UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EMW WOMEN'S SURGICAL CENTER, et. al.	)	
PLAINTIFFS,	)	
v.	)	Case No. 3:17-cv-00016-DJH
VICKIE YATES BROWN GLISSON, in her official capacity as Secretary of the Cabinet for Health and Family Services, et. al.	)	
DEFENDANTS	)	

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER

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The Plaintiffs are healthcare providers who find themselves in the odd position of arguing that their patients should have to make the terribly complicated and grave decision to abort a fetus without first receiving all of the available truthful and relevant information concerning the procedure and their pregnancy. Seeking to avoid the act of simply sharing truthful information that is *already in their possession*, the Plaintiffs argue that Kentucky's recently-enacted House Bill 2 ("HB 2") violates their First Amendment rights by requiring them to show patients the ultrasound images of their fetuses, describe for the patients what is depicted in those images, auscultate any fetal heartbeat, and provide other factual information, such as whether fetal demise has occurred. The Plaintiffs complain that the Commonwealth is unconstitutionally compelling them to engage in ideological speech. But it is not. House Bill 2 is simply a reasonable

regulation on the practice of medicine—a highly regulated profession in which mandatory disclosures are omnipresent—that is intended to ensure that women are fully informed when they decide whether to abort a fetus. As such, it complies with the requirements of the First Amendment. Because the Plaintiffs cannot demonstrate a strong likelihood of success on the merits, and the equities are greatly against them, the Court should deny their motion for temporary restraining order and allow HB 2 to remain in effect while this action proceeds on its merits.

INTRODUCTION

In 1998, the Kentucky General Assembly passed Kentucky's Abortion Informed Consent Statute. *See* KRS 311.725. That law requires a physician, at least 24 hours prior to performing an abortion, to inform the woman: (1) of the nature and purpose of the abortion procedure; (2) of the medical risks and alternatives to the procedure; (3) the probable gestational age of the fetus or embryo; (4) of the medical risks of carrying the pregnancy to term; (5) of the availability of printed materials that provide further information about the foregoing, as well as information about obtaining public and private assistance; and (6) that the father of the fetus is liable for child support, even if he has offered to pay for an abortion. KRS 311.725(1)(a)-(b). The statute was challenged on First Amendment grounds, but another judge of this Court rejected that challenge in *Eubanks v. Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky. 2000), concluding that requiring such disclosures was "a reasonable measure to insure adequate informed consent in all cases of abortion," *id.* at 460 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882-83 (1992)).

In 2017, the Kentucky General Assembly determined that women seeking abortions should be provided with additional information to assist them in deciding whether to undergo an abortion. Thus, on January 3, HB 2 was introduced in the Kentucky House of Representatives. It passed both houses of the General Assembly in strong bipartisan fashion on January 7, 2017, having received "yea" votes from more than 83% of the members of the legislature. Shortly thereafter, HB 2 was signed by the Governor. As it contained an emergency clause, it is now law.

Contrary to the Plaintiffs' protests, HB 2 presents no threat of harm—much less imminent harm—to anyone. To the contrary, it simply requires that women who are exploring the option of an abortion be provided with truthful information that is relevant to their decision-making process. Specifically, the Act requires that physicians or qualified technicians provide the following information to women prior to performing an abortion: (1) they must display an ultrasound image of the fetus and provide a simultaneous explanation of what is depicted in the image; (2) they must ascultate the fetal heartbeat so that it can be heard, if it is audible; (3) and they must provide a medical description of the ultrasound, including the dimensions of the embryo or fetus and the presence of any external members and internal organs. *See* HB 2 §1(2), 2017 Reg. Sess. (Ky. 2017). The Act permits physicians to forego these requirements in the case of medical emergency or medical necessity, and it also permits the volume of the heartbeat to be reduced or turned off at the request of the woman. *Id.* at § 1(3). The Act further provides that "nothing in this section shall be construed to prevent the pregnant woman from averting her eyes from the ultrasound images." *Id.*

The Plaintiffs—a regulated and licensed abortion clinic and three licensed physicians who provide abortions as a commercial service—object to providing this information to women. They concede in their Complaint and Memorandum that they already perform ultrasounds in all cases. Thus, they are arguing that they should not have to share information that is truthful, non-misleading, relevant, and already in their possession. The Plaintiffs claim—with apparently no hint of irony—that providing this information will undermine their integrity.

ARGUMENT

The Plaintiffs have moved for a temporary restraining order against the enforcement of House Bill 2. The standard for issuing a temporary restraining order is the same as the standard for a temporary injunction. *Ohio Republican Party v. Brunner*, 543 F. 3d 357, 361 (6th Cir. 2008). In determining whether to grant the Plaintiffs' Motion, the Court must consider the following factors:

> (1) whether the movant has shown a strong likelihood of success on the merits;
> (2) whether the movant will suffer irreparable harm if the injunction is not issued;
> (3) whether the issuance of the injunction would cause substantial harm to others; and,
> (4) whether the public interest would be served by issuing the injunction.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000) (citing *McPherson v. Michigan High Sch. Athletic Ass'n,* 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*)). These factors should be balanced against each other. *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir.1998) (citation omitted).

Temporary injunctive relief "is an *extraordinary remedy* which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary,* 228 F.3d at 739) (emphasis added). The Plaintiffs cannot meet this burden, and therefore, their Motion should be denied.

I. The Plaintiffs are not substantially likely to succeed on the merits of their First Amendment compelled-speech claim.

The Plaintiffs argue that HB 2's requirements to make an ultrasound visible to a woman considering abortion, "[p]rovide a simultaneous explanation of what the ultrasound is depicting," "ascultate the fetal heartbeat," and "provide a medical description of the ultrasound images" is compelled speech that violates their First Amendment Rights. The Plaintiffs are mistaken. While it can perhaps be argued that the Plaintiffs' First Amendment rights not to speak are implicated, the United States Supreme Court made it very clear in *Casey* that this right is only implicated as "part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 882. HB 2 plainly fits within the ambit of reasonable licensing and regulation by the Commonwealth, and therefore it easily passes constitutional muster.

A. The Plaintiffs' First Amendment claim is subject to rational basis review.

The Plaintiffs incorrectly contend that the disclosures required by HB 2 should be subject to some sort of heightened scrutiny. *Casey* addressed the question of whether

mandatory informed consent disclosures violate abortion providers' First Amendment rights, and it did not apply heightened scrutiny. On this issue, the Supreme Court held:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Casey, 505 U.S. at 884 (citations omitted). As the Fifth Circuit held in evaluating disclosure requirements similar to HB 2, the Supreme Court's First Amendment analysis in *Casey* "is clearly not a strict scrutiny analysis. It inquires into neither compelling interests nor narrow tailoring. The three sentences with which the Court disposed of the First Amendment claims are, if anything, the antithesis of strict scrutiny." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012). Similarly, the Eighth Circuit has found that *Casey* does not require "further analysis of whether the [informed consent] requirements [are] narrowly tailored to serve a compelling state interest where physicians merely were required to give truthful, nonmisleading information relevant to the patient's decision to have an abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734 (8th Cir. 2008) (citations and quotations omitted). And, in the *Eubanks* case, Judge Heyburn also did not apply heightened scrutiny. *See Eubanks*, 126 F. Supp. 2d at 458-59.

The Supreme Court's citation of *Whalen v. Roe* in *Casey* is particularly illuminating with respect to the appropriate level of scrutiny to be applied here. At issue in *Whalen* was the constitutionality of a New York statute requiring physicians to prepare prescriptions for certain drugs in triplicate and to file at least one of the copies with the state. *See Whalen*, 429 U.S. at 593. The Supreme Court held that those requirements were "a reasonable exercise of New York's broad police powers," *id.* at 598, and did not violate any specific personal constitutional rights because they did not preclude access to legitimate medical procedures or treatment, they did not deprive patients of the right to decide independently—with the advice of a physician—whether to pursue a legitimate medical treatment, and they did not condition access to any legitimate medical treatment on consent by a state official. *Id.* at 603. This is plainly not a heightened scrutiny analysis. And the Supreme Court's citation of *Whalen* in evaluating the mandatory informed consent disclosures at issue in *Casey* clearly demonstrates that the Court was not applying heightened scrutiny to those disclosures.

It is not surprising that the Supreme Court implicitly employed rational basis scrutiny in *Casey*. *Casey* obviously involved disclosures that medical professionals were mandated to make in the course of their professions, and the Supreme Court had previously held, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), that such compelled professional speech is subject only to rational basis review when the compelled disclosures concern factual matters relevant to the professional's services. In *Zauderer*, the Supreme Court addressed the constitutionality of disclosures that attorneys were required to provide in advertisements concerning

contingency fee agreements. *See id.* at 650**. The Court held that the "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."** *Id.* at 651. Thus, the Court found that the required disclosures would be constitutional as long as they were "reasonably related" to the state's interest in protecting consumers. *Id.* Tellingly, in *Casey*, the Supreme Court saw no need to distinguish *Zauderer* or expressly adopt a more stringent standard of review. Instead, even though it did not cite *Zauderer*, it adhered to the same standard.

The Sixth Circuit has acknowledged that *Zauderer* requires the application of rational basis review when it comes to mandatory disclosures of factual matters in a professional or commercial context. *See Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 558 (6th Cir. 2012). Thus, because the mandatory disclosures in the case at hand are all disclosures of fact made in a professional setting, binding Sixth Circuit precedent mandates that rational basis review be applied here.

Nevertheless, the Plaintiffs contend that heightened scrutiny applies. They noticeably ignore *Zauderer* and *Whalen* and make no mention of the Supreme Court's refusal to apply heightened scrutiny in reviewing the First Amendment claim in *Casey*. Instead, relying primarily on *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988), the Plaintiffs argue that HB 2 constitutes "a content-based regulation of speech" to which heightened scrutiny applies. [Plaintiffs' Memo. at 14]. The Plaintiffs' argument, however, expands *Riley* well beyond that which was contemplated by the court. *Riley* does not provide that strict scrutiny applies whenever a law compels non-commercial statements of fact. Instead, *Riley* only triggers strict scrutiny if the compelled speech is a

precondition to engaging in constitutionally protected speech. The requirements in HB 2 are simply preconditions to the performance of an elective abortion, an act which hardly qualifies as protected speech.

Perhaps recognizing the inherent weakness in their argument, the Plaintiffs argue alternatively that intermediate—rather than strict—scrutiny should apply, relying heavily on *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). *Stuart* created a circuit split when it rejected the rational basis review that the Fifth and Eighth Circuits had applied to mandatory informed consent disclosures. And, in doing so, the Fourth Circuit oddly made no mention of either *Whalen* or *Zauderer*. Perhaps more importantly, it ignored the import of the plain language of *Casey*, which states that physicians' First Amendment rights within their medical practices are "subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884. Simply put, *Stuart* was incorrectly reasoned. *See, e.g.*, Scott W. Gaylord, *Casey and the First Amendment: Revisiting an Old Case to Resolve a New Compelled Speech Controversy*, 66 S.C. L. Rev. 951, 985 (2015) (explaining that "*Whalen* shows why the Fourth Circuit's analysis [in *Stuart*] is incorrect."). This Court should reject it and follow *Casey*, *Rounds*, and *Lakey* instead.

B. HB 2 is a constitutional regulation of the practice of medicine.

The mandatory disclosures of HB 2 are virtually identical to the mandatory informed consent disclosures upheld by the Fifth Circuit in *Lakey*. And while they are somewhat different in specificity than the disclosures upheld in *Casey*, *Rounds*, and

Eubanks, they are no different in kind than those disclosures. The lesson from these cases is that:

> while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.

Rounds, 530 F.3d at 735.

As the Fifth Circuit put it in *Lakey*, "the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information." *Lakey*, 667 F.3d at 577-78. "They are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*—probable gestational age of the fetus and printed material showing a baby's general prenatal development stages." *Id.* at 578. Judge Heyburn, of course, drew similar comparisons using similar language in *Eubanks*. *Eubanks,* 126 F. Supp. 2d at 459.

And such disclosures are highly relevant to a woman's decision-making. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court acknowledged that the state "has an interest in ensuring so grave a choice is well informed," *id.* at 159. With respect to partial birth abortions, the Court found that:

> it is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Id. at 159-60. The same reasoning applies with respect to informed consent disclosure requirements at issue here. One can just as easily say that it is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event what she once did not know: that she allowed a doctor to stop the beating heart of her unborn child, a child assuming the human form. In other words, the disclosures mandated by HB 2 are "relevant because [they] 'further[ ] the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.'" *Rounds*, 530 F.3d at 734 (quoting *Casey*, 505 U.S. at 882). Thus, the disclosures at issue here are plainly relevant to a woman's decision-making process, and plainly within the power of the state to mandate.

"The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances." *Lakey*, 667 F.3d at 579. HB 2 is a reasonable attempt to further this goal. The Plaintiffs contend that HB 2 departs from the traditional requirements of informed consent. It is not clear whether this is true, but even if it is, the Plaintiffs fail to explain why this is a bad thing other than to say that they simply do not want to provide the required disclosures and that it will somehow harm their integrity. They seem to forget, however, that HB 2 mandates only the disclosure of truthful, factual information that is not misleading and that is relevant to their patients' decision-making processes. And if the truthful and relevant disclosures in HB 2 depart from typical informed consent practices, as the Plaintiffs

assert, that is likely because abortion itself departs from typical medical practice. Abortion is the only legal medical procedure in Kentucky that is designed to terminate life. Given this reality, and the potential for severe psychological harm that can befall those who later regret their decision to have an abortion, it is understandable why it is desirable to have more extensive informed consent disclosures in the abortion context. As the Fifth Circuit found in *Lakey*, "[d]enying [women] up to date medical information is more of an abuse to [their] ability to decide than providing the information." *Id.* Indeed, the Plaintiffs' opposition to HB 2 implies that a woman cannot handle the ultrasound information about her unborn child. At its heart, HB 2 is about choice. More precisely, it is about making an informed choice. The Plaintiffs would effectively make the decision for the woman rather than have her be fully informed.

C. HB 2 is constitutional even if intermediate scrutiny is applied.

Even if this Court were to adopt the Plaintiffs' position that intermediate scrutiny applies here, HB 2 easily meets that higher standard. To satisfy intermediate scrutiny review, "the State must show at least [1] that the statute directly advances a substantial government interest and [2] that the measure is drawn to achieve that interest." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011). In this case, HB 2 is specifically created to ensure that a woman choosing whether or not to have an abortion is well-informed.

The Supreme Court has recognized the state's interest in ensuring that consent is informed. In *Casey*, the Court stated, "It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such

profound and lasting meaning." *Casey*, 505 U.S. at 873. The Court confirmed this tenet in *Gonzales*, finding, "The State has an interest in ensuring so grave a choice is well informed." *Gonzales*, 550 U.S. at 159.

HB 2 serves this interest by merely requiring a physician to provide relevant, non-misleading factual information—indeed, information that the Plaintiffs admit that they already have—to a pregnant woman before she makes such a grave and irrevocable choice as undergoing an abortion. And it is truthful information, interpreted directly by the physician—or a qualified technician—from objective ultrasound data. As stated by the Fifth Circuit in *Lakey*, "[t]he required disclosures of a sonogram, the fetal hearbeat, and other medical descriptions are the epitome of truthful, non-misleading information." *Lakey*, 667 F.3d at 577-78. The Supreme Court has approved the mandatory disclosure of information incident to obtaining inform consent so that a woman may avoid the crushing regret that follows a choice made without all of the available facts. *See Gonzales*, 550 U.S. at 159. ("[I]t seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained."). HB 2 obviously serves this interest, and the very fact that the Plaintiffs desire to keep their patients in the dark about the factual matters addressed by HB 2 only underscores the need for mandatory disclosures.

Moreover, HB 2 is drawn to achieve the interest of making sure that women are fully informed when deciding whether to have an abortion. This is so because HB 2 only requires the disclosure of non-misleading facts, and does not require the dissemination of any ideological messages. The Plaintiffs contend that the disclosures

mandated by HB 2 do indeed amount to compelled ideological speech against abortions, but they are wrong. Speech is ideological when it conveys a point of view. *Lakey*, 667 F.3d at 577 n.4 (quoting *Wooley*, 430 U.S. at 715). The disclosures mandated by HB 2, however, do no such thing. There is a difference between non-misleading statements of fact and statements of opinion or moral judgment. The HB 2 disclosures fall into the former category rather than the latter, and therefore are not ideological. As the Fifth Circuit stated in *Lakey*:

> Though there may be questions at the margins, surely a photograph and description of its features constitute the purest conceivable expression of "factual information." 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, *Gonzales*, 550 U.S. at 160, 127 S.Ct. at 1634—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.

Id.

The Supreme Court has also recognized that a state has an interest in reducing abortions. A state, for example, may withhold taxpayer funding for abortion procedures to encourage a woman to choose childbirth over abortion. *See Harris v. McRae*, 448 U.S. 297 (1980). A state may also pass laws that impose waiting periods, parental involvement in cases involving minors, and informed consent. *See Casey*, 505 U.S. at 881-87.

HB 2 clearly and directly advances the state's interest in reducing abortions because its mandatory factual disclosures may well lead some women to choose

childbirth over abortion by making them more cognizant of the nature and consequences of an abortion. And, again, HB 2 is narrowly drawn to achieve that interest because it only requires the disclosure of non-misleading facts, not the dissemination of any ideological messages.

Significantly, in *Rounds*, the Eighth Circuit upheld more extensive and jarring mandatory disclosures than those required by HB 2. In *Rounds,* the Court upheld a South Dakota statute that required a physician to provide a written statement providing, among other things,

> (b) That the abortion will terminate the life of a whole, separate, unique, living human being;
> (c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
> (d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;

S.D. Codified Laws § 34-23A-10.1 §7(1). The Court stated, "Planned Parenthood cannot succeed on the merits of its claim that § 7(1)(b) violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient's decision to have an abortion." *Rounds*, 530 F.3d at 735. The Eighth Circuit found that under the statutory scheme, the disclosures were truthful and non-misleading, therefore, the physicians could not succeed on the merits of their First Amendment claims. *Id.* at 735-736.

Similarly, the Fifth Circuit in *Lakey* upheld a more restrictive Texas statute that included a time restriction requiring the performance of an sonogram, the display of the ultrasound so that it might be viewed by the pregnant woman, the explanation and

medical description of the sonogram image, and the auscultation of the fetal heartbeat at least 2 to 24 hours before an abortion. Tex. Health & Safety § 171.012(a)(4). Additionally, the law specifically requires the pregnant woman to hear the explanation of the sonogram images unless she meets certain criteria. *Id.* § 171.012(a)(5). The Fifth Circuit found that these regulations to merely require truthful and non-misleading disclosures. *Lakey*, 667 F.3d at 576. The Fifth Circuit further stated, "[i]f the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives. *Casey,* however, rejected any such clash of rights in the informed consent context. *Id.* at 577. The disclosures required by HB 2, while less onerous, are precisely the same type of truthful and non-misleading disclosures permitted by a state's right to regulate the medical profession.

Even the Ninth Circuit has found that requiring abortion-related factual disclosures does not violate freedom of speech protections, despite applying intermediate scrutiny. *National Institute of Family and Life Advocates v. Harris*, 839 F.3d 823, 845 (9th Cir. 2016). Unlike *Casey*, *Rounds*, *Lakey*, and the case at hand, which all addressed abortion informed consent disclosures, the statute at issue in *NIFLA* applied to crisis pregnancy centers, which are facilities whose purpose is to provide alternatives to abortion, and it required them to disseminate a notice with the following prescribed speech, "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of

contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Cal. Health & Safety Code § 123472. The Ninth Circuit found that the disclosures met intermediate scrutiny because they advanced the state's interest in informing women of available medical services and that requiring a facility to provide that knowledge was narrowly drawn to achieve that interest. *NIFLA*, 839 F.3d at 842. Thus, even if this Court were to apply the heightened level of intermediate scrutiny—which it should not—*NIFLA* demonstrates that the Court should still find HB 2 to be constitutional.

The Plaintiffs contend that these Circuits, two of which specifically relied on the Supreme Court's decisions in *Casey* and *Gonzales*, "got it wrong" and that only the Fourth Circuit was savvy enough to appropriately analyze enhanced disclosures. But, with all due respect to the Fourth Circuit, its analysis is the one that misses the mark. The Fourth Circuit misinterpreted, or flat out ignored, Supreme Court precedent in reaching its conclusion in *Stuart*. And this Court should also be aware that HB 2 differs from the statute at issue in *Stuart*. Unlike HB 2, the North Carolina statute in question required the disclosures to be made at least four hours before an abortion, except in the case of medical emergency. N.C.G.S.A. §90-21.85(a). Also, unlike HB 2, "[t]he state's avowed intent and the anticipated effect of all aspects of the Requirement are to discourage abortion or at the very least cause the woman to reconsider her decision." *Stuart*, 774 F.3d at 245. Despite the fact that the *Casey* has clearly approved such a purpose as compelling, the Fourth Circuit determined that the purpose of the act

transformed its truthful, non-misleading disclosures into ideological speech where the facts "all fall on one side of the abortion debate." *Id.* at 246.

HB 2 clearly advances the substantial state interest of ensuring that a woman's choice to have an abortion is fully informed, particularly in the face of a providers' financial interest in encouraging abortion. The Supreme Court has recognized the inherent conflict between a providers' interest in encouraging abortions and the state's interest in ensuring informed consent and encouraging childbirth over abortion. *See, e.g., Gonzales*, 550 U.S. at 159 (noting that 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). Evidencing this very conflict, the Plaintiffs here seek to deprive women of statutory protections designed to ensure that consent is fully informed. They complain about the additional time they will have to take with each woman. In essence, the Plaintiffs contend that abortion—not fully informed choice—is the goal. This is a remarkable admission by them.

The Supreme Court in *Casey* and *Gonzales* has clearly held that the state has a substantial interest in ensuring that consent is informed and in encouraging childbirth over abortion as long as the woman's choice is not coerced. The Supreme Court has also held that a mere recitation of factual information, such as that required by HB 2, advances that interest. As such, HB 2 clearly satisfies not just rational-basis review, but also intermediate scrutiny. In light of *Casey*, *Gonzales*, *Lakey*, *Rounds*, and *Eubanks*, the Plaintiffs cannot show that they are substantially likely to succeed on the merits and their motion should be denied.

II. The Plaintiffs have not shown irreparable harm to themselves.

The Plaintiffs argue that being required to disclose relevant, truthful, factual, and non-misleading medical information to a woman in advance of her choosing whether to undergo an elective medical procedure—one that will lead to the death of a fetus—will harm them by depriving them of their First Amendment freedoms. Not stopping there, they argue that giving knowledge to a woman will harm her or cause her distress. Plaintiff's position here is not only offensively paternalistic, it has no legal basis.[1]

As shown above, HB 2 is less onerous that the statutes at issue in the other Circuits. Because it merely requires physicians *or their designees* to disclose factual information to a woman in advance of substantial state interests, it is not an infringement of the First Amendment. Further, unlike two of the statutes that have already been upheld, HB 2 permits a physician in Kentucky to delegate the disclosure to a qualified technician, further removing the potential for harm. *Compare* HB 2 *with* Tex. Health & Safety § 171.012(a)(4) *and* S.D. Codified Laws § 34-23A-10.1 §7(1). Finally, it does not require any additional steps of the physician beyond the disclosure of truthful and accurate facts of the kind approved by the Supreme Court in *Casey*, the circuit courts in *Lakey* and *Rounds*, and this Court in *Eubanks.*

EMW states that they always perform an ultrasound to confirm pregnancy, the location of the pregnancy, "the probably gestational age, the number of fetuses, and that there are no other abnormalities." [Plaintiffs' Memo. at 6]. EMW further claims that this

[1] The idea that knowledge is harmful to women persisted for centuries and suppressed women's right to an education, to vote, and to own property, among other things. Again, the Plaintiffs' goal is not choice—their goal is abortion.

information is provided to the woman. They also, ostensibly, keep medical records in which the information required to be disclosed by HB 2 should already be recorded. HB 2 places no additional actions upon EMW's current stated practice beyond making the ultrasound visible to the woman, ascultating the heartbeat, and disclosing the medical description of the fetus. These regulations that merely require the provision of truthful, non-misleading information can hardly be thought to cause irreparable harm to the physician.

The Plaintiffs also claim that HB 2 will cause irreparable harm to their patients. The Plaintiffs, however, have failed to show that they have third party standing to advance their interpretation of the interests of women who are deciding whether to have an abortion. The Supreme Court limits the circumstances in which a person may assert the rights of a third party. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). In order to assert the rights of third parties, a litigant must satisfy certain criteria including: (1) demonstrating "a close relation to" the third party, and (2) a third party's ability to protect her own interests must in some way be hindered. *Id.* at 136. The litigant's complaint must also clearly allege facts demonstrating that the litigant meets these criteria. *See Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). In short, the Plaintiffs hereto lack standing to advance the theoretical harm that unknown non-party women might suffer from gaining knowledge.

Even if the Plaintiffs could advance the interests of non-party women choosing whether to have an abortion, their allegations of harm are purely conjectural. No woman is compelled to receive any of the disclosures required by HB 2. A woman may refuse to view the ultrasound or listen to the heartbeat. HB 2 § 1((f). HB 2 likewise does not require the woman to listen to the explanation and description of the ultrasound. HB 2 § 1. She, rather than the doctor, can control the information she wishes to learn and she does not have to request information that she may not know is available. As shown below, the withholding of relevant information would, instead, cause harm to others.

III. The issuance of a temporary injunction would cause others to suffer substantial harm.

The Plaintiffs argue that no one will suffer irreparable harm if a temporary injunction is issued. The Plaintiffs' argument arrogantly assumes that women in these situations will always choose an abortion and that the knowledge required to be disclosed by HB 2 is unnecessary to them. The Plaintiffs ignore the fact that armed with the knowledge the Plaintiffs seek to withhold, some women may choose childbirth over abortion. A decision to abort is irreversible and destroys the life of an unborn child. It is hard to imagine an injury more irreparable or substantial.

The Plaintiffs allege that women will suffer from the provision of knowledge, but the Supreme Court has recognized the fact that women in these situations would, instead, suffer harm from the lack of knowledge. The Court has found, "it seems unexceptionable to conclude some women come to regret their choice to abort the infant

life they once created and sustained…It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know." *Gonzales,* 550 U.S. at 159–60. HB 2 seeks to avoid the harm that would result if a woman makes an irreversible decision, absent full disclosure, and only later learns facts that would have impacted that decision. These harms far outweigh the alleged harms that the Plaintiffs might suffer from full disclosure.

IV. The public interest does not favor the issuance of injunctive relief.

The General Assembly sets public policy for the Commonwealth of Kentucky. HB 2 overwhelmingly passed both houses of the Kentucky legislature with broad bipartisan support. The House of Representatives voted 83-12 in favor of the bill. The Senate passed the bill with a vote of 32-5. The Governor signed the bill forthwith. The officials involved were democratically elected by the people of the Commonwealth of Kentucky to represent them and their interests. HB 2 thus represents the interest of the vast majority of the citizens of the Commonwealth. To enjoin the enforcement of the bill, particularly where no constitutional rights are impermissibly impacted, would thwart the will of the people and be contrary to the public interest.

V. The Court must presume HB 2 to be constitutional.

A central tenet of constitutional law is that the judicial power to declare a statute unconstitutional is an exceptional one, which should be used only when unavoidable. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *see also Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (describing the decision to declare legislation unconstitutional as "the gravest and most delicate duty that this Court is called on to perform").

Federal courts have thus historically placed limits on the power of judicial review. One such limitation is the presumption of constitutionality.

Pursuant to this presumption, the Court should assume facts necessary to satisfy constitutional "tests." Here, where the Court is to review HB 2 for reasonableness, the presumption of constitutionality should cause the Court to assume facts necessary to establish the reasonableness of the law. In other words, factual deference is to be given to Kentucky's General Assembly. *See Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934) ("[I]f any state of facts reasonable can be conceived that would sustain [the challenged legislation], there is a presumption of the existence of that state of facts…."); *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 940 (6th Cir. 2014) ("[T]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

While this case may not present disputed facts, the Court should presume HB 2 to be constitutional, and should assume any fact necessary to establish the reasonableness of HB 2.

CONCLUSION

Requiring the Plaintiffs—licensed and regulated physicians and a licensed and regulated abortion clinic—to provide truthful, non-misleading information to a patient does not create or qualify as an "injury," let alone a substantial and irreparable one. Nothing in HB 2 threatens or eliminates access to an abortion or presents an undue burden or obstruction to obtaining one—any woman who wants to obtain an abortion in Kentucky will remain able to do so.

On the other hand, an injunction of any duration will harm Defendants and the people of the Commonwealth of Kentucky whom they represent. Enjoining democratically enacted legislation, even temporarily, harms the Commonwealth and its officials by preventing them from implementing the clear will of the people. But more importantly, the Court must consider the undeniable irreparable injuries that may arise if an injunction of any sort causes more ill-informed patients to opt for abortion over childbirth. Both *Casey* and *Gonzales* emphasize the irreversible harm that befalls women who abort with less-than-complete information and later regret their decisions. But even more, the effect on the unborn is devastating.

For these and all reasons set forth herein, the Plaintiffs' motion for temporary injunction should be denied.

Respectfully submitted,
/s/ M. Stephen Pitt

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2017, a true and correct copy of the foregoing was served via electronically with the Clerk of the Court by using the CM/ECF system, which will electronically serve all counsel of record.

/s/ M. Stephen Pitt
Counsel for Secretary Glisson