No. 19-417

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,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Free Speech Clause of the First Amendment prohibits the Commonwealth of Kentucky from regulating the practice of medicine by requiring a medical professional, prior to performing a medical procedure, to provide the patient with information that is truthful, non-misleading, and relevant to the procedure.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 920 F.3d 421. The opinion of the United States District Court for the Western District of Kentucky is reported at 283 F. Supp. 3d 629.

STATEMENT OF THE CASE

A. The Challenged Statute

In 2017, the Kentucky General Assembly determined that it would be prudent public policy to augment Kentucky's existing informed-consent requirements for abortion providers. The then-existing requirements were enacted in 1998, and they simply required abortion providers to inform patients of: (1) the nature and purpose of the abortion; (2) the medical risks and alternatives to abortion; (3) the probable gestational age of the child; (4) the material risks of carrying the pregnancy to term; (5) the availability of printed materials about the foregoing, as well as information about obtaining public and private assistance; and (6) the fact that the father of the child is liable for child support even if he has offered to pay for an abortion. Ky. Rev. Stat. § 311.725(1)(a)-(b).[1] By 2017, however, the General Assembly determined that

[1] The constitutionality of those requirements was challenged on First Amendment grounds by at least one of the plaintiffs in the present lawsuit. The United States District Court for the Western District of Kentucky found the requirements to be constitutional, and the plaintiffs did not appeal that decision. *See Eubanks v. Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky. 2000).

women deserve to be even better informed before deciding whether to have an abortion.

To that end—and in light of two decades of continuous improvement in ultrasound technology—Kentucky legislators introduced House Bill 2 ("HB 2") in order to require that women seeking abortions also be provided with an ultrasound image of their fetus, and a medically-accurate description of that image, as part of the informed-consent process. The bill passed both houses of the General Assembly with overwhelming bipartisan support in the very first week of the 2017 legislative session, receiving "yea" votes from more than 80 percent of legislators. The Governor signed HB 2 two days later, and it became effective immediately.

HB 2's requirements, which are codified as Ky. Rev. Stat. § 311.727, are simple and straightforward. They do nothing more than require that women who are considering an abortion be provided with information that is truthful, non-misleading, and relevant to their decision of whether to have an abortion. Specifically, it requires a physician or qualified technician to do the following before performing an abortion: (1) display an ultrasound image of the child; (2) provide the woman with a medical description of the ultrasound, including the dimensions of the child and the presence of any external members or internal organs; and (3) auscultate the fetal heartbeat so that it can be heard if audible. *Id.* § 311.727(2).

These requirements are not applicable in the case of a medical emergency or necessity. *Id.* § 311.727(5). And, in recognition of the fact that not all patients will

have the same need or desire for information, the law strikes a balance by providing that the volume of the fetal heartbeat can be reduced or turned off at the request of the woman, and by also providing that "nothing in this section shall be construed to prevent the pregnant woman from averting her eyes from the ultrasound images." *Id.* § 311.727(3).

The Petitioners' Statement of the Case claims that HB 2 requires a physician to read patients a particular "script," [Pet. at 2], but that is completely false. HB 2 does not require anyone to follow a set script; rather, the physician or qualified technician who is making the required disclosures can use his or her own words to meet HB 2's requirements.

B. The Policy Behind HB 2

The rationale behind HB 2 is the common sense notion that nothing can better inform a patient of the nature and consequences of an abortion than actually seeing an image of the fetus who will be aborted and receiving a medically-accurate description of that image. And there is abundant evidence in the record demonstrating the real-world significance of providing women with this information.

The Commonwealth of Kentucky presented the district court with affidavits from four women who had undergone abortions. [*See* Dkt. Nos. 32-3, 32-4, 32-5, 32-6]. These affidavits are powerful statements of the despair and grief that a woman suffers when she realizes that her decision to obtain an abortion was not fully informed. [*See id.*]. Generally, the affiants state that they did not understand the true nature of their

fetus before having an abortion, and they believed their fetus to be an inanimate mass of tissue rather than a living being that was assuming the human form. [*See* Dkt. No. 32-4 at PageID # 409-10]. The affiants further state that being shown an ultrasound image of their fetus and receiving a description of that image would have been helpful to them in determining whether to have an abortion and would have helped them avoid the mental anguish that they later suffered upon realizing that they had made ill-informed decisions to abort their children. [*See* Dkt. Nos. 32-3, 32-4, 32-5, 32-6, PageID # 406-08, 409-11, 412-14, 415-17].

These brave statements, which are essentially ignored by the Petitioners, echo the considerations that this Court articulated in *Gonzales v. Carhart*, 550 U.S. 124 (2007), when it explained the especially strong interest that governments have in ensuring that women have all available information related to their pregnancy before making a decision about abortion. In particular, this Court stated:

> . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptional 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.
>
> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From

> one standpoint this ought not to be surprising. 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 is likely the case with the abortion procedures here in issue.
>
> It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Id. at 159-60 (citations omitted).

HB 2 addresses these concerns by ensuring that women have more information about not only the abortion procedure itself, but also their fetus so that they will not experience "grief more anguished and sorrow more profound" if they later realize that they made an uninformed decision. As the Fifth Circuit held in *Texas Medical Providers Performing Abortion Services v. Lakey*, "[d]enying [a woman] up to date medical information is more of an abuse to her ability to decide than providing the information." 667 F.3d 570, 579 (5th Cir. 2012).

Of course, the Petitioners contend that they do not actually deny women the information required by HB 2. They say that they *offer* women that information.[2] Tellingly, however, there is no indication that they do anything to dispel the mistaken beliefs of women who—like the affiants—are under the impression that their fetuses are simply masses of inanimate tissue rather than living beings that are assuming the human form. Thus, while the Petitioners claim to offer the information to women, there is no evidence that the Petitioners do anything to make sure that all women are fully informed about the nature of their fetus or the nature and consequences of the abortion procedure. Given this reality, the Kentucky General Assembly determined that the best way of ensuring that a woman is fully informed about the nature and consequences of an abortion prior to opting for one is to require that she be shown an ultrasound image of her fetus and be provided a description of the fetus in her doctor's own words. This is the considered judgment of the overwhelming majority of Kentucky's legislators—those elected by Kentucky's citizens to make policy decisions for the Commonwealth.

C. Decisions Below

The Petitioners filed suit in the United States District Court for the Western District of Kentucky,

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[2] The Petitioners ignore the fact that HB 2 applies not just to themselves, but to *anyone* who will ever provide an abortion in Kentucky. The fact that the Petitioners claim to offer to display ultrasound images to their patients does not guarantee that other abortion providers will do so, nor does it guarantee that the Petitioners will continue doing so in the future.

claiming that HB 2 violates their First Amendment rights by compelling them to engage in speech to which they object. They sought preliminary and permanent injunctive relief.

1. The district court held an evidentiary hearing on the Petitioners' motion for a preliminary injunction, and the parties thereafter agreed for that hearing to be treated as the trial on the merits. Several months later, the district court declared HB 2 to be unconstitutional and entered a permanent injunction against its continued enforcement.[3] *See EMW Women's Surgical Ctr. v. Beshear*, 283 F. Supp. 3d 629 (W.D. Ky. 2017). The district court reached that result by rejecting the analytical framework applied to similar laws by the Fifth and Eighth Circuits and adopting instead the intermediate-scrutiny analysis that the Fourth Circuit applied in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). *See EMW Women's Surgical Ctr.*, 283 F. Supp. 3d at 642. It adopted the Fourth Circuit's analysis because it agreed with that court's conclusion that ultrasound-disclosure requirements carry constitutionally-suspect ideological implications. *See id.* at 641-42.

2. The United States Court of Appeals for the Sixth Circuit denied a motion to stay the injunction pending appeal, but it ultimately reversed the district court's judgment based on this Court's decision in *National Institute of Family & Life Advocates v. Becerra*, 138

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[3] The district court had not previously granted preliminary injunctive relief, meaning that HB 2 was in effect for months before being enjoined.

S. Ct. 2361 (2018) ("*NIFLA*"). *See EMW Women's Surgical Ctr. v. Beshear*, 920 F.3d 421 (6th Cir. 2018). With respect to its earlier denial of a stay, the Sixth Circuit explained that "neither our court nor the district court had the benefit of the Supreme Court's recent decision in [*NIFLA*]." *See id.* at 424.

In reversing the district court's judgment, the Sixth Circuit acknowledged that there had been a conflict among circuits prior to *NIFLA*, but it held that *NIFLA* "clarified that no heightened 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)." *EMW Women's Surgical Ctr.*, 920 F.3d at 424 (citing *NIFLA*, 138 S. Ct. at 2373).

The Sixth Circuit went on to explain that "in *NIFLA*, a majority of the Supreme Court adopted the First Amendment analysis applied in *Casey*." *Id.* at 428 (citing *NIFLA*, 138 S. Ct. at 2373-74). And, under that analysis, a compelled informed-consent disclosure is a constitutional regulation of the practice of medicine so long as it is truthful, non-misleading, and relevant to the patient's decision whether to undergo the particular procedure in question. *Id.* at 428-29 (citing *NIFLA*, 138 S. Ct. at 2373; *Casey*, 505 U.S. at 882). Thus, the Sixth Circuit concluded that "[b]ecause 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." *Id.* at 424 (citing *NIFLA*, 138 S. Ct. at 2373; *Casey*, 505 U.S. at 882-84).

After concluding that HB 2 meets "the lower level of scrutiny mandated by *Casey* and *NIFLA*," *id.* at 432, the Sixth Circuit observed that its decision was "in line with two other circuits that have faced First Amendment challenges to similar abortion-informed-consent statutes," *id.* Specifically, the court observed that the Fifth Circuit in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012), and the Eighth Circuit in *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc), both held that informed-consent requirements are constitutional when they merely mandate the disclosure of truthful, non-misleading, and relevant information. *See id.*

The Sixth Circuit also discussed the Fourth Circuit's outlier decision in *Stuart*, concluding that *Stuart*'s reliance on the purported ideological implications of ultrasound-disclosure requirements is an illegitimate basis for invalidating them in light of *NIFLA*. The Sixth Circuit rejected *Stuart*'s reasoning "because it gave insufficient regard to the First Amendment analysis in *Casey* that the Court clarified and adopted as the majority view in *NIFLA*." *Id.* at 435. More specifically, the Sixth Circuit found *Stuart* to be inconsistent with *NIFLA* and held that "there is no Supreme Court authority for looking to whether the speech has ideological implications and applying a 'sliding scale' that may result in intermediate scrutiny." *Id.* at 436.

The Sixth Circuit then rejected the Petitioners' remaining arguments—*i.e.*, that HB 2 improperly

interferes with the doctor-patient relationship, and that the law should be evaluated under heightened scrutiny because it has a negative emotional effect on patients. As to the former, the Sixth Circuit held that "H.B. 2 does not interfere with the doctor-patient relationship any more than other informed-consent laws." *Id.* And the court rejected out of hand the Petitioners' argument that the constitutionality of informed-consent laws should be determined on the basis of the preferred customs of professional groups like the National Abortion Federation and the American College of Obstetricians and Gynecologists. *See id.* at 437. Citing *Gonzales*, the Sixth Circuit observed that "[t]he 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.* (quoting *Gonzales*, 550 U.S. at 163). And the court further observed that "[t]he principle that informed-consent requirements may be created by law, as opposed to merely medical profession custom, applies to all medical procedures, including abortion." *Id.* Thus, the court held that the views of medical groups are irrelevant in determining whether an informed-consent statute violates the First Amendment. *See id.* at 439.

As to the Petitioners' argument about the negative emotional effects of HB 2, the Sixth Circuit held that such considerations simply are not relevant to the First Amendment analysis. The court noted that "discomfort may be a byproduct of informed consent itself," *id.* at 442 (citing *Gonzales*, 550 U.S. at 159), and observed that *Casey* rejected the notion that discomfort to the

patient can render an informed-consent requirement invalid, *see id.*

3. Judge Donald dissented. Significantly, she acknowledged that "the controlling First Amendment cases in this context are *Casey* and *NIFLA*." *Id.* at 449 (Donald, J., dissenting). However, she believed that the majority applied those cases incorrectly. In her view, the dividing line between a valid informed-consent statute and an invalid compelled-speech statute is not whether the law requires the disclosure of information that is truthful, non-misleading, and relevant to the decision to undergo a medical procedure, but instead whether the requirements of the law are "currently embodied in the customary standard of medical care." *Id.* at 450 (quoting Majority Opn. at n.24). Thus, under Judge Donald's view, the preferences of professional groups can supplant a state's sovereignty. Accordingly, she concluded that HB 2 is unconstitutional because she found its requirements to be inconsistent with the views of certain medical groups. *See id.* at 455-56, 460-61.

4. The Petitioners moved for rehearing *en banc*, which the Sixth Circuit denied on June 28, 2019. Thereafter, they sought, and received, a stay of the mandate pending this Court's resolution of a petition for a writ of certiorari.

REASONS TO DENY CERTIORARI

A writ of certiorari is inappropriate here. The Sixth Circuit's decision simply applied recent controlling precedent from this Court—precedent that clarified the law and, in doing so, *eliminated* a conflict among the circuits. Because there is presently no conflict among circuits, and because this Court spoke to the issue at hand just two terms ago, there is no need for the Court to use this case as a vehicle for addressing the issue yet again. Moreover, the Sixth Circuit's decision is correct.

I. THERE IS NO CIRCUIT CONFLICT OVER THE QUESTION PRESENTED.

The Petitioners' sole basis for arguing that there is a conflict among the circuits is the fact that the Sixth Circuit's decision and the *Lakey* and *Rounds* decisions from the Fifth and Eighth Circuits respectively are inconsistent with the Fourth Circuit's 2014 decision in *Stuart*. Their argument ignores one overriding point: this Court's 2018 decision in *NIFLA*.

There was undoubtedly a conflict among the circuits prior to *NIFLA*, with the Fifth and Eighth Circuits applying rational-basis review in First Amendment challenges to medical-disclosure requirements like the one at issue here, and the Fourth Circuit adhering to a sliding-scale analysis that applies intermediate scrutiny to such laws. But *NIFLA* clarified the law and reset the playing field on this issue, meaning that there is no longer a circuit conflict.

After *NIFLA*, it is clear that the Fourth Circuit's decision in *Stuart* is no longer good law. *Stuart* held that regulations impacting the speech of professionals

must be evaluated on a continuum according to a sliding-scale analysis. *See Stuart*, 774 F.3d at 248 (citing *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)). Under that analysis, a regulation requiring professionals to provide certain information in the course of their profession is a regulation of both speech *and* conduct, and therefore falls within the middle of the continuum so as to be subject to intermediate scrutiny. *See id.* But *NIFLA* directly rejected that kind of sliding-scale analysis, *holding that there is no special doctrine governing the speech of professionals*. *See NIFLA*, 138 S. Ct. at 2372. In fact, *NIFLA* repudiated the Ninth Circuit's decision in *Pickup*, *see id.* at 2371-72, which was the foundation on which the Fourth Circuit erected its sliding-scale, intermediate-scrutiny analysis in *Stuart*, *see Stuart*, 774 F.3d at 248 (citing *Pickup*, 740 F.3d at 1227, 1229).

In rejecting the sliding-scale analysis applied by the Fourth Circuit, *NIFLA* clarified that content-based regulations of professionals' speech are subject to strict scrutiny except in two instances: (1) the regulation of professionals' commercial speech; and (2) the regulation of professional conduct that incidentally burdens speech. *See NIFLA*, 138 S. Ct. at 2372-73. The second exception is most relevant here. And, with respect to that exception, there are only two options when reviewing a statute that regulates professionals: (1) it is a regulation of speech; or (2) it is a regulation of conduct. There is no room under *NIFLA*'s holding for the Fourth Circuit's sliding-scale analysis that applies intermediate-scrutiny to some laws on the ground that they regulate *both* speech and conduct. Instead, *NIFLA* clarified that a law either regulates

professional conduct with only incidental burdens on speech—and therefore is not subject to any kind of heightened scrutiny—or else it is a content-based regulation of speech that is subject to strict scrutiny. This is now the law—and it is precisely the law that the Sixth Circuit applied below. More importantly, *NIFLA* is a controlling precedent of this Court, and therefore eliminates any previously existing circuit conflict on this point. This should be the end of the discussion because there plainly cannot still be a circuit conflict when there is controlling authority from this Court that was issued *after* the circuit conflict arose.

The only way that one can identify an existing circuit conflict is by ignoring the fact that this Court issued controlling authority in *NIFLA*. But not even the dissenting opinion below attempted to do that. In fact, the dissenting opinion acknowledged that *NIFLA* is a *controlling* authority. *See EMW Women's Surgical Ctr.*, 920 F.3d at 449 (Donald, J., dissenting). The dissenting opinion contended that the majority had misapplied *NIFLA*, but it did not assert that the majority had come down on the wrong side of a circuit conflict. Why not? Because the dissenting judge obviously recognized that there was no longer a circuit conflict in the wake of *NIFLA*.

Even the Petitioners themselves seem to recognize this point. Indeed, in the section of the Petition devoted to discussing the purported circuit conflict, their *primary* argument is not that the dispute in this case turns on the resolution of the supposed conflict, but that "[t]he 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)." [Pet. at 12]. And the ensuing discussion is focused on the Petitioners' belief that the Sixth Circuit simply got the wrong answer in its application of *NIFLA*. Thus, if it accomplishes anything, the Petitioners' argument just demonstrates that there is now controlling precedent from this Court rather than a circuit conflict.

Nevertheless, the Petitioners attempt to shoe-horn a circuit conflict into this case by pointing to *NIFLA*'s citation of *Casey*. *NIFLA* identified the informed-consent law at issue in *Casey* as a prime example of a law that regulates professional conduct rather than speech. *See NIFLA*, 138 S. Ct. at 2372-73. According to the Petitioners, this means that the key to determining whether a statute is a permissible regulation of professional conduct rather than an unconstitutional regulation of speech is to determine whether the statute is similar in nature to the statute in *Casey*. And, according to the Petitioners, there is a circuit conflict on this issue because the Fifth and Sixth Circuits have found that ultrasound-disclosure statutes are of the same nature as the *Casey* statute—and therefore constitutional—while the Fourth Circuit has reached the opposite conclusion with respect to a virtually identical statute. Once again, however, the Petitioners' argument ignores the impact of *NIFLA*.

The Fourth Circuit distinguished North Carolina's ultrasound-disclosure law from the law upheld in *Casey*

because it found that the disclosures required by North Carolina's law had "ideological implications." *Stuart*, 774 F.3d at 246. But *NIFLA* belies that distinction, which was illogical to begin with.

NIFLA addressed a California statute that required pro-life crisis pregnancy centers to disseminate information about obtaining free or low-cost abortions. *See NIFLA*, 138 S. Ct. at 2368-69. If the ultrasound disclosure requirement in *Stuart* carried "ideological implications," then the statute at issue in *NIFLA* certainly did as well. And, yet, this Court did not rely on any purported "ideological implications" of the California statute in distinguishing it from the law that was upheld in *Casey*. Instead, this Court distinguished the California statute solely on the basis that it was not tied to a medical procedure. *See id.* at 2373. In other words, the statute in *NIFLA* was distinguishable from the statute in *Casey* because the former "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed." *Id.* By choosing this—as opposed to any supposed ideological implications of the law—as the point of distinction from *Casey*, *NIFLA* plainly adopted a very different analysis from the one the Fourth Circuit applied in *Stuart*. *NIFLA* therefore overrode the pre-existing circuit conflict and set forth the analysis to be used going forward—which is precisely the analysis that the Sixth Circuit applied here. This state of affairs is anything but a circuit conflict.

II. THERE IS NO RECURRING QUESTION THAT THIS COURT NEEDS TO RESOLVE

The Commonwealth of Kentucky agrees that the question presented is an important one. In fact, its importance is precisely why this Court spoke directly to the question just two years ago in *NIFLA*. Contrary to the Petitioners' argument, however, there are no recurring issues that necessitate this Court's consideration of the same question for a second time in three terms.

Other than the present case, the Petitioners have not identified any post-*NIFLA* Court of Appeals' decisions addressing the question at hand. And, in fact, there are none. Moreover, if such cases arise, there is no reason to believe that the Courts of Appeals cannot handle them appropriately by applying *NIFLA*, just as the Sixth Circuit did.

The Petitioners point out that the Sixth Circuit's decision might encourage other states to pass laws similar to HB 2, but that can always be said of any decision upholding the constitutionality of a statute. This is not a legitimate basis for granting a writ of certiorari.

The Petitioners also complain that the Sixth Circuit's opinion will pave the way for graphic informed-consent requirements, like forcing physicians to show cardiac patients a recording of a chest saw being used in coronary bypass surgery, or requiring physicians to show pregnant women a video of abdominal surgery in order to discourage cesarean-

section delivery.[4] But these are policy questions, not questions of constitutional law. Under *NIFLA*, it is unquestionably true that states *can* require physicians to provide patients with information that is truthful, non-misleading, and relevant to the decision to undergo a particular medical procedure. Whether a state *should* require patients to receive all truthful, non-misleading, and relevant images, videos, and writings about a particular procedure—including graphic disclosures like those mentioned by the Petitioners—is a policy question that should be left to the political processes of the state legislatures, not the federal courts.

The essence of the Petitioners' argument is that they are displeased that several states have passed laws like HB 2, and they fear more states might pass similar laws in the wake of the Sixth Circuit's application of *NIFLA*. In their view, this presents a recurring question that needs to be resolved. But it does not. There is no recurring confusion that this Court needs to clear up, and there is no indication that the circuits need further guidance from this Court in order to apply *NIFLA* in a coherent manner. Instead, the Petitioners are simply asking this Court to

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[4] It is not clear that requiring a pregnant patient to watch a video of abdominal surgery in general—rather than specifically a cesarean section—would fall within the category of disclosures that are truthful, non-misleading, and relevant to the medical procedure at issue. There is no way to know from the record in this case whether cesarean section procedures are so similar to all other abdominal surgeries that a video of some randomly selected abdominal surgery would be relevant to a patient's decision to have a cesarean section.

reconsider part of *NIFLA* in the hope that they can obtain an outcome that they find more pleasing. But this is not why writs of certiorari exist. A desire to re-litigate an issue in the hope of getting a different result does not demonstrate the existence of the kind of important and recurring question that warrants this Court's attention.

III. THE DECISION BELOW IS CORRECT

The decision below is not only correct, but is affirmatively compelled by *NIFLA*. The Petitioners contend that the Sixth Circuit's interpretation of *NIFLA* turns that decision on its head. Nothing could be further from the truth. The Sixth Circuit correctly interpreted and applied *NIFLA*. It is the Petitioners who seek to turn that opinion upside down.

As explained above, *NIFLA* acknowledged the general rule that content-based regulations of speech are presumptively unconstitutional. *NIFLA*, 138 S. Ct. at 2371. However, it also reiterated two longstanding exceptions to this rule. First, the Court noted that content-based regulations are not presumptively unconstitutional when they "require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 2372. Second, the Court held that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* The Court identified informed-consent laws as a prototypical example of the type of regulations that fall under this second exception, *see id.* at 2373, and the Sixth Circuit correctly relied on this exception in upholding HB 2, *see EMW*, 920 F.3d at 424, 428-29, 446.

More specifically, *NIFLA* pointed to the informed-consent statute at issue in *Casey* as the prime example of a valid informed-consent statute. *See NIFLA*, 138 S. Ct. at 2372-73. Thus, *NIFLA* held that a disclosure requirement is a valid informed-consent law if it possesses the same material attributes as the statute in *Casey*. And what attributes are those? There are three. In *Casey*, the plurality opinion noted that the informed-consent statute at issue was constitutionally distinguishable from other disclosure requirements because it merely required the disclosure of information that was (1) truthful, (2) non-misleading, and (3) relevant to the proposed abortion procedure. *See Casey*, 505 U.S. at 882. And, after thus characterizing the disclosure requirements, *Casey* summarily rejected the plaintiff physicians' First Amendment claims. *See id.* at 884.

The Sixth Circuit correctly applied this analysis in determining that HB 2 falls within *NIFLA*'s exception for informed-consent statutes. The disclosures required by HB 2 "are the epitome of truthful, non-misleading information." *Lakey*, 667 F.3d at 577-78. And they are clearly relevant to a woman's decision to have an abortion. Moreover, they are identical in nature to the disclosures required in *Casey*. As the Fifth Circuit held in *Lakey*, disclosure requirements like those in HB 2 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." *Id.* at 578. Given these circumstances, it is abundantly clear that

the Sixth Circuit correctly held that HB 2 falls within *NIFLA*'s informed-consent exception.

The Petitioners do not contest the constitutionality of informed-consent laws generally. Instead, they argue that HB 2 is not an informed-consent law. In advancing this argument, they do not offer much in the way of a cogent test for determining when a disclosure requirement qualifies as an informed-consent requirement and when it does not. They complain repeatedly that HB 2 is not consistent with "traditional" informed consent—whatever that is. But *NIFLA* did not limit the informed-consent exception to only those laws that fall within some "traditional" conception of informed consent. In fact, *NIFLA* said nothing at all about "traditional" informed consent. And for good reason: If the exception were limited to "traditional" informed consent, the statute in *Casey* would not have been found constitutional. After all, even the Fourth Circuit's *Stuart* decision acknowledged that the statute in *Casey* differed from "traditional" informed consent. *See Stuart*, 774 F.3d at 253 (observing that the statute in *Casey* was a "modification" of traditional informed consent). The line of constitutionality is not—and never has been—drawn according to anyone's conception of whatever constitutes "traditional" informed consent.

It appears that what the Petitioners are really arguing is that a disclosure requirement cannot be considered a valid informed-consent requirement unless it is consistent with the informed-consent preferences of special interest groups like the National Abortion Federation and the American College of

Obstetricians and Gynecologists. In other words, when the Petitioners talk about "traditional" informed consent, what they mean is that the preferences of medical associations are the only legitimate factors in determining informed-consent requirements. Thus, the Petitioners believe that states cannot adopt informed-consent requirements that conflict with the views of such groups. The Petitioners would have this Court hold that the views of such groups should supplant the policy preferences of state legislatures. But that is obviously wrong.

At its heart, the Petitioners' argument is a policy argument, not a legal argument. That is, the Petitioners believe that an informed-consent requirement *should not* be enacted over the objections of their favored medical organizations. However, they present no legal authority for the proposition that states *cannot*—as a matter of constitutional law—enact such laws over the objections of medical associations and special interest groups. And no such authority exists. It simply is not the case that professional organizations have the authority to determine the constitutionality of state laws. As this Court held in *Gonzales*, "[t]he 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." *Gonzales*, 550 U.S. at 163.

State sovereignty is no small matter. Indeed, it is one of the foundations of our federal system of government. The Petitioners' position, if adopted, would allow the preferences of special-interest groups

to supplant the sovereignty of the states. This is unthinkable. The Constitution does not prohibit states from regulating the practice of professions in a way that is displeasing to professional associations. More specifically, *NIFLA* makes clear that state legislatures have the authority to regulate informed-consent requirements. If medical groups dislike the manner in which their profession is being regulated, the answer is to lobby the state legislature to change the law, not lobby a federal court to constitutionalize the groups' preferences.

Of course, this is not to say that a state can insulate a disclosure requirement from First Amendment scrutiny simply by labeling it as an informed-consent requirement. For example, a state cannot—under the guise of informed consent—require physicians to tell their patients that one particular political party supports lower tax rates. Indeed, there must be a line drawn between legitimate informed-consent statutes and illegitimate compelled speech. Tellingly, the Petitioners do not offer any principled manner of determining where to draw that line other than to suggest that it should be drawn wherever their preferred special-interest groups would like. Fortunately, this Court's decision in *NIFLA* identified precisely where to draw the line—*i.e.*, valid informed-consent statutes are those that require the disclosure of information that is truthful, non-misleading, and relevant to the proposed medical procedure.

The Petitioners also contend that HB 2's requirements cannot be considered part of informed consent because patients can choose to reject the

information by looking away and not listening. But that argument proves too much. It is always true that patients can look away and ignore informed-consent disclosures.

And, in a similar vein, it is irrelevant that the Petitioners claim to have patients who have rejected the information they have been given pursuant to HB 2. The Petitioners' evidence on this point is merely anecdotal, and it is rebutted by other evidence in the record showing that there are women who have had abortions who wish they had received such information prior to undergoing the procedure. [*See* Dkt. Nos. 32-3, 32-4, 32-5, 32-6]. Moreover, the fact that some individuals might not want the information is not constitutionally significant. It is no doubt true that some individuals simply want their doctors to make decisions for them and will reject *all* information provided by their doctors, even the so-called "traditional" informed consent that the Petitioners favor. Thus, if disclosure requirements can be found unconstitutional based on some patients' rejection of the information, then it is doubtful that any informed-consent laws can be constitutional.

The Petitioners further contend that HB 2 is different from the statute in *Casey*—and therefore cannot be considered an informed-consent statute—because the *Casey* statute merely required physicians to *offer* to provide certain information to the patient while HB 2 actually requires physicians to *provide* certain information. This is wrong for two reasons. First, it is an incorrect characterization of the statute in *Casey*. That statute required a number of

physician disclosures, some of which merely called for the physician to *offer* to provide information, and others that actually required the physician to provide the information. *See Casey*, 505 U.S. at 881. Thus, the requirements in HB 2 are not altogether different from the requirements in *Casey*. *See Lakey*, 667 F.3d at 578 (holding that the requirements in an informed-consent statute almost identical to HB 2 were "not different in kind" than the disclosures in *Casey*).

Second, the Petitioners' point is irrelevant. Even if the statute in *Casey* had simply required physicians to offer information to patients, as opposed to affirmatively providing information, that would make no difference in the constitutional analysis. The distinction between offering to provide information and actually providing information is a distinction that only matters to the *receiver* of the information. From the standpoint of the physician who is required to make the disclosure, there is no constitutional distinction between being required to provide the information and being required to offer to provide the information. In either instance, the physician is being compelled to say something that he or she might desire not to say, and otherwise might not say. Thus, it makes no sense to suggest—as the Petitioners do—that one is somehow more intrusive on First Amendment interests than the other.

Finally, the Petitioners contend that HB 2 somehow amounts to a viewpoint-based speech regulation. This is a puzzling argument. The disclosures required by HB 2 are purely factual. Because they are factual, they do not express a viewpoint. Factual information can be

used to support a particular viewpoint, but factual information itself does not convey a viewpoint. To say otherwise is to distort the meaning of the word "viewpoint" beyond recognition. Moreover, nothing in HB 2 requires medical providers to express any particular viewpoint, nor does it prohibit them from expressing the viewpoint of their choosing alongside the required factual disclosures. In other words, medical providers are not limited to simply providing the disclosures required by HB 2; they can accompany those disclosures with whatever viewpoints or commentary they desire. And, finally, they are allowed to put the necessary disclosures in their own terms. There is no state-provided "script" as the Petitioners claim.

To equate the factual disclosures required by HB 2 with a viewpoint-based speech regulation is not only demonstrably incorrect, but is also a frightening proposition. If courts can equate truthful, factual statements with a "viewpoint," then dizzying consequences will follow. More specifically, if courts can erase the dividing line between facts and viewpoints, then they will be able to pick and choose which facts are "viewpoints" and which viewpoints are "facts." That sounds more like George Orwell's *1984* than it does American constitutional law. Surely no one wants to live in a world where that is possible.

One last point bears mentioning about the factual nature of the HB 2 disclosures. In *NIFLA*, the dissenting justices found the factual nature of mandatory disclosures to be constitutionally significant. In fact, the dissent stated that "a doctor's

First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected precisely because of its informational value to patients. There is no reason to subject such laws to heightened scrutiny." *NIFLA*, 138 S. Ct. at 2387 (Breyer, J., dissenting). Thus, the four dissenting justices in *NIFLA* would unquestionably have found HB 2 constitutional on the ground that it requires the disclosure of factual information. The *NIFLA* majority would have agreed to the extent that the information is non-misleading and relevant to a medical procedure—which the HB 2 disclosures are. Thus, under the views of all nine justices in *NIFLA*, HB 2 is constitutional.

The bottom line here is that *NIFLA* sets the standard for evaluating medical-disclosure requirements, and it does so by referring to *Casey*. *NIFLA* therefore compels the conclusion that disclosure requirements are constitutional when they share the same material attributes as the disclosure statute at issue in *Casey*—*i.e.*, when they require the disclosure of truthful, non-misleading, and relevant information. The Sixth Circuit correctly adhered to this rule, and its adherence to this Court's precedent clearly is not a reason to grant a writ of certiorari.

CONCLUSION

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

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