No. 20-5969

IN THE 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.

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

BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, *AMICUS CURIAE*, SUPPORTING APPELLANTS AND URGING THE GRANT OF EN BANC REVIEW

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
ANDREW J. EKONOMOU
JORDAN SEKULOW*
MILES TERRY
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

* Not admitted to Sixth Circuit Bar

EDWARD L. WHITE III
ERIK M. ZIMMERMAN*
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

Counsel for Amicus Curiae

September 30, 2021

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Number: 20-5969

Case Name: Memphis Ctr. for Reprod. Health, et al. v. Herbert H. Slatery, III, et al.

Name of counsel: Edward L. White III

Pursuant to 6th Cir. R. 26.1, the American Center for Law and Justice, *amicus curiae*, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   The American Center for Law and Justice is unaware of any.

/s/ Edward L. White III
EDWARD L. WHITE III
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

Dated: September 30, 2021

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Center for Law and Justice ("ACLJ"), *amicus curiae*, is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the fundamental right to life.[1] ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as *amicus curiae* in numerous cases involving constitutional issues before the Supreme Court, this Court, and other lower federal courts. *E.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Bormuth v. Cnty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (*en banc*). In addition, the ACLJ participated as an *amicus curiae* in the instant case on the merits with the consent of the parties.

The ACLJ submits this brief on behalf of itself and more than 447,000 members of the ACLJ's Committee to Defend Pro-Life Laws and Babies with Disabilities.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made such a monetary contribution. Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION

The Constitution does not force States to allow abortion for any and every reason. The State of Tennessee should be permitted to prohibit selective abortion once there is evidence of a fetal heartbeat, or in cases where the individual is seeking an abortion for certain specified reasons, such as for the purpose of gender selection, or in the case of a disability diagnosis.

The panel was incorrect in ruling the Tennessee law unconstitutional, in particular, with regard to its conclusion that Section 217 is void-for-vagueness. This Court should grant Appellants' petition for rehearing *en banc* and review this case to maintain uniformity of its case law and to consider the questions of exceptional importance involved in these proceedings. *See* Fed. R. App. P. 35(a).

ARGUMENT

I. EN BANC REVIEW SHOULD BE GRANTED TO MAINTAIN CASE-LAW UNIFORMITY.

The two-judge majority ruled that Section 217 is unconstitutionally vague because of its use of the words "knows" and "because of." That conclusion is incorrect, as noted by the dissenting judge. Opinion, CTA Doc. 97 at Page ID # 65-70 (Thapar, J., dissenting).

Section 217 provides that "[a] person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman if the person *knows* that the woman is seeking the abortion *because of* the sex[,]… race[, 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). Tennessee enacted this law, in part, to advance its interest in stopping discriminatory abortions. Tenn. Code Ann. § 39-15-214(a)(50)-(77).

The ordinary meaning of the words used in Section 217 provides fair notice to a medical doctor with average intelligence about what is prohibited: doctors may not perform, induce, or attempt to perform or induce an abortion when they know that the pregnant woman is seeking the abortion because of the unborn child's sex, race, or Down syndrome status (actual or perceived). *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (explaining that a vague statute fails to give fair notice of what is prohibited and invites arbitrary and discriminatory enforcement); *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007) (explaining that a statute is unconstitutional when its terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to is application."). There is nothing vague or ambiguous about Section 217. No guessing is required to figure out what it prohibits.

Moreover, Section 217 is almost identical to the Ohio statute (which uses the terms *knowledge* and *because of*) that this Court, sitting *en banc*, recently upheld as constitutional. *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021) (*en banc*). The Ohio statute provides that "[n]o person shall purposely perform or

induce or attempt to perform or induce an abortion on a pregnant woman if the person has *knowledge* that the pregnant woman is seeking the abortion, in whole or in part, *because of* … [a] test result indicating Down syndrome, … [a] prenatal diagnosis of Down syndrome, … [or a]ny reason to believe the unborn child has Down syndrome." Ohio Revised Code § 2919.10(B) (emphasis added).

The *en banc* Court determined that the Ohio law did not impose an undue burden upon a woman's ability to choose or obtain an abortion, and held that the restrictions imposed by the Ohio law were reasonably related to the State's interests in preventing discriminatory abortions. *Preterm-Cleveland*, 994 F.3d at 535. Notably, the plaintiffs in *Preterm-Cleveland* did not argue that the Ohio statute was vague, and the *en banc* court did not deem it necessary to raise the question *sua sponte*. *See Manning v. Caldwell*, 930 F.3d 264, 271-72 & n.7 (4th Cir. 2019) (*en banc*) (explaining that an *en banc* court may raise issues *sua sponte* when deemed necessary to reach the correct result on matters of public importance). The Ohio statute is not vague, and neither is the Tennessee statute.

For consistency in this Court's case law, given that the Ohio statute was held constitutional, so, too, should the almost identical Tennessee statute be upheld. This Court should grant the petition for *en banc* review. *See* Fed. R. App. P. 35(a).

II. EN BANC REVIEW SHOULD BE GRANTED TO CONSIDER QUESTIONS OF EXCEPTIONAL IMPORTANCE.

A. Down-Syndrome-Selective Abortion is Discriminatory.

In addition, the issues involved in these proceedings are exceptionally important and should be reviewed *en banc*. *See* Fed. R. App. P. 35(a). This Court should examine the impact that the injunction against the Tennessee law will have on pre-born individuals, specifically those with Down syndrome, who face death through selective abortion despite the legal protection they have in every other aspect of their lives.

The Supreme Court has held that individuals with Down syndrome are a protected class of persons that should not be subject to discrimination because of their disability. In *Bowen v. American Hospital Association*, the Court held that persons with Down syndrome are entitled to protection under the anti-discrimination provisions of the Rehabilitation Act. 476 U.S. 610, 624 (1986) ("[The Act] protects [infants born with congenital defects] from discrimination 'solely by reason of his handicap.'").

This Court has affirmed similar anti-discrimination protections for children with Down syndrome in education and employment. In 2003, this Court held that a child "diagnosed with a condition commonly known as Down Syndrome . . . is a 'child with a disability' as defined in the [Rehabilitation] Act." *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 667 (6th Cir. 2003). Children with Down

syndrome are therefore entitled to the same anti-discrimination protections as any other disabled child. *Id.*

Notwithstanding the vast body of law that protects individuals born with Down syndrome, the district court's order enjoining the enforcement of Section 217 makes it legally permissible in Tennessee to abort an unborn child diagnosed with Down syndrome. In short, while Tennessee is permitted and empowered to protect its citizens from discrimination and harm, and while the federal government has issued a "national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), the district court wrongly held that Tennessee is barred from protecting its citizens from this same harm before they are born.

History shows that trait-selective abortions not only violate human rights and offend human dignity, but also lead to disastrous demographic results. To the horror of many, it was recently reported that Down syndrome has been virtually eradicated from Iceland. The disappearance of this class of persons has been caused by a rise in prenatal screening and a near-100% abortion rate when the tests revealed a diagnosis of Down syndrome. The eradication of those with Down syndrome through abortion is not limited to Iceland. The estimated termination

rates for Down syndrome pregnancies in other countries are also high: 67% for the United States, 77% for France, and 98% for Denmark.[2]

When the value of a class of persons is diminished in the womb, it is diminished out of the womb, and vice versa. If a person with Down syndrome is worthy of protection from discrimination after he or she is born, he or she is worthy of protection before birth as well.

B. Sex- and Race-Selective Abortion is Discriminatory.

Tennessee, and the nation as a whole, have an undeniable interest in protecting the pre-born from discrimination based on perceived genetic "faults," such as an undesired gender or race. *See* Tenn. Code Ann. § 39-15-214(a)(53)-(77). Because of animus against females—often manifested through sex-selective abortion and infanticide—the United Nations estimates that Asia and Eastern Europe are missing 117 million women.[3] Gender animus is so rampant in some countries that birth ratios are as high as 130 boys for every 100 girls.[4] In the United States, birth ratios of 151 boys to 100 girls have been observed among foreign-born Chinese,

---

[2] Tenn. Code Ann. § 39-15-214(a)(60); Julian Quinones and Arijeta Lajka, *What Kind Of Society Do You Want To Live In?: Inside The Country Where Down Syndrome Is Disappearing*, CBS News (Aug. 15, 2017, 2:17 AM), http://tinyurl.com/yyj24yys; *see also Preterm-Cleveland*, 994 F.3d at 517-18.

[3] United Nations Population Fund, *Gender-Biased Sex Selection* (March 15, 2017), http://www.unfpa.org/gender-biased-sex-selection.

[4] *Id.*; *see also It's a Girl: The Three Deadliest Words in the World* (2012), http://www.itsagirlmovie.com.

Indians, and Koreans who already had two daughters.[5] The World Health Organization states it plainly: "Imbalanced sex ratios are an unacceptable manifestation of gender discrimination against girls and women and a violation of their human rights."[6]

Additionally, Tennessee has an interest in prohibiting race-selective abortions. The statistics related to the racial disparities in abortion are staggering: "the abortion rate for black women is almost five times that for white women."[7] And even Planned Parenthood (the largest abortion provider in the country) has finally acknowledged its racist legacy, agreeing last year to "remove [Planned Parenthood founder Margaret] Sanger's name from its Manhattan clinic because her 'racist legacy' and 'deep belief in eugenic ideology' can no longer be denied."[8]

Tennessee should be allowed to protect all persons within the State, born and

---

[5] Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.*, Newsweek (April 14, 2016), http://tinyurl.com/y59dc33b.

[6] *Preventing Gender-Biased Sex Selection: An Interagency Statement OHCHR, UNFPA, UNICEF, UN Women, and WHO*, World Health Organization, 12 (2011), http://tinyurl.com/yyjt84z9; *see also* Nandini Oomman and Bela R. Ganatra, *Sex Selection: The Systematic Elimination of Girls*, Reproductive Health Matters: An International Journal on Sexual and Reproductive Health and Rights, 183 (2002), http://tinyurl.com/y23n2ezq.

[7] Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, Guttmacher Policy Review, Vol. 11, Issue 3 (Aug. 6, 2008), http://tinyurl.com/y5s2ny9l.

[8] William McGurn, *Margaret Sanger Gets Canceled,* Wall Street Journal (July 27, 2020), http://tinyurl.com/yxlclh9x; *see also* Tenn. Code Ann. § 39-15-214(a)(55)-(57).

pre-born, from disability-, racial-, or gender-based discrimination. Discrimination on the basis of immutable traits must be ended if an entire class of perceived "unfit" or "undesirable" persons is not to be slowly (but surely) eradicated.[9]

CONCLUSION

For the above-stated reasons, the ACLJ respectfully requests that this Court grant Appellants' petition for rehearing *en banc*.

Respectfully submitted,

/s/ Edward L. White III

EDWARD L. WHITE III
ERIK M. ZIMMERMAN*
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
ANDREW J. EKONOMOU
JORDAN SEKULOW*
MILES TERRY
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

* Not admitted to Sixth Circuit Bar

Counsel for Amicus Curiae

September 30, 2021

[9] *See Preterm-Cleveland*, 994 F.3d at 540 (Griffin, J., concurring) (discussing the rise of selective abortion of unborn children deemed "unfit" or "undesirable").

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 1,933 words, which does not exceed the maximum of 2,600 words allowed, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that the attached 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 Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Edward L. White III
EDWARD L. WHITE III
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit on September 30, 2021, using the Court's CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Edward L. White III
EDWARD L. WHITE III
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

Counsel for Amicus Curiae