

No. 20-5408

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IN THE  
**United States Court of Appeals for the Sixth Circuit**

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ADAMS & BOYLE, P.C., ET AL.,  
Plaintiffs-Appellees,  
v.

HERBERT H. SLATERY, III, Attorney General of  
Tennessee, ET AL.,  
Defendants-Appellants.

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On Appeal from the United States District Court  
for the Middle District of Tennessee  
No. 3:15-cv-00705  
Hon. Bernard A. Friedman

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BRIEF OF THE AMERICAN PUBLIC  
HEALTH ASSOCIATION AND EXPERTS IN  
PUBLIC HEALTH AS AMICI CURIAE IN  
SUPPORT OF PLAINTIFFS-APPELLEES

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## INTEREST OF AMICI CURIAE<sup>1</sup>

The American Public Health Association champions the health of all people and all communities, strengthens the public health profession, shares the latest research and information, promotes best practices, and advocates for evidence-based public health policies. APHA combines a nearly 150-year perspective and a broad-based membership working to improve the public's health.

The individual amici are leaders in public health: they include deans and professors, health commissioners, infectious disease experts, and directors of public health institutions. Amici have responded to SARS, Zika, Ebola, HIV/AIDS, tuberculosis, and other disease outbreaks, working as, or with, front-line public health practitioners, public health researchers, government advisory panels, legislators, global health security teams, and non-profit organizations to develop innovative solutions to emerging infectious diseases.

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<sup>1</sup> No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. A complete list of amici is attached as Appendix A. All parties have consented to the filing of this brief.

Amici share a professional commitment to evidence-based research and public health. From that perspective, amici are deeply concerned by Tennessee's decision to restrict access to abortions during the COVID-19 pandemic because it will endanger public health.

## ARGUMENT

### I. Burdening Access To Essential Reproductive Healthcare During A Pandemic Is Not Justified Under Public Health Principles.

Public health control measures must be "evidence-informed":

Pandemic response should be guided by the best available scientific evidence and respect for individual autonomy.<sup>2</sup> Any public health

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they are still needed as the epidemic evolves.”<sup>3</sup> Restrictions that are not evidence-informed and carefully tailored can cause the very harms to public health that the response to the pandemic intends to avoid.

- A. Essential healthcare must be maintained during a pandemic.

An effective public health response must contain the spread of the contagion and maintain access to essential healthcare services.<sup>4</sup> One category of pandemic-mitigation measures, referred to as “nonpharmaceutical interventions,” reduces the effective rate of human-to-human viral transmission through community hygiene, surveillance and diagnostic measures, isolation of the sick, and social distancing.<sup>5</sup> These interventions can help maintain healthcare capacity until pharmaceutical interventions—vaccines and antiviral drugs—become

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<sup>3</sup> Yale COVID-19 Letter, *supra* n.2, at 1; see also CDC, Ethical Guidelines, *supra* n.2, at 5.

<sup>4</sup> World Health Organization, COVID-19 Strategic Preparedness and



When considering postponing nonessential healthcare in a pandemic, one of the key questions is which health services are essential and “time-sensitive” and which are not.<sup>9</sup> In evaluating particular procedures, officials should seek guidance from public health experts who can apprise them of the likely consequences of postponement based on evidence and sound medical judgment.

Without essential health services, many will suffer serious medical consequences or even die from conditions that were otherwise treatable. Experience in past epidemics has shown that lack of access to essential health services can result in increases in morbidity and mortality that outlast the epidemic and can result in more deaths than those caused by the epidemic itself.<sup>10</sup>

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1918-1919 Influenza Pandemic, 298 J. Am. Med. Ass’n 644, 645 (2007), <https://tinyurl.com/r2sbucg>; Aledort, supra n.5, at 213.

<sup>9</sup> World Health Organization, COVID-19: Operational Guidance for Maintaining Essential Health Services During an Outbreak 4 (Mar. 25, 2020), <https://tinyurl.com/razyn78>.

<sup>10</sup> Inter-Agency Working Grp. on Reproductive Health in Crises, Programmatic Guidance for Sexual and Reproductive Health in

In addition, denying access to essential health services undermines the effectiveness of public health guidance to self-isolate and practice social distancing. People are less likely to cooperate with public health directives if they need to seek other means of obtaining medical services.<sup>11</sup>

B. Abortion is essential healthcare.

“Abortion is an essential health service.”<sup>12</sup> Access to abortion must be maintained during the COVID-19 pandemic because abortion is time-sensitive. While abortion is safe, potential health risks increase as it is delayed and gestation progresses.<sup>13</sup>

Restricting abortion means that delay can render abortion unavailable to women whose pregnancies are at later gestational ages when fetal abnormalities are diagnosed, or who face barriers in

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<sup>11</sup> Yale COVID-19 Letter, *supra* n.2, at 3-5; Robert J. Blendon et al., Public Response to Community Mitigation Measures for Pandemic Influenza, 14 *Emerging Infectious Diseases* 778, 780 tbl.1 (2008), <https://tinyurl.com/y8mfxt5>.

<sup>12</sup> Michelle J. Bayefsky et al., Abortion During The Covid-19 Pandemic—Ensuring Access to an Essential Health Service, *New Eng. J. Med.* (Apr. 9, 2020), <https://tinyurl.com/ycgyv7qw>.

<sup>13</sup> Int'l Fed. of Gynecology and Obstetrics, Abortion Access and Safety With COVID-19 (Mar. 31, 2020), <https://tinyurl.com/y7q897dn>.



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contacts, thereby undermining the effectiveness of social distancing policies in reducing viral transmission.<sup>28</sup>

Women who receive timely abortions, in contrast, use and interact with fewer healthcare resources. Abortions generally do not require hospital facilities—most take place at an outpatient facility.<sup>29</sup> Major complications from procedural abortions are rare—occurring in only 0.21% of abortions—and rarely require hospitalization, with its attendant PPE usage and contacts with healthcare workers. :

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State: There is no public health benefit to restricting access to abortion during the COVID-19 pandemic. The State's directive forecloses access to an essential healthcare service, reduces the effectiveness of social distancing by increasing travel and contacts, and requires more healthcare resources. Restricting access to abortion needlessly endangers the welfare of pregnant women and the general public.

### III. Tennessee's Restriction Of Abortions Will Exacerbate Deeply Rooted Health Inequities.

Effective public health responses minimize the risk of morbidity and mortality by accounting for existing inequity in healthcare access.<sup>31</sup> Restricting access to abortion worsens preexisting inequalities by placing disproportionate burdens on low-income women and women of color.<sup>32</sup>

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<sup>31</sup> See Sandra Crouse Quinn & Supriya Kumar, Health Inequalities and Infectious Disease Epidemics, 12 Biosecurity and Bioterrorism 263, 265-67 (2014) ("Health Inequalities"), <https://tinyurl.com/y8ka13wv>.

<sup>32</sup> See Human Rights Watch, US: Address Impact Of Covid-19 On Poor (Mar. 19, 2020) ("HRW, Covid-19 On Poor"), <https://tinyurl.com/y8wbv4w7>; Health Inequalities, supra n.31, at 23 0 Td8.8 (w)-2iH

Three out of four pregnant women who seek abortions are low-income.<sup>33</sup> And the children of women who are denied abortions are more likely to live in poverty.<sup>34</sup> Low-income pregnant women are also unlikely to have the means to travel out of state to seek medical care, which may lead to an increase in unsafe abortions,<sup>35</sup> and their serious and life-threatening complications.<sup>36</sup>

Even when Tennessee's restriction is lifted, low-income women will suffer disproportionately in obtaining abortion healthcare due to economic hardship,<sup>37</sup> the difficulty of scheduling appointments,<sup>38</sup> and a likely shortage in treatment capacity as demand for treatment surges when clinics reopen.<sup>39</sup>

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<sup>33</sup> Guttmacher Institute, *Induced Abortion in the United States* (Sept. 2019), ("Induced Abortion"),

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the f

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## APPENDIX A

### List of Amici Curiae

This Appendix provides amici's titles and institutional affiliation(dix3eTd[.m3



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