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, MD, on behalf of himself and his patients; ASHLEY BERGIN, MD, on behalf of herself and her patients; TANYA FRANKLIN, MD, on behalf of herself and her patients,

Plaintiffs-Appellees,

v.

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

and

ADAM MEIER, 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, Judge David J. Hale

BRIEF FOR THE AMERICAN MEDICAL ASSOCIATION AND AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AS *AMICI CURIAE* IN SUPPORT OF GRANTING PLAINTIFFS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Cir. R. 26.1, the American Medical Association and the American College of Obstetricians and Gynecologists 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 Medical Association and the American College of Obstetricians and Gynecologists 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: May 28, 2019

/s/ Kimberly A. Parker
KIMBERLY A. PARKER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Medical Association ("AMA") and the American College of Obstetricians and Gynecologists ("ACOG") submit this brief *amici curiae* in support of granting the petition for rehearing *en banc*.[1]

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 AMA's House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in AMA's policy-making process. The objectives of AMA are 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 is the nation's leading group of physicians providing health care for women. With more than 58,000 members—representing more than 90% of all obstetricians-gynecologists in the United States—ACOG advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases

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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.

awareness among its members and the public of the changing issues facing women's health care. ACOG is committed to ensuring access to the full spectrum of evidence-based quality reproductive health care, including abortion care, for all women. ACOG opposes medically unnecessary laws or restrictions that serve to delay or prevent care.

AMA and ACOG have previously appeared as *amici curiae* in various courts throughout the country and courts have cited their authoritative medical views. For example, AMA and ACOG submitted a brief *amici curiae* in the Fourth Circuit challenging a virtually identical abortion ultrasound law, which the court cited extensively in its decision.[2] ACOG's briefs and guidelines have been cited by numerous courts, including the Supreme Court and this Court, seeking authoritative medical data regarding childbirth and abortion.[3]

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[2] *Stuart v. Camnitz*, 774 F.3d 238, 251-252, 255 (4th Cir. 2014).

[3] *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312, 2315 (2016) (citing AMA's and ACOG'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 authorit[ies]" supporting the comparative safety of the abortion procedure at issue); *see also Stuart*, 774 F.3d at 251-252, 255 (citing AMA's and ACOG's *amici* brief for medical standards of informed consent in striking North Carolina's mandatory ultrasound display law).

SUMMARY OF ARGUMENT

The Sixth Circuit majority erroneously upheld Kentucky's House Bill 2, the Ultrasound Informed Consent Act ("H.B. 2"), because they disregarded the standard practices of the medical community in determining what information is essential for informed consent. H.B. 2 forces physicians to deliver potentially harmful information to patients—even over their objections—at a time when they are particularly vulnerable, while not actually providing information a patient requires to give her informed consent.

First, the majority incorrectly interpreted *Casey* and *Gonzales* in declaring that courts need not consider how the medical community determines informed consent. The majority concluded that it need only defer to the Kentucky legislature, ignoring the fact that courts and legislative bodies regularly rely on the expertise of the medical community to understand what information needs to be communicated to a patient to secure informed consent. Permitting the state to solely define informed consent without considering the views of the physician community creates a dangerous precedent in which legislators may mandate rules that are antithetical to well-established medical practices and ethics.

Second, the majority incorrectly decided that H.B. 2's requirements that a physician display the ultrasound, auscultate the heartbeat, and describe the movements in the ultrasound to a patient considering an abortion either provided

"more relevant information" for informed consent or was otherwise not significantly different from merely offering to provide this information to the patient. The majority relied on the fact that the patient was still free to close her ears and cover her eyes during this process, despite ample evidence that H.B. 2's requirements can impose extreme mental and emotional distress to the patient. Forcing the patient to undergo a painful experience that does not provide additional information required for informed consent undermines both the patient's autonomy and the physician's duty not to inflict harm on the patient.

For the above reasons, the petition for rehearing *en banc* should be granted.

ARGUMENT

I. THE MAJORITY INCORRECTLY DISREGARDED THE MEDICAL COMMUNITY'S STANDARDS OF INFORMED CONSENT

A. The Majority Incorrectly Relied On *Casey* And *Gonzales*

The majority's decision to defer to the Kentucky legislature's determination of informed consent without regard for the expertise of the medical community is ill-founded. The Fourth Circuit aptly recognized the medical community's informed consent standards in upholding an injunction concerning a similar law.[4] It is widely accepted that states may regulate the medical profession, including by creating requirements that doctors provide patients with information to ensure

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

informed consent.[5] However, this does not render the medical community irrelevant nor place them at a legislature's complete mercy.

The court erroneously relied on *Casey* and *Gonzales*—which both focus on statutes substantially different from H.B. 2—in finding that the views of the medical community were immaterial to their review of H.B. 2.[6] The statute in *Casey* mandated:

> a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician … must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.[7]

This presents two crucial differences from H.B. 2. *First*, the information at issue in *Casey* pertained directly to the patient's health following either childbirth or an abortion; the sound of a fetal heartbeat and sonogram imagery do not.[8] *Second*, in

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[5] Op. 21 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

[6] Op. 22-23. We do not concede that *Casey* and *Gonzales* apply. We agree with Judge Donald that "[t]his is a First Amendment case," whereas *Casey* and *Gonzales* concerned "undue burden" questions under the Fourteenth Amendment. *See* Op. 34-36 (Donald, J., dissenting).

[7] *Casey*, 505 U.S. at 881.

[8] Evidentiary Hr'g Tr. 151:23-152:7, RE 55, PageID ##809-810 (testimony of Dr. Nichols that no gynecological or obstetrical procedures showing and describing patients' ultrasounds are necessary for informed consent).

Casey, a physician must have only made the patient aware that additional information was available, not confronted her with such information in the face of her attempts to avoid hearing or seeing it.[9] Furthermore, unlike *Casey*, the majority did not consider any evidence demonstrating that *requiring* the additional information mandated by H.B. 2, rather than merely *offering* it, is the applicable standard of care.[10] With such foundational differences, reliance on *Casey* to discard the medical community's standard practices is misguided.

The statute at issue in *Gonzales*[11] is even further afield. It in no way dictated what a doctor must or could say (or not say). Indeed, the plaintiffs did not make a First Amendment claim in *Gonzales* because the statute prohibited certain medical procedures, not speech. Moreover, the Court's analysis in *Gonzales* did not in any way expound on *Casey*. Thus, the majority inappropriately relied on the holdings of *Casey* and *Gonzales*.

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9 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 ….").

10 Op. 51 (Donald, J., dissenting).

11 *Gonzales v. Carhart*, 550 U.S. 124, 124-125 (2007).

B. Even if *Casey* Applied, It Would Not Support The Majority's Disregard Of Standard Medical Practices In Defining Informed Consent

Even if, *arguendo*, *Casey*'s informed consent discussion applied, it would still run counter to the majority's holding. *Casey* holds: "[T]he physician's First Amendment rights not to speak are implicated, … but only as part of the practice of medicine, subject to *reasonable* licensing and regulation by the State."[12] At minimum, the judiciary must therefore check the legislature's power against reasonableness, which incorporates medical practitioners' expertise. Consequently, courts and legislatures regularly rely on such expertise in other contexts to understand and adjudicate informed consent laws.[13] The majority, however, fails to do so.

Furthermore, the majority's position on the relevance of the views of the medical community creates a dangerous precedent. The majority states, "[i]f the medical groups … want the legislated rules of informed consent to change, they

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[12] *Casey*, 505 U.S. at 884 (emphasis added) (citation omitted).

[13] *See*, *e.g.*, *Stuart*, 774 F.3d at 251 (ethics guidelines outlined in *amici*'s brief helped determine definition and elements of informed consent); *Rush v. Miller*, 648 F.2d 1075, 1076 (6th Cir. 1981) (Tennessee informed consent statute only requiring disclosure of standards in accordance with medical community was not invalid); *Snawder v. Cohen*, 804 F. Supp. 910, 914 (W.D. Ky. 1992), *aff'd*, 5 F.3d 1012 (6th Cir. 1993) (informing patients of risks associated with vaccine were necessary, as according to medical community standards).

should address their arguments to those elected representatives."[14] This creates a dangerous structure wherein legislators may mandate any and all rules, including those antithetical to established medical practices and ethics, "[s]o long as the state's legislators wisely use the words 'informed consent' in the title of a regulation."[15]

The majority suggests that the petitioners' approach would lead to States "surrender[ing] [their] authority to regulate informed consent to private parties."[16] But a legislature cannot have free reign to enact any laws it chooses to regulate the practice and speech of physicians. Permitting H.B. 2 to stand on this basis forces physicians to choose between their legal and ethical obligations.

II. H.B. 2 UNDERMINES—NOT FURTHERS—INFORMED CONSENT

A. H.B. 2 Does Not Require The Patient Learn Relevant Or Medically Necessary Information

H.B. 2's speech, display, and auscultation requirements contradict genuine informed consent[17] and provide no new medical information to patients than was already available upon request. Before H.B. 2, patients seeking an abortion had access to the same information in question: physicians already performed an

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14 Op. 23.

15 Op. 52 (Donald, J., dissenting).

16 Op. 23.

17 ACOG Comm. on Ethics, *Comm. Op. No. 439* (2009, reaffirmed 2015); AMA, *Code of Med. Ethics*, Opinions 2.1.1 and 2.1.3.

ultrasound[18] and already offered patients an opportunity to view the images and hear a description of the results—if they chose to.[19]

Furthermore, H.B. 2 does not *actually* provide patients with more information, as it does not require them to hear or see anything. Instead, H.B. 2 permits the woman to close her eyes and "mak[e] noises or hum[]" to drown out the sound of the fetal heartbeat, belying the claim that H.B. 2 provides "more relevant" or medically necessary information.[20] H.B. 2 therefore fails to "facilitate informed consent" in the same way the Supreme Court found the statute in *National Institute of Family & Life Advocates v. Becerra* failed to do so.[21]

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

[19] ACOG Comm. on Ethics, *Comm. Op. No. 439* (2009, reaffirmed 2015). Relatedly, the Commonwealth's contrary evidence—that women get new information on which they would rely—is dubious at best. The Commonwealth points to four patients who obtained abortions they later regretted, hypothesizing that the information in H.B. 2 may have changed their decisions. However, as the Dissent notes, it is unclear whether those patients had undergone their abortions "before or after the passage of the informed-consent statute that predated H.B. 2," Op. 51 (Donald, J., dissenting), meaning we do not know if H.B. 2 would have even had an impact as compared to the pre-H.B. 2 regime.

[20] It should be noted, however, that "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." *EMW Women's Surgical Ctr., P.S.C. v. Beshear,* 283 F. Supp. 3d 629, 645 (W.D. Ky. 2017). *See supra* n.9.

[21] 138 S. Ct. 2361, 2373 (2018) (California statute requiring pregnancy-related clinics to post notices of publicly funded family-planning services did not "facilitate informed consent.").

B. H.B. 2 Undermines The Patient's And Physician's Roles In The Informed Consent Process

H.B. 2 erodes the informed consent process from the perspective of both the patient and the physician. The majority, citing *Casey*, argued that "an informed-consent requirement in the abortion context [is] no different from a requirement that a doctor give certain specific information about any medical procedure.'"[22] However, H.B. 2's requirements are *significantly* different from other informed consent requirements—in *no other area of medicine* does the law categorically require a patient to view images of the inside of her own body to understand her medical condition to give informed consent.[23] H.B. 2's requirements can impose extreme mental and emotional trauma on a woman who does not want the information.[24] H.B. 2 violates informed consent principles by disregarding the patient's decision not to receive certain medical information.[25]

H.B. 2's mandatory disclosure requirements simultaneously contravene physicians' ethical obligations. H.B. 2 compels physicians to set aside their medical judgments as to whether their patients are capable of making "an

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22 Op. 7 (citing *Casey*, 505 U.S. at 884).

23 *See* Evidentiary Hr'g Tr. 88:17-21, RE 55, PageID #746 (testimony of Dr. Joffe: "I can't think of any other context in medicine […] in which the showing of images is viewed as a necessary part of informed consent."); *see also supra* n.8.

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

25 AMA, *Code of Med. Ethics*, Opinion 2.1.3(b).

independent, voluntary decision" and prohibits them from presenting "relevant information accurately and sensitively."[26] The majority seeks refuge in the fact that "H.B.2 [does not] penalize a doctor if she or he exercises discretion to advise a patient that she may attempt to avoid the disclosures."[27] This half-truth is unavailing because patients' alleged ability to shield themselves from the images or partially drown out the sounds is immaterial—the requirements still force the patients to confront potentially traumatizing information against their wishes and against their physicians' learned judgment. Furthermore, Appellants already conceded[28] that H.B. 2's requirement may conflict with a physician's medical judgment in a direct violation of her ethical obligations.[29]

In sum, not only does H.B. 2 "undermine[] the trust that is necessary for facilitating healthy doctor-patient relationships,"[30] it unquestionably violates the physician's ability to practice medicine in accordance with each patient's preferences and needs, a requisite of informed consent.[31]

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26 AMA, *Code of Med. Ethics*, Opinion 2.1.1(a), (b) – Informed Consent (2016).

27 Op. 3-4.

28 Evidentiary Hr'g Tr. 191:13-14, RE 55, PageID #849 (Mr. Pitt argued H.B. 2's requirements could force physicians to disclose: "I don't agree with having to do this. I'm sorry I have to do it.").

29 *See supra* n.25; AMA, *Code of Med. Ethics*, Opinions 1.1.1 and 1.1.3.

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

31 AMA, *Code of Med. Ethics*, Opinion 2.1.3(a).

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant Plaintiffs-Appellees' petition for rehearing *en banc*.

Respectfully submitted.

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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. 35(b)(2) and 29(b)(4).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and 29(b)(4), the brief contains 2,599 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.

/s/ Kimberly A. Parker
KIMBERLY A. PARKER

May 28, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2019, I electronically filed the foregoing with the Court for the United States Court of Appeals for the Sixth Circuit by e-mail to Court Clerk, Beverly Harris, who will in turn and once accepted, file same via ECF, automatically generating and sending by e-mail a Notice of Docket activity to all registered attorneys currently participating in this case. 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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