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,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This petition asks whether compulsory display-and-describe ultrasound laws such as H.B. 2 violate the First Amendment rights of doctors by requiring them to convey specific content to unwilling patients against their medical judgment. Respondent's opposition concedes that the answer to this question turns on whether such laws—which unquestionably compel content-based speech—fall within an exception to compelled-speech doctrine, recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for laws requiring "informed consent." For the reasons explained in the petition and further below, H.B. 2 and other compulsory display-and-describe laws are invalid precisely because they are *not* informed-consent laws, but rather coercive speech mandates untethered from any plausible understanding of informed consent.

Respondent disputes that the circuits are split on this question. But he does not dispute that the Fourth Circuit invalidated a law materially identical to H.B. 2, or that the court below expressly rejected the Fourth Circuit's analysis in favor of earlier Fifth Circuit precedent. Rather, respondent's entire opposition rests on its contention that *National Institute of Family & Life Advocates v. Becerra*, ("*NIFLA*"), 138 S. Ct. 2361 (2018), resolved the circuit conflict. It did not.

NIFLA did not consider, let alone resolve, the question presented here. As the decision below makes clear, *NIFLA confirmed* that the answer to the question presented turns on whether H.B. 2 and similar laws are properly understood as regulating the medical practice of "informed consent," not speech, and are

therefore shielded from First Amendment scrutiny. That is the important question on which the courts of appeals have split, and only this Court can resolve the conflict.

The petition should be granted.

A. The Circuits Are Split Over The Question Presented

1. Three different courts of appeals have considered First Amendment challenges to ultrasound display-and-describe statutes. Pet. 12-20. No one disputes that these statutes require physicians to speak words and display images that they would otherwise not speak or display—precisely what the First Amendment normally precludes. Pet. 5-8. Moreover, each appellate court to have considered such First Amendment challenges has recognized that, as *Casey* explained, some laws that implicate physician speech—in particular, informed-consent provisions—are constitutional because they principally regulate the practice of medicine and therefore only incidentally burden speech. *See* App. 11a-12a; *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574-75 (5th Cir. 2012).

These courts of appeals fundamentally disagree, however, about the scope of *Casey*'s ruling and the proper understanding of "informed consent." The Fifth and Sixth Circuits read *Casey* to authorize all laws that compel physician speech so long as the mandated-speech is "truthful, non-misleading, and relevant." App. 21a-22a (quoting *Lakey*, 667 F.3d at 576). The Fourth Circuit, by contrast, expressly disagrees,

holding a compulsory display-and-describe law materially identical to H.B. 2 invalid under the First Amendment because it compelled speech far beyond what informed-consent principles have traditionally allowed. *See Stuart*, 774 F.3d at 248-49, 251-55.

2. Respondent's rejoinder is that this Court resolved this conflict in *NIFLA*. It did not.

As respondent acknowledges, the Court in *NIFLA* considered whether there is a "special doctrine governing the speech of professionals." BIO 13 (emphasis omitted). Specifically, *NIFLA* rejected any "professional speech" category, concluding that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" 138 S. Ct. at 2372. Respondent contends that *Stuart* is no longer good law because the Fourth Circuit *did* believe that there was a special category of "professional speech," and that such speech requires less protection than non-professional speech. BIO 13. Respondent's mistake is obvious: While *Stuart* treated North Carolina's compulsory display-and-describe law as part of a category of less-protected "professional speech," it concluded *even under that more lenient standard* that North Carolina's law violated the First Amendment. 774 F.3d at 247-48. *NIFLA*'s rejection of lesser scrutiny for "professional speech" only strengthens *Stuart*'s conclusion that the compulsory display-and-describe law is invalid, for if the law was invalid under the Fourth Circuit's "sliding scale" approach to professional speech, then it is *a fortiori* invalid under the across-the-board heightened scrutiny *NIFLA* requires.

NIFLA recognized that physicians' speech *may* be subject to lesser First Amendment scrutiny if it falls

into one of two categories traditionally subject to state regulation: (i) state-mandated disclosures of factual, noncontroversial information in "commercial speech" and, as is relevant here, (ii) regulations of "professional conduct, even though that conduct incidentally involves speech." 138 S. Ct. at 2372 (citing *Casey*, 505 U.S. at 884). To illustrate the second category, *NIFLA* pointed to *Casey*'s rejection of "a free-speech challenge to [an] informed-consent requirement," *id.* at 2373, noting that "the requirement that a doctor obtain informed consent to perform an operation is firmly entrenched in American tort law," *id.* (quotations omitted).

Otherwise said, *NIFLA* did not answer the relevant question here, but confirmed that *Casey*'s First Amendment analysis continues to govern. Before *NIFLA*, the Fifth Circuit construed *Casey* to authorize compulsory display-and-describe laws because they mandate "truthful, nonmisleading, and relevant disclosures." *Lakey*, 667 F.3d at 576. The Fourth Circuit expressly disagreed with that holding *precisely because* it believed compulsory display-and-describe laws "resemble neither traditional informed consent nor the variation found in the Pennsylvania statute at issue in *Casey*." *Stuart*, 774 F.3d at 251. After *NIFLA*, the decision below agreed with the Fifth Circuit's reading of *Casey* and explicitly disagreed with the Fourth's. App. 21a-26a.

That was certainly the Sixth Circuit's understanding. Its decision explained that *NIFLA* "explicitly *reaffirmed* that heightened scrutiny is not appropriate under the First Amendment for informed-consent requirements of the nature upheld in *Casey*." App. 13a

(emphasis added). Thus, it explained, "[t]his First Amendment appeal . . . turns on whether H.B. 2 shares the same material attributes as the informed-consent statute in *Casey*." App. 14a. That is the question over which the Fourth and Fifth Circuits have split. The decision below extends that conflict.

In sum, *NIFLA* confirmed *Casey*'s understanding that informed-consent provisions are not subject to heightened First Amendment scrutiny—it did not resolve whether compulsory display-and-describe laws fall within that exception, which is the question here. Indeed, respondent ultimately recognizes the same point in Part III of his opposition. There, he (correctly) argues that "*NIFLA* held that a disclosure requirement is a valid informed-consent law if it possesses the same material attributes as the statute in *Casey*." BIO 20. Although respondent is wrong on the merits—laws like H.B. 2 are fundamentally different from the statute in *Casey*, *see infra* Section C—this concession is correct. The relevant question here is the scope of *Casey*'s exception to the ordinary operation of compelled-speech law. And that is the question over which the courts of appeals have disagreed, both before and after *NIFLA*.

B. The Question Presented Is Important And Recurring, And This Petition Provides An Ideal Vehicle Through Which To Resolve It

Respondent "agrees that the question presented is an important one." BIO 17. He also does not dispute that the petition provides an ideal vehicle to resolve that question. Pet. 20-22.

Respondent does argue that this is not a recurring issue because *NIFLA* has resolved it. But as set forth above, the circuit conflict over the question presented persists, and the number of states that have enacted similar laws—not to mention courts of appeals that have resolved their constitutionality, *see supra* Section A—demonstrate that the First Amendment issue here is not only important but recurring, warranting this Court's review. *Id.*

C. The Decision Below Is Incorrect

1. Respondent concedes that the central question in this case is whether H.B. 2 is an informed-consent law like that upheld in *Casey*—*i.e.*, a law that regulates the practice of medicine with only an incidental effect on speech. BIO 19. And like the court below, respondent asserts that H.B. 2 is an informed-consent provision just like the law in *Casey*. *Id.* at 20-21; *see also* App. 12a-13a. It is not.

a. A law like H.B. 2 that requires physicians to keep speaking the government's message when the patient is not listening cannot possibly be an informed-consent requirement because the speech is, according to the statute itself, unnecessary to informed consent. *Cf. NIFLA*, 138 S. Ct. at 2373 (state-mandated speech "does not facilitate informed consent" where it "provides no information about the risks or benefits of [a medical procedure]"). H.B. 2 is a speech mandate entirely unconnected from informed consent.

Respondent contends that "[i]t is always true that patients can look away and ignore informed-consent disclosures." BIO 24; *see also id.* ("[S]ome individuals simply want their doctors to make decisions for them

and will reject *all* information"). That is wrong and irrelevant.

Respondent is wrong because it is well-settled that for consent to be valid, a patient must have a baseline understanding of the risks, benefits, and alternatives to a procedure. *See* Biomedical Ethicists Ruth R. Faden, Ph.D, M.P.H., et al., Amici Br. 10-13 ["Ethicists Br."]; *see also* Ky. Rev. Stat. § 304.40-320 (defining informed consent under Kentucky law). While it is conceivable that some patients might refuse this information, few (if any) physicians would risk performing a procedure on a patient under those circumstances. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2373 ("[A] surgeon who performs an operation without his patient's consent commits an assault") (internal citations omitted).

More important, whether patients *can* look away is irrelevant. What matters is that the speech H.B. 2 compels cannot be essential to informed consent because, under the statute, every patient can give informed consent without seeing or hearing it. App. 4a.[1]

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[1] This is not to suggest that the information mandated by H.B. 2 is not relevant to *some* patients, in which case it is consistent with informed consent to provide it. *See* Ethicists Br. 14-15, 18. For example, the Commonwealth points to affidavits from four women who regret their decision to have an abortion and aver 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." BIO 4. As the district court recognized, however, none of these women were offered the opportunity to view their ultrasounds prior to their abortion. App. 117a. It is undisputed that petitioners offer that opportunity to all their patients, and do not object to providing

The fact that the statute requires every physician to speak these words even though the statute itself recognizes they are unnecessary for informed consent confirms that H.B. 2 compels speech *as speech*, rather than as incidental to the regulation of medical practice.

b. Indeed, H.B. 2's requirements fall far outside the bounds of traditional informed-consent disclosures. *See, e.g.*, *Stuart*, 774 F.3d at 253 (materially identical law "antithetical to the very communication that lies at the heart of the informed consent process"); Ethicists Br. 2-20. Informed consent is a legal and ethical concept that is "deeply embedded in American culture, in our religious traditions and in Western moral philosophy." Ethicists Br. 6. That is crucial because this Court has consistently held that exceptions to First Amendment scrutiny, including the exception for regulations of professional conduct that incidentally burden speech, must be narrowly circumscribed and consistent with tradition and history. *See, e.g. Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 439 (1963) ("[A] State may not under the guise of prohibiting professional misconduct ignore [First Amendment] rights"); *NIFLA*, 138 S. Ct. at 2373 (professional-conduct exceptions to First Amendment are rooted in "[l]ongstanding torts for professional malpractice," which are "firmly entrenched in American tort law") (quotations omitted); *cf. United States v. Alvarez*, 567 U.S. 709, 722 (2012) (speech exempted from protection only with "persuasive evidence that a

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the information to patients who seek it—only to having to inflict it on those who do not want it. Pet. 4-5.

novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription") (internal citations and quotations omitted).

What H.B. 2 requires—that a doctor keep speaking to a patient who has demonstrated that she does not want to hear and is not listening—is unrecognizable to the informed-consent tradition. Pet. 4-8, 14-17, 27-28; *see also* Ethicists Br. 4, 14-20. There is no tradition of informed consent that permits, let alone *requires*, a physician to continue speaking over the express objections of her patient. Ethicists Br. 15-18. Indeed, such a mandate would undermine the very patient autonomy that informed consent is designed to effectuate. *Id.* Thus, H.B. 2 is not informed consent (among other reasons) because it requires physicians to continue speaking even as their half-naked patients don earplugs and a blindfold to avoid them.

The point is not—as respondent caricatures it—that the bounds of the First Amendment are set by professional medical organizations. Rather, current ethical guidelines reflect the informed-consent tradition. *Id.* at 6. And those "longstanding principles . . . dictate that if a patient does not wish to receive certain information, the physician is to stop speaking." *Id.* at 15.

c. Unlike H.B. 2, the informed-consent provisions upheld in *Casey* were entirely consonant with traditional informed-consent principles. *See* Pet. 27-28; *see also* Ethicists Br. 14-15. The Pennsylvania law required physicians to verbally disclose to every patient the core elements of informed consent discussed above, *see* 505 U.S. at 881, which Kentucky law also requires wholly apart from H.B. 2, *see* Pet. 4. But the

Pennsylvania law merely required physicians to *offer* state-published materials that, *inter alia*, displayed and described the fetus. 505 U.S. at 881. What is more, that law expressly allowed physicians to refrain even from *offering* their patients the state-created pamphlets when, in the physician's judgment, the offer itself would harm the patient. *Id.* at 883-84. Thus, the Pennsylvania law did not require physicians to pass on the state's message through their own speech, including when the patient expressed a desire not to listen, or where it would cause the patient harm. H.B. 2 does just that, and for that reason compels physician speech untethered from, and indeed contrary to, obtaining informed consent. No decision of this Court authorizes that unprecedented result. *See* Pet. 23-24, 27.

2. Respondent, like the court below and the Fifth Circuit, maintains that *Casey* shields from First Amendment scrutiny any law that compels speech that is truthful, non-misleading, and relevant to a medical decision. BIO 20-21; *see also* App. 12a-13a. That contention affirmatively misreads *Casey* and is contrary to foundational First Amendment principles.

The invocation of the "truthful, nonmisleading, and relevant" standard is a categorical mistake. It conflates *Casey*'s analysis of abortion-patients' Fourteenth Amendment claims with physicians' separate First Amendment claims. *Casey* applied the "truthful and nonmisleading" test on which respondent relies to the patients' *Fourteenth Amendment* challenge because that test provided "the appropriate means of reconciling the State's interest *with the woman's con-*

stitutionally protected liberty." 505 U.S. at 876 (emphasis added); *see also id.* at 883 (truthful and nonmisleading "requirement cannot be considered a substantial obstacle to obtaining an abortion").

But "[t]he 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." *Stuart*, 774 F.3d at 249; *see also* App. 56a ("[I]magine 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."). And in addressing the *physicians'* separate First Amendment claims, the *Casey* plurality did not even mention, let alone apply, the "truthful and nonmisleading" test. Instead, *Casey* simply concluded that the required disclosures were consistent with "the practice of medicine," so there was "no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*." 505 U.S. at 884 (emphasis added). That conclusion is fully supported by the traditional scope of informed consent, and the fact that "the requirement that a doctor obtain informed consent to perform an operation is firmly entrenched in American tort law." *NIFLA*, 138 S. Ct. at 2373 (quotation omitted). There is no similar tradition of exempting speech from First Amendment scrutiny just because it is truthful and relevant to the listener.

To the contrary, history and precedent squarely precludes that approach. Indeed, respondent's argument that compelled truthful speech is presumptively outside the First Amendment's scope cannot be squared with this Court's established understanding that conscripting private speakers to deliver factual information is as constitutionally suspect as conscripting them to deliver an ideological message—even if those facts are arguably relevant to the listener. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *NIFLA*, 138 S. Ct. at 2371-75. The Court has likewise recognized the importance of protecting physician-patient speech, in particular, from government interference. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2374-75; *see also Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1328 (11th Cir. 2017) (Pryor, J. concurring) ("If anything, the doctor-patient relationship provides more justification for free speech, not less."). A First Amendment carve-out for virtually all factual speech relevant to a medical procedure would swallow this rule, since such speech is at the heart of the conversations that take place in a doctor's office. Respondent admits that its rule would allow legislatures to control such core doctor-patient speech completely. *See* BIO 17-18.

Respondent's reading of *Casey* as shielding from First Amendment scrutiny any mandates involving truthful and relevant speech implausibly suggests that *Casey* silently rejected all this established precedent. But this Court has *never* categorically exempted compelled truthful speech from First Amendment pro-

tection—in *Casey* or any other case. The court of appeals' contrary conclusion is wrong, and should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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