Case No. 20-5969

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
Case No. 3:20-cv-00501

BRIEF OF KENTUCKY, ALABAMA, ARKANSAS, GEORGIA, IDAHO, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS HERBERT H. SLATERY III, *ET AL.*

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INTERESTS OF *AMICI CURIAE*[1]

Protecting the most vulnerable members of society is an interest of the utmost importance for States. And it is hard to imagine a scenario where this interest comes into sharper focus than protecting unborn children from eugenics-motivated abortions. The State of Tennessee recently sought to vindicate this interest by enacting House Bill 2263. In particular, the "antidiscrimination provision" in Section 217 of the bill prohibits a physician from performing an abortion when the physician knows the abortion is sought because of the sex of the unborn child, the race of the unborn child, or a prenatal diagnosis, test, or screening indicating that the unborn child might have Down syndrome. *See* Tenn. Code Ann. § 39-15-217. The district court below preliminarily enjoined that provision, and the *amici* States have an interest in seeing that decision reversed. While some of the *amici* States have enacted similar antidiscrimination laws, *all* of the *amici* States have a compelling interest in seeing that States retain the general power to legislate for the well-being of their most vulnerable citizens.

[1] As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

Another provision in House Bill 2263—the "timing provision" of Section 216—bans abortions after a fetal heartbeat becomes detectable. *See* Tenn. Code Ann. § 39-15-216. It too was enjoined by the district court, and the *amici* States have a similar interest in defending that provision.

Finally, the district court erroneously applied the void-for-vagueness doctrine in a manner that threatens to encourage constitutional challenges to previously unquestioned criminal statutes. The *amici* States have an interest in correcting the district court's misapplication of the void-for-vagueness doctrine so that it does not render their criminal laws more susceptible to novel challenges.

ARGUMENT

The district court erroneously enjoined both the antidiscrimination provision of Section 217 and the timing provision of Section 216. This *amicus* Brief addresses three key problems with the district court's ruling. First, the district court misapplied the void-for-vagueness doctrine to Section 217, and it did so in a way that has negative implications for States' abilities to enforce long-established criminal laws. Second, the district court failed to give adequate—if any—

consideration to the compelling state interests behind both Section 217 and Section 216. Third, and finally, the district court found that the Plaintiffs-Appellees are likely to succeed on the merits of their facial challenges to Sections 216 and 217 even though it completely failed to address the essential test for facially invalidating an abortion regulation.

I. The district court should not have enjoined the antidiscrimination provision.

The district court enjoined Section 217 based on the void-for-vagueness doctrine. As Tennessee's opening Brief eruditely explains, the district court's analysis in this regard was fundamentally flawed. There is nothing impermissibly vague about the prohibition in Section 217. Any reasonable person of normal intelligence can understand what conduct is prohibited by statutory language that bans the performance of an abortion when a doctor "*knows* that the woman is seeking the abortion because of the sex of the unborn child . . . the race of the unborn child . . . [or] a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome in the unborn child." Tenn. Code Ann. § 39-15-217(b)–(d) (emphasis added); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)

(explaining the standard for applying the void-for-vagueness doctrine (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972))).

But the flaws in the district court's reasoning go even deeper. As explained below, the district court misapplied the void-for-vagueness doctrine in a way that not only led to the wrong conclusion in this case, but also threatens to jeopardize States' abilities to enforce long-established criminal laws in other cases. Moreover, the district court's misapplication of the void-for-vagueness doctrine led the district court to sidestep Tennessee's compelling interests in the antidiscrimination provision. Had the district court addressed those interests head-on and conducted the substantive due process right-to-abortion analysis in light of them, it should have concluded that the antidiscrimination provision does not violate the principles set forth in *Roe* and *Casey*.

A. The district court's misdirected void-for-vagueness ruling threatens long-established state criminal laws.

To apply criminal sanctions under the antidiscrimination provision, Tennessee must prove that a physician performed an abortion with actual knowledge that the patient sought the abortion for a prohibited reason. *See* Tenn. Code Ann. § 39-15-217(b)–(d). Thus, criminal sanctions depend—at least in part—on the government's ability to prove

the patient's state of mind *and* the physician's knowledge of that state of mind. The district court found this to violate the void-for-vagueness doctrine because—in the district court's estimation—the provision requires physicians to know the motivations and mental states of their patients. There are two problems with this.

First, the district court had it exactly backwards. The antidiscrimination provision does not *require* physicians to uncover their patients' motivations and act accordingly. Instead, it only requires physicians to avoid acting when they have actual knowledge that their patients are seeking abortions for prohibited reasons. *See id.*

Second, and more importantly from the *amici* States' perspective, it is commonplace to impose criminal sanctions based on a defendant's actions with respect to a third party's mental state. For example, the Commonwealth of Kentucky criminalizes the theft of property that has been lost, mislaid, or delivered by mistake. *See* Ky. Rev. Stat. § 514.050. A defendant is guilty of this offense when he (1) comes into control of such property, (2) acts with intent to deprive the owner of the property, (3) fails to take reasonable measures to return the property to the owner, and (4) *knows* that the property was lost, mislaid, or delivered under a

mistake—rather than, for example, being abandoned or intentionally delivered to him. *See id.* § 514.050(1). Thus, criminal penalties under this statute require the defendant to have knowledge as to the property owner's state of mind. Similarly, Ky. Rev. Stat. § 526.040(1) prohibits an individual from possessing an eavesdropping device when the individual "know[s] that another intends to use that device to eavesdrop." This, too, obviously requires the government to prove that the defendant had knowledge as to a third party's state of mind.

There are countless other criminal statutes just like these. To allow the district court's void-for-vagueness analysis to stand will potentially encourage criminal defendants to challenge all such statutes on void-for-vagueness grounds. Of course, States could argue under Supreme Court jurisprudence that abortion law is so unique that the district court's analysis should not apply in any other context. *Cf. Whole Woman's Health v. Hellerstedt*, __ U.S. __, 136 S. Ct. 2292, 2330–31 (2016) (Alito, J., dissenting) (dissenting from the Court's unique and special treatment of abortion litigation). But that is little comfort for States facing the prospect of novel constitutional challenges to previously unquestioned criminal statutes. Moreover, it is inconsistent with the rule of law to

develop judicially created rules that only apply in discrete factual circumstances. *See id.* at 2321 (Thomas, J., dissenting) ("Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law."). The better solution is for this Court to reject the district court's analysis and reiterate the previously unquestioned premise that there is no vagueness problem in requiring the government to prove that a criminal defendant acted with knowledge of a third party's mental state.

B. The district court's preliminary injunction shows too little regard for Tennessee's interest in stopping invidious discrimination.[2]

The district court's misapplication of the void-for-vagueness doctrine not only raises the specter of novel challenges to previously unquestioned criminal laws, but it also wrongly obscures Tennessee's interests in eradicating discrimination.

[2] The *amici* States realize that the constitutionality of Ohio's similar antidiscrimination law was argued before the *en banc* Sixth Circuit earlier this year in *Preterm-Cleveland v. Himes*, No. 18-3329. The *en banc* Court has not yet rendered its decision. The arguments in this *amicus* brief echo the arguments that the State of Indiana and the Commonwealth of Kentucky made on behalf of a coalition of states in an *amicus* brief supporting Ohio at the *en banc* stage in *Himes*.

It is firmly established that States have a compelling interest in eliminating discrimination on the basis of race, sex, and disability. Unsurprisingly, the United States Supreme Court has long recognized the importance of states' interests in preventing discrimination. With respect to sex-based discrimination, the Supreme Court has unequivocally held that states have a "compelling interest in eliminating discrimination against women." *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citation omitted); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Similarly, it is well established that government may prohibit the "moral and social wrong" of discrimination by private parties in public accommodations. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964). It likewise cannot be contested that states have a "strong historical commitment to eliminating discrimination and assuring their citizens equal access to publicly available goods and services." *See Roberts*, 468 U.S. at 624 (citation omitted). And, in safeguarding those with disabilities, states have an interest in "protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes,

and 'societal indifference.'" *See Washington v. Glucksberg*, 521 U.S. 702, 732 (1997) (citation omitted).

What do these interests have to do with abortion? A lot. The eugenic roots of abortion demonstrate that it should be squarely within the crosshairs of States' antidiscrimination efforts. The district court erroneously sidestepped this issue. Tennessee's interest in eradicating discrimination is a compelling one that ought not to be ignored.

As Justice Thomas observed just last year, "Planned Parenthood founder Margaret Sanger . . . emphasized and embraced the notion that birth control 'opens the way to the eugenist' . . . [a]s a means of reducing the 'ever increasing, unceasingly spawning class of human beings who never should have been born at all.'" *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, __ U.S. __, 139 S. Ct. 1780, 1783–84 (2019) (Thomas, J., concurring). While Margaret Sanger never personally advocated for eugenic abortions, other "eugenicists . . . supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons." *Id.* at 1784. After World War II, "abortion advocates echoed the arguments of early 20th-century eugenicists by

describing abortion as a way to achieve 'population control' and to improve the 'quality' of the population." *Id.* at 1790.

The risk that abortion may be used for eugenics increases as advances in fetal screening technology decrease the costs of learning whether a particular fetus may have a disability. In particular, cell-free DNA testing permits genetic screening through a simple maternal blood draw in the first trimester, without the risk of miscarriage of traditional diagnostic methods such as amniocentesis. As Justice Thomas observed, such technological advances have "heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability." *Id.* at 1784.

Worldwide, the temptation toward eugenic treatment of the unborn afforded by DNA screening is proving irresistible. As Judge Batchelder observed in her dissent from the now-vacated panel opinion in *Preterm-Cleveland v. Himes*, many countries "celebrate the use of abortion to cleanse their populations of babies whom some would view—ignorantly—as sapping the strength of society." *Preterm-Cleveland v. Himes*, 940 F.3d 318, 326 (6th Cir. 2019) (Batchelder, J., dissenting), *vacated for rehearing*

en banc by 944 F.3d 630 (6th Cir. 2019). In Iceland, for example, "close to 100 percent" of women who receive a test result indicating Down syndrome choose to terminate the pregnancy. Julian Quinones & Arijeta Lajka, *"What Kind of Society Do You Want to Live in?": Inside the Country Where Down Syndrome is Disappearing*, CBS News, Aug. 14, 2017, https://www.cbsnews.com/news/down-syndrome-iceland/. In fact, only one or two children with Down syndrome are born each year in Iceland because, as an Icelandic prenatal physician chillingly observed, "we didn't find them in our screening." Dave Maclean, *Iceland Close to Becoming First Country Where No Down's Syndrome Children Are Born*, Independent, Aug. 16, 2017, *available at* https://www.independent.co.uk/life-style/health-and-families/iceland-downs-syndrome-no-children-born-first-country-world-screening-a7895996.html.

Sadly, the eugenic use of abortion in the United States is not merely hypothetical, with the abortion rate following an in utero Down syndrome diagnosis coming in at around 67%. *Box*, 139 S. Ct. at 1790–91 (Thomas, J., concurring). Others estimate that 80% of women who learn of a Down syndrome diagnosis before 24 weeks choose to terminate the pregnancy.

Susan Donaldson James, *Down Syndrome Births are Down in the U.S.*, ABC News, Oct. 30, 2009, https://abcnews.go.com/Health/w_Parenting Resource/down-syndrome-births-drop-us-women-bort/story?id=8960803.

The data related to abortions and race are equally as distressing. In his *Box* concurrence, Justice Thomas summarized the data as showing that "abortion in the United States is . . . marked by a considerable racial disparity." *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring).

And Section 217's prohibition of sex-selective abortions also addresses a distressing problem. As Justice Thomas summarized, "recent evidence suggests that sex-selective abortions of girls are common among certain populations in the United States . . . ." *Id.* (collecting sources). Outside the United States, the evidence about sex-selective abortions is overwhelming. "In Asia, widespread sex-selective abortions have led to as many as 160 million 'missing' women—more than the entire female population of the United States." *Id.* (citations omitted). More specifically, in India, "there are about 50 million more men than women in the country." *Id.* (citation omitted). As recently as July 2019, government data from one part of India "showed none of the 216 children born across 132 villages over three months were girls." Chris Baynes,

"No girls born" for past three months in area of India covering 132 villages, Independent, July 23, 2019, https://www.independent.co.uk/news/world/asia/no-girls-born-india-villages-female-foeticide-sex-selective-abortions-a9015541.html.

In short, concern for eugenic use of abortion, and the dramatic consequences that will follow, is justified by concrete, real-world trends. And Tennessee is merely advancing compelling state interests in passing legislation to prevent such abortions. The district court's preliminary injunction fails to give appropriate consideration and deference to this compelling state interest.

C. The district court's preliminary injunction also shows too little regard for Tennessee's interest in protecting the medical profession.

Stopping invidious discrimination is not the only compelling interest served by Section 217. Specifically, Section 217's antidiscrimination provision also advances the State's interest in protecting the integrity of the medical profession and ensuring that medical providers do not become "witting accomplices" to eugenic ideals. *Preterm-Cleveland*, 940 F.3d at 326 (Batchelder, J., dissenting).

In the current environment, physicians who have "professed to do no harm" are often the ones pressuring parents to choose abortion following a Down syndrome diagnosis. In expert testimony supporting Indiana's anti-discrimination abortion law, Dr. Steve Calvin, a board-certified OB/GYN specializing in maternal-fetal medicine, observed that "[w]omen have described to me the pressure—both subtle and overt—they have felt to . . . have an abortion if Down syndrome is detected," including from "genetic counselors, physicians, and other medical personnel." Declaration of Steven E. Calvin, M.D., *Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 265 F. Supp. 3d 859, ECF 54-1, ¶¶ 20 (S.D. Ind. 2017).

Broader surveys also detect the problem. For example, an anonymous survey of nearly 500 physicians revealed that 13% emphasized the negative aspects of Down syndrome so that patients would favor terminating a pregnancy following a prenatal diagnosis of Down Syndrome, and 10% actively "urge" parents to terminate the pregnancy. Brian G. Skotko, *Prenatally Diagnosed Down Syndrome: Mothers Who Continued Their Pregnancies Evaluate Their Health Care*

Providers, 192 Am. J. of Obstetrics & Gynecology 670, 670–71 (Mar. 2005).

Promoting abortion on the basis of a Down syndrome diagnosis blurs "the time-honored line between healing and harming," *Glucksberg*, 521 U.S. at 731, which distorts the purpose that the medical profession should serve. The Supreme Court recognized a State's compelling interest in protecting the medical profession's integrity and ethics when it upheld laws banning physician-assisted suicide, *id.* at 731, 735, and a federal law banning partial-birth abortions, *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007); *see also Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 542–43 (7th Cir. 2019) (upholding Indiana law prohibiting sale, purchase, transfer, or acquisition of fetal tissue as a means to "protect[] the integrity and ethics of the medical profession" (citation omitted)).

Section 217's antidiscrimination provision fits within this well-established tradition of curbing medical practices that undermine the trust earned by centuries of practice and understanding that medicine is solely to be used for the benevolent treatment of human beings. Unfortunately, as with Tennessee's interest in eradicating discrimination, the district court's preliminary injunction fails to give

any level of consideration or deference to this interest. This Court should correct both of those mistakes.

D. The antidiscrimination provision does not interfere with the right protected by *Roe* and *Casey*.

The district court erroneously sidestepped the substantive due process right-to-abortion analysis by ignoring Tennessee's compelling interests and incorrectly finding Section 217 to be unconstitutionally vague. Addressing the right-to-abortion issue head-on should result in denial of injunctive relief in this case, especially when that issue is considered in light of the compelling interests behind the antidiscrimination provision.

The Plaintiffs-Appellees seem to believe that *Roe*, *Casey*, and their progeny establish a categorical right to previability abortions. This could not be further from the truth. *Casey* held that the right to abortion, at its core, is the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child*." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438 (1972)) (emphasis added). And *Roe* protects a woman's ability to choose to have an abortion "when the woman confronts the reality that, perhaps despite

her attempts to avoid it, she has become pregnant." *Id.* at 853; *see also* *Roe v. Wade*, 410 U.S. 113 (1973). Tennessee's antidiscrimination provision does not run afoul of either of these principles.

Importantly, "*Casey* did not consider the validity of an anti-eugenics law" like Section 217. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing *en banc*). In fact, the plaintiffs in *Casey* expressly refused to challenge a law that banned sex-selective abortions. Br. of Resp'ts, *Planned Parenthood of Se. Pa. v. Casey*, 1992 WL 12006423, at *4 (1992) (stating that a law directing that "no abortion [can] be performed solely because of the sex of the unborn child" "was not challenged" in *Casey*). In other words, by design of the *Casey* plaintiffs, the Supreme Court did not consider a law like Section 217. As a result, "[w]hatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring).

Not only did *Casey* not consider the legal question raised here, but *Roe* specifically disavowed creating a "categorical" right to receive an abortion regardless of the woman's reason for doing so. As *Roe*

summarized, "appellant and some amici argue that a woman's right [to obtain an abortion] is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." 410 U.S. at 153 (emphasis added). *Roe* rejected this proposition. *Id.* ("With this we do not agree."). Thus, the only reasonable reading of *Roe* is that a woman cannot have an abortion "for whatever reason she alone chooses." *See id.*

Moreover, the government interests that underlie Section 217 differ in meaningful respects from the interests considered in *Casey*. Importantly, *Casey* considered only two state interests: protecting unborn life and promoting women's health. *See Casey*, 505 U.S. at 871–72, 878. *Casey* did not weigh state interests like preventing discrimination and protecting the medical profession. Thus, when *Casey* asked whether "the State's interests" were strong enough to justify a law, *Casey* was speaking of different government interests than those that justify Section 217. In other words, antidiscrimination laws vindicate moral and ethical justifications not addressed in *Roe* and *Casey*. *See Gonzales*, 550 U.S. at 158 (observing that partial-birth abortion "implicates additional ethical and moral concerns that justify a special

prohibition"). As Judge Easterbrook observed, "[u]sing abortion to promote eugenic goals is "morally and prudentially debatable on grounds different than those that underlay the statutes *Casey* considered." *Comm'r of Ind. State Dep't of Health*, 917 F.3d at 536 (Easterbrook, J., dissenting from denial of rehearing *en banc*).

Ultimately, the Supreme Court has never extended the holding of *Roe* or *Casey* to apply when a woman is willing to bear a child but wishes to terminate her pregnancy because she finds a particular child unacceptable. "None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." *Id.* Judge Easterbrook, joined by three other judges (including now-Justice Barrett), put it this way: "[T]here is a difference between 'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.'" *Id.* And that difference makes Section 217 constitutional.

II. The district court gave too little consideration to the compelling state interests at stake in Section 216.

The timing provisions in Section 216 express Tennessee's profound respect for, and interest in, the lives of unborn children. This is an important interest that should not be rejected out of hand.

Nevertheless, the district court viewed Section 216 as unconstitutional simply because it prevents women from terminating a pregnancy before the judicially invented point of "viability." Without question, the Supreme Court has recognized some limits on a State's ability to regulate abortion before "viability." *See Casey*, 505 U.S. at 870. But there are other interests that at least deserve consideration as well—interests like protecting fetuses from pain, and protecting the dignity of human life.

Blind adherence to the concept of "viability" has created an outdated—and arbitrary—way of thinking about the interests at stake with abortion. "By deeming viability the point at which the balance of interests tips, the Court has tied a state's interest in unborn children to developments in obstetrics, not to developments in the unborn." *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (citation & internal quotation marks omitted). In other words, advancements in medical care render "viability" a moving target. Thus, a 24-week-old fetus in 1973 received no protection from the state, but forty years later, that same state has a compelling interest in that same fetus's life. *Id.* And the same advancements in medical science have taught us much

more about fetal development—especially fetal pain. Over time, these advancements have only deepened society's understanding and appreciation of the unmistakable humanity of fetuses.

Thus, almost five decades after *Roe*, it is clear that there are better ways to mark the beginning of a state's overriding and compelling interest in the life of an unborn child. Doing so fulfills the recognition in *Casey* and *Gonzales* that states have a legitimate interest in the life of unborn children "from the outset of the pregnancy." *Gonzales*, 550 U.S. at 145 (citation omitted). And that is exactly what Tennessee has recognized with Section 216.

The Supreme Court relied on similar considerations in upholding the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales*. In that act, Congress "express[ed] respect for the dignity of human life" by banning a gruesome procedure that the legislature believed would "coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life." *Gonzales*, 550 U.S. at 157 (citation omitted). Even though the statute at issue in *Gonzales* banned some previability abortions, the Supreme Court nevertheless upheld the law after considering all of the interests supporting it. *See id.* at 156–64. Likewise,

Section 216 protects the dignity of life by relying on an immutable characteristic of humanity—the heartbeat—to mark the bounds of when an unborn child's life can be taken. In fact, it would be hard to imagine a measure that would better express Tennessee's profound "respect for the dignity of human life." *Id.* at 157. Given Tennessee's interests in this regard, the district court should have evaluated Section 216 along the same lines as the Supreme Court's analysis in *Gonzales* rather than simply asking whether the timing provisions would restrict previability abortions.

III. The district court's ruling is fundamentally flawed because it entirely failed to address the large-fraction test.

This case involves *facial* challenges to two statutory provisions. In order to find an abortion regulation facially unconstitutional, a court must first find that the regulation will unduly burden a large fraction of the women to whom it is relevant. *See Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 367–69 (6th Cir. 2006).[3] In this case, however, the

[3] The large-fraction test is an anomaly unique to the abortion context. As in other contexts, the appropriate analysis should require those challenging an abortion regulation to prove "that no set of circumstances exists under which the [provision] would be valid." *Casey*, 505 U.S. at 973 (Rehnquist, C.J., dissenting) (quoting *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990)); *see also June Med. Servs.*

district court completely failed to engage with that standard. Instead, it inexplicably concluded that the Plaintiffs-Appellees are likely to succeed on the merits without even so much as mentioning the large-fraction standard. Because it did not even address an essential element of the Plaintiffs-Appellees' facial challenge, the district court's conclusion that they are likely to succeed on the merits is fundamentally flawed. Moreover, if the district court had addressed the large-fraction test, it could have only ruled in Tennessee's favor as there is no evidence showing that either Section 216 or Section 217 would unduly burden a large fraction of women.

The Eighth Circuit illustrated this point in *Planned Parenthood of Arkansas and Eastern Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir. 2017). At issue in *Jegley* was the constitutionality of an Arkansas statute requiring any physician providing medication abortions to have a contract with a physician who has hospital admitting privileges and who agrees to handle emergency complications caused by the abortion

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L.L.C. v. Russo, __ U.S. __, 140 S. Ct. 2103, 2175–76 (2020) (Gorsuch, J., dissenting) ("In effect, the standard for facial challenges has been flipped on its head: Rather than requiring that a law be unconstitutional in all its applications to fall, today's decision requires that Louisiana's law be constitutional in all its applications to stand.").

medication. *See Jegley*, 864 F.3d at 955–56. The plaintiff, Planned Parenthood, claimed that it was unable to find a doctor to contract with, meaning that it would have to stop providing abortions at its Fayetteville and Little Rock facilities. *See id.* at 956–57. This would have left a non-Planned Parenthood abortion clinic in Little Rock as the only abortion provider in Arkansas. *See id.* Planned Parenthood argued that the statute imposed an undue burden on its patients' right to an abortion. *See id.* The district court entered a preliminary injunction preventing the enforcement of the law. *See id.* at 957. The Eighth Circuit reversed that decision, concluding that Planned Parenthood had failed to demonstrate that it was likely to prevail on the merits of its facial undue-burden claim. *See id.* at 960.

Important for present purposes, the Eighth Circuit took issue with the fact that the district court did not "make a finding that the Act's contract-physician requirement is an undue burden for a large fraction of women seeking medication abortions in Arkansas." *Id.* at 959. The Eighth Circuit further noted that the district court erroneously failed to "define or estimate the number of women who would be unduly burdened by the contract-physician requirement." *Id.*

Due to these holes in the record, the Eighth Circuit was unable to determine whether the statute actually imposed an undue burden upon a "large fraction" of women seeking abortions in Arkansas, as required by *Casey*. *Id.* at 960. As a result, it reversed the district court's decision. *Id.* at 960–61.

The same holes in the record are present here. The Plaintiffs-Appellees have introduced no evidence whatsoever to demonstrate the number of women who will be unduly burdened by the enforcement of Section 216 or Section 217. There is no evidence as to the number—much less the fractional proportion—of Tennessee women who will have to endure increased travel distances to obtain abortions; and there is no evidence as to the number—much less the proportion—of Tennessee women who will forgo abortion as a result of the burdens purportedly imposed by Sections 216 and 217. Given this complete lack of evidence, it would have been impossible for the district court to even attempt to conclude that the enforcement of Sections 216 and 217 will impose an undue burden upon a large fraction of Tennessee women who seek abortions.

The large-fraction test does not require a mathematically precise calculation of the fraction of women who will be unduly burdened, but it does require at least some rough estimate of an actual fraction. *See Cincinnati Women's Servs., Inc.*, 468 F.3d at 374. But, in this case, there is no evidence on which such a fraction could be calculated. Therefore, the district court should not—indeed, could not—have found that the Plaintiffs-Appellees are likely to prevail on their facial challenges.

CONCLUSION

The *amici* States respectfully ask the Court to reverse the district court's decision to grant a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because the brief contains 5,009 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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Dated: November 16, 2020