17-6151, 17-6183

IN THE

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; ASHLEE 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, Attorney General,

Defendant-Appellant,

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

Defendant,

—and—

VICKIE YATES BROWN GLISSON, in her official capacity as Secretary of Kentucky's Cabinet for Health and Family Services,

Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY LOUISVILLE DIVISION

BRIEF OF *AMICUS CURIAE* AMERICAN PUBLIC HEALTH ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FRAP 26.1

Amicus curiae, the American Public Health Association, is a nonprofit organization, with no parent corporations or publicly traded stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae, the American Public Health Association ("APHA"), submits this brief in support of Plaintiffs-Appellees, EMW Women's Surgical Center, P.S.C., *et al*.[1]

APHA is an organization whose mission is to champion the health of all people and all communities, strengthen the profession of public health, share the latest research and information, promote best practices, and advocate for public health issues and policies grounded in research. APHA combines a 140-plus-year perspective, a broad-based member community, and the ability to influence federal policy to improve the public's health. APHA has over 20,000 members, 176 of whom reside in Kentucky, and also has maintained a connection to the public health community in Kentucky.

APHA has long recognized that access to the full range of reproductive health services, including abortion, is a fundamental right integral both to the health and well-being of individual women and to the broader public health. APHA opposes restrictions that make abortion services more difficult to obtain or

[1] Pursuant to Federal Rule of Appellate Procedure 29, undersigned counsel for *amicus 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 *amicus curiae*, its members, and its counsel—contributed money intended to fund the preparation or submission of this brief.

more likely to cause harm to the mental health of individual women. This includes legislation that does not respect a woman's capacity to exercise her own judgment, in consultation with her doctor, about the information that she would like to receive prior to receiving medical care, including abortion. APHA opposes legislation that violates patients' rights by imposing any form of coercion in the decision-making process, and by requiring the conveyance of information that patients' doctors do not, in the exercise of their medical judgment and consistent with their professional ethics, believe is necessary or advisable to convey.

APHA has previously appeared as *amicus curiae* in various courts on matters relating to reproductive health, including in the Sixth Circuit and in the United States Supreme Court. In fact, on July 1, 2014, APHA submitted a brief in a challenge to a virtually identical law in the Fourth Circuit in *Stuart v. Camnitz*.[2]

SUMMARY OF ARGUMENT

Reproductive health care is essential to a woman's overall health, and access to abortion is an important component of reproductive health care. When legislatures enact laws that restrict access to abortion without any valid medical

[2] Brief of *Amicus Curiae* Am. Pub. Health Ass'n In Support of Plaintiffs-Appellees, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (No. 14-1150); *see* *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014) (citing Am. Pub. Health Ass'n Br. at 9–10) ("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.").

justification—especially while contravening the fundamental principles of medical ethics and informed consent—they jeopardize women's health.

Passed in January 2017, the Ultrasound Informed Consent Act, referred to as Kentucky House Bill 2 ("H.B. 2"), states that, in addition to satisfying the preexisting informed consent requirements, Ky. Rev. Stat.§ 311.725, a woman cannot provide informed consent to abortion unless and until the physician performs an ultrasound and (i) provides an explanation of what the ultrasound is depicting; (ii) displays the ultrasound images so that the woman may view them; (iii) auscultates the fetal heartbeat so that the woman may hear it if it is audible; and (iv) provides a medical description of the images.[3]

By imposing these medically unjustified requirements on physicians providing abortion care, H.B. 2 compels physicians to compromise their medical judgment, their ethical obligations, and the integrity of the physician-patient relationship. Even for the brief period it was in effect, H.B. 2 endangered patients' mental health. H.B. 2 not only violates the constitutional rights of doctors, as Plaintiffs-Appellees argue, but also poses a grave risk to public health.

[3] H.B. 2 §§ 2(a)-(e), 2017 Gen. Assemb., Reg. Sess. (Ky. 2017) (codified at Ky. Rev. Stat. §§ 311.727, .990(32)).

ARGUMENT

I. Reproductive Health Services, Including Abortion, Are Critical to a Fully Functioning Public Health System.

APHA opposes H.B. 2 because it jeopardizes the public health in Kentucky by imposing restrictions on the provision of safe and legal abortion without medical justification. Without safe, legal abortion, women of reproductive age face significantly increased risks to their health, including risks of major physical and mental health complications from pregnancy and childbirth, and increased risks of death. Abortion is a component—and an essential one—of comprehensive reproductive care.

Comprehensive health care—including abortion—furthers the goals of public health, including preventing disease, promoting health, and prolonging life among the population as a whole. Legal abortion is extremely safe.[4] Like other

[4] *E.g.*, Bonnie Scott Jones & Tracy Weitz, *Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences*, 99 AM. J. PUB. HEALTH 623, 623 (2009) ("Abortion is very safe in both the first and second trimesters. Mortality risk is approximately 0.6 deaths per 100,000 abortions, and the risk of major complication is less than 1%. The risk associated with abortion increases with the weeks of pregnancy . . . . Second-trimester abortion, however, is still a very safe procedure."); Nat'l Acad. Sci. Eng'g Med., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES S-8 (2018) ("The clinical evidence clearly shows that legal abortions in the United States . . . are safe and effective."); Gail Erlick Robinson et al., *Is There an "Abortion Trauma Syndrome"? Critiquing the Evidence*, 17 HARV. REV. PSYCHIATRY 268, 268 (2009) ("The relative risk of death in the United States from an abortion is . . . lower than childbirth, appendectomy, or tonsillectomy."); World Health Org.,

forms of health care, safe, legal abortion reduces the risk of a range of negative outcomes, including psychological complications like maternal depression,[5] premature delivery, and low birth weight.[6]

Since 1967, APHA has recognized that availability of safe abortion services is a public health issue, and has called for increases in federal funding for abortion

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SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 67 (2012), http://extranet.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf?ua=1 ("Both vacuum aspiration and medical abortion can be provided at the primary-care level on an outpatient basis and do not require advanced technical knowledge or skills, expensive equipment such as ultrasound, or a full complement of hospital staff (e.g. anesthesiologist)."); Am. Pub. Health Ass'n, *Policy Statement No. 20152–Restricted Access to Abortion Violates Human Rights, Precludes Reproductive Justice, and Demands Public Health Intervention* (Nov. 2015), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/04/11/ 24/restricted-access-to-abortion-violates-human-rights ("[A]bortion is one of the most common and safest surgical gynecological procedures. In the United States, about 1.2 million abortions are performed each year, representing approximately 18% of all pregnancies . . . The risk of death from carrying a pregnancy to term is 14 times higher than that of abortion in the United States.") (citation omitted).

[5] *See* M. Antonia Biggs et al., *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion*, JAMA PSYCHIATRY 6 (2016), www.avortementancic.net/IMG/pdf/yoi160091.pdf.

[6] *See* A.P. Mohallajee et al., *Pregnancy Intention and Its Relationship to Birth and Maternal Outcomes,* 109 OBSTETRICS & GYNECOLOGY 678, 684 (2007) ("Our findings suggest that pregnancy intention may be an indicator for increased risk of poor outcomes, including low birth weight, preterm delivery, and premature rupture of the membranes.").

and protection of abortion as a woman's reproductive choice.[7] APHA has long recognized that affordable and acceptable reproductive health services, including abortion, are critical to a fully functioning public health system.[8]

In addition to reproductive care, H.B. 2 implicates two other critical components of public health: mental health and the physician-patient relationship. APHA has long recognized that it is critical to public health that physicians act in accordance with their medical ethics and judgment and not undertake, much less be legislatively compelled to undertake, actions that they believe would be harmful to their patients.[9] APHA also recognizes that mental health is a critical component of public health.[10] In fact, there exists ample evidence H.B. 2 caused significant harm to patients' psychological well-being during the months it was in effect,

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[7] Am. Pub. Health Ass'n, *Policy Statement No. 20083–Need for State Legislation Protecting and Enhancing Women's Ability to Obtain Safe, Legal Abortion Services Without Delay or Government Interference* (Oct. 2008), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/23/09/30/need-for-state-legislation-protecting-and-enhancing-womens-ability-to-obtain-safe-legal-abortion.

[8] *See, e.g., id.*

[9] *See id.*

[10] *See* Am. Pub. Health Ass'n, *Policy Statement No. 7633(PP)–Policy Statement on Prevention* (Jan. 1976), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/15/08/42/ policy-statement-on-prevention.

demonstrating the provision of abortion care was compromised. Accordingly, in furtherance of its mission, APHA strongly opposes H.B. 2.

APHA is not alone in recognizing that safe, legal abortion is essential to public health. The American College of Obstetricians and Gynecologists also supports "the expansion of abortion education and an increase in the number and types of trained abortion providers in order to ensure women's access to safe abortions."[11] The American Medical Women's Association ("AMWA") "considers such procedures to be a part of comprehensive healthcare for women."[12] The Association of Reproductive Health Professionals ("ARHP") has recognized that "[a]bortion care is a critical component of comprehensive reproductive health care, and ARHP supports a woman's right to choose to have an abortion."[13] The American Psychiatric Association ("APA") "affirms that the freedom to act to interrupt pregnancy must be considered a mental health imperative with major social and mental health implications."[14] Like APHA, these organizations

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[11] Am. Coll. Obstetricians & Gynecologists, *Committee Opinion No. 612–Abortion Access and Training* 1 (Nov. 2014).

[12] Gayatri Devi et al., Am. Med. Women's Ass'n, *AMWA Position Statement on Abortion and Reproductive Rights*, 18 J. WOMEN'S HEALTH 299, 299 (2009).

[13] Ass'n Reprod. Health Prof'ls, *Position Statements–Reproductive Rights* (June 2012), http://www.arhp.org/about-us/position-statements#9.

[14] Am. Psychiatric Ass'n, *Abortion and Women's Reproductive Healthcare Rights*, 167 AM. J. PSYCHIATRY 726, 726 (2010).

recognize abortion as a necessary component of reproductive health and public health more generally.

II. Kentucky House Bill 2 Is Detrimental to Psychological and Public Health.

H.B. 2 requires Kentucky physicians to display fetal ultrasound images to their patients—while the patient is partially unclothed, supine, and with a probe either in her vagina or on her abdomen—and to narrate the dimensions of the fetus and the presence of external appendages and internal organs. A physician must display and describe the images even if the patient objects and even if the physician believes this procedure will harm that patient. Similarly, the physician must make heartbeat sounds audible—again, even if the patient objects and the physician believes doing so will harm the patient. This forced ultrasound, display, and narration, imposed upon women even if they object, have a direct negative impact on mental health—as would any invasive medical procedure imposed for no medical reason on any patient. APHA opposes the Commonwealth's attempt to force unwanted and harmful speech on patients and their doctors because of the risks that this type of state-imposed speech poses to public health.

A. Kentucky House Bill 2 Undermines Patients' Psychological Health.

The right to receive medically sound abortion care is a public health and a mental health imperative. Studies have shown that abortion itself does not carry

any greater risk of adverse psychological consequences than does carrying an unwanted pregnancy to term,[15] which itself can be dangerous to women's mental health. All pregnancies involve risks of both physical and psychological complications.[16] Some of these risks can be fatal, while others, such as depression, persist even after childbirth.[17] The risks associated with unwanted pregnancies are particularly troubling. Women who undergo unintended childbirth experience increased risk of maternal depression,[18] and unwanted births carry increased risks of congenital anomalies, premature delivery, and low birth weight.[19]

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[15] *See* Acad. Med. Royal Coll., INDUCED ABORTION AND MENTAL HEALTH: A SYSTEMATIC REVIEW OF THE MENTAL HEALTH OUTCOMES OF INDUCED ABORTION, INCLUDING THE PREVALENCE OF ASSOCIATED FACTORS 125 (2011); Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 AMERICAN PSYCHOLOGIST 863, 863 (2009); Trine Munk-Olsen et al., *Induced First Trimester Abortion and Risk of Mental Disorder*, 364 NEW ENG. J. MED. 332, 332 (2011).

[16] *See* World Health Org., MANAGING COMPLICATIONS IN PREGNANCY AND CHILDBIRTH: A GUIDE FOR MIDWIVES AND DOCTORS (2nd ed. 2017), WORLD HEALTH ORG., http://whqlibdoc.who.int/ publications/2007/9241545879_eng.pdf.

[17] *See id.* at C-13; *Pregnancy Complications*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last updated June 17, 2016), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm.

[18] *See* Biggs et al., *supra* note 5.

[19] *See* Mohallajee et al., *supra* note 6.

Studies demonstrate that women who have abortions, on the other hand, are at no increased risk for psychiatric illness.[20] The relationship between abortion and mental health problems is not caused by abortion, but can be attributed to other preexisting and concurrent risk factors, such as poverty, exposure to violence, drug use, and personality characteristics.[21] One recent five-year longitudinal study, the Turnaway Study, followed almost 1,000 women who sought abortions nationwide and found that women who had an abortion had similar or even *better* mental health outcomes than those who were denied a wanted abortion.[22]

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[20] Nat'l Acad. Sci. Eng'g Med., *supra* note 4 ("[H]aving an abortion does not increase a women's risk of [depression, anxiety, and/or PTSD]."); Robinson et al., *supra* note 4, at 276 ("To date, the published studies concluding that abortion causes psychiatric illness have numerous methodological problems; since their conclusions are questionable, they should not be used as a basis for public policy.").

[21] Major et al., *supra* note 15, at 869.

[22] Biggs et al., *supra* note 5 ("Women who were denied an abortion, in particular those who later miscarried or had an abortion elsewhere . . . had the most elevated levels of anxiety and the lowest self-esteem and life satisfaction 1 week after being denied an abortion, which quickly improved and approached levels similar to those in the other groups by 6 to 12 months."); *see* Pam Belluck, *Abortion Is Found to Have Little Effect on Women's Mental Health*, N.Y. TIMES (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/health/abortion-mental-health.html.

During the months H.B. 2 was in effect, the provision of abortion care was compromised by the State's forced narration of unwanted images to patients, and this new process caused real harm to patients' psychological well-being.[23] During the process required by H.B. 2, patients were "'very upset,' 'crying,' and even 'sobbing.'"[24] The "unrebutted facts adduced at the hearing show that women experience[d] distress as a result of H.B. 2 . . . . 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."[25] While there is ample evidence of harm, there exists no evidence that any patient changed her mind about her decision to obtain an abortion.

The forced narration of images against patients' express will and their physicians' recommendation caused mental health trauma for patients by devaluing both the medical expertise of the doctors and the patients' capacity to

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[23] *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:17-CV-16-DJH, 2017 WL 4288906, at *11 (W.D. Ky. Sept. 27, 2017) ("The testimony . . . revealed that H.B. 2 causes patients distress.").

[24] *Id.* (quoting D.N. 55, PageID # 699).

[25] *Id.* at *12 ("[F]ar from promoting the psychological health of women, this requirement risks the infliction of psychological harm on the woman who chooses not to receive this information." (citing *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014)); *see also EMW*, 2017 WL 4288906, at *13 ("[T]he evidence shows that H.B. 2 inflicts harm on patients and physicians.").

make their own informed decisions in a context in which the patients were already vulnerable—they are partially clothed, supine, and in the midst of a vaginal or abdominal exam. Unwanted speech at that moment and in that manner may be difficult for even the most resilient patient to bear. For many women, however, the risk of psychological harm is even more acute.

The uncontroverted evidence before the district court was that "H.B. 2 causes patients distress" and that "[m]ost patients choose to look away from the ultrasound image."[26] In particular, "[f]or victims of sexual assault, the requirements of H.B. 2 'can be extremely upsetting'"[27] and "prove psychologically devastating."[28] "Similarly, for patients diagnosed with a fetal anomaly, who have already had several ultrasounds performed and heard detailed descriptions of the fetus, the requirements of H.B. 2 'can be extremely difficult' and 'emotional.'"[29]

A speech-and-display law like H.B. 2 is also likely to be psychologically damaging to a woman who desires to bring a healthy pregnancy to term but whose

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[26] *EMW*, 2017 WL 4288906, at *11 (citing D.N. 55, PageID # 699).

[27] *Id.* (quoting D.N. 55, PageID # 698).

[28] *Stuart v. Camnitz*, 774 F.3d at 254.

[29] *EMW*, 2017 WL 4288906, at *11 (quoting D.N 55, PageID # 700–01; D.N. 41, PageID # 601–03).

life or health is threatened by her pregnancy or who was impregnated by rape or incest and who has already undergone unmistakable psychological trauma.[30] Forcing her to endure a narrated ultrasound in which her doctor must describe and demonstrate the size and characteristics of the fetus and make heartbeat sounds audible is an additional, state-imposed ordeal that exacerbates her feelings of loss of control and dignity.[31]

B. Kentucky House Bill 2 Creates an Adversarial Relationship Between Doctor and Patient.

While in effect, H.B. 2 did not just cause substantial individual anguish, it also damaged the collective public health by fundamentally subverting the trust that is at the core of the physician-patient relationship and that plays a critical role in health care of every form. H.B. 2 inevitably—and indeed intentionally—

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[30] *See* Decl. of Tanya Ellis Franklin, M.D., M.S.P.H. at ¶ 28, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 2017 WL 4288906 (W.D. Ky. Sept. 27, 2017) ("For many of my patients, particularly women who became pregnant as a result of rape or incest, or who have decided to terminate a much-wanted pregnancy because of maternal or fetal indications, seeing the ultrasound image, and hearing me describe the fetal lungs or hands or play the fetal heartbeat, could be devastating to them. It will add pain and trauma to an already difficult decision.").

[31] *See Stuart v. Loomis*, 992 F. Supp. 2d 585, 602 n.35 (M.D.N.C. 2014), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) ("It seems unexceptionable to conclude, for example, that serious psychological harm could result from requiring a woman who became pregnant as a result of rape to lie half-undressed with a vaginal probe inside her while she listens to an unwanted message from a medical professional who has refused to listen to her wishes . . . .").

disrupted the doctor-patient relationship by forcing doctors to provide patients with information even if doing so was against their own ethical requirements and medical judgment and against their patients' wishes. This forced speech against doctors' wishes created a dynamic of distrust that undermined the provision of health care. The statute's allowance that a patient may try to avoid seeing the ultrasound images and hearing the narration and fetal heartbeat further damages public trust in the medical profession by giving the patient the impression that the physician disapproves of the patient's medical decisions. Women who perceive that their physicians disapprove of their personal decisions are more likely to suffer declines in their post-abortion mental health.[32] Kentucky physicians strive to provide compassionate, non-judgmental care, but H.B.2 makes this extremely difficult, if not impossible, especially because patients often assume they are being

[32] Although abortion itself is not correlated with negative psychological consequences, *see, e.g.*, Am. Pub. Health Ass'n, *Policy Statement No. 20152*, *supra* note 4 ("the Turnaway Study and others showed no correlation between having an abortion and increased symptoms of depression and anxiety") (citation and quotation marks omitted), perception of social stigma is predictive of a decline in post-abortion mental health. *See* Am. Psychological Ass'n, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 4, 85 (2008).

judged by their doctors from the "get-go" due to the stigma attached to abortion in Kentucky.[33]

Moreover, the provision allowing patients to cover their eyes and ears damages public trust and endangers public health by encouraging patients to refuse to hear information their physician offers them. In doing so, H.B. 2 makes it potentially more likely that patients will distrust or dismiss information that—unlike the statutory narrative—physicians ***do*** think is in the patient's best interest to hear and consider.[34] Patients who dislike or distrust their physician are also less likely to disclose important medical details to their physicians, further endangering their health.[35] Conversely, patients who feel comfortable and engaged in a medical encounter enjoy better physical and mental health.[36]

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[33] *See* Decl. of Tanya Ellis Franklin, M.D., M.S.P.H. at ¶ 35, *EMW*, 2017 WL 4288906.

[34] *See* Susan Dorr Goold & Mack Lipkin, Jr., *The Doctor-Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. GEN. INTERN. MED. 26, 26 (1999), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1496871/ (stating the doctor-patient relationship "directly determines the quality and completeness elicited and understood.").

[35] *See id.* at 26 ("[A] patient who does not trust or like the practitioner will not disclose complete information efficiently.").

[36] *See id.* ("Increasing data suggest that patients activated in the medical encounter to ask questions and to participate in their care do better biologically, in quality of life, and have higher satisfaction.").

H.B. 2 provides a disincentive for women to seek medical care, including psychological care. H.B. 2 creates an adversarial relationship between physician and patient,[37] and potentially forces a patient into the position of needing to protect or defend herself from something her physician is saying or doing as part of a medical procedure the physician is performing on her. A legally compelled situation in which the physician is directly at odds with the patient is damaging to the patient's psychological well-being, as well as her physical health. The costs to the individual patient's mental and physical health of H.B. 2 are just too high. The requirement does nothing to advance public health and much to damage it.

C. Kentucky House Bill 2 Violates the Accepted Medical Standard of Care for Informed Consent.

H.B. 2 violates the accepted medical standard of care, endangering public health and the health of individual patients. It is standard medical practice to obtain a patient's informed consent prior to performing an abortion by providing detailed, one-on-one counseling[38] and offering the patient an opportunity to view

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[37] *See Stuart v. Camnitz*, 774 F.3d at 253 ("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." (citing Am. Pub. Health Ass'n Br. at 9–10)).

[38] *See* Nat'l Abortion Fed'n, *Clinical Policy Guidelines for Abortion Care* 3 (2017), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2017-CPGs-for-Abortion-Care.pdf ("Obtaining informed consent and assessing that the decision to have an abortion is made freely by the

an ultrasound.[39] It is not standard medical practice to describe the ultrasound images unless the patient so requests.[40]

By altering this standard without medical justification and forcing women to see and hear information that some do not want, H.B. 2 endangers public health, not only by making safe, legal abortion much more onerous to obtain,[41] but also by negatively impacting the mental health of patients who do proceed despite H.B. 2. Moreover, H.B. 2 lacks medical justification, and may cause additional

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patient are essential parts of the abortion process . . . . The practitioner must ensure that appropriate personnel have a discussion with the patient in which accurate information is provided about the procedure and its alternatives, and the potential risks and benefits. The patient must have the opportunity to have any questions answered to her satisfaction prior to intervention . . . . Each patient must have a private opportunity to discuss issues and concerns about her abortion.").

[39] *See* Howard Minkoff & Jeffrey Ecker, *When Legislators Play Doctor: The Ethics of Mandatory Preabortion Ultrasound Examinations*, 120 OBSTETRICS & GYNECOLOGY 647 (2012).

[40] *Id.* at 648–49.

[41] *See* Am. Pub. Health Ass'n, *Policy Statement No. 20152*, *supra* note 4 (naming mandatory counseling prior to abortion and the requirement to have an ultrasound prior to an abortion as two of the "increasingly onerous . . . restrictive measures aim[ed] to discourage or delay women from obtaining an abortion").

psychological harm to patients. It does all this without providing any information that a patient would have otherwise been unable to access if she wanted it.[42]

D. Kentucky House Bill 2 Requires Doctors to Violate Basic Requirements of Medical Ethics.

H.B. 2 damages public health by forcing physicians to violate moral tenets central to medical ethics, including obligations to (i) respect the patient's autonomy by obtaining her informed consent; (ii) inflict no harm on the patient;

[42] Kentucky's prior informed consent law already imposed detailed informed consent requirements on physicians performing, and patients seeking, abortions. Ky. Rev. Stat. § 311.725. For example, at least 24 hours in advance of the procedure, physicians had to inform women of the probable gestational age of the embryo or fetus. *Id.* § 311.725(1)(a)(2). They also had to be told that state materials to which they are entitled include information about fetal development, including "the probable anatomical and physiological characteristics of the zygote, blastoctye, embryo, or fetus at two (2) week gestational increments for the first sixteen (16) weeks of her pregnancy and at four (4) week gestational increments from the seventeenth week of her pregnancy to full term," including a "pictorial or photographic description." *Id.* § 311.725(2)(b). These materials "shall also include, in a conspicuous manner, a scale or other explanation that is understandable by the average person and that can be used to determine the actual size of the zygote, blastocyte, embryo, or fetus at a particular gestational increment as contrasted with the depicted size of the zygote, blastocyte, embryo, or fetus at that gestational increment." *Id.* These materials must "use language that is understandable by the average person who is not medically trained, shall be objective and nonjudgmental, and shall include only accurate scientific information about the zygote, blastocyte, embryo, or fetus at the various gestational increments." *Id.*

and (iii) provide benefits to the patient and balance those benefits against the risks and costs while respecting the decision-making capacities of the patient.[43]

The obligation to respect patient autonomy requires a physician to enable the patient to make an informed, autonomous choice and to respect that choice by refraining from coercive action.[44] H.B. 2 does not provide patients with information they would otherwise be unable to access[45] and does not further fully informed consent.[46] It is not sound medical or ethical practice to mandate that a patient view an image of his or her own body in order to make an informed medical decision.[47] Rather, unnecessary disclosure of medical details, such as the

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[43] *See, e.g.*, Tom L. Beauchamp & James F. Childress, PRINCIPLES OF BIOMEDICAL ETHICS 12 (5th ed. 2001).

[44] *See, e.g.*, *id.* at 58–60.

[45] *See supra* note 42. Prior to the enactment of H.B. 2, all physicians in Kentucky were already required to comply with statutory provisions for informed consent as well as standards of medical practice.

[46] *See Stuart v. Loomis*, 992 F. Supp. 2d at 602, *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (finding that, because a similar law in North Carolina "requires providers to speak the state's message to women who cover their ears and eyes to avoid the state's message, it is performative rather than informative, and it does not serve any legitimate purpose.").

[47] Minkoff, *supra* note 39, at 647 ("There are no circumstances in which a patient's viewing of the fetus is medically necessary."); Scott Woodcock, *Abortion Counseling and the Informed Consent Dilemma*, 25 BIOETHICS 495, 500 (2011) ("Details are routinely omitted in other contexts, unless patients ask for them, because of . . . the odds that they will affect patient decisions, e.g., the intricate surgical details of an appendectomy.").

precise details of an appendectomy surgery, can in fact undermine a patient's ability to make informed decisions about her medical care.[48] H.B. 2 does not further fully informed consent and will cause physicians to violate the principle of autonomy by forcing them to perform a medically unnecessary narration and ultrasound, display the ultrasound's images, and make audible the fetal heartbeat sounds against the will of a competent patient.

Physicians are obligated to "do no harm" to their patients—a moral, ethical, and professional obligation that the Commonwealth of Kentucky would compel them to breach by forcing them to provide narration even when doing so would cause significant psychological harm to certain patients. The statute purports to ameliorate this harm by allowing a patient the "option" to avoid seeing the ultrasound images or hearing the narration and fetal heartbeat, but that is nothing more than a demeaning charade. No patient should be forced to close her eyes and cover her ears—or worse, hide her head in her shirt—to avoid information that in her own considered judgment she does not wish to see or hear. A patient's

[48] *See Woodcock*, *supra* note 47, at 497; *see also* O. O'Neill, *Some Limits of Informed Consent*, 29 J. MED. ETHICS 4, 6 (2003) ("Genuine consent is apparent where patients can *control* the amount of information they receive and what they allow to be done.").

decision that she does not wish to see or hear the information should be enough.[49] A doctor's inability to comply with her adult patient's clearly expressed desire is contrary to medical ethics and harmful to that patient's mental health.

H.B. 2 will force physicians to act against their patients' best interests by potentially exposing patients to psychological harm and medically unnecessary delays, and may result in serious consequences for the patient's health. The Commonwealth's attempt to require its doctors to violate their ethical and professional obligations and act against—not for—their patients fundamentally compromises the public health and should be rejected.

[49] *See* Zita Lazzarini, *South Dakota's Abortion Script—Threatening the Physician-Patient Relationship*, 359 NEW ENG. J. MED. 2189, 2191 (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.").

CONCLUSION

For the foregoing reasons, *amicus curiae* APHA joins Plaintiffs-Appellees in urging the Court to affirm the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,060 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2018, I electronically filed the foregoing Brief of *Amicus Curiae* American Public Health Association in Support of Plaintiffs-Appellees and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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