No. 20-5969

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, et al.,

Plaintiffs-Appellees,

v.

HERBERT H. SLATERY III, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee, Nashville Division

No. 3:20-cv-00501

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29:

I, the undersigned, counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), certify that to the best of my knowledge and belief, the Lawyers' Committee does not have a parent corporation, no publicly held company holds 10% or more of stock of the Lawyers' Committee, and no parents, subsidiaries, or affiliates thereof have any outstanding securities in the hands of the public.

STATEMENT OF COUNSEL

Pursuant to Federal Rule of Appellate Procedure 29, counsel for amicus curiae states that none of the parties to the above-captioned dispute, and none of their counsel, authored this brief in whole or in part. No persons other than amicus made a monetary contribution to the preparation or submission of this brief.

Dated: December 22, 2020
Washington, D.C.
Respectfully submitted,
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INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and vindicating the civil rights of African Americans and other racial minorities. The Lawyers' Committee's principal mission is to secure equal justice for all through rule of law, and the organization frequently participates as counsel for a party or as amicus curiae to protect the interests of racial and ethnic minorities. The Lawyers' Committee has a strong interest in eliminating systemic and structural barriers to healthcare coverage, including barriers to access to reproductive health experienced by people of color, and to that end has served as amicus curiae in relevant cases. See, e.g., *June Medical Services L.L.C v. Russo*, 140 S. Ct. 2103 (2020); *Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019), appeal filed, No. 19-1685 (4th Cir. June 26, 2019); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019), aff'd, 930 F.3d 543 (3d Cir. 2019), petition for cert. filed, (U.S Oct. 1, 2019) (No. 19-431).[1]

[1] Pursuant to Fed. R. App. P. 29(a)(2) and (4): All parties have consented to this brief's filing.

INTRODUCTION

Women must have equal access to reproductive healthcare, including abortion regardless of their race, ethnicity or class. Historically, reproductive restrictions have disproportionately impacted Black women and other women of color because of intersecting factors, including high poverty rates and lack of access to healthcare. The Cascading Ban and Reason Bans of House Bill 2263/Senate Bill 2196 (the "Act") are no different and will mount significant, if not insurmountable, barriers to the constitutional right of Black women and other women of color in Tennessee to access abortion care. Amici are gravely concerned that the Act will result in a two-tiered system in Tennessee, where wealthier, disproportionately white women will have greater access to their constitutional right to abortion care than women of color who are disproportionately low-income. If upheld as constitutional, the Act will exacerbate negative health outcomes for Black women and other women of color in the state and further entrench long-standing systemic and structural barriers to economic opportunity. For these reasons, we urge this Court to uphold the District Court's decision to preliminarily enjoin the Act.

ARGUMENT

The race provision of Section 217 (Reason Bans)—prohibiting doctors from providing pre-viability abortions if they know "that the woman is seeking the abortion because of the race" of the fetus—is unjustified, serves no legitimate

purpose, and runs afoul of the constitutional right of Black women and women of color to access abortion care. As an initial matter, each of the Bans are unconstitutional because "[b]efore 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 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion). Furthermore, nothing in abortion jurisprudence indicates that states may enact abortion legislation for reasons other than their "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life." *Id.* at 875–76. Thus, no state interests, including Tennessee's purported interest in eradicating purported race discrimination against fetuses are "strong enough to support a prohibition of abortion" prior to pre-viability. *Id.* Because the Reason Ban precludes pre-viability abortion, it is unconstitutional for this reason alone.

Moreover, the Supreme Court has made clear that, in order to comply with the Constitution, an abortion restriction must advance a "valid state interest," and do so in a manner that does not place a "substantial obstacle in the path of a woman's choice." *See, e.g.*, *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2309 (2016) (citing *Casey*, 505 U.S. at 877-878) (plurality opinion) (rejecting "[u]nnecessary health regulations.")); *June Medical Services L. L. C. v. Russo*, 140 S.Ct. 2103, 2138 (2020). Tennessee claims that Section 217 advances its "legitimate,

substantial, and compelling interest in preventing discrimination" while claiming abortion care in the state is a eugenics scheme. T.C.A. § 39-15-214(a)(53), (77). However, as discussed below, there is nothing to suggest that racism, by or against abortion patients, impacts abortion care in Tennessee. The race selection provision of Section 217, in particular, cures no problem, confers no benefits, and is wholly unnecessary to addressing racism in the state of Tennessee.

Second, the Bans, in their entirety, are inconsistent with *Casey's* requirements because it lacks a lawful exception for instances when abortion is necessary to preserve the health of the mother. *See Casey*, 505 U.S. at 846 (noting that a state may "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."). Although the statute does include a so-called "Emergency Exception," it represents a specific harm to Black women and other women of color because these groups are disproportionately afflicted with maternal health complications not covered by the Emergency Exception.

Finally, criminalizing the provision of abortion care as soon as a fetal heartbeat is detected and at weekly intervals thereafter will disproportionately impact women of color in the state of Tennessee. As detailed by plaintiff physicians, the vast majority of abortion patients simply are unable to confirm a pregnancy and get an abortion at the earliest stages of pregnancy before fetal cardiac activity

develops. This is even more so for uninsured and underinsured women who are disproportionately Black and Latinx. This ban on abortion will disproportionately and negatively impact the quality of life for women of color by worsening health, educational and economic outcomes for Black women and their children, who already experience the pervasive effects of structural racism.

I. THE ACT DOES NOT ADVANCE ANY LEGITIMATE PURPOSE AND IS NOT REASONABLY RELATED TO ANY PURPORTED ANTI-DISCRIMINATION GOAL

In order to regulate abortion, there exists a longstanding "threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'" *June Medical Services L. L. C. v. Russo*, 140 S.Ct. 2103, 2138 (2020) (Roberts, C.J., concurring in judgment).[2] Tennessee claims that Section 217 is necessary to preserve the "integrity of the medical profession" by eliminating "bias and discrimination against pregnant women, their partners, and their family members, including unborn children." T.C.A. § 39-15-214(a)(63)-(64).

Tennessee fails to provide any evidence that women of color seek abortions because of the race of their fetus, or that women of color are being targeted by

[2] Only the Sixth Circuit thus far has interpreted Chief Justice Robert's concurring opinion as controlling.

abortion providers with racist intentions. Hence, the state has no "legitimate purpose." The state's only evidence supporting a race Reason Ban is the fact that nonwhite women in Tennessee seek abortion care at greater rates than white women. The legislative findings of the Act also cite to Justice Thomas' concurring opinion in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019) stating, "the use of abortion to achieve eugenic goals is not merely hypothetical," and suggest that eugenics continue to play a role in abortion care today. T.C.A. § 39-15-214(a)(54). Tennessee's overreliance on racial disparities in abortion rates is misplaced and fails to recognize the socioeconomic factors that drive higher abortion rates among these groups, as well as the agency Black women exercise in determining their reproductive lives.

a. The Overrepresentation of Women of Color Among Abortion Recipients Is Attributable to A Systemic Lack of Access to Contraception, Healthcare and Economic Opportunity

According to Tennessee, a race Reason Ban is necessary, in part, because from 2008 through 2017, the rate of abortion per one thousand (1,000) women was nearly four (4) times higher for nonwhite women than white women, with a rate of 7.6 on average for all women, 4.6 for white women, and 16.0 for nonwhite women. *Id*. at ¶ (62). However, the overrepresentation of women of color as abortion recipients in the state is not indicative of "eugenic" motivations by abortion providers or, even more absurdly, that women of color are obtaining abortions because of the race of

their unborn fetuses. This argument wrongly suggests that women of color are passive recipients of abortion care. Reproductive justice scholars who weighed as amici in *June Medical Services, LLC, et al. v. Russo et al* strongly rebutted this erroneous presumption, noting:

> "Rather, the abortion rate among black women reflects the power of the forces that foist unintended pregnancy upon black women. And, importantly, the abortion rate reflects black women's defiance of those forces. It is a measure of black women's insistence upon carrying a pregnancy to term only when they believe that they are ready for their lives to take that course…. Black women are autonomously choosing a form of healthcare that helps them negotiate the profound constraints that limit the fullness of their lives."

June Medical Services, LLC, et al. v. Russo et al., 140 S.Ct. 2103, Brief amici curiae of Reproductive Justice Scholars at 17-18.

Indeed, Section 217 is silent on the ways in which Tennessee has failed to address the disproportionately higher rates of unintended pregnancies among women of color. Black and Latinx women across the country have higher rates of unintended pregnancies because they lack access to contraception, sexual education, and healthcare. Tennessee is no different. In 2018, Black women's pregnancy rate was 22% higher than white women, and 32.4% of all pregnancies in the state were unplanned.[3]

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[3] *Explore Unintended Pregnancies in Tennessee*, AMERICAN HEALTH RANKINGS, 2019, www.americashealthrankings.org/explore/health-of-women-and-

Over 400,000 Tennessee women living at or below 250% of the poverty level (approximately 11% of all women in the state) live in counties where there is no reasonable access to a health center offering the full range of contraceptive methods.[4] In addition to geographical limitations to family planning services, Tennessee has failed to expand Medicaid, a critical benefit that provides low-income women with access to contraception.[5] Tennessee has also refused to apply for the Medicaid Family Planning Waiver—a limited benefits program for low-income women otherwise not eligible for traditional Medicaid that provides individuals with the information and means to prevent unplanned pregnancy and maintain reproductive

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children/measure/unintended_pregnancy/state/TN; *See also Tennessee Data*, POWER TO DECIDE, powertodecide.org/what-we-do/information/national-state-data/Tennessee (Noting that the unplanned pregnancy rate in the state is as high as 56%); *Pregnancies with Rates per 1,000 Females Aged 15-44 2018*, TENNESSEE DEPARTMENT OF HEALTH, 2018, https://www.tn.gov/content/dam/tn/health/documents/vital-statistics/pregnancy/2018/TN%20Pregnancy%20Rates%20Age%2015-44%20-%202018.pdf.

[4] *See Contraceptive Access in Tennessee*, POWER TO DECIDE, 31 Mar. 2020, https://powertodecide.org/sites/default/files/2020-04/State%20Factsheet_Tennessee.pdf; U.S. Census, TN Quickfacts https://www.census.gov/quickfacts/TN.

[5] *See* Apple, Alex. *Governor Declines Medicaid Expansion as Number of Uninsured Tennesseans Rises*. WZTV, Apr. 2020, https://www.fox17.com/news/local/governor-declines-medicaid-expansion-as-number-of-uninsured-tennesseans-rises.

health.[6]

Disparities in health care access are particularly pronounced among women of color in the state, many of whom cannot access reproductive health care precisely because of the state's refusal to expand Medicaid. Though 85.3% of white women in Tennessee were insured in 2014, just 82.9% of Black women and 50.5% of Hispanic women were insured during this same time frame.[7] As noted by the Tennessee Justice Center, "[i]f all remaining non-expansion states [including Tennessee] were to expand Medicaid, the majority of the Tennessee uninsured people who would become Medicaid eligible are people of color."[8] Doing so would, in turn, provide reproductive health care access to women of color in the state, leading to lower rates of unintended pregnancies. The state has failed to take any action on this front. Compounding the effects of the lack of access to contraception is Tennessee's near-total ban on comprehensive sexual education for young people

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[6] *Medicaid Family Planning Eligibility Expansions*. GUTTMACHER INSTITUTE, 30 Nov. 2020, www.guttmacher.org/state-policy/explore/medicaid-family-planning-eligibility-expansions.

[7] DuMonthier, Asha, et al. *Status of Black Women in the United States*, INSTITUTE FOR WOMEN'S POL'Y RES., Aug. 2020 at 67, iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17.pdf

[8] *See* Young, Kinika. *Rooted in Racism: An Analysis of Health Disparities in Tennessee*, TENNESSEE JUSTICE CENTER, July 2020, www.tnjustice.org/wp-content/uploads/2020/07/Rooted-in-Racism-An-Analysis-of-Health-Disparities-in-Tennessee.pdf.

through its abstinence-only education policies. Tennessee public schools requires districts to use a curriculum that "emphatically promotes only sexual risk avoidance through abstinence and encourages sexual health by helping students understand how non-marital sexual activity affects the whole person." T.C.A. § 49-6-1304. Research continues to show that abstinence-only until marriage curriculums, like those mandated by the state of Tennessee, do not delay sexual activity and in fact deter contraception use.[9]

Finally, Tennessee's abject failure to limit unintended pregnancies is exacerbated by economic barriers women of color face in the state. Black mothers in Tennessee earn 60 cents for every dollar white fathers make.[10] And although 63.5% of Black women living in Tennessee participate in the workforce, relative to 54.3% of white women, Black women earn 13.8% less than white women.[11] While 14.8% of white women live below the poverty line, 25% of Black women and 30.7%

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[9] *Comprehensive Sex Education*, PLANNED PARENTHOOD OF TENNESSEE AND NORTH MISSISSIPPI, www.plannedparenthood.org/planned-parenthood-tennessee-and northmississippi/local-education-training/comprehensive-sex-education.

[10] *Motherhood Wage Gap for Black Mothers: 2019 State Rankings*, NATIONAL WOMEN'S LAW CENTER, May 2019, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/05/Black-Motherhood-Wage-Gap-Table-2019.pdf.

[11] *The Economic Status of Women in Tennessee*, STATUS OF WOMEN IN THE STATES, March 2018, https://statusofwomendata.org/wp-content/themes/witsfull/factsheets/economics/factsheet-tennessee.pdf.

of Latinx women live in poverty in Tennessee.[12] And, 24% of Black women in Tennessee work in lower-income service industry roles compared to just 18% of white women.[13] Not surprisingly, "[u]nintended pregnancy rates are highest among low-income women (i.e., women with incomes less than 200% of the federal poverty level), women aged 18–24, cohabiting women and women of color. Rates tend to be lowest among higher-income women (at or above 200% of poverty), white women, college graduates and married women."[14]

b. The State's Eugenics Theory is Without Merit and Disregards the Agency of Women of Color

Tennessee claims, "[t]he historical development of abortion is undeniably tied to bias and discrimination by some organizations, leaders, and policies towards impoverished and minority communities, including the imposition of forced sterilization of the intellectually disabled, poor, minority, and immigrant women." T.C.A. § 39-15-214(a)(53). The legislative findings of the Act also cite to Justice Thomas' concurring opinion in *Box* and claim that eugenics continue to play a role in abortion care today. *Id*. at ¶ (54). Tennessee's assertion that abortion care is driven

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[12] *Id*.
[13] *Id.*
[14] *Unintended Pregnancy in the United States*, GUTTMACHER INSTITUTE, 9 Jan. 2019, www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states.

by eugenics is flawed, stigmatizing, and a pretext to limiting abortion access to women of color.

Historically, Black women and other women of color were targeted against their will under state laws requiring sterilization.[15] However, the theory that the practice of forced sterilization evidences abortion as a eugenics practice has been debunked by several scholars, including Adam Cohen, whose work Justice Thomas cited in describing how widespread the eugenics movement once was in the United States. *Box*, 139 S.Ct. at 1784. According to Cohen "[n]one of this was about abortion, however. The most prominent American eugenicists did not support abortion . . . The American eugenics movement overwhelmingly supported not abortion but forced sterilization."[16] Reproductive justice scholar Dorothy Roberts also notes the stark difference between forced sterilization and voluntary abortion:

> [W]e should condemn eugenics, past and present, that intervenes in reproduction based on the myth that social inequalities result from inherited traits. But eugenics laws passed in the early 20th century relied on coerced sterilization, not abortion, to regulate devalued populations. Such laws are actually *similar* to today's

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[15] *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century*, INST. FOR HEALTHCARE POL'Y & INNOVATION, ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasted-21st.

[16] Cohen, Adam, *Clarence Thomas Knows Nothing of My Work*, *THE ATLANTIC*, ATLANTIC MEDIA COMPANY, 29 May 2019, www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/.

> abortion bans: both seek to control reproductive decision making for repressive political ends. Thus, if you oppose eugenic birth control, you should also oppose abortion bans as forms of reproductive oppression.[17]

In fact, Black women and other women of color have long advocated for abortion rights, despite, not because of, racism. As detailed in the book, *Undivided Rights: Women of Color Organize for Reproductive Justice*:

> By 1949, approximately 2.5 million African American women were organized in social and political clubs and organizations that supported access to birth control and abortion while critiquing the eugenicist policies and programs often espoused by those organizations that supported birth control. Despite their fear and distrust of the proponents of birth control, Black women sought access to contraception when and where clinics were available to them. The birth control methods available to them included [a range of options]…and underground abortions provided by doctors and midwives operating illegally when other methods failed.[18]

Advocacy by Black feminists and scholars for a range of reproductive health options, including birth control and safe abortion access persists today, and "the

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[17] *Dorothy Roberts Argues That Justice Clarence Thomas's Box v. Planned Parenthood Concurrence Distorts History*, PENN LAW, https://www.law.upenn.edu/live/news/9138-dorothy-roberts-argues-that-justice-clarence.

[18] Jael Miriam Silliman et al, *Undivided Rights: Women of Color Organize for Reproductive Justice*, "African American Women Seed a Movement" at 59 (2016).

claim that abortion among black women is part of a genocidal plot against black people … [has] been rejected – time and again over the years."[19]

It is simply not true that Tennessee physicians lure, target, and coerce women of color into having abortions against their own judgment. Black women and other women of color who voluntarily seek abortion care do so in order to exert their autonomy and agency over their reproductive lives to do what is in their best interest, as well as that of their families. *See Casey,* 505 U.S. at 851 ("Matters[] involving the most intimate and personal choices a person may make in a lifetime [are] choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment."). Tennessee's reliance on eugenic history to support a race Reason Ban is inaccurate and is purposefully designed to stigmatize women of color who seek abortion and limit their autonomy in making reproductive choices.

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[19] *June Medical Services, supra,* Br. amici curiae of Reproductive Justice Scholars at 19, (citing Kathryn Joyce, Abortion as "Black Genocide": An Old Scare Tactic Re-Emerges (Apr.29,2010), Political Research Assocs., https://www.politicalresearch.org/2010/04/29/abortion-asblack-genocide-an-old-scare-tactic-re-emerges).

II. THE BANS WILL MOUNT SIGNIFICANT, IF NOT INSURMOUNTABLE, BARRIERS TO THE CONSTITUTIONAL RIGHT TO ABORTION OF BLACK WOMEN AND OTHER WOMEN OF COLOR IN TENNESSEE

If the Bans are upheld, Tennessee's Black women and women of color will face significant hurdles to accessing abortion care, and some will be forced to carry pregnancies to term. It is widely-known that "denying women access to legal abortion does not prevent them from having abortions, but just increases the likelihood that they will resort to an illegal abortion carried out under unsafe conditions."[20]

Other women will be further entrenched in cycles of poverty. Unplanned pregnancy is often correlated with lower workforce participation and wages, and higher rates of poverty for these groups. According to the Institute for Women's Policy Research, "[w]hen broken down by race, the research consistently suggests that abortion access has greater economic impacts for Black women than White women. Abortion legalization led to significant increases in high school graduation, college entrance, and labor force participation among Black women.[21] Abortion

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[20] *Abortion Before and After Legalization*, GUTTMACHER INSTITUTE, 27 Nov. 2018, www.guttmacher.org/perspectives50/abortion-and-after-legalization.

[21] Anna Bernstein, MPH & Kelly M. Jones, PhD, *The Economic Effects of Abortion Access: A Review of the Evidence*, INST. FOR WOMEN'S POL'Y RES., July 2019 at 19, iwpr.org/wp-content/uploads/2020/07/B377_Abortion-Access-Fact-Sheet_final.pdf.

access increased women's participation in the workforce overall, increasing the probability of a woman working 40 weeks or more per year by almost 2 percentage points (from 29 percent).[22] Effects were stronger for Black women, increasing participation by 6.9 percentage points, compared with 2 percentage points among all women.[23] The effects of poverty are generational. Children who are poor are less likely to achieve important adult milestones, such as graduating from high school and enrolling in and completing college, than children who are never poor.[24]

Planning, delaying and spacing births helps women achieve their education and career goals. Teen pregnancy interferes with young women's ability to graduate from high school and to enroll in and graduate from college.[25] Delaying a birth can also reduce the gap in pay that typically exists between working mothers and their childless peers and can reduce women's chances of needing public assistance.[26]

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[22] *Id*. at 8
[23] *Id*.
[24] *Child Poverty and Adult Success*, URBAN INSTITUTE, September 2015, at 3, www.urban.org/sites/default/files/publication/65766/2000369-Child-Poverty-and-Adult-Success.pdf.
[25] *The Social and Economic Benefits of Women's Ability To Determine Whether and When to Have Children*, GUTTMACHER INSTITUTE, March 15, 2016, www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children.
[26] *Id*.

Moreover, the Bans will further exacerbate a two-tiered system of economic achievement for women of color and white women in Tennessee. While the Act will almost certainly eliminate abortion access for women of color, wealthier women, who are disproportionately white, can simply travel to other states for abortion care. According to a national study on the effects of distance on abortion care, "Black patients were half as likely to travel each category of distance farther compared with white patient."[27] In contrast, "[w]hite patients, college educated, and U.S.-born patients were more likely to travel farther for an abortion, which may reflect that these groups have more material, informational, and social resources to be able to travel."[28]

III. THE EMERGENCY EXCEPTION DOES NOT MEET THE SUPREME COURT'S REQUIREMENTS

As an initial matter, the Emergency Exception does not comport with the Court's rulings in *Casey*. Those cases confirmed "the State's power to restrict abortions *after* fetal viability, *if* the law contains exceptions for pregnancies which endanger the woman's life or health." *Casey*, 505 U.S. at 846. Here, the law unconstitutionally proscribes abortions *pre-viability*, and the Emergency Exception

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[27] Fuentes, Liza, and Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, J. OF WOMEN'S HEALTH, December 2019 at 5.
[28] *Id.*

is no savior. *See id*. at 879 ("*Regardless* of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.") (emphasis added).

Notwithstanding these facts, the governing standard requires an exception "where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother." *Stenberg v. Carhart*, 120 S.Ct. 2597, 2609, 530 U.S. 914, 931 (2000). However, the Emergency Exception reflects a complete disregard for women's overall health and quality of life—especially Black women and women of color—in contravention of abortion jurisprudence. Here, the Act provides physicians with an affirmative defense if "a medical emergency prevented compliance with the provision." T.C.A. § 39-15-217(a)(3) (referring to § 39-15-211). "Medical emergency" is vaguely defined as "a condition that, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function . . . ." T.C.A. § 39-15-211(a)(3). "Serious risk of the substantial and irreversible impairment of a major bodily function" means "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a

major bodily function. Such conditions include preeclampsia, inevitable abortion, and premature rupture of the membranes and, *depending upon the circumstances*, *may also include*, but are not limited to, diabetes and multiple sclerosis, but *does not include any condition relating to the woman's mental health*." *Id*. at § 39-15-211(a)(5) (emphasis added). It is entirely unclear what "circumstances" permit physicians to perform an abortion if a pregnant person experiences any other medical condition.

Moreover, the Emergency Exception does not contemplate a definition of "health" that aligns with Supreme Court directives. This is especially true in light of the Supreme Court's finding that "[a physician's] medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. *All these factors may relate to health*." *Doe v. Bolton*, 93 S.Ct. 739, 747, 410 U.S. 179, 192 (1973) (emphasis added); *see also U.S. v. Vuitch*, 91 S.Ct. 1294, 1299, 402 U.S. 62, 72 (1971) (noting that "the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being."). As shown below, in addition to unlawfully excluding mental health, the Emergency Exception fails to take into consideration a range of pregnancy-related health conditions, which disproportionately afflict women of color in the state.

a. Women of Color Are More Likely to Experience Chronic and Maternal Morbidities

The Supreme Court "has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Stenberg*, 530 U.S. at 931. The exception does exactly that by ignoring the the myriad of pregnancy complications pregnant people experience. This is especially true for Black and Latinx women, who are disproportionately afflicted with a host of serious maternal health issues. "Maternal morbidity is an overarching term that refers to any physical or mental illness or disability directly related to pregnancy and/or childbirth. These are not necessarily life-threatening but can have a significant impact on the quality of life."[29] Due to deeply entrenched barriers to healthcare access, bias in the healthcare system, and other compounding factors, non-Hispanic black women have the highest rates for 22 of 25 severe morbidity indicators used by the Center for Disease Control (CDC) to monitor population estimates for severe

[29] Koblinsky, Marge, et al, *Maternal Morbidity and Disability and Their Consequences: Neglected Agenda in Maternal Health*, 30(2) J. OF HEALTH, POPULATION, AND NUTRITION, INT'L CENTRE FOR DIARRHOEAL DISEASE RESEARCH, BANGLADESH 124, 125 June 2012, www.ncbi.nlm.nih.gov/pmc/articles/PMC3397324/.

maternal morbidity.[30] The short and long-term health implications for women with severe pregnancy-related conditions are serious.

The increased risk of underlying morbidities for women of color are compounded by the fact that Tennessee's maternal mortality rates are the ninth worst in the country.[31] Black women die at a rate that is 6% higher than white women in the state.[32] Nationwide, Black women die from pregnancy-related complications at three to four times the rate of White women.[33] Pregnant women who lack coverage often delay or forgo prenatal care in the first trimester, and inadequate prenatal care is associated with higher rates of infant and maternal mortality.[34]

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[30] Howell, Elizabeth A., *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61(2) CLINICAL OBSTETRICS AND GYNECOLOGY, Published in U.S. National Library of Medicine, June 2019, at 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5915910/pdf/nihms927630.pdf.

[31] Ungar, Laura, and Caroline Simon, *Which States Have the Worst Maternal Mortality?*, USA TODAY, GANNETT SATELLITE INFORMATION NETWORK, www.usatoday.com/list/news/investigations/maternal-mortality-by-state/7b6a2a48-0b79-40c2-a44d-8111879a8336/

[32] *Tennessee Maternal Mortality: Review of 2017 Maternal Deaths*, TENNESSEE DEPARTMENT OF HEALTH, 2017, www.tn.gov/content/dam/tn/health/documents/mch/MMR_Annual_Report_2017.pdf.

[33] Novoa, Cristina, and Jamila Taylor, *Eliminating Racial Disparities in Maternal and Infant Mortality*, CENTER FOR AMERICAN PROGRESS, www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal-infant-mortality/

[34] *Black Women Experience Pervasive Disparities in Access to Health Insurance*, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, Apr. 2019, www.nationalpartnership.org/our-work/resources/health-care/black-womens-health-insurance-coverage.pdf.

By stripping women of their right to access abortion care except in the most dangerous of pregnancies, the state has displayed little interest in actually protecting women's health. Rather, the Bans imports a standard of maternal "health" that considers only whether a person is near death or seriously impaired. This is no way comports with the Supreme Court's requirement that a law "contains exceptions for pregnancies which endanger the woman's life or health." *Casey*, supra. The law is unconstitutional for this additional reason.

CONCLUSION

For the reasons set forth above, along with the reasons set forth in the appellees' brief, the judgment of the District Court enjoining the enforcement of the Act should be affirmed.

Respectfully submitted,

Dated: December 22, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 4627 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 it has been prepared in a proportionally spaced typeface with serifs using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus curiae brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system on December 22, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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