No. 19-417

IN THE

Supreme Court of the United States

EMW WOMEN'S SURGICAL CENTER, P.S.C., ET AL.,

Petitioners,

v.

ADAM MEIER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES,

Respondent.

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

BRIEF OF AMERICAN PUBLIC HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, the American Public Health Association ("APHA"), submits this brief in support of Petitioners', EMW Women's Surgical Center, P.S.C., *et al.*, petition for a writ of certiorari.[1]

APHA's mission is to champion the health of all people and communities, strengthen the public health profession, share the latest research and information, promote best practices, and advocate for public health issues and policies grounded in research. APHA combines a nearly 150-year perspective, a broad-based member community, and the ability to influence federal policy to improve the public's health. APHA has nearly 25,000 members, 175 of whom reside in Kentucky, and has maintained a connection to Kentucky's public health community.

APHA has previously participated as *amicus curiae* in reproductive health matters throughout the country. APHA opposes legislation that violates the rights of health care providers and patients by imposing any form of coercion in the decision-making process. An amicus brief submitted by APHA was

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[1] No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submissions of the brief. No person or entity other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief and granted consent to file this brief in accordance with Rule 37 of the Rules of the Supreme Court of the United States.

cited in the Fourth Circuit's 2014 decision that conflicts with the Sixth Circuit panel's decision here.

The Fourth Circuit in *Stuart v. Camnitz* relied on APHA's amicus brief in striking down North Carolina's statute virtually identical to the Ultrasound Informed Consent Act, referred to as Kentucky House Bill 2 ("H.B. 2"). The Fourth Circuit explained, citing APHA's amicus brief, that "[t]ransforming 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."[2]

SUMMARY OF ARGUMENT

The Sixth Circuit erroneously vacated the order of the U.S. District Court for the Western District of Kentucky invalidating and permanently enjoining enforcement of H.B. 2. In reaching this conclusion, the Sixth Circuit equated the discretionary "offer [of state-printed, written] materials . . . describing unborn life's development at a given gestational age" upheld in *Casey*[3] with H.B. 2's requirements that physicians (i) display fetal ultrasound images to a patient while she is partially unclothed, supine, and with a probe in her vagina or on her abdomen; (ii) describe the fetus's dimensions, external appendages, and internal organs, even if

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[2] *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014) (citing Am. Pub. Health Ass'n Br. at 9–10).

[3] *EMW v. Beshear*, 920 F.3d 421, 431 (6th Cir. 2019); see *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882–83 (1992).

the patient objects and the physician believes doing so will harm the patient; (iii) make heartbeat sounds audible, even if the patient objects and the physician believes doing so will harm the patient; and (iv) continue to display and describe the ultrasound, even as the patient covers her ears and closes her eyes to avoid the speech.[4]

H.B. 2's medically unjustified requirements go far beyond the requirements imposed by the statute in *Casey*. H.B. 2 compels physicians to compromise their medical judgment and the integrity of the patient-physician relationship, endangers patients' mental health, and poses a grave risk to public health. A healthy patient-physician relationship stems from a patient seeking and trusting their doctor's independent, professional medical judgment and counsel. Restrictions like those imposed by H.B. 2 bear no resemblance to traditional notions of a healthy patient-physician relationship, undermine patients' trust in medical professionals, and increase mental health risks.

ARGUMENT

APHA opposes H.B. 2's forcing of unwanted and harmful speech on patients and their doctors because of the risks this type of state-imposed speech poses to public health. The APHA rejects the Sixth Circuit's attempt to equate these intrusive and harmful requirements with *Casey*'s approval of offering written materials to patients. While Kentucky's

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[4] See Ky. Rev. Stat. Ann. §§ 311.727, 311.990(36) (West 2017).

preexisting and unchallenged informed consent requirement resembles the statute upheld in *Casey*, H.B. 2's invasive mandate is a far cry from *Casey* and from traditional notions of informed consent.[5]

H.B. 2 erodes two critical components of public health: the patient-physician relationship and mental health. 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, or be legislatively compelled to undertake, actions that they believe would be harmful

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[5] See Ky. Rev. Stat. Ann. § 311.725 (West 2017). For example, at least 24 hours in advance of the procedure, a physician has to inform women of the probable gestational age of the embryo or fetus. *Id.* § 311.725(1)(a)(2). They also have 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 a particular 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.*

to their patients.[6] APHA also recognizes that mental health is a critical component of public health.[7] In fact, ample evidence shows that H.B. 2 caused significant harm to patients' psychological well-being during the months it was in effect,[8] demonstrating that the provision of abortion care was compromised. Accordingly, in furtherance of its mission, APHA strongly opposes H.B. 2.

I. KENTUCKY HOUSE BILL 2 CREATES AN ADVERSARIAL RELATIONSHIP BETWEEN DOCTOR AND PATIENT

H.B. 2 damages the collective public health by fundamentally subverting the trust that is at the core of the patient-physician relationship[9] and that

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[6] See e.g., 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.

[7] 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.

[8] *EMW v. Beshear*, 283 F. Supp. 3d 629, 646 (W.D. Ky. 2017) ("[t]he unrebutted facts adduced at the hearing show that women experience distress as a result of H.B. 2").

[9] See Am. Med. Ass'n, *Code of Medical Ethics Opinion 1.1.1, Patient-Physician Relationships*, https://www.ama-assn.org/delivering-care/ethics/patient-physician-relationships ("The relationship between a patient and a physician is based on

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plays a critical role in health care of every form. H.B. 2 inevitably—and indeed intentionally—disrupts the patient-doctor relationship by forcing doctors to provide patients with information even if doing so is against their own ethical requirements and medical judgment and against their patients' wishes. This forced speech creates a dynamic of distrust that undermines the provision of health care.

It is standard medical practice to obtain a patient's informed consent prior to performing an abortion by providing detailed, one-on-one counseling[10] and offering the patient an opportunity to view an ultrasound.[11] It is not standard medical practice to describe the ultrasound images unless the patient so

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trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.").

[10] 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 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.").

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

requests.[12] H.B. 2's requirement that the physician proceed with narrating the ultrasound images and playing the fetal heartbeat, even if the patient requests the physician to stop, damages public trust in the medical profession by communicating to the patient that the physician is not concerned about the patient's well-being or autonomy. Language and behavior that are interpreted as judgmental of patients generally inhibit the building of trust between doctor and patient.[13] 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 judged by their doctors due to the stigma attached to abortion in Kentucky.[14] H.B. 2 gives the patient the impression that the physician disapproves of the patient's medical decisions. This perception of social stigma is predictive of a decline in post-abortion mental health.[15]

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[12] See *id.*

[13] See Bich N. Dang et al., *Building trust and rapport early in the new doctor-patient relationship: a longitudinal qualitative study*, 17 BMC MED. EDUC. 32 (2017) (finding one action "providers can take to reduce their patients' anxiety and build trust" is to "avoid language and behaviors that are judgmental of patients.").

[14] See Decl. of Tanya Ellis Franklin, at ¶ 35, *EMW*, 283 F. Supp. 3d 629.

[15] Am. Psychological Ass'n, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 4, 12, 85 (2008). Abortion itself is not correlated with negative psychological consequences. See, e.g., M. Antonia Biggs et al., *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion*, 74 JAMA PSYCHIATRY 169 (2017).

Moreover, the statute permits patients to exercise their autonomy only by covering their eyes and ears to avoid seeing the images and hearing the narration and heartbeat which further damages public trust and endangers public health by conveying the message that it is normal for patients to refuse to see and hear information their physician offers. In doing so, H.B. 2 makes it potentially more likely that patients will distrust or dismiss information that—unlike the statutorily-required narrative—physicians ***do*** think is in the patient's best interest to hear and consider.[16] Patients who dislike or distrust their physician are also less likely to disclose important medical details to their physicians, further endangering their health.[17] Conversely, patients

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[16] See Johanna Birkhäuer et al., *Trust in the health care professional and health outcome: A meta-analysis*, 12 PLOS ONE at 2 (2017) ("trust in the health care professional has been suggested to be the foundation for effective treatments"); Susan Dorr Goold & Mack Lipkin, Jr., *The Doctor-Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. GEN. INTERNAL MED. 26, 26 (1999) (stating the doctor-patient relationship "directly determines the quality and completeness of information elicited and understood.").

[17] See Goold & Lipkin, Jr., *supra* note 16, at 26 ("[A] patient who does not trust or like the practitioner will not disclose complete information efficiently."); Jennifer Fong Ha et al., *Doctor-Patient Communication: A Review*, 10 OCHSNER J. 38, 39 (2010) ("Patients reporting good communication with their doctor are more likely to be satisfied with their care, and especially to share pertinent information for accurate diagnosis of their problems[.]").

who feel comfortable and engaged in a medical encounter enjoy better physical and mental health.[18]

II. KENTUCKY HOUSE BILL 2 UNDERMINES PATIENTS' PSYCHOLOGICAL HEALTH

Obtaining an abortion does not carry any greater risk of adverse psychological consequences than does carrying a pregnancy to term.[19] Indeed, the best available medical evidence establishes that the rates of mental health problems for women with unintended pregnancies are identical whether the woman has an abortion or carries the pregnancy to term.[20] Any relationship between abortion and men-

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[18] See Birkhäuer et al., *supra* note 16, at 8 ("We observed a significant association between trust in the health care professional and health outcome."); Goold & Lipkin, Jr., *supra* note 16, at 26 ("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.").

[19] See Acad. Med. Royal Coll., INDUCED ABORTION AND MENTAL HEALTH: A SYSTEMATIC REVIEW OF THE MENTAL HEALTH OUTCOMES OF INDUCED ABORTION, INCLUDING THEIR PREVALENCE AND ASSOCIATED FACTORS 125 (2011); Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 AM. PSYCHOLOGIST 863, 885 (2009); Trine Munk-Olsen et al., *Induced First Trimester Abortion and Risk of Mental Disorder*, 364 NEW ENG. J. MED. 332, 338 (2011).

[20] Nat'l Acad. Sci. Eng'g Med., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES S-8 (2018) ("[H]aving an abortion does not increase a woman's risk of [depression, anxiety, and/or PTSD]."); Gail Erlick Robinson et al., *Is There an "Abortion Trauma Syndrome"? Critiquing the Evidence*, 17 HARV. REV. PSYCHIATRY 268, 276 (2009) ("To date, the published studies concluding that abortion causes psychiatric illness have numerous

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tal 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]

While abortion has not been shown to negatively impact mental health, the requirements of H.B. 2 have a detrimental effect on the mental health and emotional welfare of women seeking to obtain health care. During the months H.B. 2 was initially in effect, the forced narration of unwanted images to patients caused real harm to patients' psychological well-being.[22] During this process, patients were "'very upset,' 'crying,' and even 'sobbing.'"[23] The evidence presented in the lower court showed that

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methodological problems; since their conclusions are questionable, they should not be used as a basis for public policy.").

[21] Major et al., *supra* note 19 at 869. 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 *better* mental health outcomes than those who were denied a wanted abortion. Biggs et al., *supra* note 15 ("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.

[22] *EMW*, 283 F. Supp. 3d at 645 ("The testimony . . . revealed that H.B. 2 causes patients distress.").

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

H.B. 2 harmed patients psychologically, but did not further any legitimate State interest because the very speech it forced physicians to relay over a patient's objection was already offered to patients who wanted it.[24]

This forced narration of images against patients' express will and their physicians' recommendation causes trauma for patients. Such requirements devalue both the doctors' medical expertise and the patients' capacity to make their own informed decisions, in a context in which patients are already vulnerable—partially undressed, supine, and in the midst of a vaginal or abdominal exam. It may be difficult for even the most resilient patient to bear unwanted speech at that moment or to attempt to block out the speech by covering her ears and eyes. The uncontroverted evidence before the district court and panel was that H.B. 2 is distressing to patients and most choose not to view the ultrasound image.[25]

The Sixth Circuit panel improperly minimized evidence that H.B. 2's requirements have an overwhelmingly detrimental impact on patients, espe-

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[24] *Id.* at 646 ("[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*, 774 F.3d at 253)); *see also EMW*, 283 F. Supp. 3d at 647 ("[T]he evidence shows that H.B. 2 inflicts harm on patients and physicians.").

[25] *EMW*, 283 F. Supp. 3d at 645 (citing D.N. 55, PageID # 699).

cially for particularly vulnerable patients.[26] For victims of sexual assault, such requirements could be "extremely upsetting"[27] and "prove psychologically devastating."[28] For patients who carry a fetus with a fetal anomaly, many of whom have already had ultrasounds and heard descriptions of the fetus, undergoing such a process again can be extremely painful and difficult.[29] Forcing a woman who desires to bring a healthy pregnancy to term but whose life or health is threatened by her pregnancy, whose fetus will not survive, or who was impregnated by rape or incest 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.[30]

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[26] See Decl. of Tanya Ellis Franklin, M.D., M.S.P.H. at ¶ 28, *EMW*, 283 F. Supp. 3d 629 ("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.").

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

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

[29] *EMW*, 283 F. Supp. 3d at 645 (quoting D.N 55, PageID # 700–01; D.N. 41, PageID # 601–03).

[30] 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

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CONCLUSION

H.B. 2 creates an adversarial relationship between physician and patient, forcing some patients into the position of needing to protect or defend themselves from something their physicians are saying or doing as part of a medical procedure. This legally compelled, coercive scheme in which the physician is directly at odds with the patient goes far beyond the offering of written materials upheld in *Casey* and is damaging to the patient's psychological well-being and physical health. The costs of H.B. 2 to the individual patient's mental and physical health are just too high. The requirement does nothing to advance public health and much to damage it.

For the foregoing reasons, *amicus curiae* urges the court to grant the petition for a writ of certiorari.

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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 . . . .").

Respectfully submitted,

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