No. 20-5969

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, *et al*.,
Plaintiffs and Appellees,

v.

HERBERT H. SLATERY, III, Attorney General and Reporter, *et al*.,
Defendants and Appellants

Appeal from the United States District Court for the
Middle District of Tennessee, Case No. 3:20-cv-00501

BRIEF OF AMICI CURIA OF THE TENNESSEE GENERAL ASSEMBLY SUPPORTING APPELLANTS AND URGING REVERSAL OF THE PRELIMINARY INJUNCTION

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INTERESTS OF AMICI[1]

Amici curiae (listed in the Appendix hereto) are thirty-three (33) duly elected members of the 111th Tennessee General Assembly, which enacted the law here at issue. They have a strong interest in explaining their actions and judgment that the law is a true and faithful performance of their oath of office. They believe that their oath of office imposes on them a solemn duty to secure to all persons in Tennessee (A) the rights they had prior to the adoption of the United States Constitution, which were retained by them under the Ninth Amendment[2] and are protected by the 14th Amendment, and (B) the rights they reserved to themselves under Article I, sec. 36 of the Tennessee Constitution, which provides, in full: "Nothing in this Constitution

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[1] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to its filing. Pursuant to Rule 29(a)(4)(E), undersigned counsel certify that this brief was not authored in whole or in part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than amici and their counsel have contributed money for this brief.

[2] The findings by the legislature make specific mention of the Ninth Amendment, codified at Tenn. Code Ann. 39-15-214 (a)(6): "The state has a legitimate, substantial, and compelling interest in protecting the rights of *all human beings*, including the fundamental and absolute right of unborn human beings to life, liberty, and all rights protected by the Fourteenth and *Ninth Amendments* to the United States Constitution." The Ninth Amendment states as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The District Court, in ignoring this particular finding, swept past the conception of law and rights guaranteed to the people and retained by them under the Ninth Amendment and how that comes into play with the powers the people of the states retained under the Tenth Amendment to have their representative protect their fundamental rights in a system of dual sovereigns. This finding raises an issue of first impression that this Court should direct the District Court to consider on remand.

secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother."

In the brief, *amici* seek to share their views as to how the findings they made support the law they enacted and their oath of office. *Amici* all have a strong interest in ensuring that the District Court understands the importance of their findings to the constitutionality of the law in question and that the District Court takes into account the full scope of their duty to secure the fundamental rights of all natural persons within the borders of their state and the full extent of the powers they have been given by the people they represent to ensure that a particular right expressly enumerated in the United States Constitution, liberty, is not construed in favor of some natural persons in a manner that denies or disparages other fundamental rights that were retained by other natural persons and were also expressly enumerated in the United States Constitution. More specifically, their interest is how United States courts will construe their purposes and findings set forth in the law at issue. They submit this brief to ensure that their findings as well as the full scope of the duties incumbent on them as representatives to secure the fundamental rights of *all* natural persons residing in Tennessee are not misconstrued or unconstitutionally constricted.

SUMMARY OF THE ARGUMENT

The District Court below abdicated its responsibility to find facts. It did not attempt to discern whether Tennessee's viability and non-discrimination laws would, as a matter of fact, impose an undue burden on abortion access. Nor did it consider the fundamental rights that Tennessee's laws secure, rights of life, health, and equal protection of the laws. It did not defer to legislative findings, as U.S. Supreme Court precedents require, and did not place the burdens of pleading, proof, and persuasion on the abortionists, as the Supreme Court has done.

In short, the District Court did not perform the "undue burden" analysis that Supreme Court precedent requires. The reason for this is apparent from the District Court's memorandum. The District Court failed to acknowledge that fundamental rights are at stake on both sides of this case. Against the privacy of the abortionist's counsel to an expecting mother, courts must balance fundamental rights of life, health, and equal protection of the law. The Tennessee legislature found that those rights are often jeopardized by abortions performed in Tennessee. The state's job is to secure those rights, which are essential to ordered liberty and are fundamental in our laws. So, courts reviewing Tennessee's abortion legislation should frame their analysis according to the Tennessee legislature's findings.

The legislature's findings and the text of its enactments frame the undue burden analysis because legislatures have sound reasons for regulating abortion. The burden rests on abortionists challenging the legislation to introduce evidence that would

contravene the legislature's findings. The District Court did not even examine the legislature's findings, much less put the abortionists to their burdens of proof and persuasion.

ARGUMENT

The District Court ruled that "binding Supreme Court precedent" renders Tennessee's new abortion regulations unconstitutional because the statutes might apply pre-viability, and that would be unconstitutional. But the Supreme Court of the United States has never prohibited all regulations on abortion before viability. To the contrary, the Court has insisted that the state has legitimate and powerful interests to protect the health of the mother and the life of her child "from the outset of pregnancy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). Those interests are "compelling," and they become more compelling as a pregnancy progresses. *Roe v. Wade*, 410 U.S. 113, 154 (1973). Therefore, the privacy interest of the abortionist-patient relationship "cannot be said to be absolute." *Id*.

The District Court erroneously read *Roe* and *Casey* to forbid all regulation of abortion before viability. It failed to consider abortion regulations that the Supreme Court of the United States has either upheld or refused to enjoin. *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Mazurek* v. *Armstrong,* 520 U.S. 968 (1997); *Gonzales v. Carhart*, 550 U.S. 124 (2007). In those decisions and on other occasions, the Supreme Court has recognized the power of governments to regulate abortion to protect fundamental rights

such as life, health, and equal protection of the laws. After viability, a state's interests in securing those rights prevails. Before viability, the state's interest in protecting fundamental rights prevails unless its law imposes an undue burden on abortion access.

The District Court did not require the abortionists to prove that any burden on abortion access would be undue. In *Webster* and *Gonzales* the Court upheld regulations that burdened abortion. The Court's precedents thus demonstrate that not all burdens on abortion are undue, and that regulations of abortion will not be struck down unless they impose undue burdens.

Furthermore, abortionists bear the burden of proving the existence of a burden; courts are not to assume a burden exists in fact. *See Mazurek,* 520 U.S. at 971 ("It was 'uncontested that there was insufficient *evidence of a 'substantial obstacle' to abortion*.'") (emphasis added) (citation omitted). The abortionists could not have met this standard at the preliminary injunction stage; the law has not yet been enforced, so any potential burden is hypothetical.

The District Court also demonstrated confusion concerning who has the authority to define viability. It assumed that any statute articulating a viability standard must automatically offend Supreme Court precedent. But the Supreme Court has ruled that a legislature may lawfully establish a presumption of viability at some benchmark and impose on physicians the burden of proving non-viability. *Webster*, 492 U.S. at 513-20.

The District Court failed to undertake other requisite inquiries. It did not mention the state's compelling interests that are at stake both before and after a child's viability outside the womb. It made no findings concerning the Tennessee legislature's stated purposes, namely, to secure the fundamental rights of persons under law. See *Mazurek*, 520 U.S. at 972 ("We do not assume unconstitutional legislative intent even when statutes produce harmful results."). It did not defer to the legislature's findings concerning recent developments in fetal medicine and medical ethics and did not place the burdens of proof and persuasion on the abortionists, as the Supreme Court has required where the evidence concerning medical and ethical opinions is conflicting or uncertain. *Gonzales*, 550 U.S. at 163, and cases cited therein.[3]

Whether there is a burden, and whether any burden is undue, are case-specific, fact-dependent inquiries. Because the abortionists are challenging the laws *on their face*, before enforcement, their affidavit evidence is speculative. So, they are unlikely to prevail on the merits. The District Court could have let matters settle there and denied the motion for an injunction on that ground. But if the District Court was resolved to issue an injunction, it is required by Supreme Court precedent to justify its decision on the basis of an undue burden analysis, placing the burden on the abortionists to show that any burden is undue.

[3] The District Court made all the same mistakes with respect to third-party standing. Like the "undue burden" analysis, third-party standing is a case-specific inquiry.

These inquiries cannot be avoided by simply citing some Supreme Court decisions, because the Supreme Court has made clear that there are fundamental right claims on both sides of cases such as this. An important consideration that would render any burden constitutionally permissible, rather than undue, is that a state has acted to secure fundamental rights, whether enumerated rights, such as equal protection of the law for females and the disabled, or those rights that are so firmly grounded in our history and traditions as to be essential to, and implicit in, ordered liberty, such as the right to life. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Constitutional texts and established common-law rules constitute the best evidence of the existence and importance of fundamental rights. *Glucksberg*, 521 U.S. at 711-16. Compare Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 Okla. L. Rev. 167 (2010) (explaining why the unenumerated rights referred to in the Ninth Amendment should be understood with reference to a common law baseline, especially as specified in Blackstone's *Commentaries*) with *Roe*, 410 U.S. at 153 (declining to locate the abortion liberty in the Ninth Amendment's reservation of rights to the people and instead locating it in substantive due process doctrine).

Among the most fundamental of the fundamental rights is the right to human life. *Glucksberg*, 521 U.S. at 714-15. It is not merely a privilege or immunity of citizenship, but is also among those ancient, natural, and customary rights that the people reserved to themselves at the founding. See Amendments IX and XIV to the

Constitution of the United States. Equally fundamental is the right of equal protection of the laws. Both rights belong to all natural persons, which is to say, human beings, male and female, able and disabled, born and unborn. *See Glucksberg,* 521 U.S. at 741. (Stephens, J., concurring) ("The State has an interest in preserving and fostering the benefits *that every human being* may provide to the community."); 1 William Blackstone, *Commentaries on the Laws of England* 119, 125-26 (1765); Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J.L. Pub. Pol'y 539 (2017) (demonstrating that "person" in the Fourteenth Amendment includes pre-born human beings). And the Tennessee legislature found that those rights are placed in jeopardy in abortion clinics within the state.

State legislatures have compelling reasons to secure fundamental rights because they have an obligation to do so. 1 Blackstone, *Commentaries* at 124 (emphasis added) ("[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that *the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.*"). States have especially compelling interests to secure those fundamental rights that are unalienable, which are of interest to the whole community and which no one—not even the person whose life is at stake—has the power to waive

or give away. *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 579 (1884) ("The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, *nor by any other of his fellow creatures, merely upon their own authority*.' 1 Bl. Com. 133. The public has an interest in his life and liberty.") (emphasis added).

Amici take seriously their oaths to uphold and defend the Constitution of Tennessee and the Constitution of the United States. Far from attempting to place obstacles between citizens and their fundamental rights, *amici* have enacted the laws which abortionists challenge in this case to ensure that every natural person residing within the borders of Tennessee is secure in all of his or her fundamental rights.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 2,520 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirement of Fed. R. Civ. 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 for Mac, Version 16.39 using a proportionally spaced typed, 14-point Times New Roman.

Dated: October 29, 2020

/s/ David Fowler_____
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CERTIFICATE OF SERVICE

I hereby certify that on October 29, , 2020, I filed a copy of the foregoing electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance, by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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ADDENDUM OF CONSTITUTIONAL PROVISIONS AND STATUTES CITED

U. S. CONSTITUTION

Amendment IX

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CONSTITUTION

Article I, Section 36

> Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.

Statutes

Tenn. Code Ann. 39-15-214 (a)(6)

> The state has a legitimate, substantial, and compelling interest in protecting the rights of *all human beings*, including the fundamental and absolute right of unborn human beings to life, liberty, and all rights protected by the Fourteenth and *Ninth Amendments* to the United States Constitution.