Nos. 17-6151, 17-6183

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,

v.

ANDREW G. BESHEAR, in his official capacity as Attorney General of Kentucky,

and

MICHAEL S. RODMAN, in his official capacity as Executive Director of the Kentucky Board of Medical Licensure,

and

SCOTT BRINKMAN, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Kentucky, No. 3:17-cv-16-DJH

BRIEF FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AND THE AMERICAN MEDICAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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March 29, 2018

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Cir. R. 26.1, The American College of Obstetricians and Gynecologists and the American Medical Association make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The American College of Obstetricians and Gynecologists and the American Medical Association are non-profit organizations, with no parent corporations or publicly traded stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None.

Dated: March 29, 2018

/s/ Kimberly A. Parker
KIMBERLY A. PARKER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American College of Obstetricians and Gynecologists (the "College" or "ACOG") and the American Medical Association ("AMA") submit this brief *amici curiae* in support of Appellees.[1]

ACOG is a national non-profit educational organization and the leading professional association of physicians who specialize in the healthcare of women. As a voluntary membership organization for obstetrician-gynecologists and other women's health care providers, ACOG has more than 62,000 members, including 453 obstetrician-gynecologists in the Commonwealth of Kentucky (hereafter, "Commonwealth" or "Kentucky"). ACOG develops and publishes evidence-based practice guidelines, maintains the highest standards for continuing medical education, promotes high ethical standards, and fosters contributions to medical and scientific literature across all mediums and for all aspects of women's health. ACOG recognizes that abortion is an essential health care service and opposes laws affecting health care that are unsupported by scientific evidence and that are not necessary to achieve an important public health objective.

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[1] Pursuant to Rule 29, undersigned counsel for *amici curiae* certify that: (1) no counsel for a party authored this brief, in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than *amici curiae*, their members, and their counsel—contributed money intended to fund the preparation or submission of this brief.

The College has previously been granted leave to appear as *amicus curiae* in various courts throughout the country, including the U.S. Supreme Court. In addition, the College's work has been cited frequently by the Supreme Court and other federal courts seeking authoritative medical data regarding childbirth and abortion.[2]

AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy-making process. The objectives of the AMA are

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[2] *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312, 2315 (2016) (citing ACOG and AMA's *amici* brief for academic hospital admitting requirements, medical procedure mortality rate data, and treatment procedures after a miscarriage); *Stenberg v. Carhart*, 530 U.S. 914, 932-936 (2000) (quoting ACOG's *amicus* brief extensively and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the abortion procedure at issue); *Hodgson v. Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing ACOG's *amicus* brief in assessing disputed parental notification requirement); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG publication in discussing "accepted medical standards" for the provision of obstetric-gynecologic services, including abortions); *see also Gonzales v. Carhart*, 550 U.S. 124, 170-171, 175-178, 180 (2007) (Ginsburg, J., dissenting) (referring to ACOG as "experts" and repeatedly citing ACOG's *amicus* brief and congressional submissions regarding abortion procedure); *Stuart v. Camnitz*, 774 F.3d 238, 251-252, 255 (4th Cir. 2014) (citing ACOG's and AMA's *amici* brief for medical standards of informed consent in striking North Carolina's mandatory ultrasound display law); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 168 (4th Cir. 2000) (extensively discussing ACOG's guidelines and describing those guidelines as "commonly used and relied upon by obstetricians and gynecologists nationwide to determine the standard and the appropriate level of care for their patients").

to promote the science and art of medicine and the betterment of public health. AMA members practice in all fields of medical specialization and in every state, including Kentucky.

ACOG and AMA submitted a brief *amici curiae* in the Fourth Circuit challenging a virtually identical abortion ultrasound law, which the court cited extensively in its decision.[3]

STATEMENT OF ARGUMENT

The district court correctly held that Kentucky's Ultrasound Informed Consent Act, referred to as House Bill 2 ("H.B. 2," or "the Act"), serves no medical purpose and should be invalidated. The Act, during the course of a pre-abortion ultrasound, forces a physician to place the ultrasound image in the pregnant woman's view, to orally describe the image in detail, and to auscultate the fetal heartbeat, if available—even if the woman asks the physician not to display the image or describe the fetus or to turn off the volume of the heartbeat, and, moreover, even if the physician believes that forcing this experience on the patient would harm her. H.B. 2 contains but one limited exception for medical emergencies. The district court thus correctly recognized that the Act is antithetical to the principles of informed consent and unduly interferes with the patient-physician relationship. As physicians, including physicians who specialize

[3] *Stuart*, 774 F.3d at 251-252, 255.

in the health care of women, and in light of the Act's intrusion on physicians' First Amendment rights with respect to how they communicate with their patients, *amici* are uniquely positioned to evaluate both the medical necessity of the law and its impact on patients.

First, H.B. 2 is squarely in conflict with informed consent principles, which forbid physicians from acting over the objections of competent patients. The Act does not actually promote informed consent because patients can simply close their eyes to avoid seeing the ultrasound images and cover their ears to avoid listening to the physician deliver the state-imposed script and the required fetal heartbeat auscultation. The Act further offends the principles of informed consent because it does not allow for a waiver, a medically recognized exception to the doctrine. A patient should have the freedom to determine the information she does—and does not—wish to hear, particularly where the information provides no medical benefit. Moreover, it is contrary to sound medical practice to force physicians to convey information that will harm their patients. Thus, H.B. 2 serves no valid medical purpose, yet it undermines patient autonomy and physicians' professional judgment on how best to treat their patients.

Second, the Act unduly interferes with the patient-physician relationship, which is built on trust, honesty, and confidentiality. Physicians—not the Commonwealth—are in the best position to determine what medical information a

patient should receive based on the patient's particular circumstances. Further, forcing physicians to disregard their professional judgment by subjecting patients to information that the patient does not wish to receive undermines trust and places the doctor and patient in an unnecessarily, and potentially harmful, adversarial relationship.

For these reasons, the district court's decision should be affirmed.

ARGUMENT

The Supreme Court has consistently held that statutes that compel speech are content-based, whether or not the speech involves statements of fact or opinion.[4] Content-based limitations on speech invoke First Amendment scrutiny.[5] Regardless of the level of scrutiny applied, however, the state must show that such a statute relates to an important state interest, and that there is *at the very least* a reasonable nexus between the statute and advancing that interest.[6] Appellants[7]

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[4] *E.g.*, *Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 782-783 (1988).

[5] *E.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994).

[6] *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571-572 (2011).

[7] This brief refers to Defendants-Appellants Scott Brinkman (Acting Secretary of the Kentucky Cabinet for Health and Family Services), Andrew Beshear (Kentucky Attorney General), and Michael Rodman (Executive Director of the Kentucky Board of Medical Licensure) together as "Appellants" or the "Commonwealth."

argue that the "important state interest" advanced by the Act is the regulation of the practice of medicine.[8]

Noting H.B. 2's impact on the First Amendment rights of medical providers with respect to how they communicate with and treat their patients, *amici* are uniquely positioned to address the Act's incongruity with the proper practice of medicine and standards of medical ethics.

I. KENTUCKY'S ULTRASOUND INFORMED CONSENT ACT (H.B. 2) IS INCOMPATIBLE WITH AND UNDERMINES THE DOCTRINE OF INFORMED CONSENT

The mandated speech, display, and auscultation requirements in H.B. 2 are contrary to the concept of informed consent, an ethical doctrine integral to contemporary medical ethics and practice.[9] 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.[10]

There are two elements of informed consent: (1) comprehension and (2) free consent. "Comprehension" implies that the woman has "been given adequate information about her diagnosis, prognosis, and alternative treatment choices,

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[8] Appellant's Br. 11. (This brief refers to Defendant-Appellant Scott Brinkman's February 5, 2018 corrected brief as the "Appellant's Br.")

[9] ACOG Comm. on Ethics, Comm. Op. No. 439 (2009, reaffirmed 2015); Evidentiary Hr'g Tr. 99:1-10, RE 55, PageID #757 (testimony of Dr. Joffe that H.B. 2 is "entirely inconsistent" with informed consent as espoused in ACOG Ethics Committee opinion).

[10] ACOG Comm. on Ethics, Comm. Op. No. 439.

including the option of no treatment."[11] "Free consent" involves the "ability to choose among options" and is "incompatible with being coerced or unwillingly pressured by forces beyond oneself."[12] Further, "[b]oth of these elements together constitute an important part of a patient's 'self-determination' (the taking hold of her own life and action, determining the meaning and the possibility of what she undergoes as well as what she does)."[13] In seeking informed consent, physicians should "[a]ssess the patient's ability to understand relevant medical information and the implications of treatment alternatives and to make an independent, voluntary decision [while presenting] relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information."[14]

The Act establishes several requirements a physician *must* satisfy before performing an abortion. H.B. 2 requires a provider to perform an ultrasound, "[d]isplay the ultrasound images so that the pregnant woman may view the images," and give "a simultaneous explanation of what the ultrasound is depicting,

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11 *Id.*

12 *Id.*

13 *Id.*

14 AMA Code of Medical Ethics, Opinion 2.1.1(a), (b) – Informed Consent (2016); Evidentiary Hr'g Tr. 90:13-91:6, RE 55, PageID ##748-749 (testimony of Dr. Joffe that forcing patient to view ultrasound and listen to explanation and fetal heartbeat is the "definition of insensitivity," the opposite of a physician's obligation to treat patients "sensitively" as defined in the AMA Code of Ethics).

[including] the presence and location of the unborn child within the uterus" and "the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable."[15] The physician must also "a[u]scultate [*sic*] the fetal heartbeat of the unborn child so that the pregnant woman may hear the heartbeat if the heartbeat is audible."[16] A physician must comply with all of the Act's requirements, even if the patient objects, and even if the physician believes it is against the patient's best interest—or face civil penalties or a suspension or loss of his or her medical license.[17]

A. The Act Does Not Further Informed Consent Because It Provides No Additional Medically Necessary Information

H.B. 2 does not further informed consent because it provides no new medical information to patients than was already available under existing medical practice in Kentucky, in which providers performed an ultrasound and *offered* patients an opportunity to view the images and hear a description of the results. Before H.B. 2, patients seeking an abortion already had access to all of the information the Act now mandates.[18] Kentucky abortion providers *already*

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15 Ky. Rev. Stat. § 311.727(2)(a)-(c), (e).

16 *Id*. § 311.727(2)(d).

17 *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 2017 U.S. Dist. LEXIS 158728, at *2, *42 (W.D. Ky. 2017).

18 *See* Evidentiary Hr'g Tr. 35:12-36:12, RE 55, PageID ##693-694 (testimony of Dr. Franklin).

performed an ultrasound.[19] They *already* offered patients the opportunity to hear and see the results.[20] Thus, under existing practice and general principles of medical ethics, physicians already furnished patients with this information should the patients believe it would help them understand the procedure and the risks and hazards inherent in it.

Further, in *no other area of medicine* is it required for a patient to view images of the inside of her own body to understand her medical condition to give informed consent.[21] Faced with the fact that H.B. 2's requirements starkly contrast *all other areas of medical practice*, Appellants seek to differentiate abortion by asserting that H.B. 2's unique requirements are needed to address a supposedly widespread epidemic of indecisive women having abortions, only to regret it later.[22] But Appellants' assumption not only insults patient autonomy, it flies in

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19 *Id.*

20 *Id.*

21 *See* Evidentiary Hr'g Tr. 88:17-21, RE 55, PageID #746 (testimony of Dr. Joffe: "I would add one thing to that, which is that the showing of images—I can't think of any other context in medicine—in any area of medicine, including my own area of cancer medicine, but in any other that I'm familiar with, in which the showing of images is viewed as a necessary part of informed consent."); *see also id.* at 151:23-152:7, PageID ##809-810 (testimony of Dr. Nichols that there are no medical procedures in gynecology and obstetrics where showing and describing a patient's ultrasound is necessary to obtain informed consent; the process of obtaining informed consent for abortion is no different from other medical procedures performed by OB/GYN).

22 Appellant's Br. 7-8, 57.

the face of statistical evidence demonstrating the opposite—women undergoing an abortion are no more unsure about the procedure than patients undergoing a host of other medical procedures.[23] Accordingly, H.B. 2's requirements have no bearing on the patient's ability to give informed consent to an abortion.

B. The Act's Own Language Belies Appellants' Claim That The Information Is Necessary For Informed Consent

The Act cannot be aimed at providing informed consent to a patient wishing to undergo an abortion, because although it sets forth information a patient is purportedly required to receive before she can consent, nothing in the Act *actually requires* her to hear or see that message. H.B. 2 provides:

> [N]othing 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. Neither the physician, the qualified technician, nor the 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."[24]

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[23] Ralph et al., *Measuring Decisional Certainty Among Women Seeking Abortion*, 95 CONTRACEPTION 269, 276 (2017) (study of women seeking abortion in Utah had similar or lower levels of decisional uncertainty than those found in other studies of women making healthcare decisions, such as mastectomy after a breast cancer diagnosis, and men and women making decisions on reconstructive knee surgery, or prostate cancer treatment options).

[24] Ky. Rev. Stat. § 311.727(3). Appellants appear to concede that despite the absence of specific language, H.B. 2's language allowing the patient to "avert her eyes" would permit a patient to also cover her ears to avoid hearing the ultrasound explanation and fetal heartbeat, if applicable. *See* Appellant's Br. 63.

According to the Act's own language, a woman who completely avoids the Act's message can still give valid informed consent to an abortion. A law that allows a patient to completely avert her eyes and cover her ears, and still undergo an abortion, cannot inform a patient of anything.[25] The fact that a woman can close her eyes and cover her ears, yet still consent to an abortion, belies Appellants' claim that the Act conveys any necessary medical information at all. It is proof that the ultimate goal is to convey Appellants' particular speech—whether or not the patient receives the message—rather than to provide medically necessary information for her to consent to a procedure.

C. H.B. 2 Actually Undermines Informed Consent

Far from furthering informed consent, the Act in fact *undermines* a patient's ability to provide informed consent, because it both impacts her comprehension and her free consent. The Act undermines the patient's comprehension by needlessly burdening her with a message that has no bearing on her understanding of the procedure.[26] Further, the Act's requirements affect a patient's ability to consent without coercion or unwilling external pressure.[27]

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[25] Appellants' expert, Dr. Seeds, conceded in his affidavit that the Act freely allows a patient to avert her eyes and ears from its message. "She is fully allowed to look away and avoid this viewing at her discretion. Further, she is fully allowed to request that the sounds of the fetal heart beat be suppressed to avoid hearing them." Seeds Decl. ¶ 5.2, RE 32-1, PageID #341.

[26] Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J. L. & PUB. POL'Y 1, 19 (2011) (physician has no duty to disclose what is

Appellants assert H.B. 2 merely gives patients access to "factual information pertaining to a surgical procedure."[28] This characterization of the Act minimizes the fact that the Act requires a physician to deliver a state-mandated message comprising information not necessary for a patient's understanding of a procedure—even in scenarios where it would be harmful and traumatic to the patient. Moreover, this process takes place when the patient is at her most vulnerable state, increasing the likelihood that the patient may feel coerced or pressured.[29] Nevertheless, the Act's requirements must be followed in all

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obvious to the patient); *see also* Silbey, *Picturing Moral Arguments in A Fraught Legal Arena: Fetuses, Photographic Phantoms and Ultrasounds*, 16 GEO. J. GENDER & L. 593, 606 (2015) ("Although couched as 'informed consent,' the ultrasound provides no new information to the pregnant woman. She knows she is pregnant. She is visiting a reproductive health center precisely for that reason. She knows she has the capacity to become a mother of this child. She seeks to avoid that destiny."). Informed consent does not impose an obligation to disclose what is obvious.

[27] AMA Code of Medical Ethics, Opinion 2.1.1(a), (b) – Informed Consent (2016); Evidentiary Hr'g Tr. 90:13-91:6, RE 55, PageID ##748-749 (testimony of Dr. Joffe that forcing patient to view ultrasound and listen to explanation and fetal heartbeat is the "definition of insensitivity," the opposite of a physician's obligation to treat patients "sensitively" as defined in the AMA Code of Ethics); *id.* at 99:1-10, PageID #757 (testimony of Dr. Joffe that H.B. 2 is "entirely inconsistent" with informed consent as espoused in ACOG Ethics Committee opinion).

[28] Appellant's Br. 48.

[29] *EMW Women's Surgical Ctr. P.S.C.*, 2017 U.S. Dist. LEXIS 158728, at *25 (citing *Stuart*, 774 F.3d at 245) ("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.").

circumstances, whether or not the patient wants that information. Such a mandate violates the patient's autonomy and her right to freely choose whether to hear and/or see potentially harmful information.[30]

The harm the Act can therefore cause for a patient is significant. Dr. Franklin testified in district court about the mental trauma, emotional trauma, and anguish that the Act's requirements impose on a woman seeking to undergo an abortion who does not want the information.[31] That is the antithesis of proper informed consent. As the district court aptly cited in support of its holding:

> The testimony further revealed that H.B. 2 causes patients distress. Most patients choose to look away from the ultrasound image. 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. During the process mandated by H.B. 2, patients are "very upset," "crying," and even "sobbing." For victims of sexual assault, the requirements of H.B. 2 "can be extremely upsetting." Similarly, for patients diagnosed with a fetal anomaly, who have already had several ultrasounds performed and heard detailed

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[30] Evidentiary Hr'g Tr. 82:15-83:3, RE 55, PageID ##740-741 (testimony of Dr. Joffe: "So my view of this law from the perspective of medical ethics is that it's entirely inconsistent with standards of medical ethics and that it violates usual practices of medical ethics, specifically with regard to informed consent in the sense that I believe that the information that's prescribed by the law or the interaction that's prescribed by the law is not necessary for the woman's decision-making about undergoing an abortion or not, that the requirement that the images be shown is totally inconsistent with the usual standards of informed consent in other settings, that the woman has no choice in whether this interaction takes place. So it applies a violation of her autonomy, her ability to choose the procedures that she undergoes, the interactions that she has, the information that she gets.").

[31] *E.g.*, Evidentiary Hr'g Tr. 47:25-48:5, RE 55, PageID ##705-706.

descriptions of the fetus, the requirements of H.B. 2 "can be extremely difficult" and "emotional."[32]

The Act not only undermines informed consent for its impact on the patient, but also in its mandate on the physician. Informed consent requires that a physician should assess the patient's ability to "make an independent, voluntary decision [while presenting] relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information."[33] The Act, by contrast, forces a physician to set aside his or her medical judgment regarding the patient's capacity in lieu of its requirements.[34] Indeed, Appellants conceded in the district court that the Act's requirement may diametrically oppose

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[32] *EMW Women's Surgical Ctr., P.S.C.*, 2017 U.S. Dist. LEXIS 158728, at *34.

[33] AMA Code of Medical Ethics, Opinion 2.1.1(a), (b) – Informed Consent (2016).

[34] "[W]ithin the broad requirement for informed consent, the individual practitioner traditionally has been permitted, and indeed expected, to exercise independent judgment in determining what the potential treatments, risks, benefits, and alternatives are in any particular case, and, thus, what information should be communicated to the patient." Kapp, *Abortion and Informed Consent Requirements*, 144 AM. J. OBSTEST. & GYNECOL. 1, 3 (1982). "Details are routinely omitted in other contexts, unless patients ask for them, because of the diminishing returns that apply to the time spent explaining them and the odds that they will affect patient decisions, e.g. the intricate surgical details of an appendectomy." Woodcock, *Abortion Counseling and the Informed Consent Dilemma*, 25 BIOETHICS 495 (2011).

a licensed physician's honest medical judgment.[35] The Act's requirement that the physician convey its message, even when against that physician's medical opinion, unquestionably violates his or her ability to practice medicine in accordance with each patient's preferences and needs, as required by informed consent.[36]

As the Fourth Circuit held when it invalidated North Carolina's substantially similar mandated ultrasound display law:

> Transforming the physician into the mouthpiece of the state undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes. The patient seeks in a physician a medical professional with the capacity for independent medical judgment that professional status implies. The rupture of trust comes with replacing what the doctor's medical judgment would counsel in a communication with what the state wishes told. It subverts the patient's expectations when the physician is compelled to deliver a state message bearing little connection to the search for professional services that led the patient to the doctor's door.[37]

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[35] Evidentiary Hr'g Tr. 191:13-14, RE 55, PageID #849 (Mr. Pitt argued the Act's requirements could force physicians to disclose: "I don't agree with having to do this. I'm sorry I have to do it.").

[36] Minkoff & Ecker, *When Legislators Play Doctor: The Ethics of Mandatory Preabortion Ultrasound Examinations*, 120 OBSTEST. & GYNECOL. 647, 648 (2012) ("[U]nwanted and coercive information are an affront to autonomy, and instead of enabling decisions can be confounding and potentially paralyzing in their effect.")

[37] *Stuart*, 774 F.3d at 253-254 (citation omitted).

D. The Act Further Offends The Doctrine Of Informed Consent Because In Mandating A Particular Exchange, It Does Not Allow For Waiver

The Act also undermines both the comprehension and free consent elements of informed consent because it leaves no room for a critical, medically recognized exception to the doctrine: waiver. Exceptions to informed consent necessarily exist because proper medical practice is not a one-size-fits-all concept. The ability to understand and cope with medical information relayed during the informed consent process varies among patients.

The Act permits one exception to address a patient's unique circumstances: medical necessity. This limited exception only applies to situations where the medical necessity "compels the performance or inducement of an abortion" where "an immediate abortion is necessary."[38] The exception for medical necessity does not, however, consider the pregnant woman's autonomy in deciding whether to proceed with an abortion.[39] Therefore, regardless of whether the patient herself wishes to opt out of the Act's requirements, the physician must still perform the ultrasound prior to the procedure, display the ultrasound, and describe it to the

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38 Ky. Rev. Stat. § 311.727(5).

39 907 KAR 3:130, § 2(b)(3).

patient, unless the patient fits the narrow statutory definition of a "medical necessity."[40]

The Act harms women seeking abortions by not allowing them to waive the Act's requirements on their own accord. Through waiver, a patient exercises autonomy over her own self by choosing not to receive certain information.[41] A patient should be permitted to refuse the receipt of information that she believes will be harmful to her or that she simply does not wish to see or hear, and her physician should be permitted to honor that choice. Doing so does not prevent the patient from providing informed consent, but rather ensures that her consent to the procedure is completely voluntary.

Although the Act allows a patient to "avert[] her eyes from the ultrasound images or request[] the volume of the heartbeat be reduced or turned off if the heartbeat is audible," it does not permit a true waiver of the requirements.[42] Apart from adding to any emotional trauma she may already be experiencing in the

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40 Ky. Rev. Stat. § 311.727(2)(a)-(c), (e); *Id*. §311.727(5).

41 ACOG Comm. on Ethics, Comm. Op. No. 439, at 7; AMA Code of Medical Ethics, Opinion 2.1.3(b) – Withholding Information from Patients (2016). ("Physicians should … honor a patient's request not to receive certain medical information[.]").

42 Ky. Rev. Stat. § 311.727(3); *see* Evidentiary Hr'g Tr. 40:22-42:23, RE 55, PageID #698 ("They can cover their ears, but even still, the sound cannot necessarily be drowned out unless they have their ears covered and they're yelling or… making noises or humming… [T]here's no true way not to hear the heartbeat…").

moment, allowing the patient to avert her eyes from the ultrasound image or request that the volume of the heartbeat be reduced or turned off will not guarantee that the patient does not hear or see the information that she wishes to avoid. Further, it puts the burden on *her* to do so while she is in a physically compromised position.

Moreover, a patient who waives the requirements of the Act would not be missing any pertinent information. Here, the Act mandates that patients be provided with information *beyond what is necessary* for the patient to give informed consent.[43] The Act does not allow for waiver and therefore offends the doctrine of informed consent and good medical practice.

II. THE ACT UNDULY INTERFERES WITH THE PRACTICE OF MEDICINE

A. The Act Compels Physicians To Provide Unnecessary Information To Patients

The Act undermines the patient-physician relationship by forcing physicians to provide information that has no medical benefit. It is not in the national standard of care for physicians to contemporaneously display and describe to each abortion patient a pre-abortion ultrasound and to auscultate the fetal heartbeat, regardless of whether the patient wants to see the images or hear the descriptions

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[43] *See* Section I.A., *supra*; *see also* Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics,* 19 MICH. J. GENDER & L. 1, 56 (2012).

and any heart tones.[44] As discussed above, the showing of visual images and playing of sounds is, in almost all instances, irrelevant to the patient's understanding of the risks, benefits, and alternatives to an abortion procedure that a patient needs to make an informed decision.[45] Legal abortion is one of the safest medical procedures, and major complications from abortion are extremely rare.[46] In fact, the risk of death associated with childbirth is fourteen times higher than that with abortion.[47] Furthermore, at this stage in the abortion process, the physician has already reviewed the patient's medical history, completed the necessary physical examination of the patient, obtained any tests if necessary, and has had multiple conversations with the patient regarding the procedure.[48] Forcing physicians to comply with the Act in such circumstances only increases the time it takes for the physician to conduct a pre-abortion ultrasound, and is squarely at

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[44] *EMW Women's Surgical Ctr., P.S.C.*, 2017 U.S. Dist. LEXIS 158728, at *30-31; Evidentiary Hr'g Tr. 46:6-47:15, RE 55, PageID ##704-705; *id.* at 154:8-15, PageID #812 ("The national standard of care does not require the screen to be positioned in front of a patient for her to be able to see it, nor does it require auscultation of fetal heart tones such the patient would hear it, nor does it require description of the anatomy of the fetus.").

[45] *See* Evidentiary Hr'g Tr. 87:5-13, RE 55, PageID #745 (testimony of Dr. Joffe); *id.* 88:17-89:5, PageID ##746-747; ACOG Comm. on Ethics, Comm. Op. No. 439.

[46] Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTEST. & GYNECOL. 215, 215 (2012).

[47] *Id.*

[48] *See* Evidential Hr'g Tr. 95:8-12, RE 55, PageID #753 (testimony of Dr. Joffe).

odds with physicians' ethical obligations.[49] In light of these considerations, there is simply no medical reason why a patient seeking an abortion should have to receive a narrative and visual description of her ultrasound and hear any heart tones, as the Act mandates.

B. Physicians Have An Ethical Obligation To Exercise Their Medical Discretion And Practice Medicine Based On The Specific Needs Of The Patient, Which The Act Undermines

The Act is antithetical to the basic precept that the patient-physician relationship is the central focus of all ethical concerns, and that the welfare of the patient must therefore form the basis of all medical judgments.[50] A physician's primary task is to serve as a patient's advocate. As an advocate, physicians must exercise all reasonable means to ensure that the most appropriate care is provided to the patient. Consistent with the requirements of a medical license, physicians must use their judgment and provide individualized care based on each patient's needs.[51] Serving the best interests of the patient also means respecting the right of individual patients to accept or refuse any recommended medical intervention.[52]

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[49] *See* Evidentiary Hr'g Tr. 164:15-24, RE 55, PageID #822 (testimony of Dr. Nichols).

[50] ACOG Code of Professional Ethics, at 2.

[51] *See Roe v. Wade*, 410 U.S. 113, 114 (1973) ("The abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.").

[52] ACOG Code of Professional Ethics, at 2; AMA Code of Medical Ethics, Opinion 1.1.3(d) – Patient Rights (2016).

For these reasons, it is essential that the patient's right to be counseled by a physician according to the physician's professional medical judgment be left uncompromised.

Contrary to good medical practice, the Act leaves no room for a physician to exercise *any* discretion, even in instances when the physician genuinely believes that providing the required information would harm the patient. In doing so, the Act prevents physicians from providing individualized care, as it does not permit physicians to tailor the information provided to the patient's needs. Laws that require physicians to give, or withhold, specific information when counseling patients, or that mandate which tests, procedures, treatment alternatives, or medicines physicians can perform, prescribe, or administer are detrimental to the patient-physician relationship and are ill-advised.[53]

The Act's interference with the patient-physician relationship by compelling physicians to convey unnecessary information is all but guaranteed to induce emotional turmoil in many patients. For any woman who has decided to have an abortion and who has concluded that she does not want to view images of the fetus or hear them described, or hear the fetal heartbeat (if audible), forcing such experiences upon a patient would cause her needless anxiety and anger. These

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[53] ACOG Statement of Policy, at 1; AMA Code of Medical Ethics, Opinion 2.1.3(b) – Withholding Information from Patients (2016) ("Physicians should … honor a patient's request not to receive certain medical information[.]").

emotions are heightened in women who become pregnant as a result of a rape or who are carrying a fetus that is not viable.[54] In addition, the Act requires that the information be conveyed when the patient is incredibly vulnerable—while disrobed on an examination table with the ultrasound probe inside her or on her abdomen[55]—as opposed to fully dressed and in the physician's office where most informed consent discussions occur.[56] "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."[57] That the Act will induce such emotional distress in a vast array of women is squarely at odds with a physician's ethical responsibility to

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[54] *See, e.g.*, Section II.A., *supra*; *see also* Evidentiary Hr'g Tr. 165:10-17, RE 55, PageID #823 (testimony of Dr. Nichols: "there's a subset of patients who are particularly bothered by going through a vaginal ultrasound. Those who certainly are, for example, the victim of rape would be … [particularly bothered].").

[55] *See* Evidentiary Hr'g Tr. 40:9-11, RE 55, PageID #698 (testimony of Dr. Franklin).

[56] *See id.* (For women in the early stages of pregnancy, as is the case for most abortions, this information must be delivered while there is a probe inserted into the patient's vagina.)

[57] *EMW Women's Surgical Ctr., P.S.C.*, 2017 U.S. Dist. LEXIS 158728, at *36 (citing *Stuart*, 774 F.3d at 253) ("H.B. 2 also fails to serve the Commonwealth's interests because it appears to inflict psychological harm on abortion patients.").

place his or her patients' welfare above the physician's own self-interest or obligations to others.[58]

C. Forcing Physicians To Convey Information That Patients Do Not Wish To Receive Also Undermines Trust And Creates An Adversarial Relationship, Which Is Counter To Providing The Best Medical Care

The patient-physician relationship is grounded on confidentiality, trust, and honesty.[59] Patients rely on their physicians for advice about the most intimate and important medical decisions.[60] However, the Act necessarily introduces an adversarial element to the patient-physician relationship by requiring physicians to force information and images upon unwilling patients.[61] Trust and respect are critical for a healthy patient-physician relationship and yet, forcing medically unnecessary information on patients completely undermines these values.

Requiring a patient to undergo an unnecessary and invasive procedure and hear and see information that she has unequivocally stated is not relevant to her

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[58] ACOG Code of Professional Ethics, at 1; AMA Code of Medical Ethics, Opinion 1.1.1 – Patient-Physician Relationships (2016).

[59] ACOG Code of Professional Ethics, at 2; AMA Code of Medical Ethics, Opinion 1.1.1 – Patient-Physician Relationships (2016).

[60] *See Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972) ("The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arm's length transactions. [A patient's] dependence upon the physician for information affecting [her] well-being, in terms of contemplated treatment, is well-nigh abject.").

[61] *See* Minkoff & Ecker, *supra* note 26, at 649 ("Prescriptions for counseling and caring can lead a therapeutic relationship to deteriorate into an adversarial one.").

decision is insulting and demeaning to the patient.[62] Should the patient decide that she is not interested in the information, her only option is to avert her eyes and cover her ears. In so doing, the patient is placed in the awkward position of protecting herself against something the physician is doing or saying to her.[63] This constitutes an unwarranted and unnecessary intrusion into the patient's personal decision-making process and creates a dynamic of distrust between the patient and her physician. Physicians would not be able to alleviate this tension by simply informing patients that they disagree with the Act's requirements.[64] For a patient who has made the difficult decision to terminate her pregnancy and who then must hear and see details about the fetus against her wishes from her own physician, the damage would already be done.

The Act requires that physicians in Kentucky force ultrasound images and sounds, plus an oral recitation of unnecessary information, upon all patients seeking an abortion, irrespective of whether they desire such information or

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62 Lazzarini, *South Dakota's Abortion Script — Threatening the Physician–Patient Relationship*, 359 N. ENGL. J. MED. 2189 (2008) ("By assuming that women are incapable of making decisions about abortion as competent adults in consultation with their physicians, these statutes tend to reduce women to their reproductive capacity and suggest that they need the paternalistic protection of legislatures and society.").

63 *See* Evidentiary Hr'g Tr. 42:14-23, RE 55, PageID #700 (testimony of Dr. Franklin).

64 *See id.* 49:2-12, PageID #707; *id.* 101:15-102:9, PageID ##759-760 (testimony of Dr. Joffe).

whether such information would be harmful to the patient. By interfering with the patient-physician relationship, the Act undermines sound medical care and is at odds with physicians' ethical obligations to their patients.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to affirm the district court's decision.

Respectfully submitted.

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March 29, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and 29(a)(4), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(f) and 29(a)(5), the brief contains 6,161 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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KIMBERLY A. PARKER

March 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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