No. 17-6151

In the United States Court of Appeals for the Sixth Circuit

EMW Women's Surgical Center, P.S.C., et al.,
Plaintiffs-Appellees,

v.

Andrew G. Beshear, Attorney General of Kentucky, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville, No. 3:17-cv-00016-DJH

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Statement of Interest of Amici

Amici are the States of Texas, Alabama, Arkansas, Indiana, Kansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, Phil Bryant, Governor of Mississippi, and Paul R. LePage, Governor of Maine.[1] Approximately 29 states, including most of the amici States, have laws requiring a physician to provide certain information to a patient when obtaining informed consent to perform an abortion procedure.[2] Approximately 24 states have laws involving ultrasounds in their abortion informed-consent laws. Four states have laws requiring abortion providers to display and describe ultrasound images before the abortion procedure, including Kentucky.[3] Another nine states require abortion providers to perform ultrasounds and offer their patients the opportunity to view the

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties received timely notice of filing and consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. § 36-2153; Ark. Code § 20-16-1703; Fla. Stat. § 390.0111(3); Ga. Code § 31-9A-3; Idaho Code § 18-609; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1; Kan. Stat. § 65-6709; Ky. Rev. Stat. § 311.725; La. Stat. § 40:1061.10; Mich. Comp. Laws § 333.17015; Minn. Stat. § 145.4242; Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327; N.C. Gen. Stat. § 90-21.82; N.D. Cent. Code § 14-02.1-02; Ohio Rev. Code § 2317.56; Okla. Stat. tit. 63, § 1-738.2; 18 Pa. Stat. and Cons. Stat. § 3205; S.C. Code § 44-41-330; S.D. Codified Laws § 34-23A-10.1; Tenn. Code § 39-15-202; Tex. Health & Safety Code § 171.012; Utah Code § 76-7-305; Va. Code § 18.2-76; W. Va. Code § 16-2I-2; Wis. Stat. § 253.10.

[3] Ky. Rev. Stat. § 311.727(2); La. Stat. § 40:1061.10(D); Tex. Health & Safety Code § 171.012(a)(4); Wis. Stat. § 253.10.

images.[4] Eight states do not require ultrasounds, but require the provider to offer the patient an opportunity to view the ultrasound, if one is performed.[5] And four states require abortion providers to offer an ultrasound option to their patients.[6]

Planned Parenthood of Southeastern Pennsylvania v. Casey held that state laws requiring disclosure of certain information as part of obtaining a patient's informed consent for abortion procedures—even information designed to encourage the woman to carry the pregnancy to term—do not violate physicians' freedom of speech under the First Amendment. 505 U.S. 833, 884 (1992).[7] And importantly for the instant case, *Casey* expressly stated that abortion informed-consent laws could require physicians to give patients information "relating to the consequences to the fetus, even when those consequences have no direct relation to her health." *Id.* at 882. That is because in the context of abortion, a State has dual sufficient interests supporting such laws: protecting the health of the patient as well as protecting unborn life. *Id.* at 882-84. These interests create a compelling state interest that outweighs any First Amendment interest of the physician in that context. The

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[4] Ala. Code § 26-23A-6; Ariz. Rev. Stat. § 36-2156; Fla. Stat. § 390.0111; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1; Kan. Stat. § 65-6709; Miss. Code § 41-41-34; Ohio Rev. Code § 2317.561; Va. Code § 18.2-76.

[5] Ark. Code § 20-16-602; Ga. Code § 31-9A-3; Idaho Code § 18-609; Mich. Comp. Laws § 333.17015; Neb. Rev. Stat. § 28-327; S.C. Code § 44-41-330; Utah Code § 76-7-305; W. Va. Code § 16-2I-2.

[6] Mo. Stat. § 188.027; N.D. Cent. Code § 14-02.1-04; S.D. Codified Laws § 34-23A-52; Wyo. Stat. § 35-6-119.

[7] All citations to *Casey* in this brief are to the controlling joint plurality opinion.

requirements of Kentucky's abortion-informed-consent law are valid under *Casey*, and the district court erred in concluding otherwise.

SUMMARY OF THE ARGUMENT

Casey approved laws that regulate informed consent by requiring a doctor to give a patient certain information to assess the risks and consequences of the abortion procedure. The district court erred by disregarding *Casey*'s clear holding that States can require a physician to provide a patient truthful, non-misleading information relevant to the abortion decision—including information "relating to the consequences to the fetus, even when those consequences have no direct relation to her health." 505 U.S. at 882. The district court's conclusion that Kentucky's ultrasound requirement, which is part of the informed-consent process for abortion, constituted "compelled ideological speech" is incorrect and contradicted by *Casey*. Mem. Op. & Order, R.69, Page ID #1918. As the Fifth Circuit explained in evaluating Texas's similar ultrasound law, it is "obvious" that an ultrasound, the auscultation of the fetal heartbeat, and medical descriptions of the fetus "are the epitome of truthful, non-misleading information" specifically approved by *Casey*. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577-78 (5th Cir. 2012).

I. Informed consent is a specific part of the physician-patient relationship where the State's interest in regulation is compelling. If informed consent is lacking, the physician may be legally liable. The State's interests in public health, regulating the medical profession, and protecting patient autonomy justify regulation of the informed-consent process, and many States do just that.

A majority of States also regulate informed consent in the context of abortion. Aside from the fact that it is permissible for States to regulate informed consent generally, *Casey* upheld informed-consent requirements for abortion in particular. *Casey* approved such requirements, even when they included information not strictly related to the procedure, because of the unique nature of the decision to have an abortion and its consequences.

Casey also permits States to require that information be given during the informed-consent process that expresses a State's preference for childbirth. This is because of the other strong state interest supporting informed-consent regulations for abortion beyond protecting patient health—a State's recognized interest in protecting unborn life. The import of *Casey* is clear: States may require physicians to provide certain information, including information about the fetus, during the informed-consent process before an abortion without running afoul of the First Amendment.

II. Kentucky's H.B. 2 is valid under *Casey*. Kentucky requires a physician who intends to perform an abortion to first perform an ultrasound and display the images to the woman, auscultate the fetal heartbeat, and describe the ultrasound images, as part of obtaining informed consent for the abortion procedure. Ky. Rev. Stat. § 311.727(2). The law at issue in *Casey* required the doctor to discuss the probable gestational age of the fetus and offer information about its characteristics and development to the patient. *See* 505 U.S. at 881.The Supreme Court rejected the argument that these requirements went beyond informed consent because they did not pertain to the risks to the woman from the procedure. *See id.* at 882-83. Instead, the

Court emphasized that abortion is unique among other medical procedures because it can impact the patient in a profound way if the choice is not fully informed, and it impacts another—the fetus—making those effects relevant to the woman's decision. Thus, information about the fetus is relevant and appropriate in the context of informed consent for abortion.

Instead of printed materials relating to fetal development like those discussed in *Casey*, Kentucky requires the use of real-time images of the fetus as a source of information, thanks to advances in medical technology. In the years since *Casey* was decided, ultrasounds have advanced to become a routine and necessary part of the medical care of pregnant women, whether that care has the goal of preserving the pregnancy or terminating it through abortion. Ultrasounds show images of what used to be available only as a depiction in a printed document. Kentucky's law therefore serves the State's interests in protecting the health of the pregnant woman by ensuring her decision to have an abortion is adequately informed and in protecting unborn life. These interests outweigh any First Amendment interests of the physicians in this context. As other courts have done, this Court should also uphold this law as a valid exercise of state regulation in the context of abortion.

ARGUMENT

I. *Casey* Held that Informed Consent for Abortion Is a Context Where States May Constitutionally Require Physicians to Give Certain Information to Patients.

A. It is well established that States may regulate professional conduct, even when it involves speech.

The authority of States to regulate professional conduct, including that of the medical profession, is well established. *E.g.*, *Dent v. West Virginia,* 129 U.S. 114, 122 (1889). "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar,* 421 U.S. 773, 792 (1975).

A particular area of medical practice that is heavily regulated by States without running afoul of the First Amendment is informed consent:

> The doctor-patient relationship has long been conducted within the constraints of informed consent to the risks of medical procedures, as demanded by the common law, legislation, and professional norms. The doctrine itself rests on settled principles of personal autonomy, protected by a reticulated pattern of tort law, overlaid by both self- and state-imposed regulation. Speech incident to securing informed consent submits to the long history of this regulatory pattern.

Lakey, 667 F.3d at 585 (Higginbotham, J., concurring).

Regardless of the level of scrutiny applied, the State's interest in protecting public health and the patient's ability to assess a procedure's risks and consequences is sufficient in the context of informed consent to justify government regulation.

B. Informed consent is a specific aspect of medical practice where physician discretion is routinely limited by law.

While informed consent is a routine part of contemporary medical practice and ethics, it is fundamentally a legal requirement. Before the early 1900s, treatment was often left to the discretion of physicians with little involvement of the patient. Eventually, the courts began to recognize that a patient should be able to assess a procedure's risks and consequences and that failing to obtain a patient's consent for a medical procedure should result in legal liability. *E.g.*, *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.); *Pratt v. Davis,* 79 N.E. 562 (Ill. 1906); *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

Because a physician who fails to properly obtain informed consent before performing a medical procedure is legally liable, States routinely set legal requirements for informed consent. Many States require a doctor to provide certain information to patients before performing medical procedures.[8] *See, e.g.,* Del. Code tit. 18, § 6852; Ga. Code § 31-9-6.1; Haw. Rev. Stat. § 671-3; La. Stat. § 40:1157.1; Minn. Stat. § 144.651; N.Y. Pub. Health Law § 2805-d; N.C. Gen. Stat. § 90-21.13; Ohio Rev. Code § 2317.54; Tex. Civ. Prac. & Rem. Code §§ 74.103, 74.105; Vt. Stat. tit. 12, § 1909; Wash. Rev. Code § 7.70.050; Cal. Code Regs. tit. 22, § 70707(b)(4), (5); Wis. Admin. Code DHS § 94.03.

[8] The federal government also regulates informed consent in various contexts. *See, e.g.,* 38 C.F.R. § 17.32 (informed consent requirements in veterans' health facilities); 21 C.F.R. § 50.25 (informed consent requirements in human subject research).

Some States regulate informed consent requirements for participation in experimental treatments or clinical trials. *See, e.g.*, Cal. Health & Safety Code § 24173 (informed consent for experimental treatment requires explanation of risks, benefits, ability to withdraw, source of funding, and material stake of the investigator in the outcome, among other items); Ind. Code § 25-22.5-1-2.1 (experimental treatment requires informed consent and that a physician "personally examine[]" the patient); 55 Pa. Code § 5100.54 (research must be conducted in compliance with federal regulations on human subjects and a copy of the regulations must be made available to patients); N.D. Admin. Code 33-07-01.1-36 (experimental psychiatric treatment requires hospital to make available federal regulations regarding human subject protection).

Some States also regulate informed consent for particular treatments and procedures. *See, e.g.*, Ala. Code § 22-13-70 (breast cancer treatment); Fla. Stat. § 458.324 (breast cancer treatment); Haw. Rev. Stat. § 671-3(c) (mastectomy); Md. Code, Health-Gen. § 20-114 (breast implants); *id.* § 20-113 (breast cancer treatment); La. Stat. § 40:1103.4 (same); Me. Stat. tit. 24, § 2905-A (same); Mich. Comp. Laws § 333.17013 (same); Mont. Code § 37-3-333 (same); N.Y. Pub. Health Law § 2404 (same); Tex. Civ. Prac. & Rem. Code § 74.107 (hysterectomy); Cal. Code Regs. tit. 22, §§ 70707.1, 70707.3 (sterilization).

Beyond establishing the content of the information a doctor must provide, States regulate other aspects of informed consent. Some specify when consent expires and who may give consent. *See, e.g.*, Cal. Health & Safety Code § 24178(c) (surrogate informed consent can be obtained from persons unable to consent and who do not

express dissent or resist); Or. Rev. Stat. § 421.085(2) (inmates are not permitted to participate in medical or psychiatric research); 14-472 Me. Code R. ch. 1, Pt. A § XI.H.3 (individuals between 12 and 18 must give informed consent, if able, to experimental mental health research); 10A N.C. Admin. Code § 28A.0306(b)(3) (informed consent for research subjects may not exceed six months); 25 Tex. Admin. Code § 404.153(9)(F) (informed consent to mental health treatment can be withdrawn by non-compliance or resistance); Wis. Admin. Code DHS § 94.03(1)(f) (informed consent for certain conditions may not exceed 15 months).

In short, the process of informed consent for medical procedures is highly regulated. It is a context where legal liability and the State's interest in public health provide a compelling governmental interest in regulating the medical profession, and this outweighs physician discretion in this context. Thus, informed consent is an area the States may regulate—even down to precise things physicians must tell patients before performing particular procedures—without violating the First Amendment.

C. The dual state interests—in protecting patient health as well as unborn life—implicated in the specific context of an abortion procedure make it distinct from other medical procedures.

At a minimum, abortion may be regulated to the same extent as other medical procedures:

> Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position . . . . On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

Casey, 505 U.S. at 884. Just as some States have chosen to require specific information to obtain informed consent for breast-cancer treatment and hysterectomy, a majority of States have decided to regulate the informed-consent process for abortion. *See supra* p.1 n.2.

But abortion is unlike other medical procedures in ways that support an even stronger basis for state regulation of informed consent: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). As *Casey* explained:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

505 U.S. at 852.

The Supreme Court has repeatedly recognized the gravity of the abortion decision and the State's interest in ensuring it is fully informed: "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976). "Whether to have an abortion requires a difficult and painful moral decision . . . . The State has an interest in ensuring so grave a choice is well informed." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (internal citation omitted).

Thus, the Supreme Court has affirmed a State's ability to regulate the informed-consent process to ensure that patients can adequately assess the risks and consequences of the abortion procedure—rejecting First Amendment challenges to these laws. *Id.* at 159-60; *Casey,* 505 U.S. at 882-85; *see also Danforth*, 428 U.S. at 67. As *Casey* held: "To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." 505 U.S. at 884 (internal citations omitted).

Informed-consent laws in the context of abortion would satisfy any level of scrutiny given the gravity of the state interests involved. While the physician's First Amendment interests may be the same no matter what medical procedure is at issue, in the context of abortion, the State's interest in regulating the consent process is even more pronounced. Not only does the State have a strong interest in protecting public health, but as the Supreme Court has recognized, the State also has a distinct interest in "protecting the life of the fetus that may become a child." *Gonzales*, 550 U.S. at 146; *see Casey*, 505 U.S. at 846; *Roe v. Wade*, 410 U.S. 113, 162 (1973) ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and [] it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct.").

The distinct state interest in protecting unborn life alone justifies government regulation regarding informed consent for abortion—including government regulation that would not necessarily be required for informed consent of other medical procedures: "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157. The unique implications of the abortion procedure have also been acknowledged by the Supreme Court as a basis for permitting the State to regulate abortion in ways that express its preference for childbirth. *See, e.g.*, *Harris*, 448 U.S. at 324 (upholding the Hyde Amendment); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding the exclusion of abortion from Medicaid because the government may "make a value judgment favoring childbirth over abortion").

The recognized state interest in protecting fetal life coupled with the already strong state interest in public health creates a uniquely compelling interest that outweighs any potential First Amendment interests in this specific context unless the information compelled is false or misleading. *Casey*, 505 U.S. at 882.

II. Kentucky's Abortion Ultrasound Law Is Constitutionally Permissible as Part of the Informed-Consent Process.

A. The district court failed to properly apply *Casey* and credited arguments that *Casey* and other courts have correctly rejected.

Kentucky's Ultrasound Informed Consent Act[9] (H.B. 2) is constitutional because it is a valid abortion informed-consent law. This law requires a physician to show the patient the ultrasound images of her fetus, auscultate the fetal heartbeat, and provide a medical explanation of those images before performing an abortion. It cannot be disputed that this information is truthful and non-misleading, nor can it be disputed that it is relevant to the woman's decision to have an abortion. *Lakey*, 667 F.3d at 577-78; *see also Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (en banc) ("[B]iological information about the fetus is at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*."). Thus, the result in this case is dictated by *Casey*, which expressly permits States to regulate abortion-informed-consent in this manner.

1. The type of information required by the informed-consent law upheld in *Casey* (information about the fetus and its development) is exactly what H.B. 2 requires. H.B. 2 requires that information to be shown real-time via ultrasounds, rather than just a depiction through printed materials as in *Casey*. But that distinction makes no difference in the First Amendment analysis here: "[Ultrasounds and an audible heartbeat] are not different in kind, although more graphic and scientifically up-to-

[9] Ky. Rev. Stat. § 311.727(2).

date, than the disclosures discussed in *Casey*—probable gestational age of the fetus and printed material showing a baby's general prenatal development stages." *Lakey*, 667 F.3d at 578.

That *Casey* did not consider whether real-time images rather than merely words and pamphlets would be permitted does not foreclose the State from choosing to make the information clearer and more easily understood through the use of sonogram images. The district court, and the Fourth Circuit in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), appear to incorrectly read *Casey* as creating a ceiling for informed-consent laws rather than applying the principles underlying *Casey*'s reasoning.[10] Nowhere did *Casey* even insinuate that the requirements of the Pennsylvania informed-consent law at issue there were the only ones that States could adopt. That is one reason why the Fifth Circuit rejected such a narrow reading of *Casey*. *Lakey*, 667 F.3d at 579. Instead, courts should examine whether the purpose and nature of the information provided is similar to the information approved by *Casey*. In this case, it is: The sonogram images provide a personal illustration to the woman of the fetus, and they do not limit her understanding about the fetus to generalities. As the Fifth Circuit held when evaluating a similar Texas law, "[t]o belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and

[10] The district court also relied on *Wollschlaeger v. Governor, State of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc), to support the conclusion that H.B. 2's requirements violated the First Amendment rights of physicians. Mem. Op. & Order, R.69, Page ID # 1920-24. But that case, which concerned physician questions about firearm ownership, does not involve the specific context of informed consent and is therefore inapposite.

their medical descriptions are the epitome of truthful, non-misleading information." *Lakey*, 667 F.3d at 577-78.

The district court did not find otherwise. Instead, it concluded, relying on *Stuart*, that even if "the disclosures mandated by H.B. 2 may be truthful, non-misleading, and relevant to a woman's decision to have an abortion [, that] is not dispositive" in the context of compelled speech. Mem. Op. & Order, R.69, Page ID # 1924. The district court stated the uncontroversial proposition that a State "may not compel affirmance of a belief with which the speaker disagrees." *Id.*, Page ID # 1924-25 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995)). But the State may require scientifically accurate information to be given as part of informed consent for *any* medical procedure—including abortion—without violating the First Amendment. *See supra* Parts I.B & I.C; *Lakey,* 667 F.3d at 579-80; *Rounds*, 530 F.3d at 734-35.

2. It is also incorrect to interpret *Casey* as narrowly as the district court did for the same reasons that *Casey* rejected *Roe v. Wade*'s trimester framework: such a narrow reading does not allow for advances in medical technology. *See Casey*, 505 U.S. at 860. Reading *Casey* to prevent, rather than support, the right of States to supplement the knowledge a woman may be given when contemplating abortion with the latest scientific advancements is illogical, and "[d]enying her up to date medical information is more of an abuse to her ability to decide than providing the information." *Lakey*, 667 F.3d at 579.

This is especially so in the case of ultrasounds and the sonogram images they produce. Since 1988, when the law at issue in *Casey* was enacted, ultrasound technology has changed dramatically. Sonograms in the late 1980s[11] were blurry and indefinite; ultrasound technology today allows for 3D real-time imaging.[12] In 1996, four years after *Casey* was decided, ultrasound technology clear enough to enable physicians to reliably determine the sex of the fetus was so new that physicians were still debating whether they should routinely tell parents the sex of their fetus during an ultrasound.[13] Yet this has become a common practice today in light of technological developments: "[T]he provision of sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They are viewed as 'medically necessary' for the mother and fetus." *Lakey*, 667 F.3d at 579.

3. Another argument credited by the district court, which is inconsistent with *Casey* and *Gonzales* and has been rejected by other courts, is the idea that H.B. 2 compels "ideological" speech. Mem. Op. & Order, R.69, Page ID #1924-28. But

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[11] *See* Cullen, M., et al., *A Comparison of Transvaginal and Abdominal Ultrasound in Visualizing the First Trimester Conceptus*, J. Ultrasound Med. 8:565-569 at 567-68 (1989), available at http://onlinelibrary.wiley.com/doi/10.7863/jum.1989.8.10.565/pdf [https://perma.cc/778Q-BFCC] (last visited Jan. 25, 2018).

[12] *See* GE Healthcare, *GE Healthcare Voluson HDlive Ultrasound Imaging Short Movie* (Dec. 5, 2011), https://www.youtube.com/watch?v=BD7quHKgEuk.

[13] *See* Chervenak, F.A. & McCullough, L.B., *Should Sex Identification Be Offered As Part of the Routine Ultrasound Examination?*, J. Ultrasound Obstet. Gynecol. 8:293-94 (1996), available at http://onlinelibrary.wiley.com/doi/10.1046/j.1469-0705.1996.08050293.x/epdf [https://perma.cc/5S49-KQJS] (last visited Jan. 25, 2018).

H.B. 2 does nothing of the sort. Rather, it requires physicians or qualified technicians to present scientific, medical facts—how many fetuses are present, whether fetal demise has occurred, the anatomical features of the fetus, and the fetal heartbeat. Ky. Rev. Stat. § 311.727(2). The district court did not find that this information was false or misleading. Instead, the court concluded, without much explanation, that providing a woman with scientific facts about her fetus is "ideological." It is unclear, but the basis for this conclusion appears to be twofold: (1) the disclosures mandated by H.B. 2 "go well beyond the basic disclosures necessary for informed consent to a medical procedure," Mem. Op. & Order, R.69, Page ID # 1924, and (2) H.B. 2 is "designed to persuade a woman to choose the option favored by the legislature by imposing certain information, imagery, and sounds upon her in a vulnerable state and time," "thus 'overtly trumpet[ing]' the anti-abortion preference of the legislature." *Id.*, Page ID # 1927 (quoting *Eubanks v. Schmidt,* 126 F. Supp. 2d 451, 458 n.11 (W.D. Ky. 2000) (mem. op.)).

Both arguments are contradicted by precedent. The district court's narrow interpretation of informed consent in the context of abortion was squarely rejected by *Casey*:

> We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health . . . . A requirement that the physician make available information similar to that mandated by the statute here was described in *Thornburgh* [*v. Am. Coll. Of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)] as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue be-

> tween the woman and her physician." We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.

505 U.S. at 882-83 (internal citation omitted). As explained above, in the context of abortion, it is appropriate to provide information going beyond the medical risks of the procedure because abortion is unique and has other consequences. *See supra* Part I.C.

Moreover, any anti-abortion message "trumpet[ed]" by accurate information about fetal development is the result of scientific fact (the anatomical features of the fetus and the presence of a heartbeat)—not the result of any State-imposed viewpoint or ideology. Even if the motivation behind providing that information is the State's preference in favor of childbirth—a legitimate state interest—the information itself does not favor childbirth in an ideological sense or compel the physician to express any belief. Nor does the "vulnerable" timing of the speech transform the information into ideology. Mem. Op. & Order, R.69, Page ID #1926, 1927. When information is given to obtain informed consent, it is generally given before the procedure being performed, and women receive ultrasounds before receiving an abortion regardless.[14] While contemplation of an abortion is a trying time for any person,

[14] Ultrasound "plays a major role in pregnancy diagnosis," even in the context of abortion. Nat'l Abortion Fed'n, *Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care* 68 (Maureen Paul et al., eds., 2009). In 2002, virtually all abortion providers used ultrasound to date the pregnancy before second-trimester abortion, *id.* at 74; and as of 2015, 98% of abortion providers used ultrasound to date the pregnancy before first-trimester surgical abortion. White, K. *First-Trimester Surgical Abortion Practices in the United States,* J. Contraception 92:368

the difficulty of the situation is the very reason the States requires the information to be provided; it ensures that women in such circumstances are fully informed before making an irrevocable decision under stressful conditions. As the Supreme Court has explained:

> Whether to have an abortion requires a difficult and painful moral decision. . . . 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. . . . 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.

Gonzales, 550 U.S. at 159 (internal citations omitted); *see also Danforth*, 428 U.S. at 67. With full information, some women may choose to carry the pregnancy to term; others may not.

The idea that factual, non-misleading information relevant to an abortion decision is "ideological" was also rejected by both the Fifth and Eighth Circuits.

> If the sonogram changes a woman's mind about whether to have an abortion—a possibility which *Gonzales* says may be the effect of permissible conveyance of knowledge—that is a function of the combination of her new knowledge and her own "ideology" ("values" is a better term), not of any "ideology" inherent in the information she has learned about the fetus.

Lakey, 667 F.3d at 577 n.4 (internal citation omitted); s*ee Rounds*, 530 F.3d at 737 ("Because Planned Parenthood has failed to demonstrate . . . that the disclosure

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(2015), available at http://www.contraceptionjournal.org/article/S0010-7824(15)00314-5/abstract [https://perma.cc/K8JL-9VHG] (last visited Jan. 25, 2018).

required . . . is untruthful or misleading, it has not demonstrated that there is an ideological message from which physicians need to disassociate themselves.").

B. H.B. 2 furthers the State's dual compelling interests by ensuring a woman consenting to an abortion is fully apprised of all the relevant facts and consequences of her decision.

1. Ultrasound requirements further the state interest in protecting the health of the pregnant woman and ensuring that the decision to abort is well informed.

As discussed above, States have a significant interest in ensuring that a woman has all relevant information before making the weighty and irreversible decision to have an abortion. The Supreme Court has recognized that women who come to regret their choice to abort may experience "devastating psychological consequences," "[s]evere depression," "loss of esteem," "grief," and "sorrow." *Gonzales*, 550 U.S. at 159-60; *Casey*, 505 U.S. at 882. H.B. 2's ultrasound requirement reduces the risk of those consequences by ensuring that patients have the most accurate and up-to-date information about the fetus through use of ultrasound technology.

Rather than cabin informed-consent requirements to a small set of facts, the Supreme Court's rulings encourage full and open discussion of abortion procedures and consequences to "ensure that a woman apprehend[s] the full consequences of her decision." *Casey*, 505 U.S. at 882. The Court in *Gonzales* repeated that "some women come to regret their choice to abort the infant life they once created and sustained," finding that conclusion "unexceptionable," and stating that "[s]evere depression and loss of esteem can follow." 550 U.S. at 159.

Even before *Casey*, a plurality of the Court had concluded that the decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment." *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (plurality op.). "[T]hus the State legitimately may seek to ensure that [the abortion decision] has been made 'in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient.'" *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 443 (1983) (quoting *Colautti v. Franklin*, 439 U.S. 379, 394 (1979)). As the Supreme Court stated in *Casey*, "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." 505 U.S. at 882.

Ultrasound requirements like H.B. 2 are designed to make sure that a woman has all the information relevant to her choice and are entirely consistent with *Casey*. It is, therefore, irrelevant that the National Abortion Federation or the American College of Obstetricians and Gynecologists do not require informed consent at this level of detail. Mem. Op. & Order, R.69, Page ID # 1931. States may hold abortion providers to higher standards than they would otherwise hold themselves. For example, when considering the partial-birth abortion ban in *Gonzales*, the Court acknowledged that many physicians will not go beyond the bare minimum in describing the procedure, "prefer[ring] not to disclose precise details" of late-term abortions to their patients. 550 U.S. at 159 (citing district court findings). But the Court recognized that "[i]t is . . . precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State." *Id.*

If a woman changes her mind because of the information received during the ultrasound, that is not an unconstitutional effect of a substantial obstacle to abortion access. Rather, the woman has exercised her freedom of choice after receiving all of the relevant facts. *Gonzales* even recognized that an abortion regulation's reduction in abortions can be a permissible development:

> It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. . . . The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

Id. at 160.

The Supreme Court's decisions reflect the benefits to women of a full and complete understanding of the abortion procedure and the harms that come from withholding relevant information. H.B. 2 is consistent with those decisions.

2. Ultrasound requirements support the State's interest in potential life.

The district court paid lip service to Kentucky's interest in fetal life, but ultimately gave it no weight. In doing so, the court erroneously turned back the clock to the pre-*Casey* era when the Supreme Court "undervalue[d] the State's interest in potential life." *Casey*, 505 U.S. at 873. But "the State has a substantial interest in potential life." *Id.* at 876. Kentucky's ultrasound law, like the ultrasound laws of other States, seeks to advance Kentucky's interest in potential life. It does so not by

compelling ideological speech, but by ensuring that women are fully informed about the fetal life that will be terminated by the abortion.

While maintaining *Roe*'s central holding regarding the right to choose an abortion, *Casey* concluded that it had not given sufficient weight to the State's interest in respecting unborn life, which exists throughout pregnancy. *Id.* at 873; *id.* at 876 ("[T]here is a substantial state interest in potential life throughout pregnancy."). As a result of this interest, "[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . ." *Id.* at 872. The Court found that this was not only "consistent with *Roe*'s central premises," but "the inevitable consequence of [the Court's] holding that the State has an interest in protecting the life of the unborn." *Id.* at 873.

Applying this holding to informed-consent requirements, the Court explicitly overruled its prior decisions in *Akron* and *Thornburgh*. In each of those cases, the Court had struck down informed-consent requirements that included descriptions of the anatomy and physiology of the unborn child. *Thornburgh*, 476 U.S. at 759-65; *Akron*, 462 U.S. at 442-45. The Court found those decisions in error because they were "inconsistent with *Roe*'s acknowledgment of an important interest in potential life." *Casey*, 505 U.S. at 882; *see Gonzales*, 550 U.S. at 146.

Casey demonstrates that the State's interest in potential life cannot be lightly set aside. The Court concluded that "informed choice need not be defined in such nar-

row terms that all considerations of the effect on the fetus are made irrelevant." *Casey,* 505 U.S. at 883. Instead, the State may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Id.* H.B. 2 therefore falls squarely within the parameters of valid informed-consent laws under *Casey*.

Conclusion

The Court should reverse the judgment of the district court.

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Certificate of Service

I hereby certify that on January 29, 2018, this brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send a notice of electronic filing to all parties.

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This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6308 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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