No. _____

IN THE

Supreme Court of the United States

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS; ERNEST MARSHALL, M.D., ON BEHALF OF HIMSELF AND HIS PATIENTS; ASHLEE BERGIN, M.D., ON BEHALF OF HERSELF AND HER PATIENTS; TANYA FRANKLIN, M.D., ON BEHALF OF HERSELF AND HER PATIENTS,

Petitioners,

—v.—

ADAM MEIER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Kentucky Ultrasound Informed Consent Act (House Bill 2) requires a physician, while performing a pre-abortion ultrasound, to (i) describe the ultrasound in a manner prescribed by the state; (ii) display the ultrasound image so that the patient may see it; and (iii) auscultate (make audible) the fetal heart tones. The physician must display and describe the image even when the patient objects, even when complying with the statute would harm the patient, and even when the patient seeks to avoid the state-mandated speech by covering her eyes and ears.

The Sixth Circuit upheld the law against a First Amendment challenge on the ground that it is an ordinary informed-consent provision. The Fifth Circuit previously upheld a similar Texas law for the same reason. The Fourth Circuit, in contrast, invalidated a materially identical North Carolina law as an unconstitutional compelled speech mandate, reasoning that a law requiring physicians to engage in speech over a patient's objection and in contravention of the physician's medical judgment—even when the patient is intentionally avoiding the speech and images—is "antithetical to the very communication that lies at the heart of the informed consent process." *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014).

The question presented is whether such compulsory display-and-describe ultrasound laws abridge physicians' freedom of speech in violation of the First Amendment.

STATEMENT OF RELATED PROCEEDINGS

There are no other court proceedings directly related to this case.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are EMW Women's Surgical Center, P.S.C., Ernest Marshall, MD, Ashlee Bergin, MD, and Tanya Franklin, MD, all of whom were plaintiff-appellees below. EMW Women's Surgical Center, P.S.C. has no parent corporation, and no publicly held company owns more than 10% of its stock.

Respondent is Adam Meier, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services, a defendant-appellant below.

The Attorney General of Kentucky was also named as a defendant below, but was dismissed as a party by the court of appeals. This petition does not challenge that portion of the decision below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 920 F.3d 421, and is reprinted in the Appendix to the Petition ("App.") at 1a-85a. The district court's opinion granting petitioners summary judgment is reported at 283 F. Supp. 3d 629, and reprinted at App. 86a-123a.

JURISDICTION

The court of appeals issued its decision on April 4, 2019. App. 1a. The court of appeals denied a petition for rehearing on June 28, 2019. App. 126a-127a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law … abridging the freedom of speech …."

The text of Kentucky's Ultrasound Informed Consent Act—also known as House Bill 2 ("H.B. 2" or "the Act")—is reproduced at App. 130a-134a.

STATEMENT OF THE CASE

Petitioners perform an ultrasound on all patients before providing abortion care, and, consistent with established medical practice, offer every patient the option of seeing the ultrasound image and discussing it with her provider.

The Act challenged here transforms this standard medical practice into a pure speech mandate: under the Act, the physician must display and provide a graphic description of the ultrasound image (including, e.g., identifying all visible internal organs) during the ultrasound procedure. The physician must convey these specific words, images and sounds to the patient even if she does not want to see or hear them and even if she tries to physically resist them.

As a result of this law, while the patient is half-naked on the exam table with her feet in stirrups, usually with an ultrasound probe inside her vagina, the physician has to keep talking to her, showing her images and describing them, even as she tries to close her eyes and cover her ears to avoid the speech. The Commonwealth characterizes this as part of "informed consent," but it is not. The most obvious tell is that under the Act, the patient has provided "informed consent" even when she has not seen or heard the images or description, so long as the physician has read and performed the Commonwealth's script. A law that requires a physician to keep speaking even though her words do not inform anyone of anything is not an informed-consent provision. And indeed, the Act is flatly inconsistent with the tradition of informed consent, which precludes doctors forcing information on

patients in this manner, and requires doctors to respect, not run roughshod over, their patients' autonomous choices.

The Act, in short, is on its face a compelled-speech mandate wholly unrelated to traditional informed consent and therefore presumptively unconstitutional under this Court's First Amendment precedent. The court of appeals' decision upholding the Act is not only incorrect, but solidifies a circuit conflict over whether such statutes—which have proliferated over the past several years—are consistent with the First Amendment. And this petition offers the Court a perfect vehicle through which to resolve the conflict.

The petition should be granted.

A. Factual Background and Pre-Existing Legal Landscape

Petitioners are the sole licensed abortion clinic in Kentucky—EMW Women's Surgical Center, P.S.C. ("EMW")—and its three obstetrician-gynecologists. Before the Act's enactment and to this day, petitioners engaged in the robust informed consent process applicable to medical procedures in general and to abortion in particular, consistent with preexisting law.

At the core of informed consent is "freedom from external coercion, manipulation, or infringement of bodily integrity. It is the freedom from being acted upon by others when they have not taken account of and respected the individual's own preference and choice." Dkt. No. 55 at 98 ("Trial Tr."). Regardless of the particular medical procedure involved, the informed-consent process generally consists of the following disclosures: (i) the nature

and purpose of the procedure; (ii) any potential risks or benefits associated with the procedure; and (iii) any significant alternatives to the procedure. Trial Tr. at 86-87. During the informed consent process, a provider should be "respectful of the patient, [] follow the patient's lead, and [] be empathic in the interaction with the patient in these very private and sensitive moments." *Id.* at 108.

For nearly two decades prior to the enactment of H.B.2—the Act at issue here—Kentucky has required abortion providers to make certain verbal disclosures at least 24 hours before an abortion, such as the embryo's or fetus's probable gestational age at the time the abortion will be performed and the risks of, and alternatives to, the procedure. *See* Ky. Rev. Stat. § 311.725(1) ("Abortion Consent Law"). Providers must also offer patients printed materials published by the Kentucky Cabinet for Health and Family Services containing written and pictorial descriptions of "the probable anatomical and physiological characteristics of the zygote, blastocyte, embryo, or fetus" at gestational increments. *Id.* at § 311.725(2). In 2016, Kentucky amended the Abortion Consent Law to require that this information be provided while "both parties are physically located in the same room or are participating in real-time visual telehealth services." *See id.* §§ 311.724, 311.725(1)(b). H.B. 2 does not alter the Abortion Consent Law.

The undisputed evidence presented at trial demonstrated that EMW takes seriously the responsibility of ensuring that each patient makes an informed, thoughtful decision about abortion. Trial Tr. at 31-38, 96-97. For example, on the day of the abortion, EMW presents each patient with a video

describing the procedure and detailing, again, possible complications. *Id.* at 34. Each patient then participates in an individual counseling session, where alternatives to abortion are again discussed, to ensure consent is informed and the patient's decision is voluntary. *Id.* at 34-35. EMW staff is trained to be alert to any signs of uncertainty or coercion and will not perform the procedure unless the patient is sure she wishes to proceed. *Id.* at 36-38.

Before her abortion each patient undergoes an ultrasound. Dkt. No. 3-3 at ¶¶ 12, 16-21. The clinical purpose of the ultrasound is to (i) confirm the pregnancy; (ii) confirm the embryo's or fetus's gestational age; (iii) identify the number of embryos or fetuses; (iv) identify any abnormalities with regard to the embryo's or fetus's location; and (v) determine whether fetal death has already occurred. Dkt. No. 39 at ¶ 27. To obtain this information during the early first trimester of pregnancy, when most abortions are performed, physicians must perform a transvaginal ultrasound, which requires the patient to undress from the waist down and place her feet in stirrups so that a probe may be inserted into her vagina. Dkt. No. 3-3 at ¶¶ 17-18.

Consistent with established medical practice and informed consent, petitioners convey all clinically relevant information obtained from the ultrasound to the patient, answer any questions, and also offer to show and discuss the ultrasound image with every patient. *Id.* at ¶ 12; *see also* Dkt. No. 39 at ¶ 27. Prior to the Act, most patients declined the petitioners' offer to display and discuss the ultrasound. Trial Tr. at 36. And, prior to the Act, if a patient declined to view the ultrasound image or

discuss its contents, the petitioners would never act against her wishes. Dkt No. 3-3 at ¶ 21.

The undisputed evidence shows that the petitioners' pre-Act practices are consistent with medical ethics and the standard of care. While the standard of care is for physicians to *offer* to display and discuss ultrasounds with patients, Trial Tr. at 155; Dkt. No. 39 at ¶ 28, no medical organization or guidelines countenance doing so *against a patient's wishes*, Trial Tr. at 49-50, 159-60. Indeed, there is no area of medicine that considers the forced display and description of diagnostic images over the patient's objection or against their will to be appropriate or part of informed consent. In fact, long-established ethical standards for physicians and accepted best medical practices both reject foisting such information on a patient when she does not want it, because to do so disregards patient autonomy, a central principle of informed consent.

B. The Act

H.B. 2, which was signed into law on January 9, 2017, requires a physician performing a pre-abortion ultrasound to, among other things, "[d]isplay ... ultrasound images so that the pregnant woman may view [them]," and simultaneously (i) explain what the ultrasound is depicting; and (ii) inform the woman of the presence, number, and location of the embryo(s) or fetus(es), and whether fetal demise has occurred. *See* Ky. Rev. Stat. §§ 311.727(2)(b), (c). The physician must also "provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and

viewable." *Id.* § 311.727(2)(e). In addition, the physician must "[a]scultate [*sic*] the fetal heartbeat of the unborn child so that the pregnant woman may hear the heartbeat if the heartbeat is audible." *Id.* § 311.727(2)(d). The Act's only exception is for medical emergencies; there are no exceptions, e.g., for victims of rape or incest or patients who have received a fetal diagnosis. *Id.* § 311.727(5).

These words, sounds, and images must be conveyed to the patient during the ultrasound procedure, while she lies half-naked on the examination table with her feet in stirrups, and usually with a probe inside her vagina. *See* Dkt. No. 3-3 at ¶¶ 17-18. The state-mandated expression must be conveyed to the patient even if she is straining to avoid seeing the images or hearing the speech. *See* Ky. Rev. Stat. § 311.727(3). In most cases, compliance with H.B. 2 doubles the time the probe is inside the vagina. Trial Tr. at 40.

While the Act is styled an "informed consent" provision, it provides that "[w]hen the ultrasound images and heartbeat sounds are provided to and reviewed with the pregnant woman, nothing in this section shall be construed to prevent the pregnant woman from averting her eyes from the ultrasound images or requesting the volume of the heartbeat be reduced or turned off if the heartbeat is audible." Ky. Rev. Stat. § 311.727(3). Thus, as even the Commonwealth has admitted, a woman can provide informed consent to an abortion under the Act even if she refuses to view the ultrasound image or attempts to avoid hearing the ultrasound description. *See id*. Yet nothing in the Act (other than a medical emergency) relieves petitioners from continuing to display and describe the ultrasound, or

auscultating the fetal heart tones—even if the patient objects, refuses to view or listen, and is visibly upset; and even if the physician believes doing so will cause the patient harm or distress, or undermine the doctor-patient relationship so essential to informed consent itself. *See* Ky. Rev. Stat. § 311.727(5). Thus, the undisputed evidence established that the speech mandated by the Act "looks nothing like" the long-settled, traditional standard for informed consent, and is instead "in complete violation of" medical ethics. Trial Tr. at 95.

The undisputed evidence presented further demonstrated that compliance with the Act unnecessarily exposed patients to "distress and trauma." Trial Tr. at 45-46; *see also id.* at 40-44. Some patients would "take their sweater and cover their face and cover their eyes," or "cover their face with their hands" to avoid the display. *Id.* at 41. Many were "very upset," with "[s]ome of them crying" or "sobbing." *Id.* For patients with a diagnosis of fetal demise or serious fetal anomaly, the ultrasound description was "extremely difficult." *Id.* at 43. Dr. Franklin testified that one such patient who had already undergone five or six ultrasounds sobbed inconsolably when Dr. Franklin explained the Act's requirements. *Id.* "Her husband was visibly furious, and saying, 'Why do they have to force her to do this? She has gone through enough. We have gone through enough.'" *Id.* at 43-44; *see also* Dkt. No. 41 at ¶¶ 1-9 (explaining that requirements of similar Texas law were "nothing short of torture" for patient terminating wanted pregnancy due to diagnosis of serious fetal anomaly).

C. Decisions Below

1. Petitioners challenged the law on First Amendment grounds. The parties cross-moved for summary judgment, and the district denied respondents' motion and granted petitioners'.

The district court concluded that H.B. 2 is unconstitutional and permanently enjoined it. App. 122a-123a; 128a-129a. Relying heavily on the Fourth Circuit's decision invalidating a materially identical North Carolina statute, *see Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), the district court concluded that the plaintiffs' First Amendment claim was subject to intermediate scrutiny. App. 98a-99a, 105a-109a. Based on the undisputed evidence, the district court concluded that while "*[o]ffering* the mandated information is acceptable and consistent with principles of patient autonomy, as it respects the patient's ability to decide whether or not she wants more information," App. 112a, *forcing* ultrasound images and description on patients against their will in the manner required by the H.B. 2 "go[es] well beyond the basic disclosures necessary for informed consent to a medical procedure," App. 105a. The district court found that the Act is "designed to convey the state's ideological, anti-abortion message" by requiring private physicians to force "ultrasound images, detailed descriptions of the fetus, and the sounds of the fetal heartbeat on [patients], against their will, at a time when they are most vulnerable." App. 105a, 107a. As such, the Court concluded that "application of at least intermediate scrutiny is necessary here, as rational basis review would fail to acknowledge the severity of the burden H.B. 2 imposes upon the First Amendment rights of physicians." App. 109a.

The district court held that the Act could not survive intermediate scrutiny because, based on the undisputed evidence, it "does not advance a substantial government interest, is not drawn to achieve the government's interests, and prevents no actual harm." App. 115a. Indeed, the district court concluded that the Act "has more potential to harm the psychological well-being of the patient than to further the legitimate interests of the Commonwealth." App. 116a.

2. A divided panel of the Sixth Circuit reversed.

a. Citing this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the panel majority concluded that H.B. 2 is an "informed consent" statute because it requires the provision of "truthful, non-misleading" information that "is pertinent to [the patient's] decision-making." App. 14a-17a. As such, the panel held that the Act was a "regulation[] of professional conduct that incidentally burden[ed] speech" and therefore exempt from First Amendment scrutiny. App. 12a.

In so holding, the panel concluded that its decision is "in line with two other circuits that have faced First Amendment challenges to similar abortion-informed-consent statutes." App. 21a; *see also* App. 21a-26a (citing *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012), and *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc)).

The panel also recognized that the Fourth Circuit had invalidated a materially identical law on

First Amendment grounds in *Stuart*, but "decline[d] to follow *Stuart* … because it gave insufficient regard to the First Amendment analysis in *Casey* that the Court clarified and adopted as the majority view in *NIFLA*." App. 27a-28a.

b. Judge Donald dissented. Relying in part on *Stuart*, Judge Donald concluded that H.B. 2 "does not facilitate informed consent" because it "does not permit physician discretion—a central tenet of informed consent—and it would require physicians to harm their patients with 'no medical purpose.'" App. 57a. As Judge Donald recognized, the panel majority effectively exempted physician speech from First Amendment scrutiny "[s]o long as the state's legislators wisely use the words 'informed consent' in the title of a regulation." App. 83a. But as Judge Donald recognized, this Court has held that "state labels cannot be dispositive of [the] degree of First Amendment protection." App. 83a (quoting *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) ("*NIFLA*")). In view of the undisputed evidence that H.B. 2 contravenes basic principles of informed consent, App. 73a-82a, Judge Donald would have held that H.B. 2 "does not regulate speech as part of the practice of medicine; it regulates 'speech as speech.'" App. 57a. Judge Donald accordingly concluded that the Act "should be subjected to heightened scrutiny and deemed an unconstitutional infringement of the physicians' right to free speech." App. 57a.

3. The court of appeals denied a petition for rehearing, App. 126a-127a, but stayed its mandate pending this Court's resolution of a petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The decision below solidifies a decisional conflict over the question presented that warrants this Court's review. The question of First Amendment law presented here is also self-evidently important, as it implicates numerous compulsory display-and-describe ultrasound laws around the Nation, as well as state regulation of physician-patient speech more broadly. This petition offers the Court an ideal vehicle through which to resolve the question presented. And the decision below is incorrect.

The petition should be granted.

I. THERE IS A CIRCUIT CONFLICT OVER THE QUESTION PRESENTED.

As the court of appeals recognized, the Fifth and now Sixth Circuits hold that compulsory display-and-describe ultrasound laws do not violate the First Amendment because they regulate conduct and only incidentally burden speech. The Fourth Circuit, in contrast, holds that such laws are unconstitutional compelled speech.

1. The dispute here turns on the proper interpretation of a plurality's First Amendment decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), recently reaffirmed and adopted by the Court in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*").

Casey involved (as relevant here) a First Amendment challenge to a requirement that physicians inform their patients of "the availability of printed materials published by the State

describing the fetus and providing information about medical assistance for childbirth." 505 U.S. at 881. The *Casey* plurality upheld this requirement, holding that "the physician's First Amendment rights not to speak are implicated," *id.* at 884 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)), "but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," *id.* Thus, the plurality concluded, there was "no constitutional infirmity in the requirement that the physician provide the information mandated by the State." *Id.*[1]

NIFLA affirmed the *Casey* plurality's conclusion, explaining that the law upheld in *Casey* merely required "physicians to obtain informed consent before they could perform an abortion." *NIFLA*, 138 S. Ct. at 2373. This was permissible because the First Amendment does not prohibit "regulations of professional conduct that incidentally burden speech." *Id.* And the informed-consent provision at issue in *Casey* fell within that category of regulation because "the requirement that a doctor obtain informed consent to perform an operation is

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[1] *Casey* also concerned a challenge to a provision that required physicians to explain to their patients the risks and available alternatives to abortion, the risks of carrying a child to term, and "the probable gestational age of the unborn child." 18 Pa. Cons. Stat. § 3205(a)(1). But the substance of those informed-consent requirements was not challenged under the First Amendment. The physicians in *Casey* challenged this requirement only on the ground that the First Amendment precluded compelling *physicians*, as opposed to other qualified professionals, to provide this information to patients. *See, e.g.*, *Casey*, 505 U.S. at 968 (Rehnquist, J. concurring). Indeed, as Chief Justice Rehnquist recognized, "the record show[ed] that the clinics, without exception, [already] insist on providing this information to women before an abortion is performed." *Id.* at 967.

firmly entrenched in American tort law." *Id.* (quotations and citations omitted).

2. As discussed further below, H.B. 2 bears no resemblance to the informed consent provisions at issue in *Casey*. While the physicians in *Casey* were required only to make their patients aware of pamphlets containing the *state's* speech, H.B. 2 requires physicians to display images and provide medically detailed state-prescribed descriptions of those images through their own speech. Moreover, the statute at issue in *Casey* allowed the physician to decline to offer the pamphlets if the physician believed doing so would harm the patient, consistent with general informed-consent principles. H.B. 2, by contrast, affords providers no comparable opportunity to exercise their medical judgment; they must display the images and utter the state-mandated speech without modification, even if the patient objects and is attempting to physically resist the information, and even if the patient becomes visibly distressed or traumatized during the process.

Three courts of appeals have now applied *Casey*'s First Amendment holding to compulsory display-and-describe ultrasound laws and they have reached different results because of a dispute over *Casey*'s scope.

a. The Fourth Circuit in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) considered a North Carolina law materially identical to the law here and held that statute unconstitutional under the First Amendment.

Writing for a unanimous panel, Judge Wilkinson explained that *Casey* "does not assert that physicians forfeit their First Amendment rights in

the procedures surrounding abortions." 774 F.3d at 249. The North Carolina law was "extraordinary," the Fourth Circuit explained, precisely because it was *not* an ordinary informed-consent law—it was, in fact, "antithetical to the very communication that lies at the heart of the informed consent process." *Id.* at 249, 253.

The Fourth Circuit explained that "[t]raditional informed consent requirements derive from the principle of patient autonomy in medical treatment." *Id.* at 251. "As the term suggests, informed consent consists of two essential elements: comprehension and free consent." *Id.* "Comprehension requires that the physician convey adequate information about the diagnosis, the prognosis, alternative treatment options (including no treatment), and the risks and likely results of each option." *Id.* "Free consent," meanwhile, "requires that the patient be able to exercise her autonomy free from coercion," and "include[s] at times the choice *not* to receive certain pertinent information." *Id.* at 252. The informed consent process typically involves a conversation between the patient, fully clothed, and the physician in an office or similar room before the procedure begins." *Id.* Notably, the informed-consent materials at issue in *Casey* "deviate only modestly from traditional informed consent." *Id.*

By contrast, Judge Wilkinson explained, North Carolina's compulsory display-and-describe ultrasound law "look[s] nothing like traditional informed consent." *Id.* at 254. Rather than a "fully-clothed conversation," the law "finds the patient half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina." *Id.* at 254-55. And, unlike

the law at issue in *Casey*, the North Carolina law contained no "therapeutic privilege," thereby "requiring the physician to provide the information regardless of the psychological or emotional well-being of the patient." *Id.* As the court explained, "[t]herapeutic privilege . . . permits physicians to decline or at least wait to convey relevant information as part of informed consent," thereby "protect[ing] the health of particularly vulnerable or fragile patients, and permit[ting] the physician to uphold his ethical obligations of benevolence." *Id.* at 254.

The court further explained that "[t]he most serious deviation from standard practice is requiring the physician to display an image and provide an explanation and medical description to a woman who has through ear and eye covering rendered herself temporarily deaf and blind." *Id.* at 252. "[W]hile having to choose between blindfolding and earmuffing herself or watching and listening to unwanted information may in some remote way influence a woman in favor of carrying the child to term, forced speech to unwilling or incapacitated listeners does not bear the constitutionally necessary connection to the protection of fetal life." *Id.* at 253. Rather, the effect is to "wall[] off patients and physicians in a manner antithetical to the very communication that lies at the heart of the informed consent process." *Id.* Thus, the Fourth Circuit concluded, "[t]his is starkly compelled speech that impedes on the physician's First Amendment rights with no counterbalancing promotion of state interests." *Id.* at 252.

Additionally, and in direct contrast to the decision below and the Fifth Circuit's decision in

Texas Medical Providers Performing Abortion Services v. Lakey, 667 F.3d 570 (5th Cir. 2012), the Fourth Circuit recognized that "[t]hough the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage," not to mention "the full weight of the state's moral condemnation" of the woman's choice. *Stuart*, 774 F.3d at 253, 255. As such, the Fourth Circuit held that forced ultrasound laws are "ideological in intent and in kind" and "extend well beyond those [means] states have customarily employed to effectuate their undeniable interests in ensuring informed consent and in protecting the sanctity of life in all its phases." *Id.* at 242.

b. In *Lakey*, by contrast, the Fifth Circuit upheld against First Amendment challenge a display-and-describe ultrasound law much like the Act here. App. 21a (citing *Lakey*, 667 F.3d at 574). The Fifth Circuit reasoned that, under *Casey*, all statutes labeled by the state as "informed consent laws" are permissible under the First Amendment so long as "they require truthful, nonmisleading, and relevant disclosures." *Lakey*, 667 F.3d at 576; *but see Stuart*, 774 F.3d at 249 (expressly rejecting *Lakey*'s holding that "laws that 'require truthful, nonmisleading, and relevant disclosures'" are exempt from First Amendment scrutiny (quoting *Lakey*, 667 F.3d at 576). The Fifth Circuit concluded that "the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information," and are thus "subject to reasonable licensing and regulation by the State" under *Casey*. *Id.* at 575, 577-78 (quotation omitted). The Fifth Circuit thus held

that "the most reasonable conclusion is to uphold the" challenged Texas law. *Id.* at 577.

c. The Sixth Circuit below adopted precisely the same rule as the Fifth Circuit in *Lakey*, holding that "even though an abortion-informed-consent law compels a doctor's disclosure of certain information, it should be upheld so long as the disclosure is truthful, non-misleading, and relevant to an abortion." App. 3a (citing *Casey*, 505 U.S. at 882; *Lakey*, 667 F.3d at 576; and *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (en banc)). The Sixth Circuit also followed the Fifth in holding that "the disclosures of the heartbeat, sonogram, and its description 'are the epitome of truthful, non-misleading information,'" and thus not subject to heightened First Amendment scrutiny. App. 15a (quoting *Lakey*, 667 F.3d at 577-78). Indeed, the Sixth Circuit expressly noted that its result was "in line with" *Lakey*.[2] App. 21a.

The Sixth Circuit acknowledged that *Stuart* addressed a "statute similar to H.B. 2," but "decline[d] to follow *Stuart* … because it gave insufficient regard to the First Amendment analysis

[2] The Sixth Circuit also noted that its decision was "in line with" the Eighth Circuit's decision in *Rounds*. App. 21a. *Rounds* did not involve a display-and-describe ultrasound mandate like the one at issue here and in *Stuart* and *Lakey*. Rather, the challenged provisions in *Rounds* required physicians to provide patients with a written disclosure. *See* S.D. Codified Laws § 34-23A-10.1. As the majority below recognized, App. 25a-26a, however, *Rounds* concluded (like *Lakey*) that any statute that requires the provision of "truthful, non-misleading information relevant to a patient's decision to have an abortion" is exempt from First Amendment scrutiny. *See* 530 F.3d at 734-35.

in *Casey* that the Court clarified and adopted as the majority view in *NIFLA*." App. 27a-28a.

d. In its opposition to petitioners' motion to stay the Sixth Circuit's mandate, respondent argued that there is no decisional conflict because *NIFLA* is an intervening decision of this Court that could make the Fourth Circuit rethink its construction of *Casey*. That contention is baseless. As the Sixth Circuit explained, *NIFLA* simply "adopted" *Casey*'s plurality decision "as the majority view." App. 28a. And to the extent *NIFLA* "clarified" *Casey*, App. 28a, it did so by making clear that *Stuart*'s construction was *correct*—i.e., that what the First Amendment generally allows is informed-consent laws that have an incidental effect on physician speech. *See NIFLA*, 138 S. Ct. at 2373; *Stuart*, 774 F.3d at 252-53. *Stuart* invalidated the North Carolina statute at issue precisely because the Fourth Circuit concluded that it was *not* an informed-consent provision exempt from First Amendment scrutiny, whereas the decision below upheld a materially identical law because it concluded that the Act *is* such a law.

That is a square decisional conflict. The result of that conflict is that the constitutionality of display-and-describe ultrasound laws (and other compelled physician speech mandates) is determined entirely by the jurisdiction in which they are enacted. That state of affairs is intolerable—physicians are ethically obligated to do no harm and to obtain informed consent in a manner that respects patient autonomy, and their First Amendment rights should not differ depending on whether they practice in North Carolina, Kentucky, or any other state. Only

this Court can resolve the conflict and restore uniformity to First Amendment jurisprudence.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING, AND THIS PETITION PROVIDES AN IDEAL VEHICLE THROUGH WHICH TO RESOLVE IT.

The question presented is extremely important. "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 138 S. Ct. at 2371-72. Regardless of the speaker, content-based laws that compel speech are generally subject to heightened First Amendment scrutiny, even if the speech compelled is factual. *Id.* at 2371. And, while there is an exception to this general rule for regulations of conduct that incidentally burden professional speech—such as traditional informed-consent requirements—this Court has long "been reluctant to mark off new categories of speech for diminished constitutional protection . . . without persuasive evidence . . . of a long (if heretofore unrecognized) tradition to that effect." *Id.* at 2372. Thus, this case implicates the core First Amendment rights of physicians, as well as the states' ability to regulate the practice of medicine consistent with free-speech principles. *NIFLA* implicated similar issues, and this Court's grant of certiorari at the preliminary injunction stage in that case demonstrates their importance.

The question presented, moreover, is recurring, as evidenced by the circuit conflict. The question directly affects the laws in numerous states that have enacted statutes similar to H.B. 2. Compulsory display-and-describe ultrasound man-

dates have been enacted not only in Kentucky but also in Texas (whose law was upheld in *Lakey*), North Carolina (whose law was invalidated in *Stuart*), Louisiana (La. Rev. Stat. Ann. § 1061.10), Oklahoma (Okla. Stat. Tit. 63, §§ 1-738.3d, 1-738.3e, enjoined on due process grounds, *see Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012) (per curiam)), and Wisconsin (Wis. Stat. § 253.10). More states may well enact similar laws in light of the decision below.

What is more, the breadth of the Sixth Circuit's decision to exempt any compelled factual speech relating to a medical procedure from First Amendment scrutiny—no matter how grossly it deviates from settled principles of informed consent—extends beyond just compulsory ultrasound display-and-describe laws. For example, under the panel's holding, the First Amendment would not prevent a state trying to encourage vaginal birth and decrease the rate of cesarean section delivery from requiring that a physician show *every* pregnant patient a video of significant abdominal surgery. Nor would it prevent a state seeking to curb health care spending from requiring physicians to play *every* patient choosing between angioplasty and coronary bypass a recording of a chest-saw, while providing a simultaneous, graphic description of what is on the video or recording. To borrow the panel's words, such mandates would be exempt from the First Amendment because they reflect "objective medical facts" and "inherently provides the patient with more knowledge about the effect of [a medical] procedure." App. 14a, 16a. And, under the decision below, such speech mandates would be deemed "informed consent" even if the patient is visibly disturbed and pleads with her physician to stop, or refuses to look

at the images or listen to a single word. Yet this is *precisely* the sort of "unfettered" manipulation of physician-patient speech this Court's precedent forecloses. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2375.

Finally, this petition provides the Court with an ideal vehicle through which to answer the question presented and resolve the circuit conflict. The decision below turned entirely on the question presented, meaning that answering the question would both resolve the circuit conflict and determine the outcome here.

III. THE DECISION BELOW IS INCORRECT.

This Court's review is also warranted because the decision below is wrong. In fact, this Court's decades-old compelled speech precedent—applied in *Casey* and recently reaffirmed in *NIFLA*—underscores that compelling speech of particular content, even if truthful, is fundamentally incompatible with the First Amendment. The decision below is directly contrary to this long line of precedent.

In particular, this Court has long recognized two principles directly applicable here: First, content-based laws that compel speech are generally subject to heightened First Amendment scrutiny, even if the speech compelled is factual. Second, while there is an exception to this general rule for regulations of conduct that incidentally burden physician speech—such as the exception recognized in *Casey* for traditional informed-consent requirements—such categories of permissible compelled speech are narrowly drawn and constrained by tradition. H.B. 2's compelled speech requirement does not fall within this exception because it is not a traditional

informed-consent regulation, but rather a direct, content-based regulation of speech that actually interferes with informed consent by requiring doctors to disregard their patients' autonomous choices. The Act is thus subject to heightened scrutiny, which it fails.

1. This Court has long held that content-based regulations of speech—including regulations that compel speech—are generally presumed invalid under the First Amendment. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *NIFLA*, 138 S. Ct. at 2371. Moreover, the Court has also recognized that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

The Act forces petitioners to say things they otherwise would not, by requiring them to display and provide a detailed description of a patient's ultrasound even if the patient objects, even if the patient is actively resisting the information, and even if doing so harms the patient and undermines the doctor-patient relationship by requiring the doctor to disregard the patient's clearly expressed autonomous wishes. This compulsion is contrary to not only providers' First Amendment rights, but also their ethical obligations.[3] "By requiring [providers] to

[3] *See, e.g.*, App. 112a-113a ("The American Medical Association has stressed the importance of patient autonomy in the informed-consent process, stating that physicians must '[p]resent relevant information accurately and sensitively, in keeping with the patient's preference for receiving medical information.'"); App. 114a (finding that "H.B. 2 causes patients distress");

inform [patients]" of the details of their ultrasounds over the patients' objections and against their will at the same time that providers seek to fulfill their professional and ethical obligations to respect their patient's autonomy and refrain from causing harm, H.B. 2 "plainly 'alters the content' of petitioners' speech." *NIFLA*, 138 S. Ct. at 2371 (quoting *Riley*, 487 U.S. at 795).

It may be that the speech Kentucky seeks to compel is factual and non-misleading. But the established precedent described above "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797-98. Such a mandate to speak particular content against one's will and professional judgment is presumptively invalid, and can stand only if it survives heightened scrutiny—which the Act plainly does not, *see infra* pp. 29-31.

2. a. Despite these clear principles, the court of appeals concluded that the Act is exempt from First Amendment scrutiny because the speech it compels (i) "relate[s] to a medical procedure," (ii) is "truthful and not misleading," and (iii) is "relevant to the patient's decision whether to undertake the procedure." App. 12a-13a. Yet as just explained, this Court expressly held in *Riley* that compelling speech that is truthful and relevant to the listener is still a content-based regulation of speech subject to heightened First Amendment

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Dkt. No. 3-2 (Joffe Decl.) (describing "the fundamental ethical requirement that the physician must not inflict unnecessary harm on a patient").

scrutiny. *Riley*, 487 U.S. at 797-98 (invalidating law requiring professional fundraisers to disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser in the previous 12 months). Nor does it matter that the speech relates to a medical procedure: this Court confirmed in *NIFLA* that there is no exception for speech by physicians or other professionals, whether in the abortion context or elsewhere. *NIFLA*, 138 S. Ct. at 2371-72. The legal standard adopted below flatly contradicts this Court's established precedent.

b. To be sure, *NIFLA* also confirmed what *Casey* had already held: "under [the Court's] precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372.[4] Particularly relevant here, *NIFLA* ratified the plurality opinion in *Casey*, which "upheld a law requiring physicians to obtain informed consent before they could perform an abortion." *Id.* at 2373. This Court explained that the informed-consent provision at issue in *Casey* was lawful because it "regulated speech only 'as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.'" *Id.* (quoting *Casey*, 505 U.S. at 884). And such regulation was consistent with the First Amendment because "the requirement that a doctor obtain informed consent to perform an operation is firmly entrenched

[4] In *NIFLA*, this Court also noted that "[the Court's] precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 2372. Neither the district court nor the court of appeals suggested that the speech here is commercial. *See* App. 7a n.4; 104a n.5.

in American tort law." *Id.* (quotation omitted); *see also United States v. Alvarez*, 567 U.S. 709, 717 (2012) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar" (quotation omitted)).

The court below believed that the Act falls under this *Casey* exception for traditional informed consent. App. 3a. It does not. As *Stuart* and Judge Donald's dissent explained, *see supra* pp. 11, 14-16, compulsory display-and-describe laws have no relation to traditional informed-consent requirements. Most obviously, the Act requires physicians to display, auscultate, and describe an ultrasound even to women who have "wall[ed] off" communication with their physician, *Stuart*, 774 F.3d at 253, by covering their eyes and ears—and deems "informed consent" to have been satisfied so long as the physician has followed the state's script, even when the patient has neither heard nor seen it, *see* Ky. Rev. Stat. § 311.727(3). A law that forces a speaker to speak when no one is listening, forces a doctor to ignore the will of her patient, and deems consent valid whether or not the speech is heard is on its face not an informed-consent provision. As Judge Wilkinson explained for the Fourth Circuit, such a law is "antithetical to the very communication that lies at the heart of the informed consent process." *Stuart*, 774 F.3d at 253. In fact, by requiring the physician to so directly disregard the patient's clear wishes and visible suffering, it actually undermines informed consent. *See Stuart*, 774 F.3d at 253.

H.B. 2 is thus a far cry from the provisions upheld in *Casey*. The First Amendment challenge in *Casey* was primarily to the requirement that physicians inform their patients of "the *availability* of printed materials *published by the State* describing the fetus and providing information about medical assistance for childbirth." 505 U.S. at 881 (emphasis added). Physicians were not compelled to demand that their patients confront information against their will, and were certainly not required to do so in the midst of a medical procedure with the patient incapacitated, half-naked, with a probe inside her vagina. On the contrary, physicians were allowed to exercise their medical judgment to decline to offer patients the state-created pamphlets when appropriate. *See id.* at 883-84.

This is consistent with traditional informed consent. As *Stuart* explained, "informed consent consists of two essential elements: comprehension and free consent." *Stuart*, 774 F.3d at 251. This means that physicians must "convey adequate information about the diagnosis, the prognosis, alternative treatment options (including no treatment), and the risks and likely results of each option," and the patient must "be able to exercise her autonomy free from coercion," including "at times the choice *not* to receive certain pertinent information and to rely instead on the judgment of the doctor." *Id.* at 251-52. An *offer* of information to the patient tempered by physician judgment, as in *Casey*, is fully consistent with these principles. A blanket *mandate* to provide the same content-specific speech to every patient even as she is physically resisting the speech quite clearly is not.

This difference, moreover, has substantial First Amendment significance. In *Casey*, "the viewpoint conveyed by the pamphlet is clearly the state's—not the physician's." *Id.* at 253. The Act, by contrast, "compels the physician to speak and display the very information on a volatile subject that the state would like to convey." *Id.* "The coercive effects of the speech are magnified when the physician is compelled to deliver the state's preferred message in his or her own voice. [The Act] treads far more heavily on the physicians' free speech rights than the state pamphlet provisions at issue in *Casey*." *Id.*

c. The fact that the Act requires physicians to speak while their patients are trying to avoid their speech demonstrates that the Act is not just a content-based regulation but a *viewpoint*-based speech regulation. *See NIFLA*, 138 S. Ct. at 2378 (Kennedy, J., concurring). "Though the information conveyed [by a law like H.B. 2] may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage," not to mention "the full weight of the state's moral condemnation" of the woman's choice. *Stuart*, 774 F.3d at 253, 255. Nothing in the tradition of informed consent requires that physicians force patients against their will to be confronted in the way the display-and-describe mandate does. The Act goes far beyond any reasonable informed consent requirement and instead seeks to interfere in the doctor-patient relationship with a state-mandated message designed not to inform but to deter abortion through the physician's own speech.

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The Act, in short, is nothing like the provisions upheld in *Casey*. It does not merely regulate the practice of medicine by requiring physicians to offer information—it goes far beyond any informed consent needs and "regulates speech as speech." *NIFLA*, 138 S. Ct. at 2374. The Act is thus subject to heightened First Amendment scrutiny.

3. The court of appeals did not apply any form of heightened scrutiny, and thus did not decide whether intermediate or strict scrutiny applied. It would be unnecessary for this Court to decide that question either, because the Act plainly would fail even intermediate scrutiny. *See NIFLA*, 138 S. Ct. at 2375 (declining to decide whether heightened or intermediate scrutiny applies, but assuming at least intermediate scrutiny does); *see also Riley*, 487 U.S. at 798 (subjecting state law compelling professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations "to exacting First Amendment scrutiny").

To satisfy that standard, "the State must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011). In particular, where (as here) a state defends a regulation on speech as a means to prevent harm, "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citations omitted). The Act does not advance a substantial governmental interest, prevents no actual harm, and is not drawn

to achieve the government's interests. It is plainly unconstitutional.

To begin, there is no evidence that preexisting law failed to adequately inform women about the implications of seeking an abortion, and thus there is no evidence of a "real" harm to be remedied by the Act. *Id.* Indeed, the very information the Act compels the petitioners to force on their patients was already available to every patient who wanted it before Kentucky enacted the Act. *See supra* p. 5. And when asked in district court whether the existing law was inadequate, the Commonwealth could not articulate how or why preexisting law fell short. App. 117a. Instead, the Commonwealth simply asserted that it need not make any such showing. App. 117a. The Sixth Circuit agreed, but only because it erroneously concluded that the speech mandated by the Act was exempt from the First Amendment. App. 20a. Because Kentucky cannot demonstrate that the Act would alleviate actual harm, it cannot survive intermediate scrutiny. *See Turner Broad.*, 512 U.S. at 664.

Moreover, H.B. 2 fails intermediate scrutiny because it does not alleviate any proven harms "in a direct and material way." *Id.* That is, the law does not advance, but actually impedes, the Commonwealth's purported interest in ensuring that women provide informed consent. The Act allows a patient to physically avoid hearing and seeing the compelled speech. But it does not allow providers to stop displaying and describing the ultrasound images if a patient makes clear she does not want to see or listen. Such a law is "performative rather than informative." *Stuart v. Loomis*, 992 F. Supp. 2d 585, 602 (M.D.N.C. 2014), *aff'd sub nom. Stuart v.*

Camnitz, 774 F.3d 238 (4th Cir. 2014). The law also forces a physician to act over the objection of a competent patient, in direct violation of fundamental medical ethics principles, as well as the principle of respect for patient autonomy essential to informed consent. App. 112a-113a; *see also supra* pp. 3-4.

The Act's scope is also vastly—and unconstitutionally—out of proportion with any such state interest, which is an independent basis to invalidate it. Under intermediate scrutiny "[t]here must be a fit between the legislature's ends and the means chosen to accomplish those ends." *Sorrell*, 564 U.S. at 572. Because the Act requires providers to continue delivering information even if the woman refuses to hear or see it and even if providers believe information will harm the woman, the Act self-evidently is not tailored to advance Kentucky's purported interest in informed consent. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (explaining that, to survive intermediate scrutiny, law must "not [be] more extensive than is necessary to serve [the state's] interest").

The Act is thus a plainly unconstitutional content-based regulation of petitioners' speech. This Court should grant the petition and reverse the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMW WOMEN'S SURGICAL CENTER, P.S.C., on behalf of itself, its staff, and its patients; ERNEST MARSHALL, M.D., on behalf of himself and his patients; ASHLEY BERGIN, M.D., on behalf of herself and her patients; TANYA FRANKLIN, M.D., on behalf of herself and her patients. *Plaintiffs-Appellees*,	Nos. 17-6151/6183
ANDREW G. BESHEAR, Attorney General (17-6183); ADAM MEIER, in his capacity as Secretary of the Cabinet of Health and Family Services (17-6151), *Defendants-Appellants*.	

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:17-cv-00016—David J. Hale, District Judge.

Argued: July 25, 2018

Decided and Filed: April 4, 2019

Before: NORRIS, DONALD, and BUSH, Circuit Judges;

OPINION

JOHN K. BUSH, Circuit Judge. Under *Roe v. Wade*, 410 U.S. 113 (1973), a woman has the right to choose to have an abortion. To inform that choice, the Commonwealth of Kentucky directs a doctor, before performing an abortion, to auscultate (or make audible) the fetal heartbeat, perform an ultrasound, and display and describe the ultrasound images to the patient. This appeal principally concerns whether those requirements violate the doctor's First Amendment rights.

"The Ultrasound Informed Consent Act," also known as "House Bill 2" or "H.B. 2,"[1] is challenged by Plaintiffs-Appellees EMW Women's Surgical Center, P.S.C. and its associated physicians (collectively, "EMW") under the First Amendment, as incorporated against the States by the Fourteenth Amendment. EMW prevailed in the district court, which, in granting the complaint's first claim for relief under the First Amendment, applied heightened scrutiny to invalidate the statute and permanently enjoin enforcement of H.B. 2. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629 (W.D. Ky. 2017). Our court then denied the motion of then-Defendant-Appellant Vickie Glisson, who was Secretary of the Cabinet for Health and Family Services, to stay the injunction pending appeal. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 17-6151 (6th Cir. Dec. 8, 2017) (order). However, neither our court

[1] Codified at Kentucky Revised Statute ("KRS") §§ 311.727, 311.990(34).

nor the district court had the benefit of the Supreme Court's recent decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*").

In *NIFLA* the Court clarified that no heightened First Amendment scrutiny should apply to informed-consent statutes like the abortion-informed-consent statute at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion).[2] *See NIFLA*, 138 S. Ct. at 2373. Thus, even though an abortion-informed-consent law compels a doctor's disclosure of certain information, it should be upheld so long as the disclosure is truthful, non-misleading, and relevant to an abortion. *See Casey*, 505 U.S. at 882; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (en banc).

Because H.B. 2, like the statute in *Casey*, requires the disclosure of truthful, non- misleading, and relevant information about an abortion, we hold that it does not violate a doctor's right to free speech under the First Amendment. *See NIFLA*, 138 S. Ct. at 2373; *Casey*, 505 U.S. at 882–84. We also hold that the Attorney General, Defendant-Appellant Andrew Beshear, is not a proper party to this case.

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[2] Citations to *Casey* refer to the joint opinion by Justices O'Connor, Kennedy, and Souter.

I.

H.B. 2 directs a doctor, prior to performing an abortion, to perform an ultrasound; display the ultrasound images for the patient; and explain, in the doctor's own words, what is being depicted by the images—for example, pointing out organs and whether the patient is pregnant with twins. KRS § 311.727. There is no requirement that the patient view the images or listen to the doctor's description. The doctor also must auscultate the fetal heartbeat but may turn off the volume of the auscultation if the patient so requests. *Id.* Failure to comply with these requirements can result in the doctor being fined and referred to Kentucky's medical-licensing board. KRS § 311.990(34). But H.B. 2 does not penalize a doctor if the patient requested that the heartbeat sound be turned off or chose not to look at the ultrasound images. KRS § 311.727(3). Nor does H.B. 2 penalize a doctor if she or he exercises discretion to advise a patient that she need not listen to or view the disclosures, or if the doctor makes any other statement, including advising the patient to have an abortion. Finally, a doctor need not make any disclosure from H.B. 2 at all if an abortion is medically necessary or in the case of a medical emergency. KRS § 311.727(5).

EMW sued General Beshear, Secretary Glisson, and Michael S. Rodman, who is Executive Director of the Kentucky Board of Medical Licensure. The parties cross-moved for summary judgment on the complaint's first claim for relief, styled "First Amendment Rights of Physicians." The district court ruled in favor of EMW and, as

noted, permanently enjoined enforcement of H.B. 2. Executive Director Rodman does not appeal, but Secretary Meier, as Secretary Glisson's successor, seeks reversal of the judgment. General Beshear also defends H.B. 2 on appeal but argues that he is not a proper party to this case. We address first whether H.B. 2 violates doctors' First Amendment rights, then whether General Beshear is appropriately in this suit.

II.

We engage in de novo review of the district court's summary judgment. *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016). "[W]here, as here, the parties filed cross-motions for summary judgment, 'the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *Id.* at 866 (quoting *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)). A moving party may obtain summary judgment only if it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

No material facts are in dispute here, so this matter turns on a pure question of law: does H.B. 2 compel a doctor's speech in violation of the First Amendment?

The First Amendment, applicable to the States through the Fourteenth Amendment, *see, e.g.*, *Gitlow v. New York*, 268 U.S. 652 (1925),

provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I. This constitutional guarantee, the Supreme Court has held, applies not only when government restricts speech, *see, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), but also when it compels speech, *see, e.g.*, *NIFLA*, 138 S. Ct. at 2371. When laws, whether restrictive or compulsive, "target speech based on its communicative content," they generally "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 138 S. Ct. at 2371 (quoting *Reed*, 135 S. Ct. at 2226). Such content-based restrictions have been declared unconstitutional in compelled-speech cases such as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which struck down a requirement that students salute the United States flag; *Wooley v. Maynard*, 430 U.S. 705 (1977), which invalidated a law requiring a state motto "Live Free or Die" on license plates; and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), which held that a State could not force parade organizers to include a group that would convey a message contrary to the organizers' views.

Heightened scrutiny generally applies to content-based regulation of any speaker, including a physician or other professional. *See NIFLA*, 138 S. Ct. at 2371–72. But, as the Supreme Court noted in *NIFLA*, there is "less protection for professional speech in two circumstances": first, for "some laws that require professionals to disclose factual, noncontroversial information in their

'commercial speech'";[3] second, for regulation of "professional conduct, even though that conduct incidentally involves speech," *id.* at 2372 (citing *Casey*, 505 U.S. at 884). The second exception is at issue here because H.B. 2 regulates doctors' conduct: performing abortions.[4]

We review H.B. 2 against the backdrop of thirty-five years of evolving Supreme Court precedent concerning the constitutionality of abortion-informed-consent statutes. In the 1980s, the Court invalidated some aspects of these laws. For example, in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron I*"), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the Court struck down state laws requiring abortion doctors to provide patients with information about the development of unborn life[5] and alternatives to abortion. In *Akron I*, the Court "invalidated an ordinance which required that a woman seeking an abortion be provided by her physician with specific information 'designed to influence the woman's informed choice between abortion or childbirth.'" *Casey*, 505 U.S. at 881 (quoting *Akron I*, 462 U.S. at 444). The required disclosure included the

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[3] *NIFLA*, 138 S. Ct. at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)).

[4] We do not address whether H.B. 2 falls within the *Zauderer*/*Milzavetz*/*Ohralik* commercial-speech exception.

[5] We use the term unborn life consistent with the Supreme Court's reference to "the life of the unborn," *Casey*, 505 U.S. at 883. *See also Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

statement that "the unborn child is a human life from the moment of conception." *Akron I*, 462 U.S. at 444. That this "information was designed to dissuade the woman from having an abortion," *Casey*, 505 U.S. at 882, was one of "two purported flaws in the Akron ordinance." *Id.* (citing *Thornburgh*, 476 U.S. at 762). The other purported flaw was that the *Akron I* statute mandated "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient, [that] intrude[d] upon the discretion of the pregnant woman's physician." *Thornburgh*, 476 U.S. at 762; *see also Casey*, 505 U.S. at 882. In *Thornburgh*, the purported flaw in the Pennsylvania informed-consent statute at issue was that it was "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician," *Thornburgh*, 476 U.S. at 762—that is, an interference with the doctor-patient relationship.

In the early 1990s, the Supreme Court reversed course. In *Casey*, the Court effectively abrogated the holdings in *Akron I* and *Thornburgh*. The *Casey* joint opinion declared:

> To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of *truthful, nonmisleading information* about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with

> *Roe*'s acknowledgment of an important interest in potential life, and are overruled.

Casey, 505 U.S. at 882 (emphasis added) (internal quotation marks omitted). *Casey* addressed informed-consent provisions of another Pennsylvania statute that required physicians, among other things, to inform patients orally of the nature of the abortion procedure; its risks and alternatives; the probable gestational age of the unborn life in the patient when the doctors would perform the abortion; and the availability of pamphlets (1) describing unborn life in further detail, including stages of gestational development, (2) listing agencies offering alternatives to abortion, and (3) giving information about obtaining child support from the unborn life's father. *See Casey*, 505 U.S. at 881, 902–03 (quoting 18 Pa. Cons. Stat. § 3205(a)); *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1349 (E.D. Pa. 1990) (noting that pamphlets described stages of development for unborn life).

The *Casey* plurality reasoned that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." *Casey*, 505 U.S. at 884. Though the joint opinion acknowledged that "the physician's First Amendment rights not to speak" were implicated by the informed-consent statute, the plurality applied no heightened scrutiny and upheld the statute because a doctor's rights were implicated "only as part of the practice of medicine, subject to

reasonable licensing and regulation by the State." *Id.* at 884 (citations omitted).

Importantly too, in "depart[ing] from the holdings of *Akron I* and *Thornburgh*," the *Casey* plurality emphasized that a State may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, *even when in so doing the State expresses a preference for childbirth over abortion*." *Casey*, 505 U.S. at 883 (emphasis added); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972–73 (1997) (per curiam) (affirming *Casey* and holding that a statute restricting who could perform abortions that was drafted by an anti-abortion group had no improper purpose). The plurality instructed that informed consent to an abortion procedure may mandate disclosure of the "full consequences of" the abortion decision, including "a requirement that a woman be apprised of the health risks of abortion and childbirth," as well as "the impact on" or "consequences to the fetus, even when those consequences have no direct relation to her health." *Casey*, 505 U.S. at 882. As the plurality explained, it cannot "be doubted that most women considering an abortion would deem the impact on the fetus *relevant*, if not dispositive, to the decision." *Id.* (emphasis added). The joint opinion analogized an informed-consent disclosure of the effect on unborn life to a requirement that an organ recipient learn the effect on the donor before consenting to the transplant: "[w]e would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as

risks to himself or herself." *Id.* at 882–83.

We have long understood *Casey* as marking a shift toward greater respect for States' interests in informing women and protecting unborn life. For example, in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003), we affirmed that "[a]n essential feature of the jointly authored opinion in *Casey* is the reaffirmation of the substantial state interest in potential life throughout pregnancy." *Id.* at 443 (internal quotation marks omitted). Likewise, in *Memphis Planned Parenthood v. Sundquist*, 175 F.3d 456 (6th Cir. 1999), we explained that *Casey* establishes that States may take steps to ensure that a woman's choice to abort is informed:

> [a] plurality of the justices in *Casey* recognized the weighty concerns of the state in "the protection of potential life" and reasoned that, although "the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the state is prohibited from taking steps to ensure that this choice is thoughtful and informed."

Id. at 460–61 (quoting *Casey*, 505 U.S. at 871–72). In other words, our circuit has recognized that after *Casey* there can be no doubt that "a state can require that a doctor give a woman certain information before she may have an abortion." *Id.* at 465 (citing *Casey*, 505 U.S. at 884).

Recently, in *NIFLA*, a majority of the Supreme Court adopted the First Amendment analysis applied in *Casey*. *See NIFLA*, 138 S. Ct. at

2373–74. Specifically, the Court explained that although heightened scrutiny generally applies to content-based regulations of speech, "regulations of professional conduct that incidentally burden speech" receive lower scrutiny. *Id.* at 2373. The Court acknowledged that "drawing the line between speech and conduct can be difficult." *Id.* But it held that statutes that "facilitate informed consent to a medical procedure," like the one at issue in *Casey*, fall on the conduct side of the line because they regulate speech "only 'as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.'"[6] *Id.* (quoting *Casey*, 505 U.S. at 884).

In both *NIFLA* and *Casey*, then, the Court clarified that the First Amendment has a limited role to play in allowing doctors to avoid making truthful mandated disclosures related to informed consent. Under the First Amendment, we will not highly scrutinize an informed- consent statute, including one involving informed consent to an abortion, so long as it meets these three requirements: (1) it must relate to a medical

[6] The Court went on in *NIFLA* to declare unconstitutional a California statute requiring crisis pregnancy centers to disclose that the State offered abortion services, among other things. *See NIFLA*, 138 S. Ct. at 2368–70. In so doing, the Court distinguished the California statute from the Pennsylvania law upheld in *Casey* because the notice at issue under the California statute was not an informed-consent law: it "provide[d] no information about the risks or benefits of [medical] procedures." *Id.* at 2373. Because the regulation "at issue [in *NIFLA*] [was] not an informed-consent requirement [like in *Casey*] or any other regulation of professional conduct," the Court applied heightened scrutiny and held that the California law likely violated the First Amendment. *Id.* at 2373, 2375.

procedure; (2) it must be truthful and not misleading; and (3) it must be relevant to the patient's decision whether to undertake the procedure, which may include, in the abortion context, information relevant to the woman's health risks, as well as the impact on the unborn life. *See NIFLA*, 138 S. Ct. at 2373; *Casey*, 505 U.S. at 882.

Although much of the analysis in *Casey* addressed the plaintiffs' undue-burden claim, the joint opinion's First Amendment holding built upon its conclusion that the mandated informed- consent disclosures in that case met the criteria of being truthful, non-misleading, and relevant. Contrary to the Dissent's suggestion that we have "focused on the wrong provision of the Constitution," Dissent at 38, indeed we do address the relevant provision—the First Amendment. *Casey* and *NIFLA* recognize that First Amendment heightened scrutiny does not apply to incidental regulation of professional speech that is part of the practice of medicine and that such incidental regulation includes mandated informed-consent requirements, provided that the disclosures are truthful, non-misleading, and relevant. *See Casey*, 505 U.S. at 882–84; *NIFLA*, 138 S. Ct at 2373. *Casey* also recognizes that, as part of informed consent for an abortion, permissible mandated disclosures under the First Amendment may pertain to the effect of the procedure on unborn life. 505 U.S. at 882. And in *NIFLA*, the Court explicitly reaffirmed that heightened scrutiny is not appropriate under the First Amendment for informed-consent requirements of the nature upheld in *Casey*. *See NIFLA*, 138 S. Ct. at

2373, 2375.[7] We therefore are applying *Casey* and *NIFLA* as they directly pertain to the First Amendment claim and not to any undue-burden claim under the Fourteenth Amendment.

III.

This First Amendment appeal, thus, turns on whether H.B. 2 shares the same material attributes as the informed-consent statute in *Casey*. If it does, then no heightened First Amendment scrutiny applies because, as *NIFLA* instructed, an informed-consent law like the *Casey* statute is a regulation of professional conduct that only incidentally burdens professional speech. *See NIFLA*, 138 S. Ct. at 2373.

Does H.B. 2 relate to a medical procedure? Yes—abortion. Are the mandated disclosures truthful and not misleading? Yes—no one argues that the heartbeat, sonogram, or its description is false or misleading. We have previously held that similar information conveys objective medical facts. For example, in *United States v. Paulus*, 894 F.3d 267 (6th Cir. 2018), we explained that "it would be an insult to common sense and the practice of medicine to say that [the doctor] was not

[7] The dissenters in *NIFLA* also recognized this key attribute of *Casey*'s holding. *See* 138 S. Ct. at 2385 (Breyer, J., dissenting) ("Thus, the [*Casey*] Court considered the State's statutory requirements, including that the doctor must inform his patient about where she could learn how to have the newborn child adopted (if carried to term) and how she could find related financial assistance. To repeat the point, [*Casey*] held that the State's requirements did *not* violate the Constitution's protection of free speech or its protection of a woman's right to choose to have an abortion." (citation omitted)).

measuring facts (or attempting to do so) when he conducted the angiograms at issue" in that case. *Id.* at 276. Similarly, we explained in *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2011), that anatomical pictures convey facts:

> Students in biology, human-anatomy, and medical-school courses look at pictures or drawings in textbooks of both healthy and damaged cells, tissues, organs, organ systems, and humans because those pictures convey factual information about medical conditions and biological systems. The argument that a picture of a specific person or part of a person is opinion because not every person or part of a person with that condition would appear the same way is unpersuasive. . . . People with the same illness can and often will suffer a variety of differing symptoms. But one wouldn't say that a list of symptoms characterizing a particular medical condition is nonfactual and opinion-based as a result.

Id. at 559 (footnote omitted). So, "[t]o belabor the obvious and conceded point," the disclosures of the heartbeat, sonogram, and its description "are the epitome of truthful, non-misleading information." *Lakey*, 667 F.3d at 577–78.

That leaves the final question: are the mandated disclosures relevant to the patient's decision whether to abort unborn life? The Supreme

Court's abortion precedent answers this question for us.

"Abortion is a unique act," *Casey*, 505 U.S. at 852, that "requires a difficult and painful moral decision," *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). It is "fraught with consequences . . . for the woman who must live with the implications of her decision." *Casey*, 505 U.S. at 852. "[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." *Gonzales*, 550 U.S. at 159 (citations omitted). Abortion also is "fraught with consequences . . . for the life or potential life that is aborted," *Casey*, 505 U.S. at 852, in whom the State may have a significant interest, *Gonzales*, 550 U.S. at 158, and who cannot consent to the procedure to terminate her or his life or potential life. Thus, the Supreme Court has explained that the effect of an abortion procedure on unborn life is "relevant, if not *dispositive*" information for the patient's decision. *See Casey*, 505 U.S. at 882 (emphasis added).

With this background in mind, we hold that H.B. 2 provides relevant information. The information conveyed by an ultrasound image, its description, and the audible beating fetal heart gives a patient greater knowledge of the unborn life inside her. This also inherently provides the patient with more knowledge about the effect of an abortion procedure: it shows her what, or whom, she is consenting to terminate. That this information might persuade a woman to change her mind does not render it suspect under the First Amendment. It just means that it is pertinent to her decision-

making. *See Casey*, 505 U.S. at 882 (explaining that information on abortion's impact on unborn life "furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed").

The prevalence of ultrasound-use in pregnancy also underscores the relevance of the mandated sonogram of H.B. 2 to a woman's abortion decision. Ultrasounds are ubiquitous procedures that are a part of every pregnancy and, EMW concedes, every abortion. Oral Arg. at 23:53–24:10; R. 3-3, PageID 111, 112–13. Indeed, ultrasounds are "routine measures in pregnancy [and] viewed as 'medically necessary' for the mother and fetus." *Lakey*, 667 F.3d at 579. The physical invasiveness of the sonogram, as noted by the Dissent, *see* Dissent at 35, 46 n.9, therefore, is no reason to characterize the procedure as an unwarranted invasion of bodily integrity; indeed, the Dissent cites authority "finding that up to 98% of U.S. abortion facilities use an ultrasound to date the pregnancy," *id.* at 46. Also, Kentucky is hardly alone among the States in finding ultrasounds to be relevant: according to *amici*, twenty-four other States have enacted informed-consent laws that involve ultrasounds.[8]

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[8] Three of them track more closely with H.B. 2 and require physicians to perform, display, and describe ultrasounds before an abortion. La. Stat. § 40:1061.10(D), *invalidated by June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 30 (M.D. La. 2017) (holding statute was an *undue burden*), *rev'd sub nom. June Med. Servs. LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018); Tex. Health & Safety Code § 171.012(a)(4); Wis. Stat. § 253.10.

Although *Casey* did not involve the displaying of an ultrasound, its facts are not "a constitutional ceiling for regulation of informed consent to abortion, [but] a set of principles to be applied to the states' legislative decisions." *Lakey*, 667 F.3d at 579. The *Casey* statute required doctors to inform patients of the unborn life's gestational age and offer them materials further describing unborn life's development at a given gestational age. *See Casey*, 505 U.S. at 881, 902; *Lakey*, 667 F.3d at 575 n.2, 578; *Casey*, 744 F. Supp. at 1349. The sonogram requirements of H.B. 2 provide "materially identical" information. *See A Woman's Choice–East Side Women's Clinic v. Newman*, 305 F.3d 684, 684–85 (7th Cir. 2002) (holding informed- consent law requiring abortion doctors to offer pictures, drawings, and dimensions of the unborn life within patients was "materially identical" to the *Casey* statute's requirements); *see*

Seven require doctors to perform ultrasounds and offer patients the chance to view them. Ala. Code § 26-23A-6; Ariz. Rev. Stat. § 36-2156; Fla. Stat. § 390.0111; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1, *invalidated by Planned Parenthood of Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 212 (Iowa 2018) (holding 72-hour waiting period was an *undue burden*); Miss. Code § 41-41-34; Va. Code § 18.2-76. Ten require doctors to offer the patient the chance to view the ultrasound image if they perform one. Ark. Code § 20-16-602; Ga. Code § 31-9A-3; Idaho Code § 18-609; Kan. Stat. § 65-6709; Mich. Comp. Laws § 333.17015; Neb. Rev. Stat. § 28-327 (requiring doctors to display the sonogram "so that the woman may choose to view [it]"); Ohio Rev. Code § 2317.561; S.C. Code § 44-41-330; Utah Code § 76-7-305 (requiring doctors to display the sonogram "to permit the woman . . . to view the images, if she chooses to"); W. Va. Code § 16-2I-2. Four require doctors to offer women the chance to view—and thus receive— an ultrasound. Mo. Rev. Stat. § 188.027; N.D. Cent. Code § 14-02.1-04; S.D. Codified Laws § 34-23A-52; Wyo. Stat. § 35-6-119.

also *Lakey*, 667 F.3d at 578 (explaining that disclosures like those in H.B. 2 "are not different in kind" than the disclosures in *Casey*). A sonogram depicts unborn life in further detail at the current gestational age—information no less relevant to the patient's decision than were the materials at issue in *Casey*. In fact, because of its individualized nature, a sonogram provides even *more* relevant information for the patient's decision than any of the required materials at issue in *Casey*. Whereas the Pennsylvania law provided information about unborn life *generally*, H.B. 2 directs that the patient receive *specific*, real-time images of herself and the unborn life within her.[9] H.B. 2 also allows the doctor to explain, in her or his own words, the sonogram, as well as the auscultation, thus further ensuring that the information is tailored to the patient's specific circumstances.

Sonograms of unborn life were uncommon when *Roe* was decided. Writing for the *Roe* Court, Justice Blackmun was limited by words on paper—sometimes using medieval descriptions such as "quickening" or "infused with a 'soul' or 'animated'"—to explain when life had been understood to come into being. *Roe*, 410 U.S. at 133.

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[9] Contrary to EMW's assertion at oral argument, the information's pictorial medium fails to take H.B. 2 out of the realm of informed consent. *See A Woman's Choice–East Side Women's Clinic*, 305 F.3d at 684–85; *see also* F. Rozovsky, Consent to Treatment: A Practical Guide 2-82 (5th ed. 2018) (discussing the use of videos, pictures, and slides to obtain informed consent). This means of sharing information simply is more scientifically up to date. *Lakey*, 667 F.3d at 578.

But in the Cyber Age,[10] words tell only part of a story. For today's Posterity[11]—the Gen-X, Millennial, and Gen-Z generations, whose first picture of themselves commonly comes from a sonogram, and who increasingly turn to photos and videos to share information[12]—one can hardly dispute the relevance of sonogram images for twenty-first-century informed consent.

Under the lower level of scrutiny mandated by *Casey* and *NIFLA*, there is no burden placed on the State to justify that its prior regulation "was defective in facilitating informed consent" or that "H.B. 2 filled any gaps in existing informed-consent legislation," as the Dissent apparently believes the State must show, see Dissent at 48, 52. No such requirements were imposed on Pennsylvania to justify its statute in *Casey*. But even if the Commonwealth bore such a burden, it would easily meet it here. It is not difficult to conclude that the particularized visual and audible disclosures mandated by H.B. 2 provide more relevant information for informed consent than was provided

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[10] *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (explaining "that the Cyber Age is a revolution of historic proportions [and that] we cannot appreciate yet its full dimensions and vast potential to alter how we think, *express ourselves*, and define who we want to be" (emphasis added)); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (discussing the Cyber Age).

[11] U.S. Const. pmbl.

[12] *See, e.g.*, Farhad Manjoo, *While We Weren't Looking, Snapchat Revolutionized Social Networks*, N.Y. Times (Nov. 30, 2016), https://www nytimes.com/2016/11/30/technology/while-we-werent-looking-snapchat-revolutionized-social-networks.html.

by the less patient-specific, verbal and written disclosures of the earlier Kentucky abortion-informed-consent statute, KRS § 311.725.

In sum, H.B. 2, like the Pennsylvania statute in *Casey*, provides truthful, non-misleading, and relevant information aimed at informing a patient about her decision to abort unborn life. Therefore, although the statute requires doctors to disclose certain truthful and non-misleading information relevant to the abortion procedure, it does not violate their First Amendment rights because the required disclosures are incidental to the Commonwealth's regulation of doctors' professional conduct.

IV.

This result is in line with two other circuits that have faced First Amendment challenges to similar abortion-informed-consent statutes. The Fifth and Eighth Circuits read *Casey*, as well as *Gonzales*, to establish the same First Amendment test for truthful, non-misleading, and relevant informed-consent disclosures that we apply here.

In *Lakey*, the Fifth Circuit addressed a Texas informed-consent statute requiring the performance, display, and description of an ultrasound as well as the auscultation of the unborn life's heartbeat. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). The Fifth Circuit rejected a First Amendment challenge to the statute, explaining that *Casey* upheld the constitutionality of informed-consent laws that require disclosure of truthful, non-misleading, and relevant information, including facts about the unborn life, with no heightened

scrutiny applying to such laws:

> First, informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures. Second, such laws are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling "ideological" speech that triggers First Amendment strict scrutiny. Third, "relevant" informed consent may entail not only the physical and psychological risks to the expectant mother facing this "difficult moral decision," but also the state's legitimate interests in "protecting the potential life within her."

Lakey, 667 F.3d at 576 (footnote omitted) (quoting *Casey*, 505 U.S. at 871).

Applying this understanding of *Casey*, the Fifth Circuit held that requirements that doctors perform, display, and describe the ultrasound and auscultate the heartbeat—though more technologically advanced than the mandated disclosure that *Casey* allowed—were the "epitome" of truthful, non-misleading, and relevant information that *Casey* permits:

> To belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information. *They are not different in*

> *kind, although more graphic and scientifically up-to-date, than the disclosures discussed in Casey*—probable gestational age of the fetus and printed material showing a baby's general prenatal development stages. Likewise, the relevance of these disclosures to securing informed consent is sustained by *Casey* and *Gonzales*, because both cases allow the state to regulate medical practice by deciding that information about fetal development is "relevant" to a woman's decision-making.

Id. at 577–78 (emphasis added).

Because the Texas statute at issue in *Lakey* satisfied the criteria for an abortion-informed-consent statute (that is, the statute mandated only truthful, non-misleading, and relevant disclosures related to an abortion), the Fifth Circuit determined that no heightened scrutiny of the statute was warranted under *Casey* and reversed the district court's determination otherwise:

> The [*Casey*] plurality response to the compelled speech claim is clearly not a strict scrutiny analysis. It inquires into neither compelling interests nor narrow tailoring. The three sentences with which the Court disposed of the First Amendment claims are, if anything, the antithesis of strict scrutiny. Indeed, the plurality references *Whalen v. Roe*, in

> which the Court had upheld a regulation of medical practice against a right to privacy challenge. The only reasonable reading of *Casey*'s passage is that physicians' rights not to speak are, when part of the practice of medicine, subject to reasonable licensing and regulation by the State. This applies to information that is truthful, nonmisleading, and relevant . . . to the decision to undergo an abortion.
>
> . . . .
>
> Applying to [the statute] the principles of *Casey*'s plurality, the most reasonable conclusion is to uphold the provisions declared as unconstitutional compelled speech by the district court.

Id. at 575, 577 (cleaned up).

When faced with an analogous issue, the Eighth Circuit read the Supreme Court's precedent similarly. The Eighth Circuit's decision in *Rounds* involved a South Dakota informed- consent statute. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc). The statute required physicians to give patients a written statement providing, among other things, "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being," "[t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and the laws of South

Dakota," "[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated," and "[a] description of all known medical risks of the procedure . . . including . . . [d]epression and related psychological distress [and] [i]ncreased risk of suicide ideation and suicide." *Id.* The statute defined "Human being" as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." *Id.* at 727. The statute further required physicians to certify in writing that they provided all this information to the patients. *Id.* Also, the patients had to sign a written statement showing that the abortion doctors had complied with the statute's disclosure requirements and provided them with the required information. *Id.*

Sitting en banc, the Eighth Circuit explained that Supreme Court precedent likely allowed the statute to stand because it mandated the doctor provide only "truthful, non-misleading information relevant to a patient's decision to have an abortion":

> *Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion. Therefore,

> Planned Parenthood cannot succeed on the merits of its claim that [the statute] violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient's decision to have an abortion.

Id. at 734–35. Because Planned Parenthood's evidence did not establish a likelihood of proving that the statute required "anything but truthful, non-misleading and relevant [information] to the patient's decision to have an abortion," the Eighth Circuit vacated the district court's preliminary injunction. *Id.* at 738.

The Fifth and Eighth Circuits' interpretations of *Casey* support our holding today. Like the statutes in those circuits' cases, H.B. 2 provides truthful, non-misleading, and relevant information for a decision whether to abort unborn life. Like these other circuits, we find no First Amendment infirmity.

V.

In challenging H.B. 2, EMW echoes Planned Parenthood's unsuccessful arguments in *Casey*. EMW contends that H.B. 2 warrants heightened scrutiny because it (1) compels ideological speech, (2) interferes with the doctor-patient relationship, and (3) emotionally affects patients.

Ideological Speech. *Casey* forecloses EMW's attempt to invoke heightened scrutiny by claiming that H.B. 2 requires the doctors to engage in ideological speech. The statute in *Casey* required doctors to disclose facts about the abortion

procedure, the unborn life within a patient, and options available to a patient if she carried that life to term. Planned Parenthood argued that the statute mandated ideological speech that warranted heighted scrutiny. Brief of Petitioners and Cross-Respondents, *Casey*, 505 U.S. 833 (1992) (No. 91-744), 1992 WL 12006398 at *54 ("*Casey* Br."). The *Casey* plurality acknowledged that the disclosure requirements were targeted at causing patients to "choose childbirth over abortion." *Casey*, 505 U.S. at 878. Yet, the plurality applied no heightened scrutiny to Pennsylvania's statute because of the alleged ideological nature of the required disclosures. So *Casey* rejected EMW's rationale for applying heightened scrutiny.[13]

The Fourth Circuit, however, disagreed that *Casey* forecloses the ideological argument. In *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), decided before *NIFLA*, the Fourth Circuit struck down as compelled ideological speech a North Carolina statute similar to H.B. 2. *Id.* at 246, 255–56. We decline to follow *Stuart*, however, because it gave insufficient regard to the First Amendment analysis

[13] Contrary to what the Dissent maintains, a State is entitled to regulate informed consent with respect to the abortion even when it has a political "goal" to protect unborn life. *See* Dissent at 53. The *Casey* joint opinion made that point clear when it allowed for mandated disclosures intended by the State to further its "profound interest in potential life" and "to persuade the woman to choose childbirth over abortion." *See* 505 U.S. at 878 ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.").

in *Casey* that the Court clarified and adopted as the majority view in *NIFLA*.

Stuart's basis for applying heightened scrutiny is called into question by Supreme Court precedent. *Stuart* applied heightened scrutiny because the facts disclosed by a sonogram have "moral or ideological implications." *Id.* at 246. However, the "moral or ideological" label has not been used by the Supreme Court as a reason to apply heightened scrutiny to mandated factual disclosures in the informed-consent context. Nor has the Supreme Court considered on what "side of the abortion debate" required factual disclosures fall in deciding the level of scrutiny to apply to abortion-informed-consent laws, as did the Fourth Circuit, *see id.*[14] And unlike the Fourth Circuit, the Supreme Court has not been concerned that facts might "convey[] a particular opinion" like

[14] It is not at all clear that the facts mandated to be disclosed by an H.B. 2 sonogram fall on only one side of the abortion debate. For example, abortions are increasingly sought to terminate lives likely to be born with disabilities. *See Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018) (granting a preliminary injunction against an Ohio law criminalizing abortions performed because of fetal indication of Down Syndrome), appeal docketed, No. 18-3329 (6th Cir. Apr. 12, 2018); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017) (granting a permanent injunction against a similar law), *aff'd*, 888 F.3d 300 (7th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3172 (Oct. 12, 2018) (No. 18-483); 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, 2007, 4:00 PM), https://www.cbsnews.com/news/down-syndrome-iceland/?linkId=40953194. An ultrasound showing the likelihood of a disability could be interpreted by some people, but not all, as a reason to have an abortion.

"convinc[ing] women seeking abortions to change their minds." *Id.*

Instead, under *Casey*, what matters for First Amendment purposes is whether the disclosed facts are truthful, non-misleading, and relevant to the procedure, not whether they fall on one side of the debate, and not whether they influence a woman to keep the child. *Casey*, 505 U.S. at 882–84; *see also Lakey*, 667 F.3d at 575–77; *Rounds*, 530 F.3d at 734–35. In *Stuart* the Fourth Circuit tried to distinguish *Casey* by reasoning that the *Casey* statute was not ideological: "[i]nforming a patient that there are state-issued materials available is not ideological, because the viewpoint conveyed by the pamphlet is clearly the state's—not the physician's." *Stuart*, 774 F.3d at 253. But the same is true here. H.B. 2 allows doctors to tell patients that the Commonwealth requires this information. The record shows that's exactly what they do. R. 55, PageID 699. Thus, the doctors are just as free as those subject to the statute in *Casey* to clarify that the mandated disclosures come from the State not the doctors themselves.

After holding that the North Carolina statute compelled ideological speech, the Fourth Circuit in *Stuart* adopted a "sliding-scale" test first applied by the Ninth Circuit in *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2013) (holding professional speech is viewed "along a continuum"). The Fourth Circuit then asserted the statute "reside[d] somewhere in the middle on that sliding scale" because it regulated medical treatment but also regulated speech, *Stuart*, 774 F.3d at 248, thus justifying intermediate scrutiny, *id.* at 249. This "sliding scale" test based on ideological speech,

however, appeared nowhere in *Casey*.

Nor did this test appear in *NIFLA*. In fact, the *NIFLA* Court, after citing the Ninth Circuit in *Pickup* as an example of "[s]ome Courts of Appeals" that "have recognized 'professional speech' as a separate category of speech that is subject to different rules," *NIFLA*, 138 S. Ct. at 2371, did *not* adopt any of the "different rules" applied in *Pickup*. Instead, the Court explained that, generally, it is the compulsion of a message—not whether the compulsion is of an ideological nature—that alters the content of speech and therefore dictates a single heightened- scrutiny standard, with no sliding scale. *NIFLA*, 138 S. Ct. at 2371–72. However, as discussed, the Supreme Court explicitly carved out two exceptions to that general test that do not call for heightened scrutiny. As also already explained, H.B. 2 falls into at least one of those exceptions.

We therefore find that *Stuart* is unpersuasive in light of *NIFLA*, and we decline to follow the Fourth Circuit.[15] If at least one of the two exceptions noted in *NIFLA* applies, there is no Supreme Court authority for looking to whether

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[15] The district court also relied largely on *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc), which invalidated a Florida law *restricting* doctors from asking patients about gun ownership in part because of concerns over interrupting the flow of information between doctor and patient. *Id.* at 1313. Those concerns are not present here: H.B. 2 serves to increase the flow of information between doctor and patient. Also, unlike the statute in *Wollschlaeger*, H.B. 2 restricts no speech that the doctor wishes to impart to the patient. More important, however, *Wollschlaeger* did not involve patients' informed consent.

the speech has ideological implications and applying a "sliding scale" that may result in intermediate scrutiny.

Doctor-Patient Relationship. As for EMW's second argument, H.B. 2 does not interfere with the doctor-patient relationship any more than other informed-consent laws. "[I]nformed consent is generally required for medical treatment," *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 269 (1990), and this requirement "is firmly entrenched in American tort law," *NIFLA*, 138 S. Ct. at 2373 (citations and internal quotation marks omitted). "[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." *Cruzan*, 497 U.S. at 277. This right, grounded in principles of self-determination, may "demand[] a standard set by law for physicians *rather than one which physicians may or may not impose upon themselves*." *Canterbury v. Spence*, 464 F.2d 772, 784 (D.C. Cir. 1972) (emphasis added); *see* F. Rozovsky, Consent to Treatment: A Practical Guide 2-8 (5th ed. 2018) (explaining that informed-consent standards are set by "state legislation, regulations, and case law" in addition to standards among professional groups).[16] "[T]o safeguard the patient's interest in achieving [her or] his own determination on treatment, the law must itself set the standard for adequate disclosure." *Canterbury*, 464 F.2d at 787.

The principle that informed-consent requirements may be created by law, as opposed to

[16] The Supreme Court has cited earlier editions of this treatise. *See, e.g.*, *Cruzan*, 497 U.S. at 269.

merely medical-profession custom, applies to all medical procedures, including abortion. As the Supreme Court has instructed, "an informed-consent requirement in the abortion context [is] 'no different from a requirement that a doctor give certain specific information about any medical procedure.'" *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (quoting *Casey*, 505 U.S. at 884). "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Id.* As part of States' regulation of the medical profession, they may require doctors to provide information to their patients to ensure patients can give their informed consent for an abortion, like for any other medical procedure. *See Casey*, 505 U.S. at 884.

The district court cited testimony that the mandated disclosures of H.B. 2 are inconsistent with medical standards because (1) their mandatory nature—that is, the Commonwealth's requiring their actual disclosure rather than requiring their being offered to be disclosed—makes them contrary to the customary standard of care for informed consent, and (2) they provide information that the American College of Obstetricians and Gynecologists ("ACOG") and the National Abortion Federation do not consider to be necessary for informed consent. *See EMW Women's Surgical Ctr.*, 283 F. Supp. 3d at 644.

As for the first point, most legally enacted informed-consent disclosures could be subject to the same criticism because they require the doctor to disclose, rather than simply offer to disclose,

information.[17] The *Casey* plurality explained that States can require doctors to *give* information to patients about abortion just like it can require doctors to *give* information to an organ donor about that procedure. *Casey*, 505 U.S. at 882–83. Also, the very reason that the required disclosure in *NIFLA* did "not facilitate informed consent" was because it *provided* no information about the risks or benefits of a medical procedure. *NIFLA*, 138 S. Ct. at 2373. In other words, the doctrine of informed consent does not stop at offering the opportunity for the information. It applies equally when a doctor must actually disclose the information. True, for some information, the *Casey* statute required doctors to inform patients that it was available. *See Casey*, 505 U.S. at 881. But it also mandated information actually be given to patients. *Id.* H.B. 2 is no different.[18]

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[17] For example, other Kentucky informed-consent and physician-disclosure requirements require information actually to be given when (1) diagnosing and treating breast cancer, KRS § 311.935; (2) performing acupuncture, KRS § 311.678; (3) testing for HIV infection, KRS § 214.625; and (4) performing mammograms, KRS § 214.555. An example of this at the federal level is 42 C.F.R. §§ 441.257–.258, which requires medical providers actually disclose—not just offer to disclose—the risks, benefits, and alternatives of sterilization procedures to ensure a patient's informed consent to be sterilized.

[18] The district court's first point also overlooks that H.B. 2 allows patients to decline to receive the information, by not viewing the sonogram or listening to the verbal disclosures, and asking the doctors to turn off the heartbeat. In fact, that H.B. 2 provides patients with the choice not to receive the information is the very reason the district court held that H.B. 2 does not go far enough to meet Kentucky's goal of informing the patients. *EMW Women's Surgical Ctr.*, 283 F. Supp. 3d at 645–46. In other words, according to the district court, if the Kentucky

The second point considered significant by the district court—certain medical groups' views regarding whether a particular mandated truthful disclosure is necessary for informed consent—is not the type of evidence deemed material by the Supreme Court in reviewing abortion-informed-consent statutes. Indeed, the Supreme Court has upheld abortion regulations that were directly contrary to alleged medical-profession custom and that certain medical groups did not consider to be necessary—laws that those groups asserted were inconsistent with accepted standards of care for informed consent. For example, in *Casey,* the district court found that "[t]he informed consent requirements of the [Pennsylvania law] represent a substantial departure from the ordinary medical requirements of informed consent," *Casey*, 744 F. Supp. at 1351; that "[c]ontent-based informed consent is contrary to the standard medical practice that informed consent be specifically tailored to the needs of the specific patient," *id.* at 1353; and that various provisions of the Pennsylvania law conflicted with official positions of

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legislature wished to better inform patients about their abortion procedure, it should have *required* the patients receive the information, rather than allowing them to choose not to do so. We disagree with this conclusion. That H.B. 2 allows women to avoid receiving the disclosures does not detract from the statute's purpose to better inform; it merely reflects the Commonwealth's recognition that, ultimately, it is the woman's choice as to whether to consider those disclosures in making her decision. And even if the disclosures do not change many minds, either because some patients are not persuaded by them or because some patients ignore them, the Commonwealth still is entitled under *Casey* to require doctors to provide them. *See Casey*, 505 U.S. at 882–84; *Lakey*, 667 F.3d at 575–77; *Rounds*, 530 F.3d at 734–35.

ACOG and the American Public Health Association, *see id.* at 1351–52, 1355, 1360. Still, the Supreme Court in *Casey* upheld the law's informed-consent requirements. *See Casey*, 505 U.S. at 884.

Similarly, in *Gonzales*, the Court upheld a statute prohibiting a form of partial-birth abortions, despite the district court's factual findings that the law was contrary to certain medical-profession views, including that ACOG "told Congress several times that the procedure should not be banned," *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1011 (D. Neb. 2004), and "that Congress'[s] Finding—that a medical consensus supports the ban because partial-birth abortions are unnecessary—is both unreasonable and not supported by substantial evidence," *id.* at 1015.

If the validity of an informed-consent law depended on whether doctors agreed with the law—or whether the law required disclosures that, with no law, the doctor would disclose anyway—there would be no need for the law to supplement custom. *See Canterbury*, 464 F.2d at 784 ("[T]o bind the disclosure obligation to medical usage is to arrogate the decision on revelation to the physician alone."). As *Casey* and *Gonzales* establish, the constitutionality of an abortion regulation is based on the relevant legal standard as interpreted by the Supreme Court— here, whether the mandated disclosures are truthful, non-misleading, and relevant to the medical procedure—and not necessarily whether the law is consistent with medical-profession custom or views of certain medical groups.

The Dissent, therefore, is mistaken to argue that we "must naturally turn to the medical community" to ascertain the "contours of informed consent" to determine whether a regulation is in accord with "medical practice" or "medical purpose." Dissent at 37. Following that approach would require us, in effect, to hold that a State must surrender its authority to regulate informed consent to private parties. This method, however, would conflict with the Court's recognition in *Gonzales* that the State may regulate informed consent in the abortion context in the same way that it regulates informed consent in other medical contexts. *See* 550 U.S. at 163. The validity of this regulation does not turn on what any private party claims is the norm for the practice of medicine. *See Canterbury*, 464 F.2d at 784, 787. Instead, we defer to the legislature's determination of which informed-consent disclosures are required, provided that they are relevant, truthful, and non-misleading. This deference does not make our court a player in policy making, as the Dissent contends, *see* Dissent at 44, but rather preserves our role as umpires who apply the rules enacted by the People's representatives. If the medical groups cited by the Dissent want the legislated rules of informed consent to change, they should address their arguments to those elected representatives. *Casey* makes clear, however, that the Dissent is incorrect to contend that opposition by medical groups to informed-consent rules necessarily renders those rules invalid under the First Amendment.

The reasoning in *Casey* also shows that H.B. 2 does not impermissibly infringe on abortion doctors' autonomy. Indeed, as noted, the *Casey* plurality

overruled the Court's earlier holdings that requiring doctors to give certain information to all patients impermissibly intruded upon doctors' discretion. *See Casey*, 505 U.S. at 881; *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 762 (1986).

To be sure, H.B. 2 does require the disclosure of truthful, non-misleading, and relevant facts that otherwise the doctor might not disclose. However, to the extent that it matters to the First Amendment analysis,[19] nothing prevents the doctor from informing the patient that the factual disclosures of H.B.2 are required by the Commonwealth rather than made by the doctor's choice. *See generally Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (rejecting argument that regulations abridged free-speech rights of the grantee's staff and noting that "[n]othing in [the regulations] requires a doctor to represent as [her or] his own any opinion that [she or] he does not in fact hold"); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 534 (8th Cir. 1994) (upholding abortion-informed-consent statute and observing that it allowed doctors to "disassociate themselves" from the required information).

It is also true that H.B. 2 differs from the Pennsylvania statute in *Casey* in that H.B. 2 does not have an express provision, as did the *Casey* statute, excusing a doctor from providing the mandated disclosure "if he or she can demonstrate

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[19] *See Rounds*, 530 F.3d at 737 (concluding doctor's ability to disassociate herself or himself from disclosures is irrelevant to the compelled-speech analysis if disclosures are truthful and non-misleading).

by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." *Casey*, 505 U.S. at 883–84. Although the *Casey* joint opinion noted this statutory provision in the context of discussing "a constitutional right of privacy between a pregnant woman and her physician," *id.* at 883, there is no indication that the plurality considered the provision to be significant for its First Amendment review. To the extent that it was, we also must consider that a doctor need not comply with H.B. 2 if an abortion is medically necessary or in the case of a medical emergency, KRS § 311.727(5), and H.B. 2 has other provisions not contained in the *Casey* statute that effectively give the doctor the same discretion afforded to doctors under the *Casey* statute. For example, unlike the *Casey* statute, H.B. 2 imposes no obligation that the patient certify in writing that she has received certain mandated disclosures, *see id.* at 881, or even requires that the patient pay attention to the disclosures, and it imposes no penalty on the doctor if the patient ignores the disclosures the doctor is making, *see* KRS § 311.727(3). These provisions operate to allow a doctor who reasonably believes that the disclosures would result in a severely adverse effect on the patient, to inform the patient in the doctor's discretion that she need not listen to or view the disclosures.

Furthermore, H.B. 2 restricts no doctor from advising the patient to keep or abort the unborn life displayed or from providing any other opinion, medical or otherwise, that the doctor wishes to convey. *See generally Wollschlaeger v. Governor of*

Fla., 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) ("Importantly, however, the law [at issue in other cases] *did not restrict what the practitioner could say or recommend to a patient or client*." (emphasis added)). Indeed, the statute contains nothing that would prevent a doctor in her or his discretion from advocating to the patient in favor of an abortion.

Given these considerations, the requirements of H.B. 2 are no more of a regulation that departed from a medical group's definition of medical practice than the abortion-informed- consent law upheld in *Casey* and no more of a regulation of professional speech than many informed-consent and physician-disclosure laws enacted by Kentucky, other States, and the federal government.[20]

Emotional Effect on Patients. As for EMW's third argument—that the emotional effect of H.B. 2 on patients warrants heightened scrutiny—*Casey* again is instructive. In that case, the district court accepted Planned Parenthood's similar argument and held that the Pennsylvania informed-consent statute did not survive heightened scrutiny because the mandated information "will create the impression in women that the Commonwealth disapproves of the woman's decision" and "will create undesirable and unnecessary anxiety, anguish and fear." *Casey*, 744 F. Supp. at 1354. In this regard, the district court's factual finding in

[20] *See supra* note 17. Other examples of Kentucky mandating speech in the health-care context occur when (1) reporting tuberculosis, KRS § 215.590; (2) reporting abuse of adults and dependents, KRS §§ 209.030, 620.030; (3) displaying licenses, KRS § 311.470; and, of course, (4) performing an abortion, KRS §§ 311.725, 311.727.

Casey was like the district court's finding here, based on evidence cited by the Dissent, *see* Dissent at 49–50, that "H.B. 2 causes patients distress." *EMW Women's Surgical Ctr.*, 283 F. Supp. 3d at 645. We recognize the significance of the district court's finding regarding the negative emotional effect on certain patients, as well as its acknowledgment of declarations from several women who had undergone abortions and who stated that the mandated disclosures of H.B. 2 would have had a positive impact on their emotional health by persuading them not to have an abortion. R. 32-3, PageID 406–08; R. 32-4, PageID 410; R. 32-5, PageID 412–14. However, for purposes of this summary judgment determination, we need not and should not weigh the competing evidence of emotional effect, as the district court and Dissent appear to do.[21] Instead, the *Casey* plurality did not

[21] The Dissent states that "the Commonwealth did not controvert" testimony from a Texas resident against H.B. 2 based upon the emotional impact on her from disclosures required by a Texas informed-consent statute. Dissent at 35, 47. True, the Commonwealth did not dispute that particular patient's experience, but it is not accurate to conclude that the evidence of the emotional effect of the H.B. 2 disclosures is uncontroverted based on that testimony. To the contrary, several Kentucky residents submitted declarations attesting to beneficial emotional effects they would have experienced from disclosures mandated by H.B. 2 had they received them. R. 32-3, PageID 406–08; R. 32-4, PageID 410; R. 32-5, PageID 412–14. For example, one patient stated that if she had received the information required by H.B. 2, she "would never have gone through with the procedure" and that having not received that information makes her regret of the abortion "even more painful." R. 32-3, PageID 407. The Dissent's and district court's discounting of this testimony and other evidence submitted by the Commonwealth regarding emotional effect appears to involve the weighing of proof and credibility determinations not

view any finding regarding emotional effect as material to the level of First Amendment scrutiny of an informed-consent statute. Although the *Casey* district court's finding as to emotional effect was quoted by Planned Parenthood in its brief to the Supreme Court, *see Casey* Br. at *52, the controlling opinion in *Casey* did not make any note of this finding in its analysis of the doctors' First Amendment challenge. Instead, without mentioning emotional effect on patients at all, the *Casey* plurality reversed the district court's judgment that struck down the informed-consent statute.

Casey thus implicitly recognized that discomfort to the patient from the mandated disclosure of truthful, non-misleading, and relevant

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appropriate for summary judgment. Dissent at 50; *see Alspaugh v. McConnell*, 643 F.3d 162, 168 (6th Cir. 2011) ("When reviewing a summary judgment motion, credibility judgments and weighing of the evidence are prohibited." (quotation omitted)); *Ingram v. City of Columbus*, 185 F.3d 579, 586 (6th Cir. 1999) ("[O]n summary judgment, neither the district court nor this Court may make credibility determinations or weigh the evidence." (citation omitted)). Unlike in *Casey*, where the district court made its findings of fact after a bench trial, *Casey*, 505 U.S. at 845; *Casey*, 744 F. Supp. at 1325–26, the district court here was ruling on summary judgment, *see EMW Women's Surgical Center*, 283 F. Supp. 3d at 648, and therefore was not permitted to make findings of fact based on the disputed evidence. And we further note that on cross-motions for summary judgment this court must review the issues of material fact in the light most favorable to the party whose motion did not prevail in the district court. *See B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 598 (6th Cir. 2001). However, as explained above, ultimately fact issues regarding emotional effect on patients are not material to resolution of the relevant First Amendment issue of whether the disclosures of H.B. 2 are truthful, non-misleading, and relevant to an abortion.

information does not make an informed- consent law invalid under the First Amendment. Indeed, discomfort may be a byproduct of informed consent itself. *See generally Gonzales*, 550 U.S. at 159 ("Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense."). This may be especially true in the abortion context. For, as the Supreme Court has explained, "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

Providing sonogram and auscultation results to the patient furthers the State's legitimate interest, recognized in *Casey*, of ensuring that the patient understands the full implications of her decision, including the impact on unborn life. Under *Casey*, the State may decide that its interest in having the unborn life actually be seen and heard before being aborted, and potential negative emotional consequences to the patient from not having received that disclosure, justify the incidental regulation of professional speech and outweigh the risk of negative emotional impact on the patient from the disclosure (even assuming the latter consideration is relevant to the First Amendment analysis and was a permissible finding for summary judgment given the disputed factual record). This conclusion follows from *Casey*'s reasoning that the State has "an important interest in potential life," *Casey*, 505 U.S. at 882,[22] and that

[22] *See also Gonzales*, 550 U.S. at 157 (emphasizing that a State "may use its voice and its regulatory authority to show

there is the risk to the patient's psychological health from having made such a profound decision without adequate disclosure of its consequences, including the impact on unborn life, beforehand:

> It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Casey, 505 U.S. at 882.

EMW has offered no Supreme Court authority to contradict *Casey*'s teaching. At oral argument, EMW cited only *Hill v. Colorado*, 530 U.S. 703 (2000), as support for our considering the impact of H.B. 2 on the listening patients as part of the First Amendment analysis. *Hill* explained that the effect of certain speech on unwilling listeners can be a factor when determining whether *restricting* speech is constitutional. *See* 530 U.S. at 716 ("[T]he protection afforded to offensive messages does not

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its profound respect for the life within the woman"); *id.* at 158 ("[T]he State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.").

always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."). *Hill*, however, did not involve a situation where, as here, *no* speech—fact or opinion—is restricted. The only issue here is whether the government may compel *more* disclosures of a strictly truthful, non-misleading, and relevant nature.[23]

More fundamentally, though, *Hill* is distinguishable because it did not involve informed consent to a medical procedure. *Hill* concerned speech to people on public streets and sidewalks within 100 feet of health-care facilities. 530 U.S. at 707. The informed-consent exception to heightened

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[23] *Hill* also explained that a reason we allow protestors to display vulgar language is because viewers can avert their eyes to avoid more offense. 530 U.S. at 716 (citation omitted). The information provided by H.B. 2 is not vulgar speech, but still, if the patient desires not to receive the information mandated by H.B. 2, she may avert her eyes from the ultrasound image, not listen to the doctor's description of the image, and ask the doctor to turn off the heartbeat. *See Summit Med. Ctr. of Ala., Inc. v. Riley*, 274 F. Supp. 2d 1262, 1272 (M.D. Ala. 2003) (rejecting unwilling-listener challenge to abortion-informed-consent statute because the statute did not require the patient to listen). Unlike in *Casey* and *Rounds*, this appeal involves no challenge to H.B. 2 as an undue burden on a woman's substantive due process right to choose an abortion. The only challenge here is alleged unconstitutional compelled speech of the abortion doctors. We must be careful, therefore, not to upset *Casey*'s balance between States' ability to regulate the medical profession and women's rights. *See Lakey*, 667 F.3d at 577 ("If the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives. *Casey*, however, rejected any such clash of rights in the informed consent context.").

scrutiny simply did not apply, as *NIFLA* confirms. Because H.B. 2, like the *Casey* statute, provides truthful, non-misleading, and relevant information about an abortion, it helps ensure informed consent to that procedure. It therefore is not subject to heightened scrutiny and complies with the First Amendment under *NIFLA* and *Casey*.

VI.

Finally, a few words in response to the Dissent's conclusion, based on physician testimony that is disputed by other physician testimony,[24] that

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[24] In Iaddressing standard-of-care issues, such as whether H.B. 2 "cause[s] patient harm," whether it has a "medical purpose," and whether it "facilitates informed consent as part of the practice of medicine," Dissent at 35, the Dissent and district court again appear to make credibility determinations and to weigh the evidence in a manner that is contrary to the summary judgment standard. It is *not* undisputed that H.B. 2 is "at odds with the prevailing standard of care," as the Dissent contends. *See* Dissent at 35. To the contrary, the Commonwealth's experts (John W. Seeds, M.D., FACOG, the retired chair of the Department of Obstetrics and Gynecology at Virginia Commonwealth University, and W. David Hager, M.D., FACOG, an obstetrician and gynecologist who practices in Lexington, Kentucky) submitted declarations that H.B. 2 complies with existing standards of medical care. *See generally* R. 32-1; R. 32-2. For example, Dr. Seeds stated: "Far from impairing the physician-patient relationship, the Act simply conforms the law to the existing national standards of care for the diagnosis of pregnancy and the obtaining of a knowing and voluntary consent of the patient before the pregnancy is surgically or medically terminated through elective abortion." R. 32-1, PageID 363. We also note that Dr. Seeds offered this expert opinion with the understanding that the disclosures required by H.B. 2 are mandatory. *Id.* at 349. The district court acknowledged Dr. Seeds's (and Dr. Hager's) opinion "that H.B. 2 conforms to existing national standards of care," *EMW Women's Surgical Center*, 283 F. Supp. 3d at 643,

H.B. 2 "would require physicians to harm their patients with 'no medical purpose,'" *id.* at 37, and the Dissent's statement that "[i]t is transparent that furthering informed consent was not the aim of the Commonwealth—nor will it be achieved by H.B. 2," *id.* at 52.

First, in order to make the claim that informed consent is a pretextual and not the actual reason for H.B. 2, the Dissent engages in a methodology that we respectfully submit is inconsistent with *Casey*. The Dissent argues that "H.B. 2 is not coterminous with the medical practice of informed consent. It should not receive deferential review because it regulates the content of physician speech, not the practice of medicine." Dissent at 44.

The Dissent's approach departs from with how the *Casey* joint opinion reviewed the informed-consent statute in that case. The plurality considered mandated informed-consent disclosures regarding unborn life to be an incidental regulation of professional speech that *was*engaged in as "part of the practice of medicine." *NIFLA*, 138 S. Ct. at 2373. In *Casey*, as here, certain private medical organizations argued, and the district

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but then dismissed that testimony as "undermined by the testimony given at the hearing" by EMW's witnesses, *id.* Such weighing of evidence regarding national standards of care appears inappropriate at summary judgment, but ultimately a factual finding in this area is not material to the relevant legal issue. As explained above, the First Amendment analysis of an informed-consent statute turns on whether the mandated disclosure is truthful, non-misleading, and relevant, not whether the disclosure is, or is not, currently embodied in the customary standard of medical care.

court found, that the mandated disclosures were inconsistent with informed-consent custom. But that argument and lower court finding did not cause the *Casey* plurality to conclude that the disclosures were somehow not part of the practice of medicine and therefore subject to heightened scrutiny. Nor did *Casey* question the motives of the legislature. Instead, the plurality accepted as "legitimate" that the legislature may have the motive of "protecting the life of the unborn" in fashioning informed-consent requirements for the abortion procedure. *See Casey*, 505 U.S. at 882–83. This motive did not call for heightened scrutiny in *Casey*. Nor should it in this case.

Furthermore, the reasoning in *Casey* establishes that H.B. 2 does indeed legitimately facilitate informed consent and serve a medical purpose that does not harm the patient. To give the patient more information that is truthful, non-misleading, and relevant to a medical procedure is the epitome of ensuring informed consent. *See Casey*, 505 U.S. at 882; *Lakey*, 667 F.3d at 579; *Rounds*, 530 F.3d at 735. A sonogram and heartbeat auscultation of the unborn life inside the patient are disclosures directly pertinent to whether to obtain a procedure to abort that unborn life. If we were to hold that a State may not require such disclosures, we would essentially be concluding that women must be shielded and protected from this up-to-date medical information, that women are unable to or should not be required to process it. This conclusion is incompatible with the concept of personal choice under *Casey*. *See Casey*, 505 U.S. at 883–84; *Lakey*, 667 F.3d at 579 ("Denying [a woman] up to date medical information is more of an abuse to her

ability to decide than providing the information."). *Casey* recognized that a State may require a physician to inform the patient of the impact on unborn life and that facts relating to this impact are among the disclosures that may be part of informed consent for an abortion.

VII.

Shifting from the First Amendment to the Eleventh, General Beshear argues that he is not a proper party to this matter. "[A] suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984) (citation omitted). That said, one "important exception" exists for suits "challenging the constitutionality of a state official's *action*." *Id.* (citing *Ex parte Young*, 209 U.S. 123 (1908)) (emphasis added). The district court held that General Beshear falls into this exception because he has the "necessary authority" to enforce H.B. 2. *EMW Women's Surgical Ctr.*, 283 F. Supp. 3d at 647–48. But General Beshear argues that "an attorney general's status as the chief law enforcement officer of the state is not a sufficient connection" to fall into this exception. We agree with him.

State officials who are "clothed with some duty in regard to the enforcement of the laws of the state, and *who threaten and are about to commence proceedings* . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Ex parte Young*, 209 U.S. at 156 (emphasis added). However, this exception to

sovereign immunity created in *Ex parte Young* has been read narrowly. *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996). We have held that it "does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute." *Id.* (citations omitted). There must be "a realistic possibility the official will take legal or administrative actions against the plaintiff's interests." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015) (citing *Deters*, 92 F.3d at 1415). General enforcement authority is insufficient. *Id.* (citation omitted).

H.B. 2 and its penalty provision, in contrast with other statutes, do not delegate specific enforcement power to any single state actor. KRS §§ 311.727, 311.990(33). Multiple local prosecutors—the Commonwealth's and county attorneys—have the duty to enforce H.B. 2.

True, the Attorney General is "the chief law officer of the Commonwealth" with a responsibility to "exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment." KRS § 15.020. Kentucky law permits the Attorney General to defend a statute's constitutional validity, but it also gives her or him discretion. KRS § 418.075(1); *Commonwealth v. Hamilton*, 411 S.W.3d 741, 751 (Ky. 2013). However, Kentucky law does not require the Attorney General to represent the Commonwealth "where it is made the duty of the Commonwealth's attorney or county attorney" instead. KRS § 15.020. That is what we have here.

Each Commonwealth's attorney must "attend to all civil cases and proceedings in which the Commonwealth is interested in the Circuit Courts of [her or] his judicial circuit." KRS § 69.010(1). The county attorneys must do the same within their counties. KRS § 69.210(4)(a). Both must investigate the condition of unsatisfied judgments in their districts or counties. KRS §§ 69.040, 69.240. They also must "take all necessary steps, by motion, action, or otherwise to collect [them] and cause them to be paid into the State Treasury." KRS § 69.240; *accord* KRS § 69.040. When these attorneys fail to meet this mandate, and if the Department of Revenue submits a written request, then the Attorney General must bring an action to collect any unsatisfied judgments. *See* KRS § 15.060(3). The duty to enforce H.B. 2 therefore lies not with the Attorney General but with the Commonwealth's attorneys and the county attorneys.

To support their interpretation of *Ex parte Young*, EMW cites *McNeilus Truck & Manufacturing, Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429 (6th Cir. 2000). That case, however, affirms the holding of *Deters*, which we rely on here. *See McNeilus Truck & Mfg.*, 226 F.3d at 438 (citing *Deters* for the proposition that *Young* "does not apply when the defendant official has neither enforced nor threatened to enforce" the challenged statute). *McNeilus* also held that the Attorney General is a proper defendant "[w]here there is an imminent threat of enforcement." *Id.* at 437. There, the Attorney General helped enforce portions of the statute, and the other defendant had threatened to withdraw the plaintiff's license. So, we held both the Attorney General and the other

defendant could be sued. *McNeilus*, however, does not help EMW because there is no evidence of a similar "imminent threat" of prosecution by the Attorney General in the present case. Any imminent threat comes from the Commonwealth's and county attorneys, not the Attorney General. General Beshear has not enforced or even threatened to enforce H.B. 2. Rather, the Kentucky legislature has charged local prosecutors with its enforcement. We therefore hold that the Attorney General is not a proper party to this action.[25]

VIII.

H.B. 2—The Ultrasound Informed Consent Act—is an informed-consent statute like the statute in *Casey* because it provides truthful, non-misleading, and relevant information related to an abortion. The statute incidentally burdens speech only as part of Kentucky's regulation of professional conduct. Therefore, H.B. 2 is not subject to any heightened scrutiny with respect to the doctors' First Amendment rights, and it does not violate those rights, based on *NIFLA* and *Casey*. *See NIFLA*, 138 S. Ct. at 2373; *Casey*, 505 U.S. at 884. Also, because local prosecutors would handle the enforcement of fines under H.B. 2, the Attorney General is not a proper party to this action.

With due respect for the views of the Dissent, we adopt instead the position of the Fifth and Eighth Circuits on the First Amendment issue. Our

[25] Because it is uncontested that the Secretary Meier is a proper party, no concern exists that EMW "would be unable to vindicate the alleged infringement of their constitutional rights without first violating [H.B. 2]." *See Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982).

responsibility here is to apply the level of scrutiny mandated by the plurality opinion in *Casey* and reaffirmed by a majority of the Supreme Court in *NIFLA*. Under *Casey*, "protecting the life of the unborn" is a "legitimate goal" that may be pursued by a State as part of informed consent. *See Casey*, 505 U.S. at 882–83. As a First Amendment matter, there is nothing suspect with a State's requiring a doctor, before performing an abortion, to make truthful, non-misleading factual disclosures, relevant to informed consent, even if those disclosures relate to unborn life and have the effect of persuading the patient not to have an abortion.

Accordingly, we **REVERSE** the district court's contrary decision and **VACATE** the injunction. We also remand with instructions for General Beshear to be dismissed from the case, for summary judgment to be entered in favor of Secretary Meier on the first claim for relief stated in the complaint, and for further proceedings consistent with this opinion.

DISSENT

BERNICE BOUIE DONALD, Circuit Judge, dissenting.[1]

This is a First Amendment case. Although the challenged statute affects abortion, the question before this Court is not whether the statute unduly burdens a woman's right to choose. The question is how the statute—which compels specific speech and actions by physicians— impacts a physician's First Amendment rights. The majority misses this critical distinction. They incorrectly apply Fourteenth Amendment precedent to resolve this case, as succinctly depicted by their opening line: "Under *Roe v. Wade*, 410 U.S. 113 (1973), a woman has the right to choose to have an abortion." Majority Opn. at 1. The categorical test the majority conjures today may be applicable to an undue burden challenge, but it does not reflect the protections the First Amendment affords private citizens.

Pursuant to the First Amendment, a regulation that compels physician speech is subject to heightened scrutiny unless it regulates speech "as part of the *practice* of medicine," *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("*NIFLA*") (quoting *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992)),[2] such as when it "facilitate[s] informed

[1]I agree with the majority that Attorney General Beshear is not a proper party to this action.

[2] All citations to *Casey* are to the plurality opinion, unless otherwise noted.

consent to a medical procedure," *id.* The driving term here is "practice of medicine." A regulation that affects physician speech receives deferential review only when that speech is auxiliary to a medical practice. *Id.* at 2372 ("The Court has afforded less protection for professional speech . . . where States regulate *professional conduct*, even though that conduct *incidentally* regulates speech." (emphasis added)). In other words, when the state regulates the content of physician speech in a manner that is inconsistent with the practice of medicine, we must apply heightened scrutiny, full stop. *Id.*

At issue in this case is H.B. 2, a law that has no basis in the practice of medicine. Prior to performing an abortion, H.B. 2 *requires* physicians in the Commonwealth of Kentucky to conduct an ultrasound (oftentimes using a transvaginal probe) while *simultaneously* describing the fetus with particularity, displaying the sonogram images, and playing aloud the fetus' heartbeat to the patient. Ky. Rev. Stat. § 311.727(2)(a)–(f). Moreover, the physician is *not* permitted to exercise his or her medical judgment in deciding whether the procedure is appropriate or ethical. *Id.* The Commonwealth argues that H.B. 2 facilitates informed consent as part of the practice of medicine. Prevailing standards of care and the undisputed evidence, however, contradict this contention.

H.B. 2 does not facilitate informed consent. Under the prevailing standard of care, informed consent requires respect for the patient's autonomy and sensitivity to the patient's condition. Physician discretion is vital, but H.B. 2 eviscerates physician discretion. H.B. 2 is thus at

odds with the prevailing standard of care. The undisputed evidence shows the same. Plaintiffs introduced 1) physician testimony stating that H.B. 2's mandatory provisions would cause patient harm but "serve no medical purpose," and 2) a grim account from a woman who had an abortion under a "display and describe" regulation that caused her serious harm without facilitating her informed consent. The Commonwealth did not controvert that evidence, and the majority ignores these significant points (indeed, the majority goes so far as to hold that "customary standard[s] of medical care" play no role in determining whether a regulation conforms to the practice of medicine, Majority Opn. at n. 24).

Rather than look to the standard of care and the evidence, the majority relies on *undue burden jurisprudence* to fashion a test that they believe comprehensively captures informed consent. The result is erroneous. If a regulation requires the provision of truthful, non- misleading, and relevant information, the majority has decided that the regulation per se facilitates informed consent. The three elements the majority identifies—truthful, non- misleading, and relevant—were drawn from *Casey*, a controlling case that considered *both* an undue burden and a First Amendment challenge. These three elements, however, were central only to *Casey's* undue burden analysis. *Casey*, 505 U.S. at 883 (holding that a regulation that requires provision of truthful and non-misleading information "cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden."). Nowhere are these elements even mentioned in *Casey's* discussion of the First Amendment. *See id.* at 884. It is a mistake to

transpose *Casey's* holding on undue burden to the First Amendment challenge here. *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014) ("The fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment."). To illustrate further, imagine if a state passed a law requiring all gun owners to turn in their guns for just compensation, and this Court upheld the law under the Second Amendment, but relied only on facts from Takings Clause jurisprudence. The outcome would be flawed because the issues are distinct. The same is true in this case.

The ultimate question in this First Amendment case is whether H.B. 2 regulates the practice of medicine, with physician speech being an "incidental" victim. *NIFLA*, 138 S. Ct. at 2372. The two authorities upon which the majority relies to answer this question do not canvass the medical practice of informed consent (nor do they profess to do so); the majority thus takes *Casey* and *NIFLA* too far by extrapolating from them a categorical test on informed consent. *Casey* established the general principle that regulation of physician speech must be reasonable and regulate speech "as part of the practice of medicine." *Casey*, 505 U.S. at 884. Applying that principle, the Court upheld a law that permitted a physician to exercise his or her medical judgment in deciding whether to provide truthful, non-misleading information to patients. *Id.* Then, in *NIFLA*, the Court applied the same principle to a regulation that required unlicensed medical clinics to disseminate certain

information in all of their advertising materials. *NIFLA*, 138 S. Ct. at 2373. Because that regulation extended to non-patients, the Court found that it did not facilitate informed consent, so it was nothing more than a prohibited regulation of "speech as speech." *Id.* at 2374. *Casey* and *NIFLA* do the following two things for our First Amendment inquiry: they provide a guiding principle and two factual comparators.

Despite what the majority avers, these cases *do not* set out elements that comprehensively define the medical practice of informed consent.[3] Because we do not have legal authority reciting the contours of informed consent, we must naturally turn to the medical community for that definition. The prevailing standard of care and the undisputed evidence from below make this clear: H.B. 2 does not facilitate informed consent. H.B. 2 does not permit physician discretion—a central tenet of informed consent—and it would require physicians to harm their patients with "no medical purpose." Accordingly, it does not regulate speech as part of the practice of medicine; it regulates "speech as speech." *See id.* at 2374. For that reason, H.B. 2 should be subjected to heightened scrutiny and deemed an unconstitutional infringement of the physicians' right to free speech. I respectfully dissent.

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[3] Nor do these cases propose that the state's intention in regulating physician speech is immaterial to a First Amendment challenge. To the contrary, *NIFLA* explicitly condemned California's attempt to further its ideological message by regulating the content of physician speech outside the practice of medicine. 138 S. Ct. at 2374–76.

A. Informed Consent and First Amendment Jurisprudence

The controlling First Amendment cases in this context are *Casey* and *NIFLA* (and only a limited portion of *Casey* is germane). These cases do two things. First, they create the guiding principle that reasonable regulations that facilitate informed consent to a medical procedure are excepted from heightened scrutiny. Second, they illustrate that guiding principle by applying it to a Pennsylvania statute (in *Casey*) and a California statute (in *NIFLA*). What these cases *do not do*, however, is provide a simple equation with which to calculate whether a regulation facilitates informed consent. They do not support the majority's categorical test.

1. Under *Casey*, a Regulation Compelling Physician Speech is Subject to Deferential Review Only When It is Reasonable and Conforms to the Practice of Medicine

In *Casey*, several abortion clinics and physicians challenged a Pennsylvania statute that required a woman seeking an abortion to receive certain information at least 24 hours before the abortion was performed. *Casey*, 505 U.S. at 844–45. The Pennsylvania statute also permitted the physician to exercise his or her medical judgment (e.g., discretion) to decide whether to provide the information at all. *Id.* Though the primary challenge in *Casey* centered on the woman's right to choose, the physicians also challenged the statute as a violation of their right to free speech. *See id.* at 844–853, 884. The Court disposed of that First

Amendment challenge with a *single paragraph*, reproduced in its entirety below:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. *To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.* We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Casey, 505 U.S. at 884 (emphasis added) (internal citations omitted). This paragraph "did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review." *Wollschlaeger v. Gov. Florida*, 848 F.3d 1293, 1311 (11th Cir. 2017) (quoting *Stuart*, 774 F.3d at 249). Indeed, *Casey's* First Amendment reach is limited. The Court held that the Pennsylvania statute—with all of its specific features—was a "reasonable . . . regulation by the State" "as part of the practice of medicine," and thus did not run afoul of the physicians' First Amendment rights. *Casey*, 505 U.S. at 884.

The majority interprets *Casey* very differently. First, the majority recites language from several passages in *Casey* detailing why the provision of truthful, non-misleading, and relevant information is constitutionally appropriate. They have focused

on the wrong provision of the Constitution. The following summation, which immediately follows the specific passages the majority cites from *Casey*, makes clear that the pertinent language is specific to the undue burden challenge in that case:

> In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement *cannot be considered a substantial obstacle to obtaining an abortion*, and, it follows, *there is no undue burden*.

Casey, 505 U.S. at 883 (emphasis added). Only after the discussion of those enumerated elements and the summation above did the Court begin to analyze the plaintiffs' First Amendment claims. *See id.* The analysis in *Casey* that the majority relies upon applies to an undue burden challenge, not a First Amendment challenge. We are not at liberty to transpose undue burden principles to the First Amendment.

More egregiously, the majority announces that "the First Amendment analysis of an informed-consent statute turns on whether the mandated disclosure is truthful, non-misleading, and relevant, not whether the disclosure is, or is not, currently embodied in the customary standard of medical care." Majority Opn. at n. 24. This proclamation contravenes *Casey's* explicit

holding on the First Amendment. In *Casey*, the Court addressed the First Amendment challenge within a *single* paragraph, and within that single paragraph, only a *single* sentence provided the germane, guiding principle: "To be sure, the physician's First Amendment rights not to speak are implicated, but *only as part of the practice of medicine*, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884 (emphasis added). The majority now reads this sentence completely out of *Casey*, and instead dictates that what truly matters to our inquiry is whether a subsequent statute shares *some* material features of the *Casey* statute. This is the proverbial tail that wags the dog.

Second, the majority highlights that *Casey* explicitly overruled *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) ("*Akron I*") and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), cases the majority argues might have lent credence to the position that H.B. 2 does not facilitate informed consent. This argument attacks a straw man. The legal challenges in *Akron I* and *Thornburgh* were based on undue burden, not the First Amendment. *Akron I*, 462 U.S. at n.16 ("This is not to say that the informed consent provisions may not violate the First Amendment rights of the physician . . . ."), *Thornburgh*, 476 U.S. at 830–31 (O'Connor, J., dissenting) ("Since the Court of Appeals did not reach appellees' First Amendment claim, and since appellees do not raise it here, I need not decide whether this potential problem would be sufficiently serious to warrant issuance of a preliminary injunction."). *Casey* even explained that overruling

Akron I and *Thornburgh* was premised entirely on "the *undue burden standard* adopted in this opinion." *Casey*, 505 U.S. at 881 (emphasis added). The majority's attempt to bolster their own analysis by pointing out that *Akron I* and *Thornburgh* are no longer good law unnecessarily confuses the issues.

Last, the majority avers that any statute that is "of the nature upheld in *Casey*" should not be subjected to heightened scrutiny. This point is uncontroversial. If the Court has considered a materially identical statute and treated it in one way, we are bound to do the same (given the same challenge).[4] The issue here, however, is how we define the material elements of the Pennsylvania statute in *Casey*. As the majority frequently repeats, the Pennsylvania statute required the provision of truthful, non-misleading, and relevant information. That is not the whole story, though. The statute also permitted the physician to "exercis[e] his or her medical judgment" in deciding whether to provide the information at all. *Casey*, 505 U.S. at 884–85 ("[I]t is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions 'if he or she can demonstrate by a preponderance of the

[4] *Casey* guides us to apply a deferential standard of review to a regulation on physician speech only when it regulates speech "as part of the practice of medicine." 505 U.S. at 884. It must be said that the practice of medicine is always subject to change given advancements in research and treatment. If such change occurs, it could render the facts of a previous First Amendment case no longer useful as a comparator. At which point, the Court must rely on the parties to apprise it of the prevailing standards of care.

evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.'" (quoting 18 Pa. Cons. Stat. § 3205 (1990)). This fact the majority decides not to repeat as a material feature of the statute.

To the extent that we use the facts of *Casey* to guide our decision-making in this case, we cannot cherry-pick those that align with H.B. 2 and ignore those that do not. The Pennsylvania statute in *Casey* required the provision of truthful, non-misleading, and relevant information, *and* it provided the physician the opportunity to exercise his or her medical judgment to decide not to provide that information. Those are the material facts. If we encounter a statute with those same material elements, it should be deemed constitutionally sound, just as the Pennsylvania statute in *Casey* was—but H.B. 2 does *not* share those same material elements because H.B. 2 does not allow for the physician to exercise his or her medical judgment. H.B. 2 cannot be treated as equivalent to the Pennsylvania statute in *Casey*. It is not "of the nature upheld in *Casey*."

Although they try, the majority cannot explain this stubborn fact away.[5] First, the majority concludes that "there is no indication that the [*Casey*] plurality considered the [physician discretion] provision to be significant for its First

[5] The majority also makes clear that they do not find physician discretion to be material to their First Amendment analysis. Majority Opn. at n. 24 ("[U]ltimately a factual finding in this area is not material to the relevant legal issue."). Their discussion on the matter thus amounts to surplusage.

Amendment review." Majority Opn. at 27. This principle is of no help to the majority. The *Casey* plurality never mentioned the provision of non-misleading or truthful information in its brief discussion of the First Amendment, yet the majority bases its entire analytical approach on those elements. *See* 505 U.S. at 884. Equal application of the principle, then, would undermine the majority's entire opinion. Second, the majority attempts to frame H.B. 2 as "effectively" providing the same physician discretion as the Pennsylvania statute did, pointing out that H.B. 2 permits the physician to tell his or her patient not to listen to the heartbeat and not to watch the images from the sonogram. Majority Opn. at 27. This fact may be so, but under H.B. 2, the patient must still be probed, the doctor must still describe the fetus with mandated particularity and auscultate the heartbeat, and the procedure must proceed to completion. There is *no* discretion to avoid these acts, regardless of their impact on the health of the patient. H.B. 2 thus does not afford the same discretion as the Pennsylvania statute did and is therefore not "of the nature upheld in *Casey*."

2. *NIFLA* Requires the Provision of Information to Actual Patients, and Warns of the Dangers of Abridging Speech

Moving on from *Casey*, the next case shaping the informed-consent exception is *NIFLA*. In *NIFLA*, California passed a regulation that required unlicensed facilities to display government-drafted notices on all advertising materials and within on-site locations. *NIFLA*, 138

Ct. at 2369–70. The government there argued that the regulation facilitated informed consent, but the Court was not convinced. *Id.* at 2373–74. The reason why: the provision of information was "not tied to a procedure at all . . . [and] applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure [was] ever sought, offered, or performed." *Id.* at 2373. Because the regulation did not facilitate informed consent, it did not regulate speech as part of the practice of medicine—it "regulate[d] speech as speech." *Id.* at 2374. Therefore, the Court applied heightened scrutiny and deemed it an unconstitutional infringement of the physicians' right to free speech. *Id.* at 2376. Other than requiring the provision of information to actual patients seeking a specific medical procedure, *NIFLA* does not say anything else about what constitutes informed consent. Indeed, the words "truthful," "not misleading," and "relevant" are wholly absent from *NIFLA*, except in the dissent. *Id.* at 2385, 88 (Breyer, J., dissenting).

The second and arguably most important point in *NIFLA* is that the First Amendment is necessary to maintain a free and democratic society. *Id.* at 2374 ("[W]hen the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." (quotation marks omitted)). The Court emphatically rebuked California's attempt to restrict physician speech under the guise of facilitating informed consent. *See id.* at 2375 ("[the regulation] cannot survive even intermediate scrutiny"). Of the 5,945 words in the majority and concurring opinions, approximately

2,485 (41.8%) of them were dedicated to explicating the dangers of abridging speech. Word count is, of course, a crude measure of importance; but the substance of those words underscored the same point. The Court emphasized "the fundamental principle that governments 'have no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* at 2371 (citation omitted). More specific to physician speech, the Court warned that "regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *Id.* at 2374 (citation omitted).

To illuminate that risk, the Court recounted a laundry list of despotic regimes that had "manipulated the content of doctor-patient discourse" to advance their own iniquitous interests, such as China during the Cultural Revolution, the Soviet Government in the 1930's, and Nazi Germany. *Id.* (quotation marks omitted). The results were, respectively, to suppress child rearing in peasant communities; to place injured railroad workers in significant danger; and to exact an unprecedented campaign of genocide. *Id.* It is unsettling to think that this country could follow in those ignominious footsteps. Yet, the majority cavalierly dismisses this concern, stating that "what matters for First Amendment purposes is whether the disclosed facts are truthful, non-misleading, and relevant to the procedure, not whether they fall on one side of the debate, and not whether they influence a woman to abort or keep the child." Majority Opn. at 19. This account is at odds with the principles of the First Amendment, particularly

as described in *NIFLA*.

To avoid this foundational consideration, the majority relies on (and emphasizes) the following holding in *Casey*: "a State may 'further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, *even when in so doing the State expresses a preference for childbirth over abortion*.'" Majority Opn. at 7 (quoting *Casey*, 505 U.S. at 883). This sentiment makes sense in an undue burden challenge. The state has a legitimate interest in protecting the life of unborn children, *Roe v. Wade*, 410 U.S. at 153, and, when challenged under the due process clause, is free to convey that message itself so long as the woman's right to choose is not unduly burdened, *Casey*, 505 U.S. at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

However, we apply a different, more inquisitive standard when the state forces private individuals to voice that preference. *Riley v. Nat'l Fed. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790 (1988) (content-based restrictions on speech must pass strict scrutiny). As made clear in *NIFLA*, the state "cannot co-opt [physicians] to deliver its message for it. '[T]he First Amendment does not permit the State to sacrifice speech for efficiency.'" *NIFLA*, 138 S. Ct. at 2376 (quoting *Riley*, 487 U.S. at 795); *see also Stuart*, 774 F.3d at 253 (holding that the state "cannot commandeer the doctor-patient relationship to compel a physician to express its preference to the patient[]"). As a First Amendment challenge, we must consider whether

the state is regulating the content of speech and for what reason. *Riley*, 487 U.S. at 790. Here, the Commonwealth is regulating the content of physician speech, not the practice of medicine, and is doing so to promote the Commonwealth's chosen message. The First Amendment protects physicians—who are private citizens—from such regulations.

In sum, *Casey* and *NIFLA* are useful in the underlying First Amendment case in the following ways: they establish the guiding principle that reasonable regulations that facilitate informed consent to a medical procedure are excepted from heightened scrutiny, and they provide two comparator statutes. These cases do not, however, provide comprehensive instructions on what informed consent is or what it means to facilitate informed consent. To discern those definitions, we must turn to the medical community, because, after all, the primary question here is whether H.B. 2 regulates speech "only as part of the *practice of medicine*." *Casey*, 505 U.S. at 884 (emphasis added).

B. The Medical Definition of Informed Consent

Before delving into the prevailing standard of medical care, I must address the majority's contention that the Court, and not "private part[ies],"[6] should determine on its own what constitutes a medical practice. Majority Opn. at 23–25. What the majority describes is not consistent with jurisprudential tenets. As the Chief

[6] This is the majority's reference to the *plaintiffs* in the underlying case who provided evidence to support their arguments.

Justice of the Supreme Court aptly noted, it is our job to call balls and strikes and not to pitch or bat.[7] We are not medical experts, and even if we were, we would not be permitted to divine from our own personal beliefs what a medical practice is and what it is not. This foundational rule is particularly important when confronted with an ever-evolving practice such as medicine. Indeed, what once was an acceptable medical practice—like easing children's nerves with "soothing syrups" containing heroin in the early 20th century—is no longer acceptable based upon modern standards of practice and research.[8] Unlike the majority, and pursuant to jurisprudential tenets, I rely on the evidence submitted by the parties (and the materials submitted by the amici) to determine whether H.B. 2 facilitates informed consent.

As a medical practice, informed consent requires a physician to be able to exercise his or her judgment in deciding how to provide relevant information to the patient. H.B. 2 does not allow for any physician discretion. Therefore, very simply, H.B. 2 is not coterminous with the medical practice of informed consent. It should not receive deferential review because it regulates the content of physician speech, not the practice of medicine.

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[7] Hearing Before the Senate Judiciary Comm. on the Nomination of The Honorable John G. Roberts to be the Chief Justice of the United States, 109th Cong. (Sept. 12, 2005), https://www.uscourts.gov/educational- resources/educational-activities/chief-justice-roberts-statement-nomination-process.

[8] *Soothing Syrups*, N.Y. Times (Aug. 30, 1910) https://timesmachine nytimes.com/timesmachine/1910/08/30/105088995.pdf.

The ethical doctrine of informed consent is "rooted in the concept of self-determination and the fundamental understanding that patients have the right to make their own decisions regarding their own bodies." Am. Coll. of Obstetricians & Gynecologists ("ACOG") & the Am. Med. Ass'n ("AMA") Br. at 6 (citing ACOG Comm. on Ethics, Comm. Op. No. 439 (2009, reaffirmed 2015)). Facilitating informed consent involves two major elements: comprehension and free consent. ACOG Comm. on Ethics, Comm. Op. No. 439; ACOG & AMA Br. at 7. "Comprehension . . . includes the patient's awareness and understanding of her situation and the possibilities. It implies that she has been given adequate information about her diagnosis, prognosis, and alternative treatment choices, including the option of no treatment." ACOG Comm. Op. No. 439 at 3. "Free consent is an intentional and voluntary choice that authorizes someone else to act in certain ways." *Id.* Informed consent is not attained when a patient is "deceived [or] coerced." *Id.*

The purpose of informed consent is to permit a patient's "self-determination," or, "the taking hold of her own life and action, determining the meaning and possibility of what she undergoes as well as what she does." *Id.* at 2. The AMA code of ethics requires physicians to:

> (a) ***Assess the patient's ability*** to understand relevant medical information and the implications of treatment alternatives and to make an independent, voluntary decision.

(b) ***Present relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information.*** The physician should include information about:

1. The diagnosis (when known)
2. The nature and purpose of recommended interventions
3. The burdens, risks, and expected benefits of all options, including forgoing treatment

(c) Document the informed consent conversation and the patient's (or surrogate's) decision in the medical record in some manner. When the patient/surrogate has provided specific written consent, the consent form should be included in the record.

AMA Code of Ethics, Opinion 2.1.1(a)-(c) – Informed Consent (2016) (emphasis added). As a general practice, informed consent requires the physician to be able to assess the situation and present information in a way that helps the patient make a voluntary, informed, and personal decision.

Specific to the procedure at issue here, the National Abortion Federation informed- consent standard of care states that: "The practitioner must ensure that appropriate personnel have a discussion with the patient in which accurate information is provided about the abortion process and its alternatives, and the potential risks and benefits. The patient must have the opportunity to have any questions answered to her satisfaction prior to intervention." Nat'l

Abortion Fed'n, *Clinical Policy Guidelines for Abortion Care* (2018), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2018_CPGs.pdf. There is no requirement that the patient undergo an ultrasound to provide informed consent to an abortion. See id. ("The use of ultrasound is not a requirement for the provision of first-trimester abortion care."), cf. K. White, H. Jones, E.S. Lichtenberg & M. Paul, *First-Trimester Surgical Abortion Practices in the United States*, 92 Contraception 368 (2015) (finding that up to 98% of U.S. abortion facilities use an ultrasound to date the pregnancy). When an ultrasound is conducted, the standard of care requires an evaluation of the uterus and the embryo or fetus for specific features. Nat'l Abortion Fed'n, *Clinical Policy Guidelines for Abortion Care* (2018). Further, the patient must affirm that she understands the risks of the procedure. *Id.*

Unlike H.B. 2, this standard of care does not *require* the physician to conduct an ultrasound and to *simultaneously* describe specific parts of the fetus, display those images to the patient, and play aloud any audible heartbeat. (Summary Judgment Hearing Tr., Mar. 23, 2017, Testimony of Dr. Joffe, R. 55, PageID # 751–53 (explaining in detail the National Abortion Federation standard of care).) Nor does the standard of care require physicians to abandon their ethical and professional obligation to present information sensitively. (*Id.* at 753–54.) H.B. 2 diverges from the national standard of care in a dispositive way: physicians have no ability to respond to their patients' conditions, histories, and needs in performing the mandated procedure. By proscribing physician discretion, H.B. 2 is hostile to

the medical practice of informed consent.[9] Accordingly, H.B. 2 is not a regulation of speech as part of the practice of medicine, it is a regulation of "speech as speech." *NIFLA*, 138 S. Ct. at 2374.

C. The Undisputed Evidence

The undisputed evidence introduced below demonstrates that H.B. 2 would require physicians to violate their professional and ethical obligations. Three physicians testified that H.B. 2's one-size-fits-all approach would cause them to harm their patients in direct violation of the prevailing standard of care. Further, a woman who underwent an abortion under a similar regulation described the horrifying pain she suffered as a result, all while not receiving any helpful information. The Commonwealth did not controvert these facts. Nor did the Commonwealth introduce evidence demonstrating that the mandatory nature of H.B. 2 is consistent with informed consent. Therefore, the undisputed evidence shows that H.B. 2 does not facilitate informed consent as a medical practice.

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[9] According to the majority, H.B. 2 does permit physician discretion because it allows the physician to tell his or her patient that she may avoid listening to the heartbeat or watching the images displayed. This is not the type of discretion that informed consent requires. Under H.B. 2, the physician must still probe his or her patient and perform the mandated procedure. In *Casey*, on the other hand, the physician could exercise his or her discretion not to perform the mandated practice at all based on the potential effect it would have on the patient. There is no similar discretion under H.B. 2. The majority's attempt to frame H.B. 2 as permitting physician discretion fails because it glosses over this fact.

1. Informed-Consent Regulation Preceding H.B. 2

Originally enacted in 1998, Kentucky Revised Statute § 311.725 is the abortion informed-consent statute that preceded H.B. 2 in the Commonwealth. It contains a list of required information physicians must provide to a woman at least 24 hours prior to the procedure, including:

> 1. The nature and purpose of the particular abortion procedure or treatment to be performed and of those medical risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion;
> 2. The probable gestational age of the embryo or fetus at the time the abortion is to be performed;
> 3. The medical risks associated with the pregnant woman carrying her pregnancy to term;
> 4. That published materials produced by the state are available to her which she has a right to, free of charge;
> 5. That there may be medical assistance benefits available to her for prenatal care, childbirth, and neonatal care; and
> 6. That the father of the fetus is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion.

Ky. Rev. Stat. § 311.725(1)(a)–(b) (1998). For almost twenty years, these regulations governed the information that the Commonwealth mandated be disclosed to patients seeking an abortion. In the underlying proceedings, the Commonwealth failed to, and then refused to, describe how this regulation was defective in facilitating informed consent. *EMW Women's Surgical Ctr.*, 283 F. Supp. 3d 629, 646 (W.D. Ky. 2017).

2. Physician Testimony on H.B. 2

On the other hand, the undisputed evidence shows that that regulation's successor—H.B. 2—*is* defective in facilitating informed consent. The testimony offered in affidavits and at the summary judgment hearing clarified that H.B. 2 would require physicians to inflict unnecessary harm upon their patients in direct contravention of the practice of medicine.

As an initial matter, Dr. Franklin testified that *offering*, rather than requiring, an ultrasound is the national standard of care pursuant to the National Abortion Federation practice guidelines. H.B. 2's mandatory provisions are not consistent with that standard of care. For example, Dr. Joffe testified that "[t]o continue to speak to a patient, to continue to share that information with a patient who's clearly signaling that she doesn't want that information to me is the definition of insensitivity." Dr. Nichols similarly testified that simultaneously displaying and describing the fetus "clearly violates basic principles of medical ethics and informed consent and serves no medical purpose." Indeed, in his decades of experience, Dr. Nichols has "never

heard of an institution that—absent a law compelling them to do so—forces an ultrasound image and description and any fetal heart tones on a woman before she can have an abortion."

As a practical matter, the undisputed evidence also demonstrates that, regardless of her stated preferences, the woman will likely still hear the auscultation of the heartbeat and her physician's description of the fetus. Dr. Franklin explained that a physician "can't auscultate [the fetus' heartbeat] in the room with [the patient] and she not hear it too." Yet H.B. 2 requires auscultation. Accordingly, even when a patient asks not to hear the heartbeat, "the sound can not necessarily be drowned out unless they have their ears covered and they're yelling or they're making noises or humming. So there's no true way to not hear the heartbeat, even though we think they have a choice about it." Dr. Joffe similarly testified that even when a patient is permitted to cover her ears or avert her eyes, the physician must still audibly describe and visually display the fetus as the Commonwealth mandates:

> [I]f you just imagine for a moment being in that exam room with a patient who is -- the doctor is talking, the doctor is talking on because she's mandated to be talking on by H.B. 2, and the patient is doing everything in her power to avoid that experience, and that interaction, and those sounds, that looks nothing like any informed consent that I am familiar with, any standard of informed consent. That's in complete violation of it.

These physicians each emphatically agreed that H.B. 2 bears no resemblance to the medical practice of informed consent.

3. Patient Testimony on Display-and-Describe Regulations

The procedure—and its impact—was not solely described by physicians. The affidavit of a woman who was forced to undergo a "display-and-describe" procedure offered a grim scene, one in which the professional and ethical practice of medicine was absent. This pregnant woman and her husband, already parents of a two-year-old girl, went to the doctor's office for a routine ultrasound. Horrific news and a traumatic experience followed. The doctor informed the couple that the "baby was profoundly ill," and sent them to a specialist for further consultation. After speaking with two more medical professionals that same day, the couple was left with the following options: "abortion or continue the pregnancy and subject our child to a life of pain." They had to make a "very difficult decision," but they did so with full comprehension and free consent. As a medical question, the mother provided informed consent to have an abortion (and to spare her unborn child a life of pain). However, because she was having the procedure in Texas, and pursuant to Tex. Health & Safety Code § 171.012(a)(4), she was required to undergo an additional "display-and-describe" procedure, just like H.B. 2 requires. Her account of that experience—which was mandated by her state government, not her doctor—is tragic:

> While the staff at the abortion clinic did all they could for me, this experience

was nothing short of torture. I had to lie on an examination table, with my feet in stirrups. My belly was exposed with the ultrasound gel and abdominal probe on it while we saw images of our sick child forming on the screen for the third time that day. Before the doctor even started the description, I began to sob until I could barely breathe. My husband had to calm me down and the doctor had to wait for me to find my breath.

The description the doctor provided was perhaps the most devastating part because although our baby was profoundly ill, he had healthy organs too. So, the doctor was forced to describe – and I to hear – that he had a well-developed diaphragm and four healthy chambers of the heart. His words were unwelcome and I felt completely trapped. I closed my eyes. I twisted away from the screen. The doctor and staff repeatedly apologized for making us go through this, but their compassion could not ameliorate my pain.[10]

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[10] Dr. Franklin testified at the summary judgment hearing to a similar experience:

> A. And I actually had a patient in the first month who had a fetal anomaly who was -- had five or six ultrasounds, went to that specialist, to that specialist to try to determine whether or not they were going to proceed on. This was a wanted pregnancy, a very desired pregnancy. And her

She explained that she "learned nothing as a result of [her] experience." Moreover, "the doctor and staff at the abortion clinic were clear that they were doing this, even though [she] was so upset, because the Texas law required it – not because they thought it provided any medical benefit." In her words, the "Texas law did nothing other than cause me additional pain and distress on a day that was already the worst of my life." H.B. 2 mandates the same process, which will incur the same results. This is not the practice of medicine.

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husband did come back with her because they were very, very upset and were making a very difficult decision. And so when I told them about the state laws changing and this is what I had to do, she immediately started sobbing. Like you could not console this woman. Her husband was visibly furious and saying, "Why do they have to force her to do this? She has gone through enough. We have gone through enough." And I had to auscultate the heartbeat and I had to describe in detail what I saw on the screen.

Q. And did you believe that that woman was competent to make a decision as to whether she should look at the screen or not?

A. I absolutely do think that. She had already been informed multiple times by multiple physicians with multiple ultrasounds already, and I felt like this was just adding no additional piece to the care that she and her husband ultimately decided needed to happen for them.

Q. Do you think she understood what the result of an abortion would be?

A. Yes. And I'm sure that she had multiple conversations with all those different physicians along the way because there was a problem with the pregnancy.

The Commonwealth has offered *no* evidence showing otherwise.[11]

4. The Commonwealth's Limited Evidence

Last, the Commonwealth produced no evidence that H.B. 2 was either aimed at furthering informed consent or will achieve that ostensible goal. When presented the opportunity to offer evidence at the summary judgment hearing, the Commonwealth decided instead to rely on the affidavits it submitted with its briefing, despite the extensive testimony presented by the plaintiffs' witnesses describing precisely how H.B. 2 is adverse to informed consent. Specific to the issues in this appeal, the Commonwealth produced *no* evidence demonstrating that mandating the procedure set forth in H.B. 2, rather than offering it, is the medically-accepted standard of care.

As part of its briefing, the Commonwealth submitted four affidavits from women who had obtained abortions they later came to regret; but these *undated* affidavits have no information as to

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[11] The patient also has no input in the process. She *must* subject herself to this invasive procedure. Ky. Rev. Stat. § 311.727(2). The majority makes much of the fact that the woman may cover her ears and look away as the doctor goes on with the procedure. This cannot be the saving grace of an informed-consent statute. As described, the purpose of informed consent is to ensure that the patient makes an informed, autonomous, and rational decision. Emotion should be subdued, not inflamed. Forcing a woman to undergo the invasive procedure—which adds approximately three to five minutes to a standard ultrasound—while permitting her to avoid all of the information, does nothing to facilitate her comprehension or free consent. *See* ACOG Comm. on Ethics, Comm. Op. No. 439.

when or with what information the women obtained abortions. It is even unclear whether they were before or after the passage of the informed-consent statute that predated H.B. 2. Without such information, these affidavits do not create a *genuine* issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). More importantly, simply because H.B. 2's provisions might have assisted *some* women in their autonomous decision- making does not mean that H.B. 2's provisions will assist *all* women in their autonomous decision-making. No number of affidavits can negate the grim experience described by the woman in Texas or the absence of the "practice of medicine" in that setting.

The Commonwealth also submitted two affidavits from physicians opining that an ultrasound, a description of the fetus, and an auscultation of the heartbeat are consistent with the national standard of care. Those affidavits are deficient, however, because neither physician discusses the impact of *offering* these procedures versus *requiring* them—even against patient wishes.[12] Requiring these procedures is the primary flaw with H.B. 2. Failing to directly address that flaw means the Commonwealth failed to establish that H.B. 2 regulates speech as part of the practice of medicine.[13]

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[12] As the district court noted, both physicians misunderstood EMW's previous practice.

[13] The majority contends that the dissent "appears" to be weighing the evidence and making credibility determinations in violation of the principles of summary judgment. Majority Opn. at n. 21. The majority is incorrect. If the evidence a party submits does not actually dispute the opposing evidence,

There is also no evidence that H.B. 2 filled any gaps in existing informed-consent legislation. Although the Commonwealth submitted affidavits from state legislators explaining why they passed H.B. 2 (including to "protect the lives of unborn infants"), those affidavits are silent on any deficiencies with the earlier law. In contrast, EMW (the sole abortion-provider in the Commonwealth) produced evidence, undisputed at summary judgment, that "prior to H.B. 2, EMW patients made informed decisions about abortion and that the informed-consent process followed by EMW physicians ensured this." *EMW Women's Surgical Ctr.*, 283 F. Supp. 3d at 646 (citing the testimony of Dr. Franklin). It is transparent that furthering informed consent was not the aim of the Commonwealth—nor will it be achieved by H.B. 2—and thus, H.B. 2 is an impermissible regulation of the content of speech.

D. Conclusion

I am gravely concerned with the precedent the majority creates today. Its decision opens the floodgates to states in this Circuit to manipulate doctor-patient discourse solely for ideological

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there is no weighing necessary because no *genuine* issue has been made. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (when the moving party submits a summary judgment motion, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and . . . designate 'specific facts showing that there is a *genuine* issue for trial.'" (emphasis added)). Such is the case here. The plaintiffs submitted evidence showing that the mandatory provisions of H.B. 2 conflict with the medical practice of informed consent. No other evidence refutes that fact. Therefore, there is no genuine issue as to whether H.B. 2 facilitates informed consent—it does not.

reasons. So long as the state's legislators wisely use the words "informed consent" in the title of a regulation, the majority instructs us to "defer to the legislature's determination of which informed-consent disclosures are required," despite what the evidence or standards of care say. Majority Opn. at 23; *but see NIFLA*, 138 S. Ct. at 2375 ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection." (quoting *Riley*, 487 U.S. at 796)). Even further, the majority contends that "[i]f the [plaintiffs] want the legislated rules of informed consent to change, they should address their arguments to [their] elected officials" and not the Court. Majority Opn. at 23. This instruction amounts to an improper abdication of judicial oversight. *NIFLA*, 138 S. Ct. at 2374 (striking down as unconstitutional a law the state said promoted informed consent). In reviewing whether a regulation facilitates informed consent, we do not give deference to the state simply because it is a governmental body; rather, we must rely on the evidence submitted by the parties and look to the prevailing standard of care. *See id.* Employing that practice here clarifies that H.B. 2 has the singular goal to "completely end abortion" in the Commonwealth. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 940 (2007); *see also* Audrey Carlsen, Ash Ngu & Sara Simon, *What it Takes to Get an Abortion in the Most Restrictive U.S. State*, N.Y. Times (July 20, 2018), https://www.nytimes.com/interactive/2018/07/20/us/mississippi-abortion-restrictions.html?action=click&module=Top%20Stories&pgtype=Homepage (highlighting the ways legal abortion is made increasingly less accessible).

That goal is driven by politics, which explains why H.B. 2 was not drafted to be coextensive with the practice of medicine.[14]

As a final analogy more closely related to the business of the Court, consider if the state legislature passed a law mandating that attorneys inform their clients of certain truthful, non-misleading, and relevant information in specific types of cases. More precisely, what if the state required an attorney, prior to filing a complaint, to inform each medical-malpractice plaintiff that pursuing her claim would burden the state's resources, incur reputational harm for the physician, and make healthcare less accessible to the community? Any attorney would find this to be a repugnant invasion of the attorney-client relationship. Yet, pursuant to the deferential standard adopted by the majority today, the state is the sole and final arbiter of what constitutes the practice of any profession, including the law. This hypothetical legislation amounts to client counseling, which is part of the practice of law, so would say the state; further, it does not infringe

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[14] The majority tries to lessen the impropriety of H.B. 2 by noting that the physician is permitted to distance himself or herself from the procedure's anti-abortion message after the procedure is completed. Majority Opn. At 25. This fact has no legal significance. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring) ("[The Circuit Court] reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak.").

on the attorneys' First Amendment rights, so would say the majority. On balance, this two-step registers more Orwellian than it does a "reasonable regulation" of speech "as part of the practice" of a profession. I trust that a panel of this Court would treat that claim much differently than the majority treats the underlying one.

The Commonwealth has coopted physicians' examining tables, their probing instruments, and their voices in order to espouse a political message, without regard to the health of the patient or the judgment of the physician. Armed with the title "informed consent," the majority affirms this practice as constitutional. In so doing, the majority 1) conflates the undue burden and First Amendment standards, while misreading the explicit language of *Casey*; 2) ignores the national standards of medical care; and 3) disregards the evidence showing that H.B. 2 is not consistent with the medical practice of informed consent. Benjamin Franklin warned that "[f]reedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." H.B. 2 is a restriction on speech that has no basis in the practice of medicine. It should be subjected to heightened scrutiny and deemed unconstitutional, lest our constitution dissolve, and tyranny be erected on its ruins. I dissent!

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EMW WOMEN'S SURGICAL CENTER, P.S.C., et al., Plaintiffs,

v.

Civil Action No. 3:17-cv-16-DJH

ANDREW G. BESHEAR, et al., Defendants.

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MEMORANDUM OPINION AND ORDER

In January 2017, the Kentucky General Assembly hastily passed the Ultrasound Informed Consent Act, referred to as House Bill 2 (H.B. 2).[1] (Docket No. 1-1) Although Kentucky already had a comprehensive informed-consent law pertaining to abortions, Ky. Rev. Stat. § 311.725, H.B. 2 amended the existing law to require physicians to perform an ultrasound prior to an abortion procedure; display and describe the ultrasound images; and auscultate, or make audible, the fetal heartbeat. Physicians must comply with these requirements even if a woman does not want to receive the information and chooses to avert her eyes and cover her ears.

[1] H.B. 2 has since been codified at Ky. Rev. Stat. §§ 311.727, .990(32).

Plaintiffs are the only licensed abortion clinic in Kentucky and its three doctors, who provide abortions and other health services. Defendants are various state government officials. Plaintiffs challenge the constitutionality of H.B. 2, primarily arguing that the law violates their rights under the First Amendment by compelling ideological speech. The Commonwealth argues that the law is within the Commonwealth's authority to regulate the practice of medicine.

Three similar "speech-and-display" ultrasound laws have been challenged in states outside the Sixth Circuit. The Fifth Circuit upheld Texas's speech-and-display ultrasound law in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012). Within a year of *Lakey*, the Supreme Court of Oklahoma concluded that Oklahoma's speech- and-display ultrasound law was facially unconstitutional. *See Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012) (per curiam). In *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), the Fourth Circuit explicitly disagreed with *Lakey*, holding that North Carolina's speech-and-display ultrasound law violated the First Amendment. The main reason for these differing outcomes rests on how the various courts interpreted a single paragraph in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Finding the Fourth Circuit's reasoning persuasive, the Court concludes that H.B. 2 violates the First Amendment. Like the Fourth Circuit, the Court recognizes that states have substantial interests in protecting fetal life and ensuring the psychological well-being and informed decision-making of pregnant women. *See Stuart*, 774 F.3d at

250. However, H.B. 2 does not advance those interests and impermissibly interferes with physicians' First Amendment rights. The Court will therefore enjoin enforcement of H.B. 2.

I. BACKGROUND

Prior to H.B. 2, the informed-consent process for abortion in Kentucky was governed by Ky. Rev. Stat. § 311.725. This statute required that, at least twenty-four hours before an abortion was performed, a woman receiving an abortion must be informed of the following:

- the nature and purpose of the abortion procedure to be performed as well as the medical risks and alternatives to the procedure that a reasonable patient would consider material to the decision of whether or not to undergo the abortion;
- the probable gestational age of the fetus;
- the medical risks associated with carrying the pregnancy to term;
- the availability of printed materials published by the Cabinet for Health and Family Services that she has a right to view free of charge if she so chooses;
- the potential availability of medical assistance benefits for prenatal care, childbirth, and neonatal care; and
- the liability of the father of the fetus to assist in the support of her child.

Ky. Rev. Stat. § 311.725(1)(a)–(b).

The Cabinet materials referred to in § 311.725 contain two general types of information. The first concerns alternatives to abortion, such as adoption. Ky. Rev. Stat. § 311.725(2)(a). A list of various agencies and the services those agencies offer is provided. *Id.* These materials also contain information on medical assistance benefits for prenatal care, childbirth, and neonatal care, as well as information on the father's child-support obligations. *Id.* The second type of information is "objective and nonjudgmental" scientific and medical information about fetal development. § 311.725(2)(b). The materials inform the reader of the "probable anatomical and physiological characteristics" of the embryo or fetus at two-week gestational increments for the first sixteen weeks and at four-week gestational increments thereafter. *Id.* For each stage, the materials must contain a pictorial representation and some other image for scale to reflect the actual size of the fetus. *Id.*

Abortion providers challenged these regulations in *Eubanks v. Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky. 2000). The plaintiffs in *Eubanks* sought to enjoin enforcement of § 311.725 on behalf of themselves and their patients. *Id.* at 453. The plaintiffs first argued that the requirements placed an undue burden on a woman's right to an abortion, particularly for those "who must travel long distances, who have few financial resources, and who have difficulty explaining their absence to employers, spouses, or others." *Id.* at 454. This Court concluded that the statute did not place an undue burden on women seeking an abortion in Kentucky. *See id.* at 453–57.

The plaintiffs in *Eubanks* also challenged the law on First Amendment grounds, arguing that it "compel[led] them to pay for and distribute ideological speech with which they disagree[d]." *Id.* at 457. Recognizing the brevity of the Supreme Court's disposition of the First Amendment claims in *Casey*,[2] Judge Heyburn reasoned that "[i]f Kentucky's pamphlets and the resulting infringement on speech are legally indistinguishable from those presented in *Casey*, then *Casey* controls." *Id.* at 459. Judge Heyburn found that the information provided in Kentucky's pamphlets was "quite similar" to the information provided in *Casey*. *Id.* He concluded that "distributing these pamphlets is a reasonable measure to insure adequate informed consent in all cases of abortion." *Id.* at 460 (citing *Casey*, 505 U.S. at 882–83). Because the content of the Kentucky pamphlet was similar to that in *Casey*, it fell within "the constitutional limits for which *Casey* stands." *Id.*

Unlike Kentucky's existing informed-consent laws, H.B. 2 was not accompanied by any legislative

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[2] Of the petitioners' First Amendment arguments in *Casey*, the plurality said:

> [T]he physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the state, *cf. Whalen v. Roe*, 429 U.S. 589, 603, 97 S. Ct. 869, 878, 51 L. Ed. 2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Casey, 505 U.S. at 884.

findings. *See* Ky. Rev. Stat. Ann. § 311.710 (containing the General Assembly's legislative findings in support of § 311.725). H.B. 2 imposes additional requirements upon abortion providers and women seeking abortions. Prior to a woman giving informed consent to an abortion, H.B. 2 requires a physician to

- perform an obstetric ultrasound on the woman;
- give a simultaneous explanation of what the ultrasound depicts;
- display the ultrasound images so that the woman may view them;
- auscultate the fetal heartbeat so that the woman may hear it;
- provide a medical description of the ultrasound images; and
- retain signed certification from the woman that the above information was given.

H.R. 2, 2017 Gen. Assemb., Reg. Sess. (Ky. 2017). The only exception to these requirements is for medical emergencies. *Id.* H.B. 2 further states that "nothing in this section shall be construed to prevent the pregnant woman from averting her eyes from the ultrasound images or requesting the volume of the heartbeat be reduced or turned off." *Id.* No penalty is imposed on a woman who refuses to look at the ultrasound images or listen to the heartbeat. *Id.* However, physicians who violate the requirements are subject to penalties including fines of up to $100,000 for the first offense and $250,000 for each subsequent offense. *Id.* Further, courts are to report any violation to the

Kentucky Board of Medical Licensure for whatever action or discipline the Board deems appropriate. *Id.*

Because H.B. 2 contained an emergency clause, it became effective immediately once signed by the governor. Plaintiffs filed this action (D.N. 1) and moved for a temporary restraining order to temporarily block enforcement of H.B. 2.[3] (D.N. 3) The Court held an evidentiary hearing on March 23, 2017, on Plaintiffs' motion for temporary restraining order.[4] The parties agreed to advance the trial on the merits and consolidate it with the March 23, 2017 hearing pursuant to Rule 65(a)(2) of the

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[3] Although Plaintiffs' complaint asserted six claims for relief (*see* D.N. 1, PageID # 13-15), the parties' arguments have focused exclusively on the first of those claims, which alleges that H.B. 2 violates the First Amendment rights of physicians. (*Id.*, PageID # 13; *see, e.g.*, D.N. 55, PageID # 838 (agreeing that "[t]his is a First Amendment case and the claim is about a physician's fundamental First Amendment right not to be compelled to speak by the State")). Accordingly, the Court's discussion herein will be limited to that claim.

[4] Prior to the hearing, General Assembly members Robert Stivers, Jeff Hoover, Whitney Westerfield, and Joseph M. Fischer filed a motion requesting leave to file a brief as amici curiae. (D.N. 18) "[P]articipation as an amicus to brief and argue as a friend of the court was, and continues to be, a privilege within the sound discretion of the courts, depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice." United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991) (internal citations and quotations omitted). The historical purpose of an amicus "was to provide impartial information on matters of law about which there was doubt, especially in matters of public interest." Id. at 164. Because Plaintiffs here do not object (see D.N. 31, PageID # 324), the motion for leave to file an amicus brief will be granted.

Federal Rules of Civil Procedure. (D.N. 53) The parties then filed cross-motions for summary judgment, which are now before the Court. (D.N. 58; D.N. 59; D.N. 60; D.N. 62)

II. STANDARD

In order to grant a motion for summary judgment, the Court must find that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of identifying the basis for its motion and the parts of the record that demonstrate an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies this burden, the non-moving party must point to specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see* Fed. R. Civ. P. 56(c)(1). "[O]n cross-motions for summary judgment, 'the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 592 (6th Cir. 2001) (quoting *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)). The Court concludes that there is no genuine dispute of material fact in this case.

III. DISCUSSION

Plaintiffs argue that H.B. 2 violates their First Amendment rights because it compels them to deliver the state's ideological, anti-abortion message to their patients. (D.N. 60-1, PageID #

903) But for H.B. 2, Plaintiffs would not force ultrasound images, detailed descriptions of the fetuses, or the sounds of the fetal heartbeat on abortion patients who do not wish to hear the descriptions or heartbeat or see the images. (*Id.*, PageID # 904) Plaintiffs assert that because H.B. 2 compels ideological, content-based speech, it necessarily triggers at least intermediate scrutiny, which it cannot survive. (*Id.*, PageID # 903, 910) Intermediate scrutiny requires the state to prove that "the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011) (citing *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

The Commonwealth maintains that H.B. 2 is constitutional because states have the right to regulate the practice of medicine. (D.N. 62-1, PageID # 1820) It argues that H.B. 2 is subject to rational basis review, which requires only that the statute "bear some rational relation to a legitimate state interest." *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002) (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)). But the Commonwealth adds that H.B. 2 could survive even intermediate scrutiny, as the law merely requires physicians to disclose truthful, non-misleading, and relevant information. (D.N. 62-1, PageID # 1825, 1835)

The Court's analysis will begin with a discussion of relevant authority, including those cases forming the circuit split over the constitutionality of speech-and-display ultrasound laws. Next, the Court will explain that the Fourth

Circuit's intermediate-scrutiny approach is appropriate because H.B. 2 compels ideological speech. The Court will then apply intermediate scrutiny to the facts of this case, ultimately finding that H.B. 2 is unconstitutional.

A.

The First Amendment protects an individual's right to refrain from speaking just as much as it protects the right to speak freely. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (Murphy, J., concurring)); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[A]ll speech inherently involves choices of what to say and what to leave unsaid." (emphasis removed) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion))); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."). At issue here is compelled speech, which "is particularly suspect because it can directly affect listeners as well as speakers. Listeners may have difficulty discerning that the message is the state's, not the speaker's, especially where the 'speaker [is] intimately connected with the communication advanced.'" *Stuart*, 774 F.3d at 246 (alteration in original) (quoting *Hurley*, 515 U.S. at 576). Statutes that compel speech are considered content-based regulations of speech, as "[m]andating speech that a speaker would not otherwise make necessarily alters the content of speech." *Riley*, 487 U.S. at 795. This is true whether the compelled speech involves statements of opinion or statements of fact. *Id.* at 797–98.

Content-based regulations are generally subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015). Such regulations can only survive if the government proves that the regulation "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). Because H.B. 2 mandates speech Plaintiffs would not otherwise make, its requirements are "quintessential compelled speech." *Stuart*, 774 F.3d at 246. But courts reviewing speech-and-display ultrasound laws like H.B. 2 have not applied strict scrutiny. Nor have these courts reached a consensus on which level of scrutiny applies. The Sixth Circuit has not yet addressed the issue. Looking to other circuits for persuasive authority, the Court finds that the circuit courts of appeals are split. Thus, the Court must first determine whether First Amendment scrutiny is triggered here and, if so, which level of scrutiny applies.

The Fifth Circuit reviewed the constitutionality of Texas's speech-and-display ultrasound law in *Lakey*, holding that the law was within the state's right to regulate the practice of medicine. *See* 667 F.3d at 580. The court did not believe the law triggered First Amendment scrutiny. *Id.* at 576. In reaching this conclusion, the court relied heavily on the Eighth Circuit's decision in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc), which upheld a South Dakota statute regulating informed consent to abortion. Though not a speech-and-display ultrasound law, the law at issue in *Rounds* required physicians to provide abortion patients with certain information prior to the procedure. *Id.* at 726-27. Planned

Parenthood argued that the law compelled ideological speech because it required specific disclosures such as "[t]hat the abortion would terminate the life of a whole, separate, unique, living human being." *Id.* at 726; *see id.* at 727. Relying on *Casey* and *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Eighth Circuit concluded that "while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion." *Id.* at 734–35.

The Fifth Circuit agreed with the Eighth Circuit that both *Casey* and *Gonzales* acknowledge the state's significant role in regulating the medical profession. *Lakey*, 667 F.3d at 575–76. In particular, the *Lakey* court noted that *Casey* clearly did not apply strict scrutiny to the First Amendment claims in that case. *Id.* at 575 ("The three sentences with which the Court disposed of the First Amendment claims are, if anything, the antithesis of strict scrutiny."). Instead, the Fifth Circuit read *Casey* to hold "that physicians' rights not to speak are, when 'part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" *Id.* (quoting *Casey*, 505 U.S. at 884). The court thus concluded that the speech-and-display requirements did not trigger First Amendment strict scrutiny as compelled, ideological speech. *Id.* at 576.

Not all courts interpret *Casey* this way. Although its brief opinion provides little analysis of *Casey*, the Supreme Court of Oklahoma found Oklahoma's speech-and-display law to be "facially unconstitutional pursuant to *Casey*." *Pruitt*, 292 P.3d at 28. More significantly, the Fourth Circuit explicitly disagreed with the Fifth and Eighth Circuits, stating that those courts "read too much into *Casey* and *Gonzales*." *Stuart*, 774 F.3d at 249. The Fourth Circuit concluded that "[*Casey*] did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review." *Id.* Further, the court interpreted the *Gonzales* decision to be limited to the state's role in regulating the informed-consent process because *Gonzales* is silent on which level of scrutiny to apply when reviewing a compelled-speech claim in the abortion context. *Id.*

Recognizing that there are "many dimensions" to professional speech, the Fourth Circuit concluded that it was necessary to analyze the North Carolina speech-and-display law for First Amendment purposes. *Id.* at 247 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). Of course, the court recognized that states have the power to regulate the medical profession, including imposing licensing requirements, requiring payment of dues to professional organizations, setting standards of conduct, and requiring certain disclosures for informed consent. *Id.* at 247 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972)). However, the court explained, "[w]hen the First

Amendment rights of a professional are at stake, the stringency of review . . . slides 'along a continuum' from 'public dialogue' on one end to 'regulation of the professional *conduct*' on the other." *Id.* at 248 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)). Finding speech-and-display requirements to fall in the middle of that sliding scale, the court chose to apply intermediate scrutiny. *Id.* The court concluded: "A heightened intermediate level of scrutiny is . . . consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure." *Id.* at 249.

Applying intermediate scrutiny, the Fourth Circuit held that North Carolina's speech-and-display law was unconstitutional. *Id.* at 250. The state's interests in protecting fetal life and protecting the pregnant woman's welfare and informed decision-making were obviously important. *Id.* at 250-51. But the requirements of North Carolina's speech-and-display law were "far-reaching—almost unprecedentedly so—in a number of respects and far outstrip[ped] the provision at issue in *Casey*." *Id.* at 250. The law interfered with physicians' First Amendment rights "beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient's psychological health, interfering with the physician's professional judgment, and compromising the doctor-patient relationship." *Id.*

Recently, the Eleventh Circuit sitting en banc expressed approval of the Fourth Circuit's interpretation of *Casey* when it decided that certain

provisions of Florida's Firearms Owners' Privacy Act (FOPA) violated the First Amendment rights of doctors. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc). The four FOPA provisions at issue in *Wollschlaeger* were content-based regulations of speech that restricted speech by physicians and other medical professionals on the subject of firearm ownership. *Id.* at 1300. Physicians routinely ask their patients about potential health and safety risks, and many leading medical associations believe that unsecured firearms increase the risk of injury, especially for minors and those suffering from depression or dementia. *Id.* at 1301. The Florida Legislature enacted FOPA after learning of six incidents where patients complained that physicians asked them questions regarding firearm ownership. *Id.* at 1302.

The "record-keeping" provision of FOPA states that a physician may not enter any information concerning firearm ownership into a patient's medical record if such information is not relevant to the patient's medical care, the patient's safety, or the safety of others. *Id.* (citing Fla. Stat. § 790.338(1)). The "inquiry" provision states that a physician should refrain from making a written inquiry or asking questions concerning firearm ownership unless he or she believes in good faith that such information is relevant to the patient's medical care, the patient's safety, or the safety of others. *Id.* at 1302-03 (citing Fla. Stat. § 790.338(2)). The "anti- discrimination" provision states that a physician may not discriminate against a patient based solely on firearm ownership or possession. *Id.* at 1303 (citing Fla.

Stat. § 790.338(5)). The "anti-harassment" provision states that a physician "should refrain from unnecessarily harassing a patient about firearm ownership during an examination." *Id.* (quoting Fla. Stat. § 790.338(6)). FOPA violations are punishable by fines and discipline by the Florida Board of Medicine. *Id.*

According to the Eleventh Circuit, the record-keeping, inquiry, and anti-harassment provisions of FOPA "constitute speaker-focused and content-based restrictions on speech." *Id.* at 1307. The record-keeping and inquiry provisions "expressly limit the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict their ability to communicate and/or convey a message." *Id.* The anti-harassment provision is also a speaker-focused and content-based restriction. *Id.* The Eleventh Circuit believed that it referred to "questions or advice to patients concerning the subject of firearm ownership." *Id.* The court recognized that content-based restrictions normally trigger strict scrutiny. *Id.* at 1308 (citations omitted). However, because it found that the FOPA provisions failed under intermediate scrutiny, the court did not determine whether strict scrutiny applied. *Id.*

Florida argued that the First Amendment was not implicated because "any effect on speech [was] merely incidental to the regulation of professional conduct." *Id.* But the state's argument relied on Justice White's framework for evaluating professional speech, which was espoused in a concurrence. *Id.* (citing *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring). Justice

White concluded that the speech of an individual "'engaging in the practice of a profession' . . . is 'incidental to the conduct of the profession,' such that [the individual's] First Amendment interests are diminished." *Id.* (quoting *Lowe*, 472 U.S. at 232 (White, J., concurring)). In a later dissent, Justice White advocated for rational basis review of professional speech. *Id.* (citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 802 (1986) (White, J., dissenting)). However, "[t]he Supreme Court has never adopted or applied Justice White's rational basis standard to regulations which limit the speech of professionals to clients based on content." *Id.* at 1310 (citations omitted). Instead, on at least two other occasions, the Supreme Court has applied heightened scrutiny to regulations that restricted the speech of professionals. *Id.* (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542–48 (2001); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438–44 (1963)).

In *Velazquez*, the Supreme Court applied heightened scrutiny to a federal law that prohibited attorneys employed by entities that receive funds from the Legal Services Corporation from challenging existing welfare laws and from advising their clients about such challenges. *See* 531 U.S. at 536–37, 542-48. The Supreme Court concluded that the law violated the First Amendment because it limited constitutionally protected expression and altered the traditional role of the attorneys. *Id.* at 544–48. *Button* concerned a Virginia law that prohibited organizations like the N.A.A.C.P. from finding or retaining lawyers for individual litigants and paying those lawyers a per diem fee for their services. 371 U.S. at 423. The Supreme Court

concluded that this law violated the First Amendment because the state failed to advance any substantial regulatory interest justifying the prohibition. *Id.* at 444. In *Wollschlaeger*, the Eleventh Circuit reasoned that because the Supreme Court

> cited and discussed *Button* with approval recently in *Reed*, 135 S. Ct. at 2229, the state officials cannot successfully rely on a single paragraph in the plurality opinion of three Justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey* . . . to support the use of rational basis review here. In any event, as Judge Wilkinson correctly explained for the Fourth Circuit, the *Casey* "plurality did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review."

848 F.3d at 1310–11 (quoting *Stuart*, 774 F.3d at 249).

The Eleventh Circuit not only expressly agreed with the Fourth Circuit's view that *Casey* fails to set a broad standard, but it also showed why Justice White's rational basis standard is unpersuasive. *See id.* Plaintiffs urge the Court to follow the Fourth Circuit and the Eleventh Circuit. They contend that the above excerpt from *Wollschlaeger* indicates that the Eleventh Circuit rejected the very same arguments made by the Commonwealth here. (D.N. 37, PageID # 536-37) Indeed, the Commonwealth argues that *Casey* and Justice White's concurrence in *Lowe* require the

Court to apply rational basis review.[5] (D.N. 62-1, PageID # 1835) It further contends that *Wollschlaeger* fails to support Plaintiffs' case because the statute at issue in *Wollschlaeger* prohibited speech rather than compelling it. (D.N. 38, PageID # 540; D.N. 67, PageID # 1901) However, the Commonwealth addresses neither the Eleventh Circuit's approval of the Fourth Circuit's

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[5] The Commonwealth also relies on *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), in support of this argument. This reliance appears misplaced. *Zauderer* concerned certain restrictions on attorney advertisements. *See id.* at 629. The Supreme Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. In so holding, the Supreme Court permitted regulations that required "purely factual and uncontroversial information" to be disclosed in advertisements. *Id.*

The Commonwealth argues that *Zauderer* requires application of rational basis review "to disclosures that professionals are required to give to clients." (D.N. 62-1, PageID # 1831) But the fact that attorneys and physicians are both regulated professionals does not make *Zauderer* applicable here. *Zauderer* is confined to *commercial speech* in the *advertising* context. *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 522 (D.C. Cir. 2015) ("[T]he Supreme Court's opinion in *Zauderer* is confined to advertising, emphatically, and, one may infer, intentionally."); *see also Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 524 (6th Cir. 2012) (stating that *Zauderer* applies in the context of "misleading or potentially misleading commercial speech"). Contrary to the Commonwealth's assertion, the speech at issue here does not propose a commercial transaction and thus is not commercial speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding that commercial speech, which does no more than propose a commercial transaction, is protected by the First Amendment). Thus, *Zauderer* is unpersuasive in this context.

decision in *Stuart* nor its assessment of Justice White's concurrence.

B.

At the heart of the circuit split outlined above is the question of whether *Casey* requires rational basis review of all speech restrictions in the physician-patient context. The Court finds the decisions of the Fourth and Eleventh Circuits more persuasive and agrees that *Casey* did not set a broad standard. The Fourth Circuit recognized the differences between the required disclosures in *Casey* and the required disclosures of speech-and-display ultrasound laws like H.B. 2. In the context of abortion, laws like H.B. 2 are designed to convey the state's ideological, anti-abortion message. Such laws go well beyond the basic disclosures necessary for informed consent to a medical procedure. That the disclosures mandated by H.B. 2 may be truthful, non-misleading, and relevant to a woman's decision to have an abortion is not dispositive. *See Stuart*, 774 F.3d at 246. "Although the State may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information, outside that context it may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (internal citations and quotations omitted). "[T]he speaker has the right to tailor the speech," and this "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Riley*, 487 U.S. at 797–98).

It is misguided to assert, as does the Commonwealth, that the requirements of H.B. 2 "are no different in essence" than the requirements upheld by *Eubanks* or *Casey*. (D.N. 62-1, PageID # 1819) The requirements at issue in *Eubanks* were nearly indistinguishable from those of *Casey*, which was Judge Heyburn's primary reason for upholding them. *See Eubanks*, 126 F. Supp. 2d at 459 ("Irrespective of the Supreme Court's limited discussion [of the First Amendment in *Casey*], one must recognize an overriding imperative: If Kentucky's pamphlets and the resulting infringement on speech are legally indistinguishable from those presented in *Casey*, then *Casey* controls."). Although Judge Heyburn considered the disclosures in *Casey* and *Eubanks* to be "compelled speech," he carefully distinguished them from compelled *ideological* speech. *See id.* at 458-59.

This distinction is what warrants greater protection of the First Amendment rights of Plaintiffs here. Speech-and-display laws like H.B. 2 compel ideological speech. *See Stuart*, 774 F.3d at 242, 246. *Casey* contained no discussion of ideological speech. In *Eubanks*, Judge Heyburn noted that if the compelled speech in *Casey* had been ideological, Justice O'Connor would have said so. *Eubanks*, 126 F. Supp. 2d at 458. This is because, prior to the *Casey* plurality, Justice O'Connor dissented in *City of Akron v. Akron Center for Reproductive Health*, noting that informed-consent provisions may "violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology." 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting) (citing *Wooley*, 430 U.S. 705), *overruled*

by Casey, 505 U.S. at 882; *see also Eubanks*, 126 F. Supp. 2d at 458 n.11. The Court thus views this Opinion as consistent with and, at minimum, not in conflict with Judge Heyburn's holding in *Eubanks*.

The declaration of Kentucky State Senator Robert Stivers denies that H.B. 2 is intended to convey an ideological message. (D.N. 32-7, PageID # 420) But the Commonwealth argues that the state has an interest in reducing abortions and a right to enact legislation to that effect. (D.N. 21, PageID # 230; D.N. 55, PageID # 671–72; D.N. 62-1, PageID # 1836) H.B. 2 is intended to advance that interest. And as the Fourth Circuit stated, "[c]ontext matters." *Stuart*, 774 F.3d at 246 (quoting *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 286 (4th Cir. 2013) (en banc)). This is especially true when evaluating compelled speech. *See id.* at 247; *see also Riley*, 487 U.S. at 796. ("Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon."). H.B. 2 is intended to dissuade women from choosing abortion by forcing ultrasound images, detailed descriptions of the fetus, and the sounds of the fetal heartbeat on them, against their will, at a time when they are most vulnerable. *Cf. Stuart*, 774 F.3d at 245 ("The clear import of displaying the sonogram in this context—while the woman who has requested an abortion is partially disrobed on an examination table—is to use the visual imagery of the fetus to dissuade the patient from continuing with the planned procedure.").

Of the requirements at issue in *Eubanks*, Judge Heyburn stated that "[t]hough the legislature

passed this Statute to further its preference for birth over abortion[,] the pamphlets do not overtly trumpet that preference. They provide information from which a woman might naturally select the choice favored by the legislature." *Eubanks*, 126 F. Supp. 2d at 458 n.11. By contrast, H.B. 2 is designed to persuade a woman to choose the option favored by the legislature by imposing certain information, imagery, and sounds upon her in a vulnerable state and time. H.B. 2 thus "overtly trumpet[s]" the anti-abortion preference of the legislature and is ideological in nature. *Id.*; *see also Stuart*, 774 F.3d at 242, 246, 255.

"[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717. Both *Stuart* and *Wollschlaeger* concluded that, despite the state's power to regulate certain professions, members of those professions are still entitled to speech protection. Simply "[b]eing a member of a regulated profession does not . . . result in a surrender of First Amendment rights." *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (citing *Thomas v. Collins*, 323 U.S. 516, 531 (1945)). Even *Eubanks* recognized that "[t]he Supreme Court *has consistently invalidated schemes which compel ideological speech*." *Eubanks*, 126 F. Supp. 2d at 458 (emphasis added) (citing *Keller*, 496 U.S. at 14; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)). The conclusion reached here is thus consistent with *Eubanks*.

In sum, the Court finds the Fourth Circuit's application of intermediate scrutiny and its

rationale in *Stuart* to be persuasive, particularly because of the key differences between H.B. 2 and the informed-consent laws at issue in *Casey* and *Eubanks*. The Eleventh Circuit's recent approval of the Fourth Circuit's decision underscores the soundness of *Stuart*'s rationale. Therefore, the Court concludes that application of at least intermediate scrutiny is necessary here, as rational basis review would fail to acknowledge the severity of the burden H.B. 2 imposes upon the First Amendment rights of physicians.

C.

Having adopted the Fourth Circuit's approach, the Court will apply intermediate scrutiny. As the North Carolina law reviewed by the Fourth Circuit is nearly identical to Kentucky's law, the result is the same—H.B. 2 is unconstitutional. But before the Court conducts its constitutional analysis of H.B. 2, a statement of the relevant facts is necessary.

1.

At the March 23, 2017 evidentiary hearing, the Court heard testimony from Dr. Tanya Franklin (one of the plaintiffs) as well as Plaintiffs' expert witnesses, Dr. Steven Joffe and Dr. Mark Nichols. Dr. Franklin is a board-certified obstetrician/gynecologist and provides a variety of healthcare services in addition to abortion. (D.N. 55, PageID # 682-83) Dr. Joffe is an associate professor of medical ethics and health policy and an associate professor of pediatrics at the University of Pennsylvania Perelman School of Medicine. (*Id.*, PageID # 734) He practices medicine in the field of pediatric hematology/oncology, but the bulk of his work, including research, teaching, and consulting,

concerns medical ethics. (*Id.*) Dr. Nichols is a board- certified obstetrician/gynecologist and a professor at the Oregon Health and Science University. (*Id.*, PageID # 800) Dr. Nichols practices medicine at OHSU and Planned Parenthood. (*Id.*, PageID # 800, 802) For twenty years, he served as the medical director of Planned Parenthood in Portland, Oregon, where he wrote protocols on patient care. (*Id.*, PageID # 802)

The Commonwealth called no witnesses at the hearing, but it submitted declarations from two board-certified obstetrician/gynecologists, Dr. John Seeds and Dr. W. David Hager, in opposition to Plaintiffs' motion for temporary restraining order. (D.N. 32-1; D.N. 32-2) These declarations do little to refute the testimony proffered at the hearing.

Dr. Hager practices in Lexington, Kentucky. (D.N. 32-2, PageID # 399) He has counseled patients who were considering abortion, but he does not state that he has any experience performing elective abortions. (*Id.*, PageID # 402) He explains that in his practice, he shows patients "photographs, pamphlets and videos of the proposed gynecologic procedures and the organs that will be involved." (*Id.*, PageID # 401) For pregnancy, he states that "an ultrasound is a necessary means of visualizing the infant in order to make an accurate diagnosis and to plan appropriate management in pregnancy." (*Id.*) He describes these steps as the "proper standard of care." (*Id.*) Notably, the requirements of H.B. 2—auscultating the fetal heartbeat and displaying and describing the ultrasound images against an abortion patient's wishes—are not included in his description of the "proper standard of care." Nevertheless, Dr. Hager

opines that the requirements of H.B. 2 are necessary to fully inform patients. (*Id.*, PageID # 405)

This opinion, however, appears to stem from a fundamental misunderstanding of Plaintiffs' practice. Dr. Hager states, "I understand the Plaintiff physicians to say that, absent HB 2, they would not show an ultrasound to women patients, not tell them what is depicted on the ultrasound, and not make available the unborn child's heartbeat for the expectant mother to hear, should she desire to do so." (*Id.*, PageID # 404-05) This is an inaccurate summary of Plaintiffs' practice. Plaintiffs *offer* such information to a patient and will provide the information if the patient wants it. (D.N. 55, PageID # 694, 703–04) But absent H.B. 2, Plaintiffs would not force that information on a patient.

Similar to Dr. Hager, Dr. Seeds opines that H.B. 2 conforms to existing national standards of care. (D.N. 32-1, PageID # 366) But many of his assertions are undermined by the testimony given at the hearing. Critically, Dr. Seeds's opinion never addresses the standard of care for abortion set by the National Abortion Federation (NAF), which is the standard of care followed by the EMW clinic. (D.N. 55, PageID # 704–05, 813) Nor does Dr. Seeds clearly indicate whether he has ever performed elective abortions. (*See* D.N. 32-1, PageID # 352) Further, his opinion is premised on the assumption that viewing the ultrasound image and listening to the ultrasound description and fetal heartbeat are voluntary for the patient. (*Id.*, PageID # 349) Dr. Franklin's testimony revealed that it is impossible for a patient to entirely ignore the information being forced upon her. (*See* D.N. 55, PageID # 699–700, 722)

Additionally, Dr. Seeds states that the mandated disclosures strengthen, rather than impair, the physician-patient relationship. (D.N. 32-1, PageID # 363) However, as mentioned, Dr. Seeds does not perform elective abortions (*id.*, PageID # 352, 363), and Dr. Franklin's hearing testimony—which is based on firsthand observation of the effects of H.B. 2—directly refutes this assertion. (D.N. 55, PageID # 706–07)

Ultimately, any discrepancy between the hearing testimony and the doctors' declarations is immaterial. The following unrebutted facts were established at the hearing.

Patient autonomy—the patient's ability to make informed decisions about her own medical care—is at the heart of the informed-consent process. (*Id.*, PageID # 743–44, 808, 829) The informed-consent process consists of five core elements or types of information that the physician will disclose to the patient: the nature of the procedure, the purpose of the procedure, the potential risks of the procedure, the potential benefits of the procedure, and the major alternatives to the procedure. (*Id.*, PageID # 688–89, 744–45, 807–09; *see also* D.N. 32-1, PageID # 344–46) The information mandated by H.B. 2 falls outside of these core elements. (*See* D.N. 55, PageID # 744–45) Offering the mandated information is acceptable and consistent with principles of patient autonomy, as it respects the patient's ability to decide whether or not she wants more information beyond the five core elements listed above. (*Id.*, PageID # 744–45) The American Medical Association has stressed the importance of patient autonomy in the informed-consent process, stating that physicians must

"[p]resent relevant information accurately and sensitively, in keeping with the patient's preference for receiving medical information." (*Id.*, PageID # 748)

EMW clinic is accredited by NAF and follows its standard of care. (*Id.*, PageID # 683) H.B. 2 is inconsistent with that standard. (*See id.*, PageID # 704–05, 813) Guidelines written by the American Congress of Obstetricians and Gynecologists (ACOG) also inform the practice of medicine in this field and the informed-consent process. (*See id.*, PageID # 755-56, 758-59; *see also* D.N. 32-1, PageID # 352–53) But Dr. Franklin and Dr. Nichols were unaware of any ACOG guidance that recommends or requires a physician to simultaneously display and describe an ultrasound or auscultate the fetal heartbeat prior to performing an abortion. (*See* D.N. 55, PageID # 708, 813, 817, 819–20) The witnesses were similarly unaware of any medical procedure for which it is required that a patient view diagnostic images in order to give informed consent. (*Id.*, PageID # 707, 746, 810)

The NAF standard of care requires physicians to perform an ultrasound to date the pregnancy, look for any abnormalities, and determine if a fetal demise has occurred. (*Id.*, PageID # 693-94, 705) ACOG guidelines also require that an obstetric ultrasound be performed, for the same reasons. (*See* D.N. 32-1, PageID # 355) But it is not the standard of care to force the patient to view the ultrasound or listen to a detailed description of the internal and external organs of the fetus, as well as the fetal heartbeat. (*See* D.N. 55, PageID # 705, 708, 813, 817, 819–20) Despite this, physicians at EMW clinic have been complying

with H.B. 2. (*Id.*, PageID # 726) Notably, the testimony at the hearing established that the requirements of H.B. 2 had not dissuaded any women from undergoing an abortion. (*See id.*, PageID # 726-27, 728-29)

The testimony further revealed that H.B. 2 causes patients distress. Most patients choose to look away from the ultrasound image. (*Id.*, PageID # 699) But although they may attempt to avoid listening to the fetal heartbeat and ultrasound description, it is impossible for patients to entirely drown out the sounds. (*Id.*, PageID # 699–700, 722) During the process mandated by H.B. 2, patients are "very upset," "crying," and even "sobbing." (*Id.*, PageID # 699) For victims of sexual assault, the requirements of H.B. 2 "can be extremely upsetting." (*Id.*, PageID # 698) Similarly, for patients diagnosed with a fetal anomaly, who have already had several ultrasounds performed and heard detailed descriptions of the fetus, the requirements of H.B. 2 "can be extremely difficult" and "emotional." (*Id.*, PageID # 700-01; D.N. 41, PageID # 601–03)

2.

Having established the relevant facts, the Court will now apply intermediate scrutiny. Intermediate scrutiny requires the state to prove that "the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Stuart*, 774 F.3d at 250 (quoting *Sorrell*, 564 U.S. at 572). When a state defends a regulation on speech as a means to prevent harm, "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these

harms in a direct and material way." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (citations omitted). Because H.B. 2 does not advance a substantial governmental interest, is not drawn to achieve the government's interests, and prevents no actual harm, it fails under intermediate scrutiny and is unconstitutional.[6]

The Commonwealth asserts that H.B. 2 advances a number of substantial governmental interests, including the practice of medicine, the well-being and informed decision-making of pregnant women, and the protection of fetal life and discouragement of abortion. (D.N. 62-1, PageID # 1820-21, 1823, 1836; D.N. 32-7, PageID # 421) The Court finds, as have other courts, that these are substantial governmental interests. *See Gonzales*, 550 U.S. at 158 (recognizing a state interest in fetal life); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (recognizing a state interest in maintaining "the integrity and ethics of the medical profession"); *Casey*, 505 U.S. at 871, 882 (recognizing state interests in fetal life, the psychological well-being of pregnant women, and informed decision-making); *Stuart*, 774 F.3d at 250 (same). But H.B. 2 still must directly advance the

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[6] The Commonwealth argues that if the Court finds H.B. 2 to be unconstitutional, the decision will render unconstitutional numerous other statutes that compel physicians to make certain disclosures. (D.N. 62-1, PageID # 1822–24) This argument is unpersuasive. Only H.B. 2 is under review by the Court at this time, and the Court will make no determination as to the constitutionality of the statutes cited by the Commonwealth. But the Court notes that those statutes require disclosures different in nature than those required by H.B. 2, and it is entirely possible that they do not infringe on physicians' First Amendment rights as does H.B. 2.

Commonwealth's interests and be drawn to achieve those interests. *Sorrell*, 564 U.S. at 572.

The facts here show that H.B. 2 does not advance the Commonwealth's interests and, in fact, acts to the detriment of those interests. As an initial matter, it is impossible to say that H.B. 2 is intended to better inform women considering an abortion when it also permits women to cover their eyes and ears in order to avoid receiving the information the Commonwealth intends for them to receive. Thus, even the plain language of H.B. 2 fails to advance the substantial governmental interests of the Commonwealth.

H.B. 2 also fails to serve the Commonwealth's interests because it appears to inflict psychological harm on abortion patients. (*See* D.N. 55, PageID # 699–701) *See Stuart*, 774 F.3d at 253 ("[F]ar from promoting the psychological health of women, this requirement risks the infliction of psychological harm on the woman who chooses not to receive this information."). The unrebutted facts adduced at the hearing show that women experience distress as a result of H.B. 2. (D.N. 55, PageID # 699–701; D.N. 41, PageID # 601–03) Requiring physicians to force upon their patients the information mandated by H.B. 2 has more potential to harm the psychological well-being of the patient than to further the legitimate interests of the Commonwealth. *See Stuart*, 774 F.3d at 253.

Nor can the Commonwealth demonstrate that H.B. 2 alleviates a "real, not merely conjectural" harm. *Turner*, 512 U.S. at 664. When the Kentucky General Assembly enacted § 311.725, its express purpose was to ensure that women made

informed decisions when considering abortion. *See* Ky. Rev. Stat. § 311.710(4). Here, the Commonwealth argues that H.B. 2 is intended to ensure that abortion patients "possess[] sufficient information" to make their decisions. (D.N. 62-1, PageID # 1838) But there is no evidence that the existing law fell short of its goal, thereby creating a "real" harm to be remedied by H.B. 2. *Turner*, 512 U.S. at 664. When asked at the hearing whether the existing law was inadequate, the Commonwealth could not articulate specifically how or why § 311.725 fell short. (D.N. 55, PageID # 676–78) In its post-hearing brief, the Commonwealth asserted that it need not prove that the existing informed-consent law was inadequate. (D.N. 62-1, PageID # 1828 n.2) But this assertion ignores the burden placed on the Commonwealth under intermediate scrutiny. *See Turner*, 512 U.S. at 664.

The Commonwealth submitted several affidavits from women who chose to have an abortion but later came to regret their decision after realizing that they may not have been fully informed about the procedure. (D.N. 32-3; D.N. 32-4; D.N. 32-5; D.N. 32-6) While compelling, the affidavits are irrelevant; all of the affiants had abortions prior to the passage of the informed-consent laws preceding H.B. 2. (D.N. 55, PageID # 856-57) Thus, the record contains no evidence that Kentucky's existing informed-consent laws were in any way inadequate or left unresolved some "real, not merely conjectural" harm. *Turner*, 512 U.S. at 664.

Further, the Commonwealth's suggestion that H.B. 2 ensures that women are no longer "den[ied]" certain information is misleading. (D.N. 62-1, PageID

1825 (citing *Lakey*, 667 F.3d at 579)) The evidence shows that it is not only the practice at EMW, but also the nationwide standard, to *offer* women the opportunity to see an ultrasound, hear a description of that ultrasound, and hear the fetal heartbeat. (D.N. 55, PageID # 694, 705, 813) There is no evidence that physicians in Kentucky were denying women this information prior to the enactment of H.B. 2.

To the contrary, Dr. Franklin's testimony shows that prior to H.B. 2, EMW patients made informed decisions about abortion and that the informed-consent process followed by EMW physicians ensured this. While Dr. Franklin's testimony also shows that EMW physicians complied with the existing informed-consent laws and have been complying with H.B. 2, there is no evidence that H.B. 2 has dissuaded women from choosing to have an abortion. (*See id.*, PageID # 690–94, 698–702, 726-27) Indeed, Dr. Franklin testified that in the nearly three months since H.B. 2 took effect, not a single EMW patient decided against an abortion as a result of viewing an ultrasound image or hearing an ultrasound description and the fetal heartbeat. (*Id.*, PageID # 722, 725–27, 729) Moreover, the evidence shows that H.B. 2 inflicts harm on patients and physicians. The Commonwealth has thus failed to meet its burden under intermediate scrutiny, and H.B. 2 is therefore unconstitutional.

D.

The Court will now address the motions for summary judgment filed by Defendant Attorney General Andrew G. Beshear and Defendant Michael

S. Rodman. Beshear and Rodman argue that they are not proper defendants to this action. Having concluded that Beshear and Rodman are proper defendants, the Court will deny both motions.

Defendant Beshear argues that he is not a proper party because he has no authority to enforce H.B. 2. (D.N. 58-1, PageID # 872) This is the same argument submitted in Beshear's motion to dismiss. (D.N. 13) In the event that he is a proper party, Beshear submits a substantive defense of H.B. 2, arguing that it is constitutional on its face. (D.N. 58-1, PageID # 872) Because the Court has already determined that H.B. 2 is unconstitutional, the latter argument fails.

Nor is the Court convinced that Beshear lacks the necessary authority. The attorney general is the "chief law officer of the Commonwealth" and has a statutory responsibility to

> exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment. . . . [H]e shall . . . commence all actions or enter his appearance in all cases, hearings, and proceedings in and before . . . courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state . . . in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or

> growing out of, his or its official duties, except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.

Ky. Rev. Stat. § 15.020. "It is unquestioned that '[a]t common law, [the Attorney General] had the power to institute, conduct[,] and maintain suits and proceedings for the *enforcement* of the laws of the state, the preservation of order, and the protection of public rights.'" *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009) (emphasis added) (alterations in original) (quoting *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974)). "Indeed, the Attorney General has not only the power to bring suit when he believes the public's legal or constitutional interests are under threat, but appears to have even the duty to do so." *Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016) (citing *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 618 (Ky. 1992) (Leibson, J., dissenting)). "And, notably, this 'broad grant of authority . . . includes the power to act to *enforce the state's statutes*.'" (omission in original) (emphasis added) (quoting *Thompson*, 300 S.W.3d at 173); *see also Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 826 (Ky. 1942) ("It is generally recognized that unless denied by statute the attorney general of any state is clothed with . . . the powers . . . . to represent his state as its chief lawyer and to advise and speak for its several departments and officers in legal matters.").

From the above, it is fair to conclude that the Kentucky attorney general is empowered to enforce

state law, unless that power is explicitly delegated by statute to another authority. The General Assembly has not expressly made it the duty of any other official to represent the Commonwealth in actions to enforce penalties under H.B. 2. Beshear cites no authority that expressly designates another official. Therefore, the Court can only infer that the official with the authority to enforce H.B. 2 is the attorney general. Beshear thus appears to be a proper party here.

Defendant Rodman, the executive director of the Kentucky Board of Medical Licensure, also argues that he is an improper party because he has no enforcement authority under H.B. 2 and no authority to take disciplinary action against a medical licensee. (D.N. 59-1, PageID # 884) Additionally, Rodman argues that Plaintiffs' injuries are purely hypothetical. (*Id.*)

H.B. 2 requires courts to report violations of the law to the Kentucky Board of Medical Licensure for disciplinary action. Plaintiffs describe Rodman's position on the Board as a "gatekeeper" to the disciplinary process. (D.N. 66, PageID # 1890) When the Board receives a grievance, the executive director assigns that grievance to an inquiry panel composed of Board members. Ky. Rev. Stat. § 311.591(2). If the panel determines that there has been a violation, the panel issues a complaint. § 311.591(3)(d). The executive director then assigns the matter for a hearing. § 311.591(5). This role is sufficient to name the executive director as a defendant, as he may be enjoined from initiating any inquiries or disciplinary hearings related to violations of H.B. 2.

Further, while it is true that Article III standing requires an injury, causation, and redressability, pre-enforcement review is permitted in some circumstances. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Airline Prof'ls Ass'n of Int'l Bhd. of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne Inc.*, 332 F.3d 983, 988 (6th Cir. 2003). Potential adverse licensing actions, like those that could result from violating H.B. 2, are serious enough on their own to create a constitutional injury-in-fact to satisfy the justiciability requirements. *See Kiser v. Reitz*, 765 F.3d 601, 608-10 (6th Cir. 2014). Notably, in *Eubanks*, Judge Heyburn concluded that the plaintiff physicians could seek pre-enforcement review of the informed-consent law because "they *may* face disciplinary proceedings under the Statute." *Eubanks*, 126 F. Supp. 2d at 453 (emphasis added) (citing *Bolton*, 410 U.S. at 188). The same is true here. The executive director of the Kentucky Board of Medical Licensure at the time, C. William Schmidt, was named as a defendant in *Eubanks*. Here, Rodman is a proper defendant.

IV. CONCLUSION

The Court concludes that H.B. 2 violates the First Amendment. Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) Plaintiffs' motion for summary judgment (D.N. 60) is **GRANTED**. A permanent injunction and judgment will be entered this date.

(2) Defendant Glisson's motion for summary judgment (D.N. 62) is **DENIED**.

(3) Defendant Beshear's and Defendant Rodman's motions for summary judgment (D.N. 58; D.N. 59) are **DENIED**.

(4) Defendant Beshear's and Defendant Rodman's motions to dismiss (D.N. 13; D.N. 14) are **DENIED** as moot.

(5) Plaintiffs' motion for temporary restraining order (D.N. 3) is **DENIED** as moot.

(6) The third-party motion for leave to file a brief as amici curiae (D.N. 18) is

GRANTED.

September 27, 2017

David J. Hale, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 17-6151/6183

EMW WOMEN'S SURGICAL CENTER, P.S.C., on behalf of itself, its staff, and its patients; ERNEST MARSHALL, M.D., on behalf of himself and his patients; ASHLEY BERGIN, M.D., on behalf of herself and her patients; TANYA FRANKLIN, M.D., on behalf of herself and her patients,

Plaintiffs-Appellees

v.

ANDREW G. BESHEAR, Attorney General (17-6183); ADAM MEIER, in his capacity as Secretary of the Cabinet of Health and Family Services (17-6151),

Defendants-Appellants.

BEFORE: NORRIS, DONALD, and BUSH, Circuit Judges.

JUDGMENT

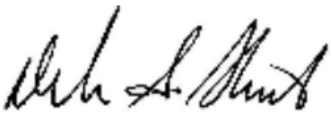
On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is

ORDERED that the judgment of the district court is REVERSED, the injunction is VACATED, and the case is REMANDED with instructions for General Beshear to be dismissed from the case, and for summary judgment to be entered in favor of Secretary Meier on the first claim for relief stated in the complaint and for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 17-6151/6183

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS, ET AL.,
Plaintiffs-Appellees

v.

ANDREW G. BESHEAR, ATTORNEY GENERAL (17-6183); ADAM MEIER, IN HIS CAPACITY AS SECRETARY OF THE CABINET OF HEALTH AND FAMILY SERVICES (17-6151),
Defendants-Appellants.

FILED
Jun 28, 2019
DEBORAH S. HUNT, Clerk

ORDER

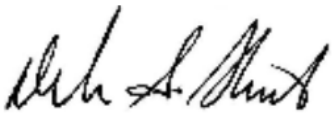
BEFORE: NORRIS, DONALD, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court.* Less than a majority of the judges voted in favor of rehearing en banc.

* Judges Thapar and Murphy recused themselves from participation in this ruling.

Therefore, the petition is denied. Judge Donald would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EMW WOMEN'S SURGICAL CENTER, P.S.C., et al., Plaintiffs,

v. Civil Action No. 3:17-cv-16-DJH

ANDREW G. BESHEAR, et al., Defendants.

* * * * *

JUDGMENT AND PERMANENT INJUNCTION

Pursuant to Rules 58 and 65 of the Federal Rules of Civil Procedure, and in accordance with the Memorandum Opinion and Order entered this date, it is hereby

ORDERED and **ADJUDGED** as follows:

(1) Judgment is entered in favor of Plaintiffs as to their first claim for relief. (Docket No. 1, PageID # 13) H.B. 2, codified at Ky. Rev. Stat. §§ 311.727, .990(32), violates the First Amendment rights of physicians.

(2) Defendants and their officers, agents, and employees, and those persons in active concert or participation with Defendants who receive actual notice of this Order, are **PERMANENTLY ENJOINED** from enforcing H.B. 2 by civil action, criminal proceeding, administrative action or proceeding, or any other means; penalizing any person for failure to comply with H.B. 2 by civil

action, criminal proceeding, administrative action or proceeding, or any other means; and applying, imposing, or requiring compliance with, implementing, or carrying out in any way any part of H.B. 2.

(3) This action is **DISMISSED** with prejudice and **STRICKEN** from the Court's docket.

(4) This is a **FINAL** and **APPEALABLE** Judgment, and there is no just cause for delay.

September 27, 2017

David J. Hale, Judge
United States District Court

RELEVANT STATUTE

AN ACT relating to full disclosure in public safety and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS 311.710 TO 311.820 IS CREATED TO READ AS FOLLOWS:

(1) As used in the section:

(a) "Ascultate" means to examine by listening for sounds made by internal organs of the fetus, specifically for a fetal heartbeat, utilizing an ultrasound transducer or a fetal heart rate monitor;

(b) "Obstetric ultrasound" or "ultrasound" means the use of ultrasonic waves for diagnostic or therapeutic purposes, specifically to monitor a developing fetus; and

(c) "Qualified Technician" means a medical imaging technologist as defined in KRS 311B.020 who is certified in obstetrics and gynecology by the American Registry for Diagnostic Medical Sonography or a nurse midwife or advance practice nurse practitioner in obstetrics with certification in obstetrical ultrasongraphy.

(2) Prior to a woman giving informed consent to having any part of an abortion performed, the physician who is to

perform the abortion or a qualified technician to hom the responsibility has been delegated by the physician shall:

(a) Perform an obstetric ultrasound on the pregnant woman;

(b) Provide a simultaneous explanation of what the ultrasound is depicting, which shall include the presence and location of the unborn child within the uterus and the number of unborn children depicted and also, if the ultrasound image indicates that fetal demise has occurred, inform the woman of that fact;

(c) Display the ultrasound images so that the pregnant woman may view the images;

(d) Ascultate the fetal heartbeat of the unborn child so that the pregnant woman may hear the heartbeat if the heartbeat is audible;

(e) Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable; and

(f) Retain in the woman's medical record a signed certification from the pregnant woman that she has been presented with the information required to be provided under paragraphs (c) and (d) of this

subsection and has viewed the ultrasound images, listened to the heartbeat if the heartbeat is audible, or declined to do so. The signed certification shall be on a form prescribed by the cabinet.

(3) When the ultrasound images and heartbeat sounds are provided to and reviewed with the pregnant woman, nothing in this ection shall be construed to prevent the pregnant woman from averting her eyes from the ultrasound images or requesting the volume of the heartbeat be reduced or turned off if the heartbeat is audible. Neither the physician, the qualified technician, nor pregnant woman shall be subject to any penalty if the pregnant woman refuses to look at the displayed ultrasound images or to listen to the heartbeat if the heartbeat is audible.

(4) The requirements of this section shall be in addition to any requirement contained in KRS 311.725 or any other section of KRS 311.710 to 311.820.

(5) The provisions of this section shall not apply in the case of a medical emergency or medical necessity. If a medical emergency or medical necessity compels the performance or inducement of an abortion, the physician who will perform or induce the abortion, prior to its performance or inducement if possible, shall inform the pregnant woman of the

medical indications supporting the physician's judgment that an immediate abortion is necessary. Any physician who performs or induces an abortion without the prior satisfaction of the requirements of this section because of a medical emergency or medical necessity shall enter the reasons for the conclusion that a medical emergency or medical necessity exists in the medical record of the pregnant woman.

Section 2. KRS 311.990 is amended to read as follows:

(30) (a) Any physician or qualified technician who violates Section 1 of this Act shall be fined not more than one hundred thousand dollars ($100,000) for a first offense and not more than two hundred fifty thousand dollars ($250,000) for each subsequent offense.

b) In addition to the fine, the court shall report the violation of any physician, in writing, to the Kentucky Board of Medical Licensure for such action and discipline as the board deems appropriate.

Section 3. Sections 1 and 2 of this Act shall be known and may be cited as the Ultrasound Informed Consent Act.

Section 4. Whereas ultrasound requirements serve an essential medical purpose in confirming the presence, location, and gestational age of a pregnancy, and whereas the knowledgeable exercise of a woman's decision to have an abortion depends on the extent to which the woman receives sufficient information to make an informed choice between the two alternatives of giving birth or having an abortion, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming law.