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.

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

BRIEF OF *AMICUS CURIAE* CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, *Amicus* Christian Medical and Dental Associations makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No. *Amicus* is a nonprofit organization, has no parent corporation, and does not issue stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

***Amicus* is aware of no such entity.**

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

This legal challenge concerns the constitutionality of a Tennessee law that mirrors those of many other states: a modest waiting period before a doctor takes a human life through an abortion procedure. The common-sense law provides women contemplating abortions the opportunity to receive crucial information about the procedure before it takes place.

Amicus Christian Medical and Dental Associations (CMDA), founded in 1931, is an incorporated nonprofit Tennessee organization of Christian physicians and allied healthcare professionals with over 19,000 members nationally, many of whom reside and practice in Tennessee. Among CMDA's purposes is to provide a public voice on bioethics and healthcare policy, and more specifically to uphold the sanctity of life, to oppose abortion, and to actively develop and employ alternatives to abortion.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

CMDA believes that abortion is contrary to the revealed, written Word of God and Judeo-Christian medical ethics. As such, CMDA has a strong interest in ensuring that the courts apply the correct legal standard when evaluating constitutional challenges to abortion regulations, especially following the Supreme Court's fractured opinion in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).

INTRODUCTION

For decades, myriad states have enacted and enforced modest waiting-period laws before an abortion procedure can commence, ensuring that women contemplating the procedure receive crucial information before making a life-altering decision. Consistent with a similar waiting period that the United States Supreme Court upheld in *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992), Tennessee passed such a law in 2015 and enforced it without incident for five years.[2] But after a group of abortion providers challenged the law, the district court conducted a bench trial and enjoined Tennessee's waiting period, finding that it constituted an undue burden. Findings of Fact and Conclusions of Law, *Bristol Regional Women's Center v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Oct. 14, 2020), ECF No. 275. In so doing the district court ignored the binding precedential force of not only *Casey*, but also this court's decision in *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006), both of which upheld waiting periods in remarkably similar circumstances.

[2] Tenn. Code § 39-15-202(a)-(h).

Just as important, the district court applied the wrong legal standard. Instead of applying Chief Justice Roberts' controlling opinion in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), the court inexplicably weighed the Tennessee law's "asserted benefits against the burdens it imposes on abortion access." ECF No. 275 at 127. Five Justices in *June Medical* rejected such a balancing test and confirmed that the applicable inquiry is *Casey*'s undue burden standard: whether a law imposes a "substantial obstacle" on a woman's ability to obtain an abortion. *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring).

Under *June Medical*—and this court's adoption of Chief Justice Roberts' opinion as controlling in *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020)—the district court's order enjoining Tennessee's waiting period must be reversed. In addition, this Court should apply the proper test and direct entry of judgment in favor of Tennessee.

ARGUMENT

I. The Supreme Court's *June Medical Services v. Russo* decision garnered no majority opinion.

In *June Medical*, the Supreme Court invalidated a Louisiana law that required "any doctor who performs abortions to hold active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." 140 S. Ct. at 2113 (cleaned up). But no opinion in *June Medical* commanded majority support. Rather, a four-Justice plurality held that—*after* conducting *Casey*'s substantial-obstacle analysis—courts should judge for themselves a law's benefits and then balance them against the law's purported burdens, citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In essence, the plurality asked "whether the law burdens a very large fraction of the people that it burdens," *June Medical*, 140 S. Ct. at 2176 (Gorsuch, J. dissenting), even though *Casey* conducted no such analysis. The plurality's new balancing test would "require[ ] courts [to] independently [ ] review the legislative findings upon which an abortion-related statute rests and to weigh the law's

asserted benefits against the burdens it imposes on abortion access." *June Medical*, 140 S. Ct. at 2112 (cleaned up).

Chief Justice Roberts concurred in the result only, but rejected the four-justice plurality opinion's reasoning. He authored a separate opinion which concluded that "[u]nder *Casey*, the State may not impose an undue burden on the woman's ability to obtain an abortion." *Id.* at 2135 (Roberts, C.J., concurring). He explained that a "finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," and further explained that "[l]aws that do not pose a substantial obstacle to abortion access are permissible, so long as they are reasonably related to a legitimate state interest." *Id.* (cleaned up).

The Chief Justice thus rejected the plurality's unfounded assumption that *Hellerstedt* adopted a balancing test, explaining that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the traditional rule that state and federal legislatures have wide discretion to pass legislation in areas where

there is medical and scientific uncertainty is consistent with *Casey*." *Id.* at 2136 (cleaned up). *Casey*, in other words, "focuses on the existence of a substantial obstacle," *id*., and *Hellerstedt* did nothing more than apply the *Casey* calculus in that regard. *Id*. at 2138.

In so holding, Chief Justice Roberts criticized the plurality's reasoning as "invit[ing] a grand balancing test in which unweighted factors mysteriously are weighed." *Id*. at 2135 (cleaned up). Under such a test, courts "would be asked in essence to weigh the State's interest in protecting the potentiality of human life and the health of the woman, on the one hand, against the woman's liberty interest in defining her own concept of existence, of meaning, of the universe, and of the mystery of human life on the other." *Id*. at 2136 (cleaned up). But this, he concluded, is impossible, because "[t]here is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *Id*. In fact, attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy," a quixotic task if ever there were one. *Id*. (quoting *Bendix Autolite Corp.*

v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment)).

In sum, Chief Justice Roberts' concurring opinion affirmed that the applicable inquiry under *Casey*'s undue burden standard is not some talismanic balancing test permitting courts to wander freely as if by judicial divining rod, but rather a much simpler determination, as *Casey* itself articulated—whether a law imposes a "substantial obstacle" on a woman's ability to obtain an abortion. *June Medical*, 140 S. Ct. at 2138.

II. Chief Justice Roberts' concurring opinion in *June Medical* is controlling.

Under *Marks v. U.S.*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977) (cleaned up). In *June Medical*, Chief Justice Roberts' opinion was the narrowest grounds for holding Louisiana's admitting-privileges law unconstitutional, so his concurrence is therefore controlling, meaning it constitutes the "holding

of the court and provide[s] the [opinion's] governing standards." *Marks*, 430 U.S. at 194. This Court and the Eighth Circuit agree.

A. This Court confirmed that Chief Justice Roberts' *June Medical* concurrence is the Court's binding opinion.

In *EMW*, this Court examined a Kentucky law "requiring abortion facilities to obtain transfer agreements with a local hospital and transport agreements with a local ambulance service." 978 F.3d at 422–23. The plaintiff abortion facilities challenged the requirements as imposing an undue burden on abortion access, and the district court agreed, permanently enjoining the law. *Id*. at 423. On appeal, this Court faced the exact question presented here: whether the law should be analyzed using *Casey*'s undue-burden test or the *June Medical* plurality's balancing test. This Court's held that *Casey*'s undue-burden test controlled. *Id*. at 433-34.

EMW invoked *Marks* and deemed the Chief Justice's *June Medical* concurrence "the holding of the Court." *Id*. at 431 (quoting *Marks*, 430 U.S. at 193). Specifically, this Court reasoned that "[i]n a fractured decision where two opinions concur in the judgment, an opinion will be the narrowest under *Marks* if the instances in which it would reach the same result in future cases form a logical subset of the instances in

which the other opinion would reach the same result." 978 F.3d 431 (cleaned up). "[B]ecause the Court invalidated the Louisiana statute at issue, the narrowest opinion concurring in the judgment [in *June Medical*] is the one that would strike down the fewest laws regulating abortion in future cases." *Id.* at 432. That opinion, this Court concluded, was the Chief Justice's, "[b]ecause all laws invalid under [his] rationale [would be] invalid under the plurality's, but not all laws invalid under the plurality's rationale [would be] invalid under the Chief Justice's." *Id.* at 433 (cleaned up).

In addition to providing a roadmap for all district courts in this Circuit for the proper test to apply when reviewing abortion legislation, this Court emphasized that Chief Justice Roberts' *June Medical* opinion made it clear that "it is not the role of courts to attempt to 'objectively assign weight' to 'the State's interests' in passing regulations on abortion, including its interest in 'the health of the woman," because doing so would "'require [courts] to act as legislators, not judges.'" *Id.* at 438 (quoting *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring)).

Having adopted Justice Roberts' *June Medical* opinion as controlling and expressed its resistance to the judicial usurpation of the

legislative function, this Court reversed the district court's judgment and vacated its injunction, which was based on an improper weighing of burdens and benefits. *Id*. at 442–46, 448. But the Court went further and (1) deemed Kentucky's requirements reasonably related to a legitimate state interest, and (2) concluded that the law did not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. *Id*. at 442–46. Accordingly, Kentucky was entitled to judgment as a matter of law. *Id*. at 439-446.

Under the clear and controlling holdings of *June Medical* and *EMW*, then, *Casey*'s "undue burden" test is the governing standard to be used in evaluating challenges to abortion legislation like Tennessee's waiting period. The *June Medical* plurality's balancing test is not the law in this Circuit.

B. The Eighth Circuit also held Chief Justice Roberts' *June Medical* concurrence is the binding opinion in the case.

Applying the *June Medical* plurality's balancing test would require this Court not only to denounce its precedent but also to create a conflict with the United States Court of Appeals for the Eighth Circuit. In *Hopkins v. Jegley* the Eighth Circuit similarly gave the Chief

Justice's opinion the weight to which it is entitled under *Marks*. 968 F.3d 912, 914–15 (8th Cir. 2020). The court reasoned that because "Chief Justice Roberts' vote was necessary in holding unconstitutional Louisiana's admitting-privileges law . . . his separate opinion is controlling." *Id*. at 915 (citing *Marks*, 430 U.S. at 193). It further pointed out that in *June Medical*, "Chief Justice Roberts rejected the observation made in [*Hellerstedt*] and again by the plurality [in *June Medical*] that the undue burden standard requires courts to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Hopkins*, 968 F.3d at 914 (cleaned up). As a result, the court reversed a district court injunction based on the *Hellerstedt* "cost-benefit standard to the challenged laws." *Id*. at 915-16.

As did this Court in *EMW*, the *Hopkins* court noted with approval the Chief Justice's affirmation "that legislatures, and not courts, must resolve questions of medical uncertainty." *Id*. at 916 (cleaned up). The court recognized that Chief Justice Roberts "emphasized the 'wide discretion' that courts must afford to legislatures in areas of medical uncertainty." *Id*. (quoting *June Medical*, 140 S. Ct. at 2136 (Robert, C.J., concurring)).

III. This Court should reverse the district court, which departed from *June Medical* and *EMW* and erroneously conducted a balancing test rather than *Casey*'s undue burden analysis.

The district court erroneously applied the wrong legal standard. And by enjoining Tennessee's waiting period, the district court became the very thing Chief Justice Roberts cautioned against in *June Medical*—a "legislator[ ], not [a] judge[ ]." *June Medical*, 140 S. Ct. at 2136. In fact, the district court effectively admitted its error in plain sight, maintaining in its order that in making its undue burden determination, it was required under *June Medical* to "weigh" the waiting period's "asserted benefits against the burdens it imposes on abortion access." ECF No. 275 at 127 (quoting *June Medical*, 140 S. Ct. at 2112) (cleaned up).

In discharging that faulty analysis, the district court concluded that "the statutory waiting period provides no appreciable benefit to fetal life or women's mental and emotional health," and further concluded that the law "imposes numerous burdens that, taken together, place women's physical and psychological health and well-being at risk." *Id.* at 128. This conclusion is at odds with the Supreme Court's upholding in *Casey* of a 24-hour waiting period in

indistinguishable circumstances. *See Casey*, 505 U.S. at 885-86 (rejecting the idea that Pennsylvania's 24-hour waiting period constituted an undue burden and upholding the law, even after concluding that the law may "often" cause "delay[s] of much more than a day," could be "particularly burdensome" for low-income women and those "who must travel long distances," and could generally "increase[e] the cost and risk of delay of abortions") (cleaned up). And it directly contravenes *June Medical* and *EMW*.

The district court's admission that it employed a balancing test is fatal to its permanent injunction under *June Medical* and *EMW*. Based on *Casey*'s undue burden analysis and the way the *Casey* Court applied that test in *Casey* itself, Tennessee's law is constitutional.

CONCLUSION

The Supreme Court in *Casey* made it clear that even "under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion." *Casey*, 505 U.S. at 886. Tennessee's 48-hour waiting period is designed to ensure that those women contemplating abortion give "truly informed consent." Tenn. Code § 39-15-202(b). As Tennessee demonstrated in its principal brief,

that interest is not only legitimate and reasonable, but the law which ensures it is eminently constitutional. *See* Brief of Defs.-Appellants, 33-54. Accordingly, *Amicus* CMDA urges this Court to reverse the district court's order enjoining Tennessee's 48-hour waiting period and to direct that judgment be entered in Tennessee's favor.

Respectfully submitted this 16th day of February, 2021,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(B) because it consists of 2,595 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This amicus brief also complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

Dated: February 16, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, the foregoing amicus brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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