Case 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
Case No. 3:15-cv-705

BRIEF OF THE STATES OF KENTUCKY, LOUISIANA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, &WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS' PETITION FOR INITIAL HEARING EN BANC OR ALTERNATIVELY REHEARING EN BANC

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INTERESTS OF *AMICI*

The *amici* States have enacted laws requiring waiting periods before a would-be mother has an abortion. Although laws like these have been upheld by the Supreme Court and this Court, the motion panel's published decision puts that precedent in jeopardy. What's more, the panel reached its erroneous decision by casting doubt on circuit precedent issued just four months ago on an issue of critical importance: the governing rule set by *June Medical Services L.L.C. v. Russo*, ~ U.S. ~ , 140 S. Ct. 2103 (2020). The *amici* States share a commitment to promoting the States' interests in life and protecting the health and well-being of pregnant women. Because of that, the *amici* States have a strong interest in ensuring that courts apply the correct standard in deciding whether to enjoin laws that promote a State's legitimate interests.

ARGUMENT

Precedent matters. "The legal doctrine of *stare decisis* requires [courts], absent special circumstances, to treat like cases alike." *Id.* at 2134 (Roberts, C.J., concurring). That admonition rings especially true for circuit courts, which depend on three-judge panels "to produce consistent and principled circuit law." *See Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Mem.) (Sutton, J., concurring in the denial of rehearing en banc). Yet the motion panel treated precedent like obstacles to outmaneuver. And it

did so in a published decision that needlessly throws the law of this circuit into disarray.

The en banc Court should "immediately correct[]" the panel's errors and stay the district court's injunction against Tennessee's obviously constitutional law. *See* Slip op. at 20 (Thapar, J., dissenting).

I. The motion panel's decision undermines recent circuit precedent on an issue of exceptional importance.

Since the Supreme Court handed down its split decision in *June Medical* last summer, courts have grappled with the question of which opinion controls. *See, e.g.*, *Hopkins v. Jegley*, 968 F.3d 912, 914–16 (8th Cir. 2020) (per curiam); *Whole Woman's Health v. Paxton*, 978 F.3d 896, 903–04 (5th Cir. 2020), *vacated by* 978 F.3d 974 (5th Cir. 2020) (Mem.). The answer to that question matters quite a bit. In fact, deciding whether the Chief Justice's concurrence controls is nothing short of deciding what legal standard courts must apply when evaluating the constitutionality of abortion laws.

The Sixth Circuit answered that question four months ago in *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020)—a published decision that adopted the Chief Justice's concurrence as "the 'controlling opinion' from [*June Medical*]." *Id.* at 437. In doing so, the panel made its holding clear: "We *must* apply [the Chief Justice's] reasoning as we would the reasoning of any other controlling

Supreme Court opinion." *Id.* (emphasis added). No waffling. No equivocation. No hint that this was an unnecessary detour. In fact, the very next sentence in the opinion explained that the district court below erred "[b]ecause" it did not apply the legal standard from the Chief Justice's concurring opinion. *See id.*

At the time, no one seemed confused about whether this aspect of the *EMW* decision was binding. Quite the contrary. So consequential was this decision that the *EMW* plaintiffs (having lost the appeal) petitioned the Court for rehearing en banc to undo "[t]he majority's *holding* that the Chief Justice's concurrence controls." *See id.*, 6th.Cir.Dkt. 101 at 13 (emphasis added). In other words, not even the losing party in *EMW* claimed that the Court's holding about the meaning of *June Medical* was dicta.

Despite the Court's careful analysis in *EMW*, the motion panel dismissed the decision as possibly "much ado about nothing" and invited courts across the circuit to ignore it as "dicta." *See* Slip op. at 9. That conclusion is wrong for all the reasons laid out by Judge Thapar in his dissent. *See id.* at 24–25 (Thapar, J., dissenting). Most critically, the *EMW* plaintiffs argued that Kentucky's law failed constitutional scrutiny *even if* it did not impose a substantial obstacle to obtaining an abortion because it provided no appreciable benefits. *See EMW*, 978 F.3d at 438. While that argument might have had some legs under the balancing test from *Whole Woman's Health v. Hellerstedt*, ~~ U.S. ~~, 136 S. Ct. 2292 (2016), it has none under the Chief Justice's *June*

Medical concurrence. And so the *EMW* Court rejected the plaintiffs' argument because of its holding that the Chief Justice's opinion controlled. *See EMW*, 978 F.3d at 438.

The holding of *EMW* matters greatly to the *amici* States, especially those in this circuit. But the motion panel's disregard of published precedent should worry every litigant. Not only did the panel "ignore[]" circuit precedent, Slip op. at 20 (Thapar, J., dissenting), its decision is an "invitation" for other courts "to defy precedent," *id.* at 23. The panel's "suggesti[on] that district courts (and appellate panels) have free rein to disregard controlling precedent," *id.* at 32–33, cannot lead to anywhere good.

This Court should grant rehearing en banc and vacate the decision. Doing so is necessary to reestablish the Court's respect for the decisions of its three-judge panels, even when those decisions are subject to disagreement. *See United States v. Havis*, 907 F.3d 439, 442–44 (6th Cir. 2018), *vacated by* 921 F.3d 628 (6th Cir. 2019) (Mem.) (rejecting the appellant's argument as "foreclosed" by precedent despite that argument "[having] legs"); *id.* at 448 (Stranch, J., concurring) (adhering to circuit precedent while calling to revisit the issue en banc).

II. The motion panel's decision cannot be squared with *Casey* or this Court's precedent.

On the merits, the motion panel's treatment of binding precedent is even more alarming. Tennessee's waiting-period law is hardly unique. More than half of the

States mandate waiting periods before a physician may perform an abortion. And there are plenty of good reasons for that: Abortion is a "unique act" that is "fraught with consequences." *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality). Those consequences affect not only the unborn child, but also "the woman who must live with the implications of her decision." *Id.* As such, it is "unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). Given these stakes, it is no surprise that Tennessee opted to join the majority of its sister States in imposing a reasonable waiting period for would-be mothers seeking an abortion.

Both the Supreme Court and this Court have upheld similar laws against constitutional challenges. In fact, *Casey* itself rejected a challenge to a waiting-period law based on a materially indistinguishable record from that here. Despite evidence that a 24-hour waiting period "often" would lead to a "delay of much more than a day because [it] requires that a woman seeking an abortion make at least two visits to the doctor," *Casey*, 505 U.S. at 885–86, despite evidence that the waiting period would be "particularly burdensome" for poor women and those who must travel long distances, *id.* at 886, and despite evidence that the waiting period would "increase[e] the cost and risk of delay of abortions," the Supreme Court held that such evidence

"[does] not demonstrate that the waiting period constitutes an undue burden." *Id.* Likewise, this Court upheld Ohio's waiting-period law more than a decade ago even though the law might have "the effect of delaying abortions up to two weeks." *See Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 366, 372–74 (6th Cir. 2006).

The bottom line is that even when a waiting period has "the effect of increasing the cost and risk of delay of abortions," it does not amount to a substantial obstacle under *Casey*. *See* Slip op. at 28 (Thapar, J., dissenting) (quoting *Casey*, 505 U.S. at 886). The motion panel's decision otherwise defies this precedent. If courts are to "treat like cases alike," *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring), they must do so no matter which party that commitment to stare decisis favors.

III. The Court should clarify that en banc relief can be sought from interim decisions.

The motion panel and the dissent battled in footnotes about a procedural issue of exceptional importance: Tennessee's ability to seek en banc rehearing of the panel's stay order. *Compare* Slip op. at 3 n.3, *with id.* at 20 n.1 (Thapar, J., dissenting). This issue matters greatly to the *amici* States. They are frequent flyers in appellate motion practice about the propriety of a stay or injunction pending appeal—often when their ability to enforce state law is on the line. Other circuit courts "routinely entertain" en banc petitions in this posture. *See Thomas v. Bryant*, 938 F.3d 134, 188 & n.101 (5th Cir. 2019) (Willett, J., dissenting), *on reh'g en banc sub nom. Thomas v. Reeves*, 961 F.3d

800 (5th Cir. 2020) (Mem.); *see also Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17-1996, Sept. 27, 2017 Order (8th Cir.); 6th.Cir.Dkt. 39 at 2. The Court should clarify that it likewise permits parties to seek en banc rehearing in this circumstance.

The motion panel did two things that, taken together, put Tennessee and the *amici* States, especially those in this circuit, in a bind. First, the panel published its decision; and second, the panel sought to wall off its decision from en banc rehearing. The panel determined that, under the Court's Internal Operating Procedures, Tennessee is "preclude[d]" from pursuing the "wasteful result" of en banc rehearing. Slip. op. at 3 n.3. Going further, the panel doubted whether en banc review is "even available" at this stage. *See id.* Thus, in one breath, the panel created binding circuit precedent, while, in the next, it concluded that en banc rehearing is not an option. For at least three reasons, this "inflicts lasting harm upon Article III and our federal structure." *See Thomas*, 938 F.3d at 187 (Willett, J., dissenting).

First, the panel's attempt to forbid Tennessee from seeking en banc rehearing is in considerable tension with Supreme Court precedent. The Supreme Court has deemed it "essential that litigants be left free to *suggest* to the court . . . that a particular case is appropriate for consideration by all the judges." *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 261 (1953) (emphasis added). "Suggest" is the key word: "[I]t

is enough if the court simply gives each litigant an opportunity to call attention to circumstances in a particular case which might warrant a rehearing en banc." *Id.* at 262. It follows that permitting litigants to seek en banc rehearing is "an irreducible minimum" that cannot be barred. *See Thomas*, 938 F.3d at 188–89 (Willett, J., dissenting).

Second, it cannot be the case that a panel can make binding circuit precedent that a losing litigant cannot bring to the full Court's attention. After all, three-judge panels are "delegate[ed] . . . the authority to decide cases on behalf of the full court." *Davenport v. MacLaren*, 975 F.3d 537, 541 (6th Cir. 2020) (Mem.) (Sutton, J., concurring in the denial of rehearing en banc). Three-judge panels can bind other members of this Court "precisely because there is a mechanism that allows the full Court to revisit that decision." *Thomas*, 938 F.3d at 189 (Willett, J., dissenting). Here, however, the panel—purporting to act as the full Court's agent—bound every member of this Court while insisting that Tennessee cannot even seek en banc rehearing. It should be obvious that an agent cannot box out its principal in this way.[1] Doing so

[1] The panel countered that Tennessee will be "free to seek" en banc rehearing once the Court issues its merits decision. Slip op. at 3 n.3. But even under the best of circumstances, that likely is many months away. *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 424 (6th Cir. 2019) (nearly 16-month delay between stay and merits decisions). In the meantime, *Casey* is "functionally overrule[d]" in this circuit and the laws of 14 states are "call[ed] into question." Slip op. at 32 (Thapar, J., dissenting).

erodes the "trust implicit in delegating authority to three-judge panels to resolve cases as they see them." *See Issa v. Bradshaw*, 910 F.3d 872, 877–78 (6th Cir. 2018) (Mem.) (Sutton, J., concurring in the denial of rehearing en banc).

Third, "[a]t best, the rules are confusing on whether a party may seek en banc review of a stay order." Slip op. at 20 n.1 (Thapar, J., dissenting). That confusion is untenable. Although the courts of appeals have wide latitude to fashion the rules governing en banc rehearing, those rules "should be clearly explained, so that members of the court and litigants in the court may become thoroughly familiar with [the rules]." *W. Pac.*, 345 U.S. at 267. This is "essential." *See id.* at 260–61.

Why? For one thing, uncertainty naturally makes litigants less likely to bring even the most important stay or injunction decisions to the Court's attention, especially when the appeal arises in an emergency posture. Case in point: A motion panel of this Court recently stayed a preliminary injunction against Kentucky's Governor allowing him to shutter religious K–12 schools in response to COVID-19 while simultaneously allowing all manner of other in-person activities to continue. *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). In part because of the uncertainty surrounding its ability to seek en banc rehearing, the Commonwealth opted instead to pursue emergency relief in the United States Supreme Court. More specifically, given the urgency of the matter, the Commonwealth could not risk its

rehearing petition not being distributed to the full Court, which would have delayed its efforts to re-open Kentucky's religious K–12 schools.[2] Thus, the "confus[ion]" identified by Judge Thapar played a role in the full Court not hearing from a sovereign state on a question of surpassing importance.

Nor is Kentucky's recent experience unique. This Court regularly issues published interim decisions that resolve far-reaching issues. *See, e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam); *Monclova Christian Academy v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477 (6th Cir. 2020); *Priorities USA v. Nessel*, 978 F.3d 976 (6th Cir. 2020). Yet, in the panel's view, losing parties are powerless to petition the full Court, even if a motion panel resolved "a precedent-setting question of exceptional public importance" or reached a result that "directly conflicts with Supreme Court or Sixth Circuit precedent." 6th Cir. I.O.P. 35(a). As the Supreme Court long ago held, "certainly, if the en banc power is to be wisely utilized, there is no reason to deny the litigants any chance to aid the court in its effective implementation . . . ." *W. Pac.*, 345 U.S. at 262. The panel's conclusion to the contrary warrants immediate correction.

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[2] Also weighing on the Commonwealth's mind was the fact that a divided panel recently barred Kentucky's Attorney General from even *seeking* en banc rehearing of a 2–1 decision denying the Attorney General's motion to intervene in defense of state law. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 19-5516, 6th.Cir.Dkt. 56-1 (6th Cir. July 16, 2020), *petition for cert. filed*, No. 20-601 (Oct. 30, 2020).

CONCLUSION

The full Court should hear this case or rehear the panel's stay order, vacate the panel's decision, and stay the district court's injunction against Tennessee's law.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(b)(4) because it contains 2,571 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Goudy Old Style font using Microsoft Word.

s/ Matthew F. Kuhn

CERTIFICATE OF SERVICE

I certify that on March 2, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit 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/ Matthew F. Kuhn