Press Releases

April 8, 2021

ATTORNEY GENERAL RAOUL CHALLENGES RESTRICTIVE ABORTION LAW

Chicago — Attorney General Kwame Raoul today led a coalition of 18 attorneys general in filing an amicus brief in the U.S. Court of Appeals for the 6th Circuit, supporting a group of Tennessee abortion providers. The providers are challenging a law requiring women seeking abortions to attend two in-person appointments with physicians no fewer than 48 hours apart.

The plaintiffs in Bristol Regional Women's Center v. Slatery argue that Tennessee's waiting-period law subjects women to an unnecessary and onerous requirement that will, in practice, delay abortions and increase the risks for women who seek to obtain them. In today's brief, Raoul and the coalition explain that waiting period laws are not necessary to ensure informed consent – Tennessee's stated aim – and impose substantial burdens on women and abortion rights.

"Tennessee's attempt to restrict its residents' access to safe and legal abortion services is unconstitutional and compromises the health and well-being of women seeking medical care," Raoul said. "Women have the right to make their own reproductive health decisions, and I am committed to defending that right."

In 1992, the U.S. Supreme Court ruled in Planned Parenthood v. Casey that a state may impose restrictions on a woman's right to terminate her pregnancy only if those restrictions are reasonably related to a legitimate state interest, such as protecting women's health. Following a four-day trial challenging Tennessee's waiting period law in September 2019, the district court issued a thorough and comprehensive opinion, finding, among other things, that the law "provides no appreciable benefit" to women's health and instead "imposes numerous burdens that, taken together, place women's physical and physiological health and well-being at risk."

In today's brief, Raoul and the coalition urge the 6th Circuit to uphold the district court's ruling. Raoul and the coalition explain that, contrary to Tennessee's suggestion, many states, including Illinois, do not subject women seeking abortion care to lengthy and onerous waiting periods, and instead treat abortion as one medical service among many, governed by standard ethical and legal obligations to secure patients' informed consent. The attorneys general argue that because there is no evidence that women in these states fail to make informed decisions about their medical needs, Tennessee's waiting-period law is not reasonably related to the aim of ensuring informed consent.

Raoul and the coalition also argue that waiting-period laws impose serious burdens on women seeking medical care by delaying abortions and thereby increasing associated medical risks, as well as adding financial and logistical costs.

Joining Raoul in the brief are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, Virginia and Washington.

No. 20-6267

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 of Tennessee, et al.,

Defendants-Appellants.

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

No. 3:15-cv-00705
The Honorable Bernard A. Friedman

BRIEF OF AMICI CURIAE ILLINOIS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

SARAH A. HUNGER
ALEX HEMMER
Deputy Solicitors General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5202
shunger@atg.state.il.us

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

Attorneys for Amici States

(*Additional counsel on signature page*)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI STATES

The amici States of Illinois, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington submit this brief in support of Plaintiffs-Appellees Bristol Regional Women's Center, P.C., Memphis Center for Reproductive Health, Knoxville Center for Reproductive Health, Planned Parenthood of Tennessee and North Mississippi, and Dr. Kimberly Looney (collectively, "Plaintiffs") pursuant to Federal Rule of Appellate Procedure 29(a)(2). Amici States agree that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter).[1] Amici States thus have an interest in promoting the health and safety of all women seeking abortion services by assuring the proper application of *Casey*'s undue-burden standard to prevent unwarranted burdens on a woman's right to terminate a pregnancy.

[1] Unless otherwise indicated, all citations to *Casey* are to the joint opinion.

Amici have a particular interest in protecting the rights and health of their residents who may need medical care while present as students, workers, or visitors in Tennessee. Amici also have a more general interest in assuring that each State satisfies its constitutional obligation to protect the right to terminate a pregnancy within its borders because, among other reasons, a substantial reduction in the availability of abortion services in one State can cause women to seek services in other States, thereby potentially limiting the regulatory choices available to those other States and placing a strain on their healthcare systems.

The law at issue here requires women to attend two separate in-person sessions with a physician at least 48 hours apart to obtain an abortion. After a four-day bench trial, the district court issued a thorough opinion that, after making detailed factual findings and carefully applying *Casey*'s undue-burden standard, found that the law imposes substantial burdens on women seeking abortions. Because the district court's analysis on these points is sound and fully consistent with the Supreme Court's opinion in *Casey*, amici States urge this Court to affirm the judgment below.

SUMMARY OF ARGUMENT

The district court correctly held that Tennessee's waiting-period law provides no medical benefit and imposes numerous and substantial burdens on women seeking abortions. Final Order, R.275, PageID#6622, 6636. For the reasons Plaintiffs provide, its decision should be upheld. Amici States write to emphasize two main points in support of the decision below.

First, although Tennessee and its amici attempt to defend the waiting-period law on the ground that it protects women's health by facilitating informed consent and imposes only minimal burdens on women, amici States' own experience is to the contrary. Amici States share Tennessee's purported goal of protecting women's health, and agree that women seeking abortions should make that decision in a voluntary and informed manner. Although amici States have taken different approaches to regulating in this area, they have determined that waiting-period laws like Tennessee's do not serve that end, and that they impose significant burdens on women seeking abortions. All States impose an obligation on physicians to secure informed consent from their patients before conducting major medical procedures, and many States

do not impose any additional requirements on the process of obtaining informed consent in the abortion context. There is no evidence that women in these States fail to make informed decisions about their medical needs, or that waiting-period laws improve women's decisionmaking process. The challenged law thus is not reasonably related to Tennessee's stated aim of ensuring informed consent. Instead, the law increases the costs of accessing abortion and unnecessarily delays the procedure, imposing serious burdens on women seeking to terminate pregnancies, including by increasing the medical risks associated with later abortions and, in some cases, eliminating a woman's ability to exercise her constitutional right at all. The district court's decision, which rests on extensive findings to that effect, is consistent with the experience of and decisions by amici States regulating in this area.

Second, although Tennessee argues at length that *Casey* settled the constitutionality of state waiting-period laws, such that the district court here erred in even applying the undue-burden standard to the facts of this case, that argument is not supported by *Casey* and conflicts with basic principles of constitutional adjudication. *Casey* emphasized that its holding was limited to the record before it—a record that this Court has

since characterized as "sparse." *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361, 372 (6th Cir. 2006). And subsequent cases, including this Court's own, have not read *Casey* as resting on a categorical holding about the constitutionality of state waiting-period laws—no matter the burdens they impose—but instead as mandating the application of a fact- and circumstance-sensitive standard to the record before the court. That is precisely what the district court did here, and its well-reasoned, careful findings should be upheld.

ARGUMENT

I. Waiting-Period Laws Generally Do Not Promote Women's Health Or Facilitate Informed Consent, And They Impose Substantial Burdens On Women Seeking Abortions.

Under the Supreme Court's decision in *Casey*, a State may impose restrictions on a woman's right to terminate her pregnancy only if those restrictions are "reasonably related to" a legitimate state interest, such as protecting women's health. *Casey*, 505 U.S. at 878; *see Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016). Even a law that is reasonably related to a legitimate state interest, moreover, may be unconstitutional if it imposes an undue burden on women seeking abortions. *Casey*, 505 U.S. at 877-78. Here, Tennessee and its

amici seek to defend the 48-hour waiting period primarily on the ground that it serves Tennessee's "'legitimate concern that [a] woman's decision [to obtain an abortion] be informed.'" Tenn. Br. 35 (quoting *Casey*, 505 U.S. at 885); *see also id.* at 10-12, 26-38; *accord* Brief for Louisiana et al. ("La Br.") 10 (arguing that "the State has a legitimate interest in ensuring that the abortion decision is well informed, sure, and free from coercion for the woman's benefit"). And Tennessee argues at length that the law does not impose substantial burdens on women. Tenn. Br. 38-52. But the district court rejected both propositions, finding after a four-day bench trial that the challenged law does not ensure informed consent, does not otherwise advance women's health, and imposes an undue burden on women seeking abortions. Final Order, R.275, PageID#6621-22, 6630, 6636.[2] That finding is consistent with amici States' own

[2] Tennessee's amici contend that the district court's extensive findings of fact are "entitled to no deference" because, in their view, the district court "applied the wrong legal standard"—that is, it applied the undue-burden test as articulated in the *June Medical* plurality opinion rather than the articulation of that test set out in the Chief Justice's concurring opinion. La. Br. 4 n.3. They are incorrect: The district court did not "appl[y] the wrong legal standard" in *making* factual findings (for instance, by applying the wrong test for what a "substantial burden" is); in light of *June Medical*, the question to be decided is *which* factual findings are relevant. As the Court observed in denying Tennessee's stay

experience: Waiting-period laws like Tennessee's are neither necessary nor appropriate to facilitate informed consent, and they impose serious burdens on women seeking to obtain abortions.

As an initial matter, waiting-period laws like Tennessee's cannot be justified by the need to facilitate informed consent because medical providers, including abortion providers, are *already* under both ethical and legal obligations to obtain informed consent from women before rendering abortion services. Abortion is, at bottom, a medical procedure like any other, and all physicians, including abortion providers, are required both by basic principles of medical ethics and by state law to obtain their patients' informed consent before conducting a medical procedure. The American College of Obstetricians and Gynecologists, for instance, explains that "the ethical obligations of informed consent" require any obstetrician-gynecologist contemplating performing a medical procedure on a patient to provide "adequate, accurate, and understandable information" and to ensure that the patient is able to

---

motion, "no one contends that the district court's factual findings would . . . change," no matter how that question is resolved. *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 337 (6th Cir. 2021).

"understand and reason through this information," to "ask questions" of the provider, and to "make an intentional and voluntary choice, which may include refusal of care or treatment."[3] The National Abortion Federation has adopted similar guidance.[4] Moreover, every State—including Tennessee—imposes an equivalent legal obligation on physicians (either by statute or under state tort law), requiring them as a matter of law to obtain informed consent before conducting any medical procedure.[5] Thus, a waiting-period law like Tennessee's plays no role in

---

[3] *See, e.g.*, Am. College of Obstetricians & Gynecologists, ACOG Committee Op. No. 819 at e34, *Informed Consent and Shared Decision Making in Obstetrics and Gynecology* (2021), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/02/informed-consent-and-shared-decision-making-in-obstetrics-and-gynecology.pdf. All cited websites last visited April 8, 2021.

[4] Nat'l Abortion Federation, *Ethical Principles for Abortion Care* 1, http://prochoice.org/wp-content/uploads/NAF_Ethical-_Principles.pdf.

[5] Studdert et al., *Geographic Variation In Informed Consent Law: Two Standards For Disclosure Of Treatment Risks*, 4 J. Empirical L. Stud. 103, 108-09 & tbl. 1 (2007). *See, e.g.*, Tenn. Code Ann. § 29-26-118 (permitting tort liability where plaintiff shows that physician did not "supply appropriate information to the patient in obtaining informed consent . . . in accordance with the recognized standard of acceptable professional practice in the profession"); 410 ILCS 50/3(a); N.Y. Pub. Health Law § 2805-D. The exact standard varies from State to State, but "[t]he key element . . . is that the doctor must disclose material risks to the patient." Vandewalker, *Abortion And Informed Consent*, 19 Mich. J.

ensuring informed consent, because medical providers are already obligated by legal and ethical principles to obtain informed consent from their patients before performing abortions, just as in any other medical context.

It is thus no surprise that 22 States and the District of Columbia do not impose any waiting period at all on women seeking abortions.[6] These States understand that abortion-specific waiting periods can prevent women's access to care and harm women's health, and thus use other mechanisms to ensure that woman seeking abortions make informed and voluntary decisions.

Gender & Law 1, 5 (2012); *see also* Studdert et al., *supra*, at 104-106 (describing variation in state standards).

[6] *See* Guttmacher Inst., *Counseling And Waiting Periods For Abortion* (March 2021), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion. Tennessee's amici assert that "28 states, including the *amici* States, require a waiting period before abortions." La. Br. 1 & n.1. But one of the cited state statutes was permanently enjoined over two decades ago, *Planned Parenthood of Missoula v. State*, No. BDV-95-722 (Mont. Dist. Ct. Mar. 12, 1999), and others are the subject of ongoing litigation, *see, e.g.*, *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017); *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, No. EQCV081855 (Iowa Dist. Ct. June 30, 2020). And one of the amici States (Alaska) does not, in fact, impose a waiting period on women seeking to obtain an abortion.

A minority of these States have chosen to establish specific rules regulating the process of obtaining informed consent in the abortion context. For instance, some States, including Connecticut, Maine, Nevada, and Rhode Island, specifically require healthcare professionals counseling abortion patients to obtain such patients' written informed consent or to certify in writing that those patients have provided such consent.[7] These States, however, largely permit medical professionals to determine the content of such disclosures. For instance, although Maine expressly requires a physician to advise a woman seeking an abortion about the risks of both pregnancy and abortion, it also provides that the physician shall do so "in a manner that in [his or her] professional judgment is not misleading and that will be understood by the patient." Me. Stat. tit. 22, § 1599-A(2).

But most States that have chosen not to impose abortion-specific waiting periods likewise do not specifically regulate the process by which physicians obtain informed consent in the abortion context. These States recognize that generally applicable informed-consent obligations,

[7] *See* Conn. Gen. Stat. § 19a-116; Conn. Agencies Regs. § 19a-116-1(c); Me. Stat. tit. 22, § 1599-A(1); Nev. Rev. Stat. §§ 442.252-.253; R.I. Gen. Laws §§ 23-4.7-2 to 7-5.

supra pp. 7-9, are sufficient to ensure that all patients—including women seeking abortions—make informed and voluntary decisions. Over a dozen States, then, have chosen not to supplement physicians' legal obligations with an abortion-specific rule, recognizing that abortion is governed by standard legal and professional rules mandating informed consent prior to any medical procedure.

Tennessee and its amici identify no evidence that these States' regimes fail to facilitate informed consent and patient autonomy. Indeed, many States have made the decision over the last several years to repeal statutes imposing waiting periods and other similar restrictions on the abortion right, concluding that these statutes serve little purpose other than to burden patients' exercise of that right. For instance, in 2020 Virginia enacted the Reproductive Health Protection Act, which repealed the Commonwealth's requirement that women seeking abortions be provided certain written materials at least 24 hours before obtaining an abortion. *See* 2020 Va. Acts, ch. 898, § 1. One of the bill's sponsors explained that it was designed to "roll[] back restrictions that

are not evidence-based."[8] Massachusetts also repealed a 24-hour waiting period in 2020, replacing it with a law that requires physicians to obtain "written informed consent" from patients but that does "not impose any waiting period between the signing of the consent form and the patient obtaining the abortion." *See* 2020 Mass Acts 263 (codified in part at Mass. Gen. Laws ch. 112, § 12R).

Other States, including Illinois, have similarly enacted statutes in the last several years reaffirming these States' commitment to allowing women to make "autonomous decisions about how to exercise" the right to have an abortion, and to regulate abortion the same way as any other medical procedure, "consistent with accepted standards of clinical practice." 775 ILCS 55/1-5(2); *see also, e.g.*, Strengthening Reproductive Health Protections Amendment Act of 2020, 67 D.C. Reg. 3,537 (Mar. 27, 2020) (amending D.C. law to "prohibit the District government from interfering with reproductive health decisions"); Reproductive Health Act of 2019, 2019 N.Y. Laws, c. 1, § 1 (legislative findings) (finding that,

[8] Gov. Ralph Northam, Press Release, *Governor Northam Signs Virginia Reproductive Health Protection Act* (Apr. 10, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856019-en.html.

"as with other medical procedures, the safety of abortion is furthered by evidence-based practices developed . . . by medical professionals"); *see also* Reproductive Privacy Act of 2002, 2002 Cal. Stat. 2202, 2202 (similar). These States have thus concluded that waiting periods not only fail to ensure informed consent, but also burden patients' rights.

Waiting-period laws like Tennessee's, however, treat abortion unlike other medical services, imposing additional burdens on women who have determined that they want to terminate their pregnancies. As a wide range of studies have shown, the waiting periods established by these laws serve no genuine medical purpose; they primarily operate to delay, and, in some cases, prevent women who have made voluntary and informed decisions to terminate their pregnancies from exercising their right to do so by imposing serious financial and logistical burdens on that right.

The evidence that waiting-period laws serve no medical purpose is extensive. By the time they arrive at a physician's office, studies show, women are generally confident in their decision to obtain an abortion. One 2012 study found that 94% of over 5,000 women surveyed before obtaining an abortion at one clinic reported that they were "sure" of

their decisions.[9] A national study conducted in 2008 reported that over 92% of women had made up their minds regarding their decision to obtain an abortion before even making their first appointment.[10] Even a study on which Tennessee relied at trial shows that waiting-period laws have little to no effect on informed decisionmaking, concluding that "the vast majority of women presenting for abortion are certain about their decision and go on to have an abortion."[11] This study, as one court has observed, "demonstrates that mandatory waiting periods have no effect on patient decision-making." *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 241 (Iowa 2018).

---

[9] Foster et al., *Attitudes and Decision Making Among Women Seeking Abortions at One U.S. Clinic*, 44 Persp. Sexual & Repro. Health 117, 120 (2012).

[10] Moore et al., *What Women Want From Abortion Counseling In The United States: A Qualitative Study of Abortion Patients In 2008*, 50 Soc. Work Health Care 424, 432 (2011).

[11] Roberts et al., *Utah's 72-Hour Waiting Period for Abortion: Experiences Among a Clinic-Based Sample of Women*, 48 Persp. Sexual & Repro. Health 179, 187 (2016); *see also* Roberts et al., *Do 72-Hour Waiting Periods and Two-Visit Requirements for Abortion Affect Women's Certainty? A Prospective Cohort Study*, 27 Women's Health Issues 400, 400 (2017) (concluding that "[m]ost women were certain of their decision to have an abortion when they presented for their abortion information visit and their certainty remained unchanged despite the information visit and 72-hour waiting period").

At the same time, waiting-period laws impose significant burdens on women seeking to obtain an abortion—burdens that many amici States have recognized in choosing not to enact such measures. The district court here made extensive factual findings regarding the burdens imposed by Tennessee's law, explaining that the law "causes increased wait times, imposes logistical and financial burdens, subjects patients to increased medical risks, and stigmatizes and demeans women." Final Order, R.275, PageID#6630. Multiple academic studies have reached the same conclusion. For example, a committee of experts convened by the National Academies of Sciences, Engineering and Medicine in 2018 found that mandatory waiting-period laws like Tennessee's "delay[] the abortion" and in doing so "increase[] the risk of harm to the woman," including by exacerbating the risk of medical complications.[12] The district court made a similar finding here, adding that the delays caused by the challenged statute "can and do cause patients to miss the short cutoff date for a medication abortion," requiring women to undergo

[12] Nat'l Academies of Sci., Eng'g, & Med., *The Safety And Quality Of Abortion Care In The United States* 77-78 (2018), https://www.ncbi.nlm.nih.gov/books/NBK507236/pdf/Bookshelf_NBK507236.pdf.

surgical abortions or, in some cases, preventing them from obtaining abortions at all. Final Order, R.275, PageID#6631. There is also ample evidence that waiting-period laws impose logistical and financial hurdles on women, especially on low-income women, who, as the district court found, "make up the majority of abortion patients in Tennessee." Final Order, R.275, PageID#6633. One study based on interviews of over 300 women seeking abortions shortly after the enactment of a waiting-period law found that the law increased the costs of having an abortion for low-income women by 48 percent.[13] The net effect of the burdens imposed by waiting-period laws can be substantial, deterring women from obtaining abortions altogether or causing them to travel to another State to obtain abortion services. Three studies conducted in Mississippi in the early 1990s found that the State's in-person counseling and waiting-period law led to both a decline in the abortion rate and a rise in abortions obtained out of state.[14]

---

[13] Lupfer & Silber, *How Patients View Mandatory Waiting Periods For Abortion*, 13 Fam. Planning Persp. 75, 75 (1981).

[14] *See* Joyce & Kaestner, *The Impact of Mississippi's Mandatory Delay Law On The Timing Of Abortion*, 32 Fam. Planning Persp. 4 (2000); Joyce et al., *The Impact of Mississippi's Mandatory Delay Law On Abortions And Births*, 278 J. Am. Med. Ass'n 653 (1997); Althaus &

In short, the academic literature and amici States' own experience and decisions regulating in this area support the district court's holdings that Tennessee's waiting-period law is not "reasonably related to" women's health, *Casey*, 505 U.S. at 878, and imposes substantial burdens on women seeking to terminate their pregnancies, Final Order, R.275, PageID#6622, 6630, 6636.

Tennessee and the States supporting it thus err in asserting that the district court's decision here makes Tennessee an "outlier." La. Br. 1; *see also* Tenn. Br. 7. To the contrary, a large number of States have reached the same conclusion that the district court did regarding the lack of medical benefit, and the substantial burdens, associated with waiting-period laws. *Supra* pp. 9-13. And a range of courts have reached the same conclusion that the district court did here, albeit on state constitutional grounds. *See Planned Parenthood of the Heartland*, 915 N.W.2d at 243 (finding that analogous waiting-period law "does not, in fact, further any compelling state interest"); *Gainesville Woman Care*, 210 So. 3d at 1260 (explaining that "the State failed to offer evidence of a

---

Henshaw, *The Effects of Mandatory Delay Laws On Abortion Patients And Providers*, 26 Fam. Planning Persp. 228 (1994).

compelling state interest in treating a woman who has chosen to terminate her pregnancy, unlike any other patient, as unable to determine for herself when she is ready to make an informed decision about her medical care"). There is nothing unprecedented about the district court's conclusion.

Tennessee's amici are likewise wrong to suggest that the fact that some States have established waiting periods in other contexts, La. Br. 12-13, somehow renders waiting-period laws appropriate in the abortion context. The vast majority of the cited statutes do not govern medical decisions, meaning that there is no physician bound by ethical guidelines and legal rules to secure the decisionmaker's informed consent, as there is in the abortion context. *Supra* pp. 7-9. And amici's comparison between abortion and "tubal ligations and vasectomies," La. Br. 12, is inapt for multiple reasons. For one, none of the cited statutes require a patient seeking one of those procedures to attend two separate in-person sessions with a physician, as the statute challenged here does. And even if such a regime existed elsewhere, it would not matter, given the differences between those procedures and abortion—especially the serious consequences that might result from a short delay in the abortion

context, but not in the context of these other procedures. As the district court found, Tennessee's waiting-period law significantly increases both the risk that women seeking abortion will miss the State's cut-off date for medication abortions (or all abortions) and the likelihood that women will experience adverse medical consequences as a result of the delayed procedure. Final Order, R.275, PageID#6330-32; *see supra* pp. 15-16.

In sum, as amici States' experience and decisions in this area show, waiting-period laws like Tennessee's are not "reasonably related" to an asserted interest in advancing women's health, *Casey*, 505 U.S. at 878, and they impose substantial burdens on women exercising their right to obtain an abortion.

II. The District Court's Finding That Tennessee's Waiting-Period Law Imposes An Undue Burden Is Consistent With *Casey*.

Under *Casey*, even if a State's regulation advances a legitimate interest, it still violates the Constitution if it imposes an "undue burden" on a woman's right to terminate her pregnancy. *Whole Women's Health*, 136 S. Ct. at 2301; *Casey*, 505 U.S. at 878. The district court here heard four days of testimony about the impact of Tennessee's waiting-period law on women seeking abortions. Based on that testimony, the district

court found "overwhelming evidence" that the challenged law "places a substantial obstacle in the way of women who seek an abortion." Final Order, R.275, PageID#6638. The district court's holding, and the factual findings underlying it, were well supported and fully consistent with opinions issued by this Court and the Supreme Court in this area.

Tennessee and its amici, however, argue that the district court erred in conducting any fact-finding on this question, contending that the Supreme Court's decision in *Casey*, alongside this Court's decision in *Taft*, 468 F.3d 361, "preordain the outcome in this case." Tenn. Br. 2; *accord* La. Br. 2-3 (similar). According to Tennessee, *Casey* established as a matter of law that a State may enact a 24- or 48-hour waiting-period law without imposing an undue burden on the abortion right, and the district court here erred in failing to "adhere" to that rule. Tenn. Br. 2. But *Casey* held no such thing. The *Casey* Court reviewed the record in that case and held that, on that record, the plaintiffs had not shown that the law at issue imposed an undue burden. *See Casey*, 505 U.S. at 885-86; *see also id.* at 969 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Far from disregarding *Casey* and subsequent precedent, the district court carefully considered these cases

and explained why the voluminous record assembled here dictated a different result.

As the Court has observed, *Bristol Reg'l Women's Ctr.*, 988 F.3d at 341, *Casey* made clear the fact-specific nature of its holding. The question in *Casey* was whether a state law that imposed a range of restrictions on the abortion right imposed an undue burden on that right. 505 U.S. at 844-46, 876-79. Among those restrictions was a statutory provision imposing a 24-hour waiting period on abortion seekers. *Id.* at 885. The plurality described as a "close question" whether, "in practice," this provision imposed an undue burden on women seeking abortions. *Id.* It recounted certain findings of fact made by the district court and reasoned that, although the factual findings were "troubling," they did not "demonstrate that the waiting period constitute[d] an undue burden." *Id.* at 885. The plurality thus concluded, "on the record before [it]," that the waiting-period law did not place an undue burden on abortion access. *Id.* at 886. The plurality did not state, however, that *all* state laws imposing waiting periods of analogous length would similarly satisfy the undue-burden standard. Indeed, the Third Circuit on remand read the Supreme Court's opinion

to require courts to review each law on its own facts: "By basing its rulings . . . 'on the record,'" the Third Circuit explained, "the Court signal[ed] that it was not announcing a per se rule." *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 861 (3d Cir. 1994). "At a minimum," the Third Circuit elaborated, "the Court meant that other state abortion laws require individualized application of the undue burden standard." *Id.*

Tennessee and its amici insist that the Supreme Court's holding in *Casey* was absolute and allows no factual distinction. *See* Tenn. Br. 2-3, 41-42; *see also* Tenn. En Banc Pet'n 8-10; La. Br. 2. But they point to no case reading *Casey* to establish a bright-line rule. This Court's decision in *Taft*, on which Tennessee otherwise relies, *see* Tenn. Br. 2, did not read *Casey* this way. The Court there conducted an extensive review of what it described as an "impressive" factual record, which it contrasted with the "sparse" record amassed in *Casey*. 468 F.3d at 372. It did not suggest, as Tennessee now contends, that *Casey* resolved the constitutionality of all waiting-period laws of analogous length, no matter the burdens they impose on women; to the contrary, the Court in *Taft* conducted a detailed, lengthy analysis of how the statute at issue

fared under *Casey*'s undue-burden standard. *See id.* at 372-74. The other cases cited by Tennessee, *see* En Banc Pet'n 9-10, are largely to the same effect: Although these cases uphold state waiting-period laws, they do so by applying the undue-burden standard to those statutes, not by treating their constitutionality as settled by *Casey*. *See, e.g.*, *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 691-92 (7th Cir. 2002) ("This is not to say that a [waiting-period] requirement *could not* create a burden comparable to a spousal-notice requirement."); *Karlin v. Foust*, 188 F.3d 446, 485 (7th Cir. 1999) (a waiting period law "similar" to *Casey*'s "could well be found to impose an undue burden on women in that state depending on the interplay of factors"); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 532-34 (8th Cir. 1994) (conducting extensive analysis of undue burden).

It makes good sense that these courts have applied *Casey*'s undue-burden standard to the facts before them rather than deriving the broad holding from it that Tennessee suggests. As the Supreme Court has repeatedly explained, "[c]onstitutional questions are not to be dealt with abstractly," but instead "dealt with only as they are appropriately raised upon a record" before a court. *Local No. 8-6, Oil, Chem. & Atomic*

Workers Int'l Union, AFL-CIO v. Missouri, 361 U.S. 363, 370 (1960); *see Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C.J.) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."). That approach permits States to tailor regulations to the needs of their jurisdictions. *See Hillsborough Cnty. v. Automated Med. Labs.*, 471 U.S. 707, 719 (1985) (regulation of medicine is a "matter of local concern"). And it also permits courts to review the facts and circumstances on the ground to analyze whether States have, in practice, infringed protected constitutional rights. *See Whole Woman's Health*, 136 S. Ct. at 2310 (explaining that "the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings"). Indeed, courts "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). The Court should decline Tennessee's invitation to forbear from performing that duty here.

The district court, applying *Casey*'s undue-burden standard, correctly observed that there are many differences between this case and

Casey. As a threshold matter, the statutory regimes differ on their faces. The Pennsylvania law at issue in *Casey* did not expressly require two separate, in-person visits; it required only that a physician "orally inform[]" the patient of certain information 24 hours before the abortion was to occur, 18 Pa. Cons. Stat. § 3205(a)(1)—a requirement that could, at least on its face, be met without an in-person visit. Tennessee, by contrast, requires patients to travel and receive the state-mandated information in person 48 hours before the abortion is to take place, Tenn. Code Ann. § 39-15-202(b), (d). Pennsylvania's law also allowed some of the information furnished at the initial appointment to be provided by a "physician assistant, health care practitioner, technician, or social worker," 18 Pa. Cons. Stat. § 3205(a)(2), whereas Tennessee requires that a physician provide such information, Tenn. Code Ann. § 39-15-202(b)—a rule that in practice serves to extend the delay between appointments, given the small number of physicians providing abortions in Tennessee.

The burdens imposed by Tennessee's waiting-period law also are more substantial in practice than the burdens imposed by the statute at issue in *Casey*. For starters, as the district court found, *see* Final Order,

R.275, PageID#6638, although Pennsylvania and Tennessee are of comparable size, at the time *Casey* was decided Pennsylvania had 81 abortion providers, ten times the number Tennessee currently has. That discrepancy means, as the Court observed in the stay opinion, that the "logistical, financial, and medical obstacles created by" the challenged statute are "substantially more severe" than those created by *Casey*'s analogous law. *Bristol*, 988 F.3d at 341-42. For instance, Tennessee's waiting-period law, the district court found, causes women seeking abortions to experience delays of up to four weeks between their first and second appointments. Final Order, R.275, PageID#6631. By contrast, the record in *Casey* was insufficient to establish the "practical effect" of the waiting-period law at issue there beyond the observation that it might lead to delays of "much more than a day." 505 U.S. at 885-86.

The district court also made detailed and comprehensive findings regarding the other burdens that the waiting-period law here imposes on women seeking abortions. *See* Final Order, R.275, PageID##6529-31, 6534-37, 6543-46, 6554-78, 6636-38. For instance, the lengthy wait times caused by the challenged statute, the district court found, "can and do cause patients to miss the short cutoff date for a medication abortion . . .

or even to miss the cutoff date in Tennessee for" all abortions—an issue not supported by the record in *Casey*. *Id.*, PageID#6631; *see Casey*, 505 U.S. at 969 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Patients who miss this cutoff, the district court found, "may resort to illegal or unsafe abortions," or be forced to carry to term, which carries health risks and may lead to "financial instability." *Id.* And for those patients who are able to obtain an abortion, the district court found that the delay caused by the waiting-period law creates risks: "As gestational age increases," the court explained, "an abortion becomes lengthier, more invasive, more painful, and riskier." *Id.*, PageID#6332. Finally, the court found and credited evidence that the gestational age at which abortions are performed in Tennessee has increased since the waiting-period law has been in effect, making clear that the law has, "in practice," *Casey*, 505 U.S. at 885, imposed substantial health risks on women seeking abortions in Tennessee. *Id.*, PageID#6331. None of this evidence was before the Court in *Casey*.

In sum, the district court carefully applied *Casey*'s undue-burden standard to the extensive record assembled by the parties regarding the impact of the challenged statute on women in Tennessee. Its analysis is

fully consistent with *Casey*, and its thorough findings of fact should be upheld.

CONCLUSION

For these reasons, this Court should affirm the judgment below.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

/s/ Sarah A. Hunger
SARAH A. HUNGER
ALEX HEMMER
Deputy Solicitors General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5202
shunger@atg.state.il.us

MATTHEW RODRIQUEZ
Acting Attorney General
State of California
1300 I Street, Suite 125
Sacramento, CA 94244

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway, 10th Floor
Denver, CO 80203

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

KARL A. RACINE
Attorney General
District of Columbia
400 6th Street NW, Suite 8100
Washington, DC 20001

CLAIRE E. CONNORS
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

AARON D. FORD
Attorney General
State of Nevada
100 North Carson St.
Carson City, NV 89701

GURBIR S. GREWAL
Attorney General
State of New Jersey
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504

LETITIA JAMES
Attorney General
State of New York
The Capitol
Albany, NY 12224

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North 9th Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington St. SE
Olympia, WA 98504

April 8, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,550 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirement of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word.

/s/ Sarah A. Hunger
SARAH A. HUNGER
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5202
shunger@atg.state.il.us

April 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2021, I electronically filed the foregoing Brief of Amici Curiae Illinois et al. with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Sarah A. Hunger
SARAH A. HUNGER
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5202
shunger@atg.state.il.us