 (opinion of the Court); *id.* at 886 (plurality opinion).

Tennessee's waiting period is materially indistinguishable from the waiting period upheld in *Casey*. It serves the same legitimate state interests as Pennsylvania's waiting period: "protecting the life of the unborn" and ensuring that the decision to have an abortion is "informed and deliberate." *Id.* at 885 (plurality opinion).[6] And the burdens on abortion access that the district court attributed to Tennessee's waiting period are either the same ones that *Casey* held insufficient or differ in ways that are legally immaterial.[7] Consider each burden in turn: (1) delays, (2) costs and logistical difficulties, and (3) medical risks.

Delays. This Court has repeatedly held that moderate delay in obtaining an abortion does not constitute a substantial obstacle. *E.g.*, *Casey*, 505 U.S. at 886 (plurality opinion) ("delay[s] of *much more* than a day" (emphasis added)); *Hodgson*, 497 U.S. at 448-49 (opinion of Stevens, J.); *id.* at 496-97 (Kennedy, J.,

[6] Although *Casey* involved a 24-hour waiting period, a 48-hour waiting period serves both these interests at least as well. *See Hodgson v. Minnesota*, 497 U.S. 417, 448 (1990) (opinion of Stevens, J.).

[7] The findings the district court relied on to invalidate Tennessee's waiting period are strikingly similar to the findings the district court in *Casey* relied on to invalidate Pennsylvania's waiting period. *Compare* App. 122a-27a, *with Planned Parenthood of Se. Penn. v. Casey*, 744 F. Supp. 1323, 1351-52 (E.D. Pa. 1990).

concurring in the judgment in relevant part) (upholding 48-hour waiting period for minors); *see also Garza v. Hargan*, 874 F.3d 735, 755-56 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (collecting cases upholding laws that caused "real-world delays of several weeks"). The district court here found that patients experience delays ranging from three days to four weeks between their first and second appointments, but it made no findings about how many women experience delays in the upper end of that range. App. 122a-23a. This Court has already held that the possibility that some women will experience a delay of more than three weeks in obtaining an abortion "is plainly insufficient to invalidate the statute on its face." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990). The delays the district court attributed to the waiting period are likewise insufficient to facially invalidate the law.

The district court could not avoid these precedents by characterizing the inevitable effects of delay as new and different burdens on the right to abortion. For example, the district court found that delays cause women to have abortions at later gestational ages and thus can cause some women to miss the cutoff for a medication abortion (10 weeks LMP) or the cutoffs that providers themselves establish for performing a surgical abortion, which are earlier than Tennessee's legal limit of viability. App. 123a-24a; *see also* COA Dkt. No. 33-3, at 223a (making clear that the cutoffs for surgical abortions are set by the abortion provider). But all waiting

periods will cause women to have abortions at later gestational ages and will 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 period in *Casey* and the judicial bypass procedure in *Akron Center for Reproductive Health*, which like Tennessee's law could delay abortions for days or weeks. *Casey*, 505 U.S. at 886 (plurality opinion); *Akron Ctr. for Reprod. Health*, 497 U.S. at 514. So long as any delay still allows for "an effective opportunity to obtain [an] abortion," the delay is constitutional. *Akron Ctr. for Reprod. Health*, 497 U.S. at 513. And the delays associated with Tennessee's 48-hour waiting period plainly satisfy that standard: more than 10,000 abortions have occurred each year since the law took effect, roughly the same number that occurred immediately before the law's enactment. *See* pp. 11-12, *supra*.

Even considered as a distinct burden, the prospect that delays from the waiting period could cause some women to miss the deadline for a medication abortion is insufficient to facially invalidate the law. Even laws that completely prohibit a particular method of abortion are not "a substantial obstacle" if they permit other "commonly used and generally accepted method[s]" of abortion that are "considered to be safe alternatives." *Gonzales v. Carhart*, 550 U.S. 124, 165, 167 (2007). That is true even "if some procedures have different risks than others" and even if some medical experts believe that "the barred procedure is [sometimes] necessary to

preserve a woman's health." *Id.* at 166-167; *see also id.* at 162. It follows *a fortiori* that the inability to obtain a medication abortion because of a waiting period—which does not prohibit any method of abortion—is not an undue burden if surgical abortion, a method that this Court has considered safe for women, remains available. *See Stenberg v. Carhart*, 530 U.S. 914, 923-26 (2000).[8] The Court implicitly confirmed as much earlier this year by permitting the federal government to enforce an in-person dispensing requirement that could cause some women "to miss the 10-week window for a medication abortion altogether." *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 582 (2021) (Sotomayor, J., dissenting from grant of application for stay).

Finally, the district court's finding that the waiting period caused some unspecified number of women "to miss the cutoff date in Tennessee" for a surgical abortion cannot sustain the injunction for two reasons. App. 123a.

First, that finding "is predicated on a misunderstanding of the governing . . . law" and is therefore entitled to no deference. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). The district court wrongly

[8] Respondents' witnesses agreed that surgical abortion is a safe procedure at all gestational ages. *E.g.*, App. 16a ("[S]urgical abortion at all times remains very safe . . . ." (quotation marks omitted)); *see also* Dist. Ct. Dkt. No. 219, at 42 (even later in pregnancy, surgical abortion "remains a very, very safe procedure in women"); Dist. Ct. Dkt. No. 220, at 57 ("Abortion is very safe."); *id.* at 131 (abortion is "safe" at 20 weeks).

conflated the self-imposed cutoff of "19 weeks and 6 days LMP" that some providers were using at the time of trial with the legal cutoff for abortion in Tennessee, which is viability. *See* App. 123a; pp. 8-9 & n.3, 21, *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. Harris v. McRae*, 448 U.S. 297, 316 (1980) (explaining that the government "need not remove" obstacles to abortion access that are "not of its own creation"); *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). A contrary rule would allow the business practices of abortion providers to determine the constitutionality of abortion regulations. Because the district court did not find that any women were delayed past Tennessee's legal limit of viability, the waiting period is not an undue burden.

Second, even if abortion providers' self-imposed gestational age cutoffs were legally relevant, the district court did not find that the waiting period caused a *large fraction of women* to miss those cutoffs. *See* App. 23a. So there still was no basis to facially invalidate the waiting period.

Costs and logistical difficulties. Laws are invalid under the undue burden standard not because they "ha[ve] the incidental effect of making it more difficult or

more expensive to procure an abortion," *Casey*, 505 U.S. at 874 (plurality opinion), but because they "prevent a significant number of women from obtaining an abortion"—that is, they "impose a substantial obstacle." *Id.* at 893-94 (opinion of the Court). Applying that principle, this Court upheld Pennsylvania's waiting period even though it required "at least two visits to the doctor" and therefore "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." *Id.* at 886 (plurality opinion).

The costs and logistical difficulties the district court identified in this case are not materially different from those at issue in *Casey*. *Compare id.* at 885-87, *with* App. 124a-26a (listing increased costs and logistical difficulties from travel, childcare, and time off work caused by the two-visit requirement); *see also Casey*, 744 F. Supp. at 1351-52 (same). As in *Casey*, the district court found that these costs and logistical difficulties are "particularly burdensome" for some women. *Compare Casey*, 505 U.S. at 886 (plurality opinion), *with* App. 125a. But it never found that these costs and difficulties effectively prevent a large fraction of women from exercising their constitutional right to an abortion. Thus, there is no basis to conclude, as the panel majority did, that the burdens imposed by Tennessee's waiting period "are substantially more severe" than those at issue in *Casey*. App. 159a. Roughly the same number of women obtained abortions before and after

Tennessee's waiting period took effect, and neither Respondents nor the district court have ever suggested that the slight decline in annual abortions is attributable to the waiting period. App. 174a (Thapar, J., dissenting); *see also* pp. 11-12, *supra*. "This is not the sort of evidence that permits an inferior federal court to depart from the holding of *Casey* that an informed-consent law is valid even when compliance entails two visits to the medical provider." *A Woman's Choice-E. Side Women's Clinic*, 305 F.3d at 692 (Easterbrook, J.).

The panel majority reasoned that Tennessee's waiting period is likely unconstitutional because the burdens it imposes "mirror (if not surpass)" the burdens at issue in this Court's recent admitting-privileges decisions. App. 156a (citing *Whole Woman's Health*, 136 S. Ct. at 2313, and *June Med. Servs.*, 140 S. Ct. at 2140-41 (Roberts, C.J., concurring in the judgment)). But the delays and logistical difficulties at issue here are nothing like the ones at issue in the admitting-privileges cases. The admitting-privileges requirements posed a substantial obstacle to abortion because they caused or would cause abortion clinics to close, with the result that the demand for abortion would exceed the supply. *Whole Woman's Health*, 136 S. Ct. at 2313, 2316; *June Med. Servs.*, 140 S. Ct. at 2128-29 (plurality opinion); *id.* at 2140 (Roberts, C.J., concurring in the judgment). Tennessee's waiting period has not caused any abortion clinics to close or reduce services. The admitting-privileges cases therefore provide no basis to depart from *Casey*.

The only actual difference the district court identified between *Casey* and this case is the number of abortion providers in the State. App. 90-91a, 130a (stating that Pennsylvania had 81 abortion providers in 1992 while Tennessee has eight). But that difference is legally immaterial for four reasons.

First, *Casey* did not even mention the number of abortion providers in Pennsylvania, let alone consider that fact in evaluating the constitutionality of Pennsylvania's waiting period. And when interpreting precedent, "what matters is the [evidence] the Court considered as the basis for its decision, not any latent [evidence] not alluded to by the Court." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 n.4 (2020).

Second, the number of abortion providers is irrelevant when, as in *Casey* and this case, the government has not limited that number. The State "need not remove" obstacles to abortion access that are "not of its own creation." *Harris*, 448 U.S. at 316. And Tennessee's waiting-period law did not cause any clinics to close or reduce services.

Third, the number of abortion providers is irrelevant when, as in *Casey* and this case, there is no evidence that the existing providers are unable to satisfy current demand for abortions. *Cf. June Med. Servs.*, 140 S. Ct. at 2140 (Roberts, C.J., concurring in the judgment). Tennessee's eight abortion clinics are located in major metropolitan areas spread across the State, such that "almost every Tennessean lives

within a two-hour drive of an abortion clinic." App. 173a n.3 (Thapar, J., dissenting); *cf. June Med. Servs.*, 140 S. Ct. at 2140 (Roberts, C.J., concurring in the judgment) (referring to district court's finding that the admitting-privileges law would cause a clinic in northern Louisiana to close, forcing women there to travel 320 miles to access a clinic).

Fourth, contrary to the panel majority's assertion, the district court never "found" that "abortion services were far less available in Tennessee than in Pennsylvania when the Court decided *Casey*." App. 159a n.10. The district court made a logically flawed legal conclusion that the difference in the raw number of abortions providers in the two states would "[o]bviously" "affect[] the extent to which [abortion] was available to Pennsylvanians in 1992 as compared to Tennesseans in 2020." App. 130a. But that conclusion—divorced from any factual findings aside from the raw number of providers in each State—was neither obvious nor correct. Setting aside that the number of abortion providers in the two States may not be so different,[9] Tennessee's population is about *half* of Pennsylvania's population in 1992, and "almost every Tennessean lives within a two-hour drive of an abortion clinic." App. 173a n.3 (Thapar, J., dissenting). So there was no basis

[9] The district court acknowledged that "the calculation of Pennsylvania providers also included smaller OB/GYNs or hospitals that performed abortions, which were not included in the calculation of Tennessee providers." App. 47a n.24; *see also* App. 173a n.3 (Thapar, J., dissenting).

for the district court to conclude that a smaller number of abortion providers in Tennessee would "obviously" result in less access to abortion, especially when the number of abortions performed annually before and after the waiting period took effect did not change appreciably.

Medical Risks. The district court also invoked "increased medical risks" as a basis for facially invalidating the waiting period. App. 122a. But the waiting-period law has an exception for medical emergencies, 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 health risks. 505 U.S. at 879-80 (opinion of the Court); *id.* at 886 (plurality opinion); *cf. Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 323 (2006). And in any event, only "significant health risks" qualify as a substantial obstacle. *Gonzales*, 550 U.S. at 161 (quotation marks omitted). The district court did not find, and Respondents do not contend, that delaying an abortion for a few days or weeks creates *significant* health risks for any women—only "increased" risks. App. 122a, 131a; COA Dkt. No. 26, at 3, 18-19. Respondents' position is understandable: their consistent view is that the abortion procedure is *always* "very, very safe," even if marginally riskier later in pregnancy. *See, e.g.*, p. 23 n.8, *supra*. As Judge Thapar explained in dissent, "minimal increases in risk cannot create appreciable medical risk when, as plaintiffs contend, the procedure isn't risky to begin with." App. 172a.

The other "burdens" the district court mentioned in its opinion are legally immaterial and cannot justify the facial invalidation of Tennessee's waiting period. The court stated that complying with the waiting period "is especially difficult for victims of intimate partner violence." App. 124a. But it made no findings about how many women (if any) are at risk of domestic violence because of the waiting period, and the record suggests that domestic violence victims are an extremely small percentage of Respondents' patients. Dist. Ct. Dkt. No. 219, at 122-23; COA Dkt. No. 33-4, at 312a. The district court also asserted that the waiting period can "cause patients to suffer emotionally and psychologically." App. 124a. Yet this Court has never held that psychological harm qualifies as a substantial obstacle, and Respondents 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.*, Dist. Ct. Dkt. No. 220, at 194-95. Finally, the district court reasoned that the waiting period "places significant burdens on the clinics themselves" by causing them to modify schedules and hire additional staff. App. 127a. 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.

III. There Is a Likelihood That Irreparable Harm Will Result from the Denial of a Stay.

Tennessee and its citizens will likely suffer irreparable harm if a stay is denied. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets and quotation marks omitted). The harm is especially acute here because the district court frustrated years of democratic efforts to enact a waiting period, including a state constitutional amendment. *See* p. 6, *supra*.

The irreparable harms Tennessee will suffer extend beyond its inability to enforce its duly enacted law. *See King*, 567 U.S. at 1303. As long as the waiting period remains enjoined, some unborn children will be aborted who might otherwise be spared that fate. *Casey*, 505 U.S. at 883 (plurality opinion) (explaining that informed-consent laws may cause women "to choose childbirth over abortion"). Some women will choose abortion without making an "informed and deliberate" decision, *id.* at 885, and some will later come to regret that irreversible decision. *Gonzales*, 550 U.S. at 159 (concluding that "some women come to regret" their abortions and experience "grief" and "sorrow"); *Harris*, 448 U.S. at 325 ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.").

By contrast, a stay will not substantially injure Respondents, who complied with Tennessee's waiting period for five years while the litigation proceeded in the district court. During that time, Respondents continued to operate their clinics, and women in Tennessee continued to obtain abortions. There is no reason Respondents cannot continue complying with the law during appellate proceedings.

The irreparable harms created by the district court's injunction have lasted long enough. This Court should end them now by granting a stay.

CONCLUSION

The Court should stay the district court's judgment and injunction pending the completion of further proceedings in the court of appeals and, if necessary, this Court.

Respectfully submitted,

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