

No. 25-5738

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

RACHEL WELTY, et al.
Plaintiffs-Appellees/Cross-Appellants,

v.

BRYANT DUNAWAY et al.,
Defendants-Appellants/Cross-Appellees.

On appeal from the United States District Court for the Middle District of
Tennessee, No. 3:24-cv-768 (The Honorable Aleta A. Trauger)

**BRIEF OF AMICUS CURIAE COMPASSION & CHOICES
IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, counsel for amicus curiae, Compassion & Choices, confirms that it is not a subsidiary or affiliate of any publicly owned corporation, and that, to the best of Compassion & Choices' knowledge, no publicly traded corporation that is not a party to this appeal has a financial interest in the outcome.

DATED: February 4, 2025

/s/ Hunter C. Branstetter
Attorney for Amicus Curiae

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STATEMENT OF INTEREST

Compassion & Choices is a non-profit corporation whose mission is to improve care, expand options, and empower everyone to chart their end-of-life journey. Its services include educating the public about the importance of documenting their end-of-life values and priorities, empowering individuals to control their end-of-life care by providing information about the full range of available options at the end of life, advocating for expanded end-of-life healthcare options and improved medical practices that focus on patients, and defending existing end of-life healthcare options from efforts to restrict access.

Given its mission and services, Compassion & Choices is uniquely positioned to comment about the importance of ensuring First Amendment protections extend to all speech between medical providers, patients, family members, and loved ones about personal medical decision making. Compassion & Choices submits this brief to inform the Court that a ruling in favor of Appellants risks consequences far beyond reproductive medicine and family planning by diminishing an individual's ability to make complex and highly sensitive end-of-life decisions in line with their needs, values, and beliefs.

STATEMENT OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party’s counsel authored this brief, in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. And no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

Counsel for both Appellants and Appellees have consented, in writing, to Compassion & Choices’ submission of this brief.

SUMMARY OF ARGUMENT

The Court should affirm the district court’s ruling that the recruitment provision of Tenn. Code Ann. § 39-15-201, et seq., (the “Underage Abortion Trafficking Act” or the “Act”) is an impermissible restriction on constitutionally protected speech.

ARGUMENT

Decisions about medical care are some of our most intimate and consequential. This is particularly true at the end of life, when we weigh a lifetime of experiences, values, and beliefs to decide what treatments we want, or do not want, before we leave this world. Being fully informed about all end-of-life healthcare options ensures that we make the right decision for ourselves. Additionally, patients are free to travel throughout the United States to access the healthcare that best meets their personal and particular needs, whether or not that healthcare is available in their home state. The First Amendment protects the right to discuss all available end-of-life healthcare options with chosen medical providers and loved ones.

By restricting constitutionally protected speech about legal healthcare options available in other states, the Act invites governmental invasion of private medical decision-making spaces and threatens deeply personal medical decision making writ large, including at the end of life. The District Court's decision should be affirmed to protect the right of medical providers and their patients to speak openly and honestly about all legally available healthcare options.

I. The First Amendment protects speech about healthcare options available in other states.

The Act is unconstitutional because it seeks to ban speech about legally available healthcare options in other states. Speech about legal healthcare options

available in other States is protected by the First Amendment’s free speech clause. U.S. Const. amend. I; *see Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975) (“A State . . . may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.”); *Kat v Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) (“[T]he First Amendment protects speech that proposes a transaction lawful in the place where the transaction is to occur when both the underlying transaction and the offer are unlawful in the place where the offer is made.”). Here, the Act limits this critical constitutional protection by impermissibly restricting people, including medical and legal professionals, from speaking openly about all legally available healthcare options, both inside Tennessee and out-of-state. Such a restriction falls squarely within the confines of protected speech, so the District Court’s decision should be affirmed.

II. The Act’s recruitment provision is a content-based restriction on speech because it prohibits speech about legal healthcare available in other states.

At its core, the Act seeks to criminalize the content of speech about healthcare options available in other states simply because those healthcare options are not legal in Tennessee. Tenn. Code Ann. § 39-15-201(a), (b). “A regulation of speech is facially content based under the First Amendment if it targets speech based on its communicative content—that is, if it applies to particular speech because of the topic

discussed or the idea or message expressed.” *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (cleaned up, citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). The recruitment provision of the Act directly targets speech about abortion because recruitment requires speech. *See* Tenn. Code Ann. § 39-15-201(a). Such content-based restrictions of speech are “presumptively invalid,” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), subject to strict scrutiny, *Reed*, 576 U.S. at 163-164, and must be narrowly tailored to serve a compelling state interest, *id.* at 163.

Here, the Act is content based because it directly “targets speech based on its communicative content” by restricting the speech of any adult who “recruits” a specific type of person by informing them about the legal healthcare available to them in another state. *See id.*; *see generally* Tenn. Code Ann. § 39-15-201(a). The State cannot deny that recruiting requires persuasion and that persuasion takes place via pure speech. Moreover, the narrow exceptions in the Act as to when and to whom it does not apply suggest that it applies to everyone and everything not excepted. Tenn. Code Ann. § 39-15-201 (a), (c), (f).

Laws that prohibit, criminalize, or chill constitutionally protected speech regarding legal healthcare options available in other states set a precedent that could prevent patients from making fully-informed decisions about their healthcare

because medical providers may limit discussions of available healthcare options to only those available within Tennessee. Patients and their loved ones have the right to know, and openly discuss, all available healthcare options at the end-of-life, including those that are available to them in other states.

III. Patients have a constitutional right to travel to access medical care in other states.

Since the overturning of *Roe v. Wade* in *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022), reproductive regulations have reverted back to the States, in the same manner that regulations concerning end-of-life healthcare options were left to the democratic “‘laboratory’ of the States” after *Cruzan* and *Glucksberg*. See *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O’Connor, J., concurring) (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring)). While States are permitted to police certain activities within their own borders, a State’s sovereign power does not extend past those borders. *Massachusetts v. E.P.A.*, 549 U.S. 497, 519 (2007) (“When a State enters the Union, it surrenders certain sovereign prerogatives.”). No State can restrict the travel of its residents to other States, even if that travel is for the purpose of accessing a healthcare choice that it has made illegal for its own residents. Cf. *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (“a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the ‘Privileges and Immunities of Citizens in the several States’ that he visits.”). Travel to access

healthcare in other states is thus constitutionally protected, as is speech about the existence of legal healthcare options in another state. *See supra* Section I.

The ability to travel to access healthcare is crucially important at end-of-life because medical aid in dying (“MAID”) is end-of-life healthcare available to qualifying patients in Oregon, Montana, and Vermont, regardless of their state of residence. Reversing the District Court’s decision and allowing Tennessee to restrict speech by medical providers and professionals about one type of healthcare it disfavors opens the door to restrictions on speech about other types of disfavored healthcare. Such a reversal of established precedent would contravene the “happy incident[.]” of the “laboratory of the states” created, and encouraged, by our federal system. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932); *Glucksberg*, 521 U.S. at 737 (O’Connor, J., concurring) (citing *Cruzan*, 497 U.S. at 292 (O’Connor, J., concurring)). Because MAID is legally available healthcare for qualified non-residents in Vermont, Oregon, and Montana, but not in Tennessee, just like abortion is legal in many other states, but not Tennessee, this Act sets a precedent that threatens more than just speech about reproductive healthcare. The District Court’s decision should stand.

IV. The speech-integral-to-criminal-acts exception does not apply because it is legal to travel to another state for medical care.

The State argues that the Act permissibly restricts speech because it regulates speech integral to criminal acts, and is therefore exempted from First Amendment

protections. Appellees’ Brief, Doc. 21, 55–60. A state, however, cannot regulate speech about legal activities in other states. *Bigelow*, 421 U.S. at 824–25 (holding that a State “may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State” even if “the welfare and health of its own citizens may be affected when they travel to that State”). As long as abortion is legal for an unemancipated minor in any state, Tennessee may not bar content that informs unemancipated minors about that option. If this type of ban were allowed to stand, it is only a short step to States banning “recruitment” for other legally available medical care in other states, such as medical aid in dying.

Compassion & Choices is concerned about the chilling effect of reversing the District Court decision because available end-of-life healthcare options vary from state to state. For example, medical aid in dying is a legal end-of-life healthcare option available in Oregon, Washington, Montana, Vermont, California, Colorado, the District of Columbia, Hawaii, Maine, New Jersey, New Mexico, Delaware, and Illinois¹ but is currently unavailable in Tennessee. Importantly, Oregon, Vermont,

¹ Illinois Gov. Pritzker signed legislation authorizing medical aid in dying as an end-of-life healthcare option on December 12, 2025. The law takes effect September 12, 2026. *Governor Pritzker Signs Bill Expanding End-of-Life Options for Terminally Ill Patients*, Office of the Governor JB Pritzker (Dec. 12, 2025), <https://gov-pritzker-newsroom.prezly.com/governor-pritzker-signs-bill-expanding-end-of-life-options-for-terminally-ill-patients>.

and Montana do not require residency for MAID eligibility. Thus, a very real scenario exists where a terminally ill Tennessean over the age of 18 with six months or less to live would want to discuss MAID with their family and medical providers in Tennessee as one of many available end-of-life healthcare options. Reversing the District Court's decision and allowing the Act to restrict speech about legal healthcare options available in other states would undoubtedly send the message to medical providers and other professionals that their speech should be limited to only those healthcare options Tennessee favors. The First Amendment does not permit such a limitation. This Court should affirm the District Court's ruling.

CONCLUSION

Compassion & Choices' mission includes informing people of all end-of-life healthcare options available, even if those options are not currently available or legal in a person's state of residence. People have the constitutional right to travel between the states for healthcare, as well the constitutional right to share information about legally available healthcare options available in other states. The recruitment provision of Tenn. Code Ann. § 39-15-201 impermissibly criminalizes constitutionally protected speech concerning legally available healthcare options. The Court should affirm the District Court's decision to ensure that Tennesseans' right to Free Speech is not infringed.

Respectfully submitted,

DATED: February 4, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6th Cir. R. 32(a), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,794 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) 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 this brief has been prepared using Microsoft Word using a properly sized and proportionally spaced typeface, 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I am electronically filing this Brief of Amicus Curiae with the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system on February 4, 2025.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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