No. 20-5969

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CTR FOR REPRO HEALTH, ET AL.,

Plaintiffs-Appellants,

v.

HERBERT SLATERY, III, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee
3:20-cv-00501

BRIEF OF AMICI CURIAE SISTERREACH AND ELEVEN OTHER REPRODUCTIVE JUSTICE AND HEALTH ORGANIZATIONS

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and 6th Cir. R. 26.1(a), *Amici* SisterReach and eleven other reproductive justice and health organizations state that they have no parent corporations and do not issue stock.

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INTEREST OF AMICI CURIAE

Amici are advocates of reproductive justice. The term reproductive justice was coined in Chicago in 1994 by twelve Black women to center the lived experiences of Black women and people of color on issues of reproductive and sexual health and justice. The framework is grounded in Black feminist and human rights theory. Central to the framework are the human rights to dignity, self-determination, and autonomy. The goal of reproductive justice advocates is to protect the human rights of women and people who give birth,[1] including the rights (1) to decide if and when they will have children and the conditions under which they will give birth, adopt or parent; (2) to decide if they will not have children and their options for preventing or ending a pregnancy; (3) to parent the children they already have with the necessary social supports, in safe environments and healthy communities, and without fear of violence from individuals or the government; (4) to bodily autonomy free from all forms of reproductive and sexual oppression; (5) to express their sexuality and spirituality without violence or shame; and (6) to a quality of life and sustainability before and beyond the ability to give birth or parent. *See* Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction* (2017).

[1] *Amici* recognize that abortion restrictions impact not just cisgender women, but rather all people who can become pregnant.

Amici respectfully ask the Court to consider the maternal and infant mortality crisis in Tennessee and the lived experiences of Black women and people of color, which demonstrate that the State's purported interests in promoting maternal health and preventing discrimination are a pretext for restricting access to abortion. Far from advancing maternal health and preventing discrimination, the Abortion Bans will exacerbate racial disparities in health outcomes in Tennessee. *Amici* urge the Court to uphold the constitutional right to pre-viability abortion by affirming the District Court's decision.

Amici are the following reproductive justice and health organizations:

SisterReach, founded in 2011, is a 501(c)3 nonprofit grassroots organization dedicated to protecting the reproductive autonomy of women and teens of color, poor and rural women, LGBT+, Gender Non-Conforming individuals, including those who give birth, and their families through the framework of Reproductive Justice. SisterReach's mission is to empower its base to lead healthy lives, raise healthy families and live in healthy and sustainable communities. SisterReach works from a four-pronged strategy of education, policy and advocacy, culture shift, and harm reduction.

A Better Balance uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through legislative advocacy, direct legal services and

strategic litigation, and public education, A Better Balance's expert legal team combats discrimination against pregnant workers and caregivers and advances supportive policies like paid sick time, paid family and medical leave, fair scheduling, and accessible, quality childcare and eldercare. When people value the work of providing care, which has long been marginalized due to sexism and racism, our communities and our nation are healthier and stronger. A Better Balance has a strong interest in ensuring that low-wage working women of color, who are hit hardest by measures that impose undue economic burdens on individuals seeking reproductive healthcare, are empowered and trusted to make their own decisions regarding their healthcare, families, and well-being.

Healthy and Free Tennessee promotes sexual and reproductive health and freedom in Tennessee by advancing policies and practices which recognize these elements as essential to the overall well-being of all individuals and communities.

In Our Own Voice: National Black Women's Reproductive Justice Agenda is a national organizational initiative designed to amplify and lift up the voices of Black women at the national and regional levels in the ongoing fight to secure Reproductive Justice for all women and girls.

For more than 50 years, the **National Health Law Program (NHeLP)** has worked to advance access to quality health care and health equity for low-income and underserved people. NHeLP recognizes that all people should have access to

comprehensive and quality reproductive and sexual health care and engages in education, policy advocacy, and litigation to achieve these goals.

Payton Place stands against systemic oppression and works in partnership with SisterReach and other justice-centric organizations to serve and support those most impacted by unjust and harmful policies and law making practices.

Reproaction is a national organization leading bold action to increase access to abortion and advance reproductive justice.

SisterLove, Inc. is a women's HIV/AIDS and reproductive justice organization headquartered in Atlanta, Georgia. SisterLove, Inc. engages local, state and federal governments in policy changes for women, communities of color, youth and members of the LGBTQIA+ community in all issues related to reproductive justice and human rights.

SPARK Reproductive Justice NOW! works to build and strengthen the power of our communities and a reproductive justice movement that centers Black Women, Women of Color, and Queer & Trans Young People of Color in Georgia and the South. Based in Georgia, Spark Reproductive Justice NOW! understands firsthand the importance of fighting legislation that significantly restricts access to abortion, specifically, the serious implications of a six-week ban. These laws have a disproportionate impact on Spark Reproductive Justice NOW!'s base and other

marginalized groups, preventing folks from making informed and empowered choices about their reproductive futures.

STEPS works to empower and transform the lives of survivors, educate the community, and advocate for victims of domestic violence.

The Afiya Center (TAC) was established in response to the increasing disparities between HIV incidences worldwide and the extraordinary prevalence of HIV among Black women and girls in Texas. TAC is unique in that it is the only Reproductive Justice (RJ) organization in North Texas founded and directed by Black women. TAC's mission is to serve Black women and girls by transforming their relationship with their sexual and reproductive health through addressing the consequences of reproduction oppression.

Women With A Vision improves the lives of marginalized women, their families, and communities by addressing the social conditions that hinder their health and well-being. Women With A Vision accomplishes this through relentless advocacy, health education, supportive services, and community-based participatory research.

Under Federal Rule of Appellate Procedure 29(a)(2), *Amici* file this *amicus curiae* brief with the consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than SisterReach and its

counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

In the summer of 2020, in the middle of a pandemic that is disproportionately harming people of color and low-income people and placing an incredible strain on healthcare workers, Tennessee passed pre-viability abortion bans with felony penalties for doctors. *See* 2020 Tenn. Pub. Acts, ch. 764. The law added new abortion restrictions to Tennessee's already obstructive landscape, two of which were challenged by Plaintiffs-Appellees: (1) the "Six Week Ban" criminalizes abortions starting as early as six weeks gestational age unless there is no "fetal heartbeat," and then, upon the invalidation of that ban, at or after 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 weeks (the "Cascading Bans"), Tenn. Code Ann. § 39-15-216, and (2) the "Reason Bans" criminalize abortion if the patient is seeking an abortion because of the race, sex, or the potential for a Down syndrome diagnosis of the fetus, Tenn. Code Ann. § 39-15-217 (collectively the "Abortions Bans").

Tennessee's Cascading Bans and Reason Bans prohibit abortion before viability and are plainly unconstitutional under *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) and *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992). Tennessee's purported interests are therefore irrelevant and this Court need not credit them. Yet Tennessee still asserts its alleged state interests, including promoting maternal health and preventing discrimination, in an attempt to justify

the Abortion Bans. Tennessee's maternal and infant mortality crisis that disproportionately harms people of color paints a very different picture and Tennessee's alleged interests thus lack credibility, similar to the state interests that the Supreme Court rejected in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016). Furthermore, *Amici* demonstrate that the Abortion Bans will harm maternal health and disproportionately harm Black women and people of color, undermining Tennessee's professed goals in enacting the challenged laws.

ARGUMENT

Supreme Court precedent clearly establishes that states may not prohibit pre-viability abortions regardless of the states' purported interests. *See Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."); *Roe*, 410 U.S. at 163-64 (1973); *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (citing *Casey*, 505 U.S. at 871) (Roberts, J., concurring) (noting that "*Casey* reaffirmed 'the most central principle of *Roe v. Wade*,' 'a woman's right to terminate her pregnancy before viability'"); *see also Whole Woman's Health*, 136 S. Ct. at 2299(reaffirming that a provision of law is constitutionally invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("assum[ing]" the principle that, "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879))*; Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" the legal principles reaffirmed in Casey that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'") (quoting *Casey*, 505 U.S. at 870)); *see also Preterm-Cleveland v. Himes*, 940 F.3d 318, 323 (6th Cir. 2019) (upholding preliminary injunction of Ohio reason ban

because a state may not prohibit abortion prior to viability regardless of the "the state's purported reason for prohibiting a woman from obtaining an abortion"), *reh'g en banc granted, opinion vacated*, 944 F.3d 630 (6th Cir. 2019).

As found by the District Court, the Abortion Bans only serve to restrict pre-viability abortions because Tennessee law already prohibits abortion after viability, Tenn. Code Ann. § 39-15-211(b)(1). PI Order Mem., R.41, PageID#731.[2] The Abortion Bans thus violate long-standing Supreme Court precedent and any purported state interests are thus irrelevant and need not be credited by this Court. Nevertheless, in an attempt to justify its pre-viability abortion bans, Tennessee still invokes its interests in, *inter alia*, maternal health and preventing discrimination. *See* Defendants-Appellants' Brief (Defs.' Br.) at 11. This justification will not save these unconstitutional laws.

In *Whole Woman's Health*, a case challenging a Targeted Regulation of Abortion Providers (TRAP) law, not a law prohibiting pre-viability abortions like here, the Supreme Court considered and rejected the state's purported interest in maternal health as disingenuous where the state did little to advance maternal

[2] The District Court correctly found that "Plaintiffs have shown a likelihood of success on the merits of their claim that Section 216 violates long-standing Supreme Court precedent prohibiting bans on pre-viability abortions that this Court is bound to follow." PI Order Mem., R.41, PageID#757. The District Court's order appealed here did not address whether the Reason Bans also operated as unconstitutional pre-viability abortion bans because it found the provision was void for vagueness. *Id.*

health other than attack abortion. 136 S. Ct. at 2315. Even if this Court were to consider Tennessee's purported interests, which it need not, the Court should not credit the asserted interests when the reality in Tennessee demonstrates these interests are a pretext for restricting access to abortion, which disproportionately harms Black women and people of color.

I. TENNESSEE'S PURPORTED INTERESTS IN MATERNAL HEALTH AND ANTI-DISCRIMINATION ARE DISINGENUOUS

Tennessee's purported interests in maternal health and anti-discrimination, *see* Defs.' Br. at 19-20, are not credible given the state's troubling record on maternal, infant, and sexual and reproductive health under which Black women and people of color have suffered disproportionately. Furthermore, Tennessee's alleged interest in anti-discrimination is disingenuous at best, as it co-opts the language of civil rights and racial justice movements to stigmatize and harm Black women and people of color.

A. Tennessee Has Failed to Promote Maternal Health, Disproportionally Harming Families of Color.

1. Tennessee is among the worst performing states for infant and maternal mortality.

Despite being one of the most advanced countries in the world, the maternal mortality rate in the United States is higher than any other developed country and Tennessee's rate is even higher than the national average. Amber Bellazaire & Erik Skinner, *Preventing Infant and Maternal Mortality: State Policy Options*,

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[3] In 2017, the infant mortality rate was 579.3 infant deaths per 100,000 live births, with the rate slightly decreasing in 2018, to 566.2 deaths per 100,000 live births. Jiaquan Xu et al., *Mortality in the United States, 2018*. NCHS Data Brief No. 355, January 2020, Centers for Disease Control and Prevention (CDC): National Center for Health Statistics, https://www.cdc.gov/nchs/data/databriefs/db355-h.pdf (last visited Dec. 21, 2020), https://www.cdc.gov/nchs/products/databriefs/db355.htm#:~:text=NOTES%3A%20A%20total%20of%2021%2C467,deaths%20in%20the%20United%20States.

https://www.cia.gov/library/publications/resources/the-world-factbook/fields/354.html#XX (last visited Dec. 21, 2020).

Within the United States, Tennessee is "among the worst performing states for high rates of infant and maternal deaths, and poor health care access is likely to blame." Lummus, *supra*, at 1. Whereas the CDC reported that the 2018 maternal mortality rate in the United States was 17.4 maternal deaths per 100,000 live births, in Tennessee that rate was 21 per 100,0000. Donna L. Hoyert et al. *Maternal Mortality in the United States: Changes in Coding, Publication, and Data Release*, 69 NAT'L VITAL STAT. REP. 1-18 (Jan. 30, 2020), https://www.cdc.gov/nchs/data/nvsr/nvsr69/nvsr69-02-508.pdf (last visited Dec. 21, 2020); *Maternal Mortality by State, 2018*, Centers for Disease Control: National Center for Health Statistics, https://www.cdc.gov/nchs/maternal-mortality/MMR-2018-State-Data-508.pdf (last visited Dec. 21, 2020).

The CDC also reported above-average infant mortality rates in Tennessee: in 2018, the infant mortality rate was 6.9 per 1,000 in Tennessee and 5.7 per 1,000 across the country. *Infant Mortality*, Centers for Disease Control and Prevention (CDC): Reproductive Health (last visited Dec. 21, 2020), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm.

2. Black Women and infants are more likely to die than any other group of women and infants in Tennessee.

These troubling statistics are even more striking in Black communities; in fact, the disparity in Black maternal and infant deaths in the Unites States accounts for the main reason both rates are higher in the United States than in other developed countries. *See* Nina Martin & Renee Montagne, *Special Series: Lost Mothers: Maternal Mortality In The U.S.: Black Mothers Keep Dying After Giving Birth. Shalon Irving's Story Explains Why,* NPR, Dec. 7, 2017, https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why (last visited Dec. 21, 2020). Across the United States, Black women are three to four times more likely to die from pregnancy-related complications than White women and Black infants are more than twice as likely to die within their first year of being born as White infants. *See* Sunshine Muse et al., *Setting the Standard for Holistic Care of and for Black Women*, Black Mamas Matter Alliance, April 2018, at 2, https://blackmamasmatter.org/wp-content/uploads/2018/04/BMMA_BlackPaper_April-2018.pdf (last visited Dec. 21, 2020) (citing *Pregnancy Mortality Surveillance System*, Centers for Disease Control and Prevention (CDC): Reproductive Health, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html (last visited Dec. 21, 2020)); Table 011: Infant Mortality Rates, by Race: United States, Selected Years 1950–2015, 2016, Centers for Disease Control and Prevention

(CDC): National Center for Health, https://www.cdc.gov/nchs/data/hus/2016/011.pdf (last visited Dec. 21, 2020).[4] These disparities have persisted throughout our country's history. *See*, *e.g.*, Lauren M. Rossen & Kenneth C. Schoendorf, *Trends in Racial and Ethnic Disparities in Infant Mortality Rates in the United States, 1989-2006*, 104 AM. J. PUB. HEALTH, 1549-56 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4103228/; Table 011, *supra*. Significantly, these disparities in Black maternal health outcomes persist even when controlling for education and income, indicating that these disparities are "rooted in racism." Taylor *supra*, at note 4; *see also* Andreea A. Creanga, et al., *Pregnancy-related Mortality in the United States, 2011–2013*, 130 OBSTET. GYNECOL. 366-73 (2017), https://www.ncbi.nlm.nih.gov/pubmed/28697109 (last visited Dec. 21, 2020); Muse, *supra*, at 4.

[4] Though women of color and infants born to them also face higher risks of mortality, the racial disparities between Black women and babies as compared to White women and babies are the most drastic. Jamila Taylor et al, *Eliminating Racial Disparities in Maternal and Infant Mortality: A Comprehensive Policy Blueprint*, CENTER FOR AMERICAN PROGRESS (May 2, 2019), https://www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal-infant-mortality/ (citations omitted) (last visited Dec. 21, 2020); Table 012: Infant Mortality Rates, by Race and Hispanic Origin of Mother, State, and Territory: United States and U.S. Dependent Areas, Average Annual 1989–1991, 2003–2005, and 2012–2014, 2016, Centers for Disease Control and Prevention (CDC): National Center for Health Statistics, https://www.cdc.gov/nchs/data/hus/2016/012.pdf (last visited Dec. 21, 2020).

In Tennessee, Black women are three times more likely to die from pregnancy complications than white women. *See* Tennessee Dept. of Health, Maternal Mortality Review, https://www.tn.gov/health/health-program-areas/fhw/maternal-mortality-review.html (last visited Dec. 21, 2020). During 2017 and 2018, forty-six Black women in Tennessee died while pregnant or within one year of pregnancy. *Id*. Four in ten deaths were determined by a maternal mortality review committee to be pregnancy-related and 100% of pregnancy-related deaths to black women were determined to be *preventable*. *Id.* Black infants in Tennessee face roughly double the risk of infant mortality as white infants. *See* Tennessee Dept. of Health, Infant Mortality, https://www.tn.gov/health/health-program-areas/tennessee-vital-signs/redirect-tennessee-vital-signs/vital-signs-actions/infant-mortality.html (last visited Dec. 21, 2020).

3. Despite these dire statistics, Tennessee fails to take adequate steps to protect maternal health.

Tennessee has a maternal and infant mortality crisis, disproportionately affecting Tennesseans of color. Yet Tennessee refuses to take steps to address these preventable deaths, such as expanding Medicaid or providing comprehensive sexual and reproductive health education, instead reducing funding for post-natal care in 2020.

a. Tennessee fails to ensure pregnant people have access to prenatal care.

In addition to racism driving racial disparities in maternal and infant mortality,[5] "significant underinvestment in family support and health care programs contribute to the alarming trends in maternal and infant health." Taylor, *supra*, at note 5. An alarming 39% of women in Tennessee receive delayed or no prenatal care (as compared to 23% of women across the country). Chattanooga-Hamilton County Health Department, Picture of Our Health: Hamilton County Community Health Profile, 2019, at 36, http://health.hamiltontn.org/Portals/14/DataPublications/Docs/2019%20Report%20Final%202019-02-28.docx.pdf (last visited Dec. 21, 2020). In Tennessee, women of color are more likely to be uninsured and due to the healthcare coverage gap, pregnant people in Tennessee often ignore signs of failing health due to the financial consequences associated with getting a diagnosis or seeking treatment. *See Uninsured Rates for the Nonelderly by Race/ Ethnicity*, Kaiser Family Foundation, https://www.kff.org/uninsured/state-indicator/nonelderly-uninsured-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22: %22

[5] For example, "[t]he long-term psychological toll of racism puts African American women at higher risk for a range of medical conditions that threaten their lives and their infants' lives, including preeclampsia (pregnancy-related high blood pressure), eclampsia (a complication of preeclampsia characterized by seizures), embolisms (blood vessel obstructions), and mental health conditions." Taylor, *supra* at note 4.

Location%22,%22sort%22: %22asc%22%7D (last visited Dec. 21, 2020); Carles Anderson, *Why Protecting the ACA is Crucial for Women of Color*, TENNESSEE LOOKOUT, November 3, 2020, https://tennesseelookout.com/2020/11/03/commentary-why-protecting-the-aca-is-crucial-for-women-of-color (last visited Dec. 21, 2020).

Despite clear and convincing evidence that there is a lack of access to healthcare, Tennessee failed to pass legislation to expand Medicaid this year, leaving about 260,000 people without an affordable coverage option. *See Status of State Medicaid Expansion Decisions: Interactive Map,* Kaiser Family Foundation, Nov. 2, 2020, https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ (last visited Dec. 21, 2020); Rachel Garfield, Kendal Orgera, and Anthony Damico. *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, Kaiser Family Foundation, Jan. 14, 2020, https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/. Moreover, at the same time as passing the Abortion Bans and in the middle of the pandemic, Tennessee cut $6.6 million dollars from the budget for post-natal care, preventing the expansion of post-natal care for low-income women from 60 days to one year. Multi-Year Approach to a Structurally Balanced Budget, FY21 June Adjusment [*sic*] Schedule 060420, June 3, 2020,

https://www.tn.gov/content/dam/tn/finance/budget/documents/overviewspresentations/FY21JuneAdjusmentSchedule060420.pdf (last visited Dec. 21, 2020).

b. Tennessee fails to provide comprehensive reproductive and sexual health education, disparately impacting Black youth.

Comprehensive reproductive and sexual health education that is evidence-based serves as a powerful tool to reduce maternal mortality, infant mortality, abortion rates, adolescent pregnancies, and sexually transmitted diseases. *See* SisterReach, *Our Voices & Experiences Matter: The Need for Comprehensive Sex Education Among Young People of Color in the South* (2015) at 5, 7, https://www.sisterreach.org/uploads/1/2/9/0/129019671/2015_sr_our_voices_and_experiences_matte.pdf. In fact, unlike abstinence-based curricula, which medical and public health experts have shown do not eliminate sexual activity and can be harmful to young people because they fail to prevent unintended pregnancies and sexually transmitted diseases, many comprehensive sexuality education programs successfully delay sexual intercourse initiation and reduce sexual risk behaviors. Society for Adolescent Health and Medicine. *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*. 63 J. ADOLESC. HEALTH 400-03 (2017), https://www.jahonline.org/article/S1054-139X(17)30297-5/fulltext (last visited Dec. 21, 2020); *see also* John Santinelli, *Abstinence-only Education Doesn't Work.*

We're Still Funding it. THE WASHINGTON POST, Aug. 21, 2017, https://www.washingtonpost.com/news/posteverything/wp/2017/08/21/abstinence-only-education-doesnt-work-were-still-funding-it/ (last visited Dec. 21, 2020).

Despite the clear need for comprehensive sexual health education, Tennessee law does not require that schools provide any sexual health education unless county pregnancy rates exceed 19.5 pregnancies for every 1,000 females ages 15 to 17. Tenn. Code Ann. § 49-6-1302(a)(1). And those schools in Tennessee that have chosen to provide sexual health education are required to teach students "sexual risk avoidance" programming through an abstinence-focused curriculum. Tenn. Code Ann. § 49-6-1304. Furthermore, in 2012 the Tennessee legislature passed Senate Bill 3310, otherwise known as the Gateway Sexual Activity Law, which further restricts access to comprehensive sexual health education. 2012 Tenn. Laws Pub., ch. 973 (S.B. 3310), repealing Tenn. Code Ann. § 49-6-1305 and amending Tenn. Code Ann. §§ 49-6-1301–07. This law prohibits any sexual health education instruction that promotes or condones "gateway sexual activity," defined as "sexual contact encouraging an individual to engage in a non-abstinent behavior," and subjects offenders to civil liability and fines of up to $500. Tenn. Code Ann. § 49-6-1306. In addition to preventing students from receiving comprehensive sexual health education, the Gateway Sexual Activity Law has stopped educators from teaching sex abuse education for fear of lawsuits

by parents or interest groups.[6] Anita Wadwhani, *Nervous About Legal Action, Schools are Implementing Sex Abuse Prevention Law in Tennessee*, THE TENNESSEAN, Aug. 27, 2017, https://www.tennessean.com/story/news/2017/08/27/nervous-legal-action-schools-arent-implementing-sex-abuse-prevention-law-tennessee/598330001/ (last visited Dec. 21, 2020). As Assistant Director of Vanderbilt University's Carpenter Program in Religion, Gender, and Sexuality Lyndsay Godwin notes, the problem with Tennessee's abstinence-focused education is that "'people still enact the sexual behaviors that they're trying to keep people from doing . . . oftentimes with less protection, and without the skills to communicate clearly what they want and don't want.'" Steven Hale, *Sex Issue: Let's Talk About Sex: When it Comes to Teens and Sex, What They Don't Know Can Hurt Them,* NASHVILLE SCENE, Oct. 24, 2019, https://www.nashvillescene.com/news/cover-story/article/21093674/sex-issue-lets-talk-about-sex (last visited Dec. 21, 2020). The lack of comprehensive reproductive health education in Tennessee's public schools may also help explain why Tennessee is amongst the top ten of U.S. states in rates of teenage births. *See National Center for Health Statistics: Teen Birth Rate by State*, Centers for Disease Control and

[6] This is despite the fact that Tennessee has encouraged schools to teach sex abuse education through the passage of Erin's Law in 2014. *See* 2014 Tenn. Laws Pub. Ch. 706 (S.B. 2421), amending Tenn. Code Ann. § 37-1-601.

Prevention (CDC), https://www.cdc.gov/nchs/pressroom/sosmap/teen-births/teenbirths.htm (last visited Dec. 21, 2020).

While all young people in Tennessee suffer from the lack of access to comprehensive sexual health education, these laws have a disparate impact on young Black people, a group that already faces the highest rates of health disparities in the state. *See* SisterReach, *supra*. An overwhelming 90% of young Black people surveyed by SisterReach in 2015 said they did not think they were given all the information they needed to make fully educated decisions about sex or their bodies. *Id.* at 15. Not having a solid foundation of prevention and intervention access, Black youth and young people of color in Tennessee disproportionately experience higher unintended pregnancy rates, sexually transmitted infection rates, and are more likely to experience multi-layered sexual violence in their adolescence and throughout their lifetimes. *See id.* at 5; Tennessee State Government, Number of Pregnancies with Rate Per 1,000 Females Aged 10-19, By Race, For Counties of Tennessee, Resident Data, 2018, https://www.tn.gov/content/dam/tn/health/documents/vital-statistics/pregnancy/2018/TN%20Pregnancy%20Rates%20Age%2010-19%20-%202018.pdf (last visited Dec. 21, 2020).

In sum, Tennessee's alleged interest in promoting maternal health and preventing discrimination is not credible when the state has a maternal and infant

mortality crisis disproportionately harming people of color that it not only fails to address, but also actively takes steps to worsen.

B. Tennessee's Alleged Interest in Anti-Discrimination is not Credible.

Tennessee claims that "[b]y prohibiting physicians from knowingly participating in eugenic abortions," the Reason Bans further its interest in, *inter alia*, preventing discrimination. *See* Defs.' Br. at 19. Appellants cite to the Tennessee Legislature's findings that, "In this state, from 2008 through 2017, the rate of abortion per one thousand (1,000) women was nearly four (4) times higher for nonwhite[7] women than white women." *Id*. at 13 (citing Tenn. Code § 39-15-214(a)(62)). As in the United States generally, women of color in Tennessee have higher rates of abortion than White women. *See* Katherine Kortsmit et al., *Abortion Surveillance - United States 2018*, 69 MORBID. & MORT. WKLY. REP. 1-29(2020),https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm?s_cid=ss6907a1_x last visited Dec. 21, 2020). However, rather than address the underlying causes of these disparate statistics—*e.g.*, structural racism in health access including access to contraception and sexual health education, socioeconomic inequality, and higher rates of unintended pregnancies—Tennessee relies on these disparities born of inequity to justify further burdens on women of color.

[7] Tennessee tracks the rates of abortion by categories of White and "non-white" people.

Last year, the Supreme Court declined to consider a similar "reason ban", leaving in place the lower court's injunction. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019). In Justice Thomas' concurrence, cited by Appellants, he presented the concept of abortion as "an act rife with the potential for eugenic manipulation." *Id*. at 1787; Defs.' Br. at 4. Though not a new concept, anti-abortion advocates have increasingly utilized this argument to say that their stance in opposing abortion access is a form of racial justice work. As other race-reason bans have been passed in a number of other states, anti-abortion advocates allege that such bans are based on the idea that "women of color are coerced into abortions or are complicit in a 'genocide' against their own community." Kathryn Joyce, *Abortion as "Black Genocide" An Old Scare Tactic Re-Emerges*, Political Research Associates, April 2010, https://www.politicalresearch.org/2010/04/29/abortion-as-black-genocide-an-old-scare-tactic-re-emerges (last visited Dec. 21, 2020). By "selectively co-opting civil rights rhetoric," anti-abortion groups present abortion as "eugenicist plots disguised as voluntary reproductive choices, which are leading to a slow 'Black genocide.'" *Id*.

One of the first race-reason bills was introduced in 2010 in Georgia as the so-called Prenatal Nondiscrimination Act. The legislation—which was not introduced by Black women, people of color, or their legislative allies—claimed

that women are coerced into their decision to terminate a pregnancy due to racial bias, and required doctors to prove that women were not coerced into choosing abortion. Rather than trusting Black women and people of color seeking abortion access as required under *Roe*'s protection of individual autonomy, such legislation places further burdens on health care professionals providing these services. *See Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures . . . center on a woman's autonomy to determine her life's course . . . ."). Black reproductive health advocates have described such legislative agendas as "White organizations capitalizing off of Black bodies and the shaming and blaming of Black women." Joyce, *supra*.

Implicit in these rationales is the baseless assumption that women of color are committing genocide against their own community. While Black women and women of color do have higher abortion rates, the host of structural racial burdens to which they are subjected create the conditions for this disparity. Susan A. Cohen, *Abortion and Women of Color*, Guttmacher Institute, Aug. 2008, https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture (last visited Dec. 21, 2020) (describing how women of color are more likely to have unintended pregnancies due to socioeconomic inequality, a lack of healthcare access, and unequal opportunities regarding contraception and sex education).

Additionally, this false equivalency to eugenics practices invokes and perverts this country's deeply troubling history of forcibly sterilizing tens of thousands of people of color, including Native American, African American, Puerto Rican, and Mexican American women, in order to compel similar communities of color now to bring to term fetuses that the government has decided it wants them to birth. *See* Alexandra Stern, Forced Sterilization Policies in the US Targeted Minorities and Those With Disabilities – and Lasted into the 21st Century, Univ. of Mich. Institute for Healthcare Policy & Innovation (Sept. 23, 2020), https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasted-21st (last visited Dec. 21, 2020). But controlling the reproduction of Black and Brown people is not merely our country's shameful past. This year, immigrant women detained at an ICE-contracted center in Georgia said the detention center's gynecologist performed unwarranted hysterectomies and other invasive gynecological procedures on them. *See* Caitlin Dickerson et al., *Immigrants Say They Were Pressured Into Unneeded Surgeries*, NEW YORK TIMES, September 29, 2020, https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html (last visited Dec. 21, 2020). Moreover, *denying* abortion access to Black women and people of color in Tennessee can be compared to eugenics because "both seek to control reproductive decision making for repressive political ends." Dorothy Roberts, *Dorothy Roberts*

Argues that Justice Clarence Thomas's Box v. Planned Parenthood Concurrence Distorts History, U. Penn. Law, June 6, 2019, https://www.law.upenn.edu/live/news/9138-dorothyroberts-argues-that-justice-clarence (last visited Dec. 21, 2020).

Rather than address the underlying causes of racial disparities in abortion rates, Tennessee exploits the disparities using inflammatory language to further restrict access to abortion. Far from "preventing discrimination," this will inflict further harm on Black women and people of color in the state as detailed below.

II. TENNESSEE'S REAL INTEREST IS TO RESTRICT ACCESS TO ABORTION, DISPROPORTIONATELY HARMING BLACK WOMEN AND PEOPLE OF COLOR

A. Tennessee's Abortion Bans Continue Tennessee's Legacy of Severely Restricting Access to Abortion.

Tennessee's Abortion Bans restrict access to abortion in a state that has few abortion providers and already has some of the harshest abortion restrictions in the country. Only eight outpatient clinics provide abortion care in Tennessee. *See* Guttmacher Institute, *State Facts About Abortion: Tennessee*, Sept. 2020, https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-tennessee (last visited Dec. 21, 2020). A shocking 96% of counties in Tennessee have no clinics that provide abortions, with 63% of female Tennesseans residing in those counties. *Id*.

In 2014, Tennessee passed S.B. 1391, a draconian law which allowed

pregnant women to be arrested for using narcotics during pregnancy if the drug use resulted in the child being born addicted to or harmed by the drug. The penalty under this so-called Fetal Assault Law included up to 15 years of incarceration and loss of child custody. Despite fervent opposition to the legislation on local, national, and international levels, the Fetal Assault Law remained in effect until July of 2016, when the Tennessee General Assembly decided not to extend the law after studying its impact on maternal, child, and fetal health. During this time, 124 women were arrested across the state. SisterReach conducted a qualitative study in 2017 to understand the impact of this law on pregnant people. It found that in response to the law, women began avoiding prenatal care out of fear, they were more likely to give birth at home rather than at a hospital or cross state lines for their delivery, and some elected to have an abortion to avoid potential arrest. Orisha A. Bowers et al., *Tennessee's Fetal Assault Law: Understanding its Impact on Marginalized Women*, SisterReach, March 2019, https://www.sisterreach.org/uploads/1/3/3/2/133261658/full_fetal_assault_rpt_1.pdf (last visited Dec. 21, 2020).

As of September 1, 2020, women seeking abortions in Tennessee face a myriad of restrictions and often insurmountable hurdles:

- Abortion can only be performed at or after viability in situations involving "life endangerment or severely compromised health." Tenn. Code Ann. §

39-15-21.

- If a patient is seeking an abortion, they must first undergo an ultrasound, and the doctor must show and explain the ultrasound image to the patient. 2020 Tenn. Pub. Acts, ch. 764.
- Until the law was enjoined on October 14, 2020, a person seeking an abortion was required first to receive in-person "state-directed counseling" and then wait 48 hours, thus requiring two trips to the abortion-providing facility. Tenn. Code Ann. 37-10-303; *Id*. at 39-15-202; *Id.* at 63-6-241; *Id*. at 63-9; *Id.* at 68-11-223; *Adams & Boyle, P.C. v. Slatery*, No. 3:15-CV-00705, 2020 WL 6063778 (M.D. Tenn. Oct. 14, 2020). Tennessee is appealing this order and has sought to stay the order pending its appeal.
- Abortion coverage is not provided by health plans offered under the state's Affordable Care Act health exchange. 2010 Ten. Pub. Acts, ch. 879 (enacted May 11, 2010).
- Telemedicine may not be used for abortion medication. Tenn. Code Ann. § 63-6-241.
- Before providing an abortion to a minor, Tennessee law generally requires that a parent, guardian, or judge must first consent. Tenn. Code Ann. § 37-10-303; *Id*. §§ 37-10-303(b), 304.
- Since its initial enactment in 1976, the Hyde Amendment has restricted

federal funding for abortion coverage to cases involving life-endangerment to the pregnant person, rape, or incest. *See* Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94, 133 Stat. 2534. While some state Medicaid programs use their own funds to cover abortions in broader circumstances than the Hyde Amendment allows, Tennessee law bans the use of state funds to cover abortions. Tenn. Code Ann. § 9-4-5116. Private insurance coverage of abortion is also restricted. Tenn. Code Ann. § 56-26-134.

The Abortion Bans challenged in this case are not Tennessee's first attempt to prohibit abortion during the pandemic. In April of 2020, as the COVID-19 pandemic erupted, Governor Bill Lee issued an order banning all abortions other than medical abortions, deeming such procedures "elective and non-urgent." Governor Lee, Executive Order 25 (Apr. 8, 2020), https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf (last visited Dec. 21, 2020). Governor Lee's order contradicted the guidance of leading medical organizations such as the American College of Obstetricians and Gynecologists and the American Medical Association, which categorize abortion services as essential and time-sensitive health care. *Joint Statement on Abortion Access During the COVID-19 Outbreak*, Am. Coll. Obstetrics & Gynecology, Mar. 18, 2020, https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-

access-during-the-covid-19-outbreak (last visited Dec. 21, 2020). This Court affirmed the preliminary injunction granted by the Middle District of Tennessee which allowed Tennessee abortion clinics to continue providing abortion procedures during the pandemic, finding that every "serious medical or public health organization" opposed the State's policy choice. *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020).

Against this restrictive backdrop, Tennessee's Abortion Bans represent some of the most extreme restrictions on abortion access in the country. Under the "Six Week Ban," an abortion cannot be performed once a fetal heartbeat is detected. This often occurs before many women even know they are pregnant. Tenn. Code Ann. § 39-15-217. The "Reason Bans" prohibit a physician from performing an abortion where the physician knows that a woman is seeking an abortion because of the sex, race, or the potential for a Down syndrome diagnosis of the fetus. Tenn. Code Ann. § 39-15-217. The Abortion Bans criminalize the provision of abortion in all cases, including rape, incest, and fatal fetal conditions. The Abortion Bans only create affirmative defenses to criminal prosecution if "in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision." Act §§ 39-15-216(e)(1), 217(e)(1).

B. Tennessee's Abortion Bans Will Disproportionately Impact Black Women and People of Color, Further Increasing the Racial Disparities in Maternal and Infant Health

Tennessee's latest attempts to further restrict abortion access threaten to increase the rate of unintended childbirth and increase the rate of abortions at later gestational ages (due to the logistical delays of finding the means and funds to obtain an abortion), causing further racial disparities in health outcomes.

Amici are concerned about the impact the Abortion Bans will have on all pregnant people in Tennessee. However, restricting access to abortion places disproportionate burdens on Black women and people of color in Tennessee, who have higher rates of unintended pregnancy and abortion than White women. *See* supra at 23-24.

If the Six Week Ban goes into effect, people in Tennessee who seek to terminate a pregnancy past detection of a fetal heartbeat will have to: 1) carry the unintended pregnancy to term; 2) travel to a neighboring state to obtain abortion care; or 3) procure an abortion in a less safe or even dangerous manner. Restricting abortion access threatens to increase the rate of unintended childbirth and increase the rate of abortions at later gestational ages, which will further exacerbate racial disparities in health outcomes. *See* Christine Dehlendorf, et al. Disparities in Abortion Rates: A Public Health Approach, 103 AM. J. PUBLIC HEALTH 1772-79 (2013),

https://ajph.aphapublications.org/doi/10.2105/AJPH.2013.301339 (last visited Dec. 21, 2020). While abortion is an extremely safe medical procedure, risks increase with gestational age. Black women are more likely to have later abortions, and if they have to delay abortion care while they find the means to procure an abortion out-of-state, they will be exposed to greater health risks. *Id*. If Black women and people of color in Tennessee have to carry unintended pregnancies to term, their lives and their infants' lives are at stake due to Tennessee's maternal and infant mortality crisis, which disproportionately impacts Black women. *See* supra at 14-16.

Amici are highly concerned that pregnant people in Tennessee, and Black women and people of color in particular, face the prospect of returning to the horrors of just forty years ago when a lack of access to abortion meant choosing between illegal abortions or being forced to carry unintended pregnancies to term.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: December 22, 2020

Respectfully submitted,

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RULE 32(G)(1) CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 6,436 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

This brief 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 Microsoft Word using a proportionally spaced typeface, 14-point Times New Roman.

Dated: December 22, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amici Curiae SisterReach and Eleven Other Reproductive Justice and Health Organizations was filed via the Court's electronic filing system on December 22, 2020, which will serve electronic notice to all parties of record.

Dated: December 22, 2020

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