No. 11-50814

In the United States Court of Appeals
for the Fifth Circuit

TEXAS MEDICAL PROVIDERS PERFORMING ABORTION SERVICES,
a class represented by METROPOLITAN OB-GYN, P.A., d/b/a/
REPRODUCTIVE SERVICES OF SAN ANTONIO and ALAN BRAID, M.D.,
on behalf of themselves and their patients seeking abortions,

Plaintiffs-Appellees,

v.

DAVID LAKEY, M.D., Commissioner of the Texas Department of State
Health Services, in his official capacity; MARI ROBINSON,
Executive Director of the Texas Medical Board, in her official capacity;
DAVID ESCAMILLA, County Attorney for Travis County, in his
official capacity and as representative of the class of all county and
district attorneys in the State of Texas with authority to prosecute
misdemeanors; and their employees, agents, and successors,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No. 1:11-cv-00486-SS

BRIEF *AMICUS CURIAE* OF TEXAS ALLIANCE FOR LIFE TRUST FUND IN SUPPORT OF DEFENDANTS-APPELLANTS

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TEXAS MEDICAL PROVIDERS PERFORMING ABORTION SERVICES, *et al.*,

Plaintiffs-Appellees,

v.

DAVID LAKEY, M.D., *et al.*,

Defendants-Appellants.

Supplemental Certificate of Interested Persons

Pursuant to Fifth Circuit Rules 28 and 29.2, the undersigned counsel of record certifies that neither *amicus curiae*, Texas Alliance for Life Trust Fund, nor any other entity or person associated with Texas Alliance for Life Trust Fund has any financial interest in the outcome of this appeal.

s/Paul Benjamin Linton
Paul Benjamin Linton
Counsel for the *Amicus*

November 1, 2011

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Interest of the *Amicus*

Texas Alliance for Life Trust Fund, the 501(c)(3) component of Texas Alliance for Life, Inc., a 501(c)(4) organization, is committed to the preservation and protection of unborn human life through litigation, public education and promoting compassionate alternatives to abortion. Attorneys associated with the Trust Fund represented more than one-third of the Texas Legislature in the Texas Supreme Court in defense of the State's restrictions on public funding of abortion. *See Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002). The Trust Fund has submitted *amicus curiae* briefs in the Texas Court of Appeals and the Texas Court of Criminal Appeals in defense of the Texas Prenatal Protection Act. *See Flores v. State*, 215 S.W.3d 520 (Tex. App. 2006), *aff'd*, 245 S.W.3d 432 (Tex. Crim. App. 2008); *Lawrence v. State*, 240 S.W.3d 912 (Tex. Crim. App. 2007); *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010). Finally, the Trust Fund submitted an *amicus curiae* brief (along with Liberty Legal Institute) in this Court in *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), in defense of an appropriations rider restricting the use of public funds for elective abortions by recipients of family planning services. This brief is filed pursuant to Rule 29 of the Federal Rules of Appellate Procedure. Defendants have consented to the filing of the brief; plaintiffs have not consented.

No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

Summary of Argument

Texas H.B. 15 requires that, except in a medical emergency, at least twenty-four hours before an abortion, the physician who is to perform the abortion (or a certified sonographer) must perform a sonogram on the woman; the physician must display the sonogram images so that the pregnant woman may view them; the physician must verbally explain, in a manner understandable to a layperson, the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of any cardiac activity and the presence of external members and internal organs; and the physician (or the certified sonographer) must make audible the heart auscultation for the pregnant woman to hear (if the auscultation is present) and simultaneously verbally explain, in a manner understandable to a layperson, the heart auscultation.

The district court preliminarily enjoined enforcement of the foregoing requirements (other than the requirement that a sonogram be performed) on the basis that such requirements violate the First Amendment rights of abortion providers by mandating speech that is not "narrowly tailored" to a "compelling state interest." In so ruling, the court committed reversible error. First, the court ignored the fact that "compelled speech," in the context of the State's regulatory authority over the professions, is subject to the rational basis, not the strict

scrutiny, standard of judicial review. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). Second, the court disregarded binding precedent from the Supreme Court–*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)–that is directly on point and disposes of plaintiffs' "compelled speech" argument. Under *Casey*, the State may require that truthful, nonmisleading information be conveyed to a pregnant woman seeking an abortion so long as the mandated information is (or may be) relevant to her decision to undergo the abortion. The plaintiffs in the case at bar neither alleged nor proved (and the district court did not find) that the information mandated by H.B. 15 is either untruthful or misleading. Under the Supreme Court's decisions in *Casey* and *Gonzales v. Carhart*, 550 U.S. 124 (2007), that information is (or may be) relevant to the pregnant woman's decision to have an abortion. That is sufficient to sustain its constitutionality. See *Planned Parenthood Minnesota, North Dakota*, *South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (*en banc*). Accordingly, the district court's order preliminarily enjoining enforcement of H.B. 15 should be reversed and the injunction vacated.

ARGUMENT

THE SONOGRAM REQUIREMENTS OF TEXAS H.B. NO. 15 DO NOT VIOLATE THE FIRST AMENDMENT FREE SPEECH RIGHTS OF PHYSICIANS PERFORMING ABORTIONS.

The district court held that the sonogram requirements of Texas H.B. No. 15 violate the free speech rights of physicians who perform abortions. The court reasoned that the requirements must satisfy the strict scrutiny standard of review because they force physicians to engage in speech. Those requirements, however, are not narrowly tailored to achieve a compelling state interest and, therefore, are unconstitutional. Order of August 30, 2011, 40-51. *Amicus* responds that the district court applied an erroneous standard of review and disregarded controlling Supreme Court precedent–*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)–on the precise issue raised by plaintiffs.

H.B. No. 15 requires that, except in a medical emergency, at least twenty-four hours before an abortion "the physician who is to perform the abortion or [a certified] sonographer . . . perform[] a sonogram on the pregnant woman on whom the abortion is to be performed[;]" that the physician "display[] the sonogram images . . . in a manner that the pregnant woman may view them[;]" that the physician provide[], in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description

of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs[;]" and that the physician or a certified sonographer "make[] audible the heart auscultation for the pregnant woman to hear, if present . . . and provide[], in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation." H.B. No. 15, § 2 (adding subsections (a)(4)(A)-(D) to § 171.012 to the Tex. Health & Safety Code). A pregnant woman may choose not to view the sonogram images required by § 171.012(a)(4)(B), and not to hear the heart auscultation, required by § 171.012(a)(4)(D). H.B. No. 15, § 3 (adding §§ 171.0122(b), (c) to the Code). And, in certain circumstances, she also may choose not to receive the verbal explanation of the results of the sonogram images required by § 171.012(a)(4)(C). H.B. No. 15, § 3 (adding § 171.0122(d) to the Code).

A. Regulation of Professional Speech is Subject to Rational Basis Review.

The Supreme Court has recognized a right *not* to speak as a corollary of the right to free speech protected by the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("the right of freedom of thought protected by the First Amendment against state action includes both the right so speak freely and the right to refrain from speaking at all"); *Hurley v. Irish-American Gay*, *Lesbian and Bisexual Group of Boston*, *Inc*., 515 U.S. 557, 573 (1995) (because all speech

"'inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'") (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 11, 16 (1986) (plurality op.)). As a general proposition, if state action implicates the right not to speak, a court must determine whether the action satisfies the strict scrutiny standard of judicial review, *i.e.*, whether it is narrowly tailored to serve a compelling state interest. *Wooley*, 430 U.S. at 717 ("where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message").[1] The strict scrutiny standard of judicial review, however, does *not* apply to a State's decision to require members of a profession to impart truthful, nonmisleading information to their clients or patients in the course of their professional duties.

"[S]peech may be labeled 'professional speech' when it is given in the context of a quasi-fiduciary–or actual fiduciary–relationship, wherein the speech is tailored to the listener and made on a person-to-person basis." *Centro Tepeyac v.*

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[1] The Court has held that "this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact [that] the speaker would rather avoid." *Hurley*, 515 U.S. at 573 (citations omitted).

Montgomery County, 779 F. Supp.2d 456, 467 (D. Md. 2011) (relying upon *Lowe v. SEC*, 472 U.S. 181, 231-32 (1985) (White, J., concurring)). The dialogue that occurs between a physician and his or her patient regarding a surgical or medical procedure quite obviously meets the foregoing definition of "professional speech." "[T]he professional's speech is incidental to the conduct of the profession," *Lowe*, 472 U.S. at 232 (White, J., concurring), and, therefore, is subject to reasonable regulation by the State. *Id*. at 228-33.

For example, under Texas law, "[b]efore a patient . . . gives consent to any medical care or surgical procedure . . . , the physician or health care provider shall disclose to the patient . . . the risks and hazards involved in that kind of case or procedure," as determined by the Texas Medical Disclosure Panel. TEX. CIV. PRAC. & REM. CODE § 74.104. *See also*, *id*., §§ 74.102, 74.103 (setting forth Panel's authority). The Texas Medical Disclosure Panel has identified specific risks and hazards that must be disclosed to a patient by his or her physician for scores of medical treatments and surgical procedures. *See* 25 TEX. ADMIN. CODE § 601.2 (2011). Under the district court's mode of reasoning, the "compelled speech" mandated by these disclosure requirements would have to meet the "strict scrutiny" standard of judicial review applicable to "compelled speech" generally, even though the "speech" in question is clearly incidental to the State's regulation

of the practice of medicine, a highly regulated profession. Although a plausible argument could be made that most, if not all, of the disclosure requirements are "narrowly tailored" to the State's "compelling interest" in the health of its citizens, such requirements need not satisfy the strict scrutiny standard of review.

The Texas Disciplinary Rules of Professional Conduct require an attorney to disclose to a client the basis or rate of the fee to be charged for legal services (Rule 1.04(c)), and detailed information regarding contingent fees (Rule 1.04(d)) and any fee-splitting arrangements (Rule 1.04(f)). Where there may a conflict of interest in an attorney's representation of multiple clients, the attorney may represent each client if he "reasonably believes that the representation of each client will not be materially affected" and "each affected or potentially affected client consents to such representation *after full disclosure of the existence*, *nature*, *implications*, *and possible adverse consequences of the common representation and the advantages involved*, *if any*." Rule 1.06(c)(1), (2) (emphasis added). And an attorney may not enter into in a business transaction with a client unless, *inter alia*, "the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client *and are fully disclosed in a manner which can be reasonably understood by the client*." Rule 1.08(a)(1) (emphasis added). Although most, if not all, of the mandated disclosures could be sustained under the strict

scrutiny standard, the State need not prove that such disclosures are "narrowly tailored" to the State's "compelling interest" in regulating professional ethics.

Several lower courts have recognized the difference in analysis that applies to speech in the context of professional regulation and speech outside that context, holding that the former, in contrast to the latter, is subject to a lower standard of judicial review. *See National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1053-55 (9th Cir. 2000) ("[t]he communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation") (upholding state laws licensing psychologists under rational basis standard); *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992) ("[a]ny abridgement of the right to free speech" resulting from attorney disciplinary rule prohibiting lawyers from assisting non-lawyers in the unauthorized practice of law "is merely the incidental effect of observing an otherwise legitimate regulation") (applying rational basis review); *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 603-05 (4th Cir. 1988) ("[p]rofessional regulation is not invalid, nor is it subject to first amendment strict scrutiny, merely because it restricts some kinds of speech") (upholding restrictions on what representations accountants who are not certified public accountants may make) (applying rational basis review). And so has the Supreme Court.

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court held that an attorney could be disciplined for failing to include in an advertisement offering to represent clients in tort litigation on a contingency fee basis "information that [the] clients might be liable for significant litigation costs even if their lawsuits were unsuccessful . . . ." 471 U.S. at 650. The Court distinguished "material differences between disclosure requirements and outright prohibitions on speech." *Id*.

> In requiring attorneys who advertise their willingness to represent clients on a contingent fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

Id. Although recognizing that, "in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech," *id*., citing *Wooley* (an operator of a motor vehicle could not be required to display the state motto, "Live Free or Die," on his license plates), *Miami Harold Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down state statute requiring newspapers to give equal reply space to those whom they editorially criticized), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (striking down state statute requiring public school students to salute the flag), the Court noted that "the interests at stake in this case are not of the same order as those discussed

in *Wooley*, *Tornillo*, and *Barnette*." *Zauderer*, 471 U.S. at 650-51.

> Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [*Barnette*], 319 U.S. at 642. The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.

Id. at 651. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id*. (emphasis in original). The Court noted that, "in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warning[s] or disclaimier[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." *Id*. (citation and internal quotation marks omitted).

In *Zauderer*, the Court recognized that "disclosure requirements . . . implicate the advertiser's First Amendment rights . . . ." *Id*. Accordingly, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id*. Nevertheless, "we

hold that an advertiser's rights are adequately protected as long as disclosure requirements are *reasonably related* to the State's interest in preventing deception of consumers." *Id*. (emphasis added). The State's requirement "that an attorney advertising his availability on contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard." *Id*. at 652.

> Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs"–terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead."

Id. at 652-53 (citation omitted). "The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed." *Id.* at 653.

The Court, *amicus* emphasizes, expressly rejected the appellant's contention

in *Zauderer* that disclosure requirements should be subjected to a "strict 'least restrictive means' analysis under which they must be struck down if there are other means by which the State's purposes may be served." *Id*. at 651-52 n. 14:

> Although we have subjected outright prohibitions on speech to such analysis, all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech. [Citation]. Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized. . . . *The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right*.

Id. (emphasis added).

In the case at bar, the district court held that the Supreme Court's decisions involving purely commercial speech are not controlling because the speech between a physician and his or her pregnant patient is not entirely of a commercial nature. Order at 40-42, citing, *inter alia*, *Riley v. National Federal of the Blind of North Carolina*, *Inc*., 487 U.S. 781, 795-801 (1988) (applying the test for "fully protected expression" to a state charitable solicitations law that provided, *inter alia*, that a professional fundraiser must disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the State within the previous twelve

months). But neither *Riley* nor any of the other cases cited by the district court– *Wooley*, *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007), *Pleasant Grove City*, *Utah v. Summum*, 129 S.Ct. 1125 (2009), *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010)–involved professional regulation, which the Supreme Court, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), found to be dispositive in rejecting an identical "compelled speech" argument.[2]

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[2] In *Hersh v. United States ex rel Mukasey*, 553 F.3d 743 (5th Cir. 2008), cited by plaintiffs below, Plaintiffs' Motion for Preliminary Injunction 5, this Court upheld the constitutionality of a provision in the federal bankruptcy law requiring attorneys to provide "assisted persons" with written notice of certain basic information regarding bankruptcy proceedings. Without deciding whether the "compelled speech" was subject to "strict scrutiny" review, the court held that the challenged provision was "narrowly tailored" to promote a "substantially compelling" governmental interest. 553 F.3d at 766-67. In *Hersh*, the court recognized that the Supreme Court has acknowledged that "the government may, under certain circumstances, restrict or compel the speech of professionals," *id* at 766, citing *Zauderer*, and cited with approval an Eighth Circuit opinion applying rational basis review to similar provisions in the bankruptcy law, *id*. at 768, citing *Milavetz*, *Gallop & Milavetz*, *P.A. v. United States*, 541 F.3d 785, 796 (8th Cir. 2008) ("we conclude that rational basis review is proper") (following *Zauderer*). *See also Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 91-102 (2d Cir. 2010 (same) following *Zauderer*). Neither the district court nor plaintiffs have cited any case in which a court has struck down, on First Amendment "compelled speech" grounds, a statute or rule requiring physicians, attorneys or other licensed and regulated professionals to provide certain information to their patients or clients. In *Public Citizen*, *Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011), cited by plaintiffs below, Motion for Preliminary Injunction 5, this Court applied rational basis review to two disclosure requirements imposed by a state attorney disciplinary board, upholding one and striking down the other. 632 F.3d at 227-29. The former rule required certain disclaimers in attorney advertising; the latter specified the format, but not the content, of such advertising.

In *Casey*, the Court held that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion" implicates a physician's First Amendment right not to speak, "but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State*." 505 U.S. at 884 (plurality op.) (emphasis added). Without subjecting the "compelled speech" at issue in *Casey* to the strict scrutiny standard of review that applies in other contexts, the Court upheld the statutory requirement where physicians were simply required to give "truthful, nonmisleading information" relevant to the patient's decision to have an abortion." *Id*. at 882, 884.[3] Indeed, in its Order (at

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[3] In an effort to dilute the significance of the Court's analysis of the "compelled speech" issue in *Casey*, plaintiffs claimed below that the abortion providers in *Casey* "consented" to "application of the purely commercial speech standard" in the Third Circuit, "so the issue of [the] applicable standard was not litigated." Motion for Preliminary Injunction at 7 n. 3, citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 705 (3d Cir. 1991) ("This case involves commercial speech and the clinics do not dispute this point"). That claim, however, is demonstrably false.

In their opening brief in the Supreme Court, petitioners (Planned Parenthood and other abortion providers) argued that the speech mandated by the informed consent statute forced physicians to communicate the State's ideology in violation of the First Amendment. Brief for Petitioners and Cross-Respondents, 53-55, reprinted in Philip B. Kurland & Gerhard Casper (editors), LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1991 TERM SUPPLEMENT, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), Vol. 216, pp. 185-87. Petitioners never characterized the speech in question as "commercial." Moreover, in their reply brief, petitioners took issue with the Third Circuit's suggestion (quoted

47), the district court acknowledged that, under *Casey*, "physicians are, in a professional setting, subject to 'reasonable' regulation by the state."

In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court, in upholding the constitutionality of the federal Partial-Birth Abortion Ban Act, reaffirmed that "the State has a significant role to play in regulating the medical profession" and that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." 550 U.S. at 157.

As the Eighth Circuit has noted in its decision rejecting a "compelled speech" argument in the abortion context, "*Casey* and *Gonzales* establish 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." *Planned Parenthood Minnesota, North Dakota*, *South Dakota v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) (*en banc*). *See also Eubanks*

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above) that they had conceded that the speech at issue was "commercial." "The First Amendment issues were never discussed at oral argument," petitioners emphasized, "and [their] briefs took exactly the contrary position." Reply Brief, 21 n. 39 (citing brief), reprinted in Kurland & Casper, *supra*, LANDMARK BRIEFS, Vol. 216, p. 353. Plaintiffs' strained efforts to avoid the precedential force of the Supreme Court analysis of the "compelled speech" issue in *Casey* is unavailing.

v. Schmidt, 126 F. Supp.2d 451, 457-60 (W.D. Ky. 2000) (same) (rejecting First Amendment "compelled speech" challenge to abortion informed consent statute).[4] Consequently, plaintiffs here cannot prevail on the merits of their claim that the sonogram requirements violate a physician's right not to speak unless they can show that the information mandated by H.B. No. 15 "is either untruthful, misleading or not relevant to the patient's decision to have an abortion." *Id*. Plaintiffs have neither alleged nor proved (and the district court did not find) that the disclosures required by the sonogram statute are either "untruthful" or "misleading."[5] The remaining question is whether they are (or could be) relevant to the pregnant woman's decision whether or not to undergo an abortion. The answer to that question is an unqualified "Yes."

B. The Truthful and Nonmisleading Professional Speech Required by H.B. No. 15 is Relevant to a Pregnant Woman's Decision to Obtain an Abortion.

In considering the constitutionality of the informed consent mandated by the

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[4] In *Eubanks*, the district court noted that "[s]imply because a subject is controversial . . . does not make it ideological. It is possible to convey information about ideologically charged subjects without communicating another's ideology, particularly in the context of the reasonable regulation of medical practice." 126 F. Supp.2d at 458 n. 11. Moreover, it is appropriate for the legislature to require a physician to convey information "from which a woman might naturally select the choice favored by the legislature." *Id*.

[5] The district court (Order at 50) asserts that "the Act compels physicians to advance an ideological agenda with which they may not agree," but never suggests that the mandated information is either untruthful or misleading.

Pennsylvania Abortion Control Act, the Court in *Casey* emphasized that the State is not limited to requiring the physician to inform his or her patient of "[t]he nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo an abortion," and "[t]he medical risks associated with carrying her child to term." *Casey*, 505 U.S. at 902. The State may also require the physician to inform the patient of "[t]he probable gestational age of the unborn child at the time the abortion is to be performed," that "[m]edical assistance benefits may be available for prenatal care, childbirth and neonatal care," and that "[t]he father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion." *Id*. at 881-84, 903. Further, the State may require the physician (or a qualified nonphysician) to inform his or her patient "of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion." *Id*. at 881, 902-03.

In *Casey*, the Court recognized that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision."

505 U.S. at 882. "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers 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." *Id*. The Court also saw no reason "why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health." *Id.* " . . . informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant." *Id*. at 883. Accordingly, a State may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth." *Id*. "In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion." *Id*.[6]

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[6] In its discussion of *Casey*, the district court suggested that "Information about the probable gestational age of the embryo or fetus, being directly indicative of how advanced the woman's pregnancy is, is relevant to not only the health risks

In *Gonzales*, the Court elaborated in detail upon the State's interest in regulating the information provided by physicians prior to performing an abortion:

> Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.
>
> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks that the procedure [partial-birth abortion] entails. . . .
>
> It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring that so grave a choice is well informed. 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.
>
> It is a reasonable inference that a necessary effect of the regulation and the knowledge [that] it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions.

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associated with an abortion, but also the particular procedure the physician may employ." Order at 46. But this suggestion quite obviously does not do justice to the breadth and scope of the holding in *Casey*, which clearly and unmistakably permits the State to require a physician to inform his or her pregnant woman patient of the consequences *to the unborn child* of her choice, even when those consequences have no direct relation to maternal health.

Id. at 159-60 (citations omitted).

The touchstone of constitutionality, with respect to a requirement that a physician (or other qualified person) inform a pregnant woman of certain truthful, nonmisleading information, is simple and straightforward–whether the information is (or could be) relevant to her decision whether or not to undergo an abortion. Contrary to the understanding of the district court (Order at 48), the information mandated by H.B. No. 15 may be "particularly relevant" to some women seeking abortions. Just as informing a pregnant woman of her unborn child's gestational age (*Casey*), offering to provide her with a description of the probable anatomical and physiological characteristics of her unborn child (*Casey*), explaining the method by which the abortion will kill her unborn (or partially-born) child (*Gonzales*) and informing her that an abortion "will terminate the life of a whole, separate, unique, living human being" (*Rounds*, 530 F.3d at 733-38) may be relevant to her decision, so, too, are (or may be) seeing sonogram images of her unborn child, listening to the physician's explanation of those images (including a medical description of the child's anatomical and physiological development, the presence of cardiac activity and the presence of the external members and internal organs), hearing her child's heartbeat and listening to the physician's (or sonographer's) explanation of what she is hearing. It is not unreasonable to

assume that at least *some* pregnant women who see sonogram images of their unborn child, who are given a medical description of their child in terms that they can understand, who hear their child's heartbeat and who are given an explanation of what they are hearing, may decide not to undergo an abortion. Although that may not be in the interests of physicians who perform abortions, it is indisputably in the interests of the pregnant women, "most [of whom] would deem the impact on the fetus relevant, if not dispositive, to [their] decision." *Casey*, 505 U.S. at 882. Under *Casey* and *Gonzales*, it is far preferable for the pregnant woman to learn of these facts *before*, rather than *after*, undergoing an abortion.

Plaintiffs' attempt to distinguish *Casey* on the basis that the informed consent statute upheld in that case, unlike H.B. No. 15, "did not require a physician to convey imagery, description, and auditory representations of the fetus, and did not prevent a physician from respecting the stated desires of the patient not to receive the message." Motion for Preliminary Injunction 7.[7] But, as

[7] Plaintiffs' description of H.B. No. 15 fails to note that, under the law, a pregnant woman may *always* choose not to view the sonogram images required by § 171.012(a)(4)(B), and not to hear the heart auscultation, required by § 171.012(a)(4)(D). H.B. No. 15 § 3 (adding §§ 171.0122(b), (c) to the Health and Safety Code). Moreover, in certain circumstances, she also may choose not to receive the verbal explanation of the results of the sonogram images required by § 171.012(a)(4)(C). H.B. No. 15, § 3 (adding § 171.0122(d) to the Code). Thus, it is inaccurate to state, as the district court did (Order at 45), that H.B. 15 "force[s]" women to consider "whatever information the government deems appropriate."

the defendants stated in their Motion to Stay Preliminary Injunction (at 5), "that is a distinction without a difference." Under *Casey* (and *Gonzales*), the State may require a physician to communicate truthful, nonmisleading information to a pregnant woman that may be relevant to her decision whether or not to undergo an abortion, that expresses a preference for childbirth over abortion and that is aimed at persuading her to choose childbirth over abortion. As with the information required by the South Dakota informed consent law, the information required by H.B. No. 15 to be communicated to the pregnant woman patient "is at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*." *Rounds*, 530 F.3d at 736.

The district court's preliminary injunction should be reversed and vacated.

Conclusion

For the foregoing reasons, *amicus curiae*, Texas Alliance for Life Trust Fund, respectfully requests that this Honorable Court reverse and vacate the district court's preliminary injunction.

Respectfully submitted,

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November 1, 2011

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This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,915 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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November 1, 2011

United States Court of Appeals
for the Fifth Circuit
Case No. 11-50814

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