

No. 23-35014

United States Court of Appeals for the Ninth Circuit

MONTANA MEDICAL ASSOCIATION, et al.,
Plaintiffs-Appellees,

MONTANA NURSES ASSOCIATION,
Intervenor-Plaintiff-Appellee,

v.

AUSTIN KNUDSEN, Montana Attorney General, et al.,
Defendants-Appellants,

Appeal from the United States District Court for the
District of Montana
District Court No. 9:21-cv-00108-DWM (Hon. Don W. Molloy)

**UNOPPOSED MOTION OF AMERICAN MEDICAL ASSOCIATION FOR
LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF MONTANA
MEDICAL ASSOCIATION, ONE OF THE PLAINTIFFS-APPELLEES,
URGING AFFIRMANCE**

Leonard A. Nelson
Office of General Counsel
American Medical Association
330 N. Wabash Ave.
Suite 39300
Chicago, IL 60611
Phone: 312-464-5532
Leonard.Nelson@ama-assn.org

*Attorney for American Medical Association
Amicus Curiae*

**MOTION OF AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO
FILE AMICUS CURIAE BRIEF IN SUPPORT OF MONTANA MEDICAL
ASSOCIATION, ONE OF THE PLAINTIFFS-APPELLEES**

I. INTRODUCTION

Pursuant to Fed. R. App. P. 29(a), the American Medical Association (“AMA”) requests leave to submit the accompanying brief as *amicus curiae* in support of the Montana Medical Association, one of the Plaintiffs-Appellees, and affirmance.

II. IDENTIFICATION AND INTEREST OF *AMICUS CURIAE*

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Its purpose is to promote the art and science of medicine and the betterment of public health. Substantially all physicians, residents and medical students in the United States are represented in its policy-making process through state and specialty medical societies and other physician groups seated in its House of Delegates. AMA members practice in every medical specialty and reside in all 50 states, including Montana.

The AMA authors and publishes the *Code of Medical Ethics*,¹ which is widely accepted as the preeminent standard of medical ethics in the United States. The

¹ The *AMA Code of Medical Ethics* is available from the AMA in print form and also through the AMA website at <https://www.ama-assn.org/delivering-care/ama-code-medical-ethics>.

United States Supreme Court has repeatedly cited the *Code of Medical Ethics* as an authoritative source for determining ethical standards for physicians.² The AMA has an interest in opposing state laws, such as Montana HB702, which impede physicians from caring for their patients according to ethical standards, including those set forth in the *Code of Medical Ethics*.

The AMA offers this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the state medical societies, whose purpose is to represent the viewpoint of organized medicine in the courts.

III. DESIRABILITY OF *AMICIUS* BRIEF AND RELEVANCE TO DISPOSITION OF THE CASE

The AMA brief will offer a unique perspective and knowledge to assist the Court. It will present distinct arguments, research, and analysis that will not otherwise be presented.

² See, e.g., *Lilly v. Commissioner*, 343 U.S. 90, 97 n.9 (1952); *Roe v. Wade*, 410 U.S. 113, 144 n.39 (1973); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 369 n.20 (1977); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 288, 308 (1990) (O'Connor, J., concurring & Brennan, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 214 (1991) (Blackmun, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); *Vacco v. Quill*, 521 U.S. 793, 800 n.6, 801 (1997); *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *Baze v. Rees*, 553 U.S. 35, 64, 112 (2008) (Alito, J., concurring); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 592-93 (2012) (Ginsburg, J., dissenting).

The first section of the brief explains why physicians have a Fourteenth Amendment protected liberty interest in practicing medicine according to core ethical principles. The second section explains why Montana HB702 contravenes the core ethical principle that patients should, within their knowledge and skill, protect patients from harm. HB702 compels Montana physicians to violate the foundational canon – First Do No Harm. Thus, HB702 infringes Fourteenth Amendment protections.

The parties do not address the case from this ethical perspective. The proposed brief offers an alternative argument for affirmance.

IV. POSITIONS OF THE PARTIES

The Plaintiffs-Appellees have consented to the filing of the requested brief. The Intervenor-Plaintiff-Appellee has also consented to the brief. The Defendants-Appellants have stated that they take no position regarding the filing of this brief.

CONCLUSION

The AMA respectfully requests that the Court grant this motion and accept the proposed *Amicus Curiae* brief accompanying this motion.

Dated: September 21, 2023

Respectfully submitted,

/s/ Leonard A. Nelson

Leonard A. Nelson
Office of General Counsel
American Medical Association
330 N. Wabash Ave.
Suite 39300
Chicago, IL 60611
Phone: 312-464-5532
Leonard.Nelson@ama-assn.org

Attorney for American Medical Association,
Amicus Curiae

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d). It contains 612 words, excluding the parts of the motion excluded by Fed. R. App. P. 32(f). This motion complies with the typeface requirements of Circuit Rule 32 and the typestyle requirements of Fed. R. App. P. 32(a).

Dated: September 21, 2023

/s/ Leonard A. Nelson
Leonard A. Nelson

CERTIFICATE OF SERVICE

I certify that on September 21, 2023, I served the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of filing to all registered CM/ECF users.

Dated: September 21, 2023

/s/ Leonard A. Nelson
Leonard A. Nelson

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Leonard A. Nelson
Office of General Counsel
American Medical Association
330 N. Wabash Ave.
Suite 39300
Chicago, IL 60611
Phone: 312-464-5532
Leonard.Nelson@ama-assn.org

*Attorney for American Medical Association
Amicus Curiae*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae, the American Medical Association, an Illinois not-for-profit corporation, does not have a parent corporation. No publicly held corporation owns 10% or more of its stock.

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IDENTIFICATION AND INTEREST OF *AMICUS CURIAE*¹

The American Medical Association (AMA), an Illinois not-for-profit corporation, is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Montana.

The AMA publishes the *Code of Medical Ethics*,² which is widely accepted as the preeminent standard of medical ethics in the United States. The United States Supreme Court has repeatedly cited the *Code of Medical Ethics* as an authoritative source for determining ethical standards for physicians.³ The AMA

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel or a person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. Further, all parties have either affirmatively consented to the filing of this brief or have stated that they will take no position regarding its filing.

² The *AMA Code of Medical Ethics* is available from the AMA in print form and also through the AMA website at <https://code-medical-ethics.ama-assn.org/>.

³ See, e.g., *Lilly v. Commissioner*, 343 U.S. 90, 97 n.9 (1952); *Roe v. Wade*, 410 U.S. 113, 144 n.39 (1973); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 369 n.20 (1977); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 288, 308 (1990)

has an interest in opposing state laws, such as Montana HB702, which impede physicians from caring for their patients according to ethical standards, including those set forth in the *Code of Medical Ethics*.

The AMA submits this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the state medical societies, whose purpose is to represent the viewpoint of organized medicine in the courts.

SUMMARY OF ARGUMENT

Montana HB702 limits the ability of physicians to care for those patients who have compromised immune systems. It prevents physicians from determining if their employees and the physicians' patients are vaccinated against infectious diseases. This compromises the health of the most vulnerable patients and risks their incurring a potentially fatal disease when they visit a physician's office in Montana.

From the time of Hippocrates, physicians have been guided by the maxim *Primum Non Nocere*, First Do No Harm. In practical terms, this means that

(O'Connor, J., concurring & Brennan, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 214 (1991) (Blackmun, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); *Vacco v. Quill*, 521 U.S. 793, 800 n.6, 801 (1997); *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *Baze v. Rees*, 553 U.S. 35, 64, 112 (2008) (Alito, J., concurring); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 592-93 (2012) (Ginsburg, J., dissenting).

physicians should be loyal to their patients, first and foremost, and, within their knowledge and skill, do nothing to harm their patients. They should put their patients' health care above competing interests. This is the essence of medical professionalism, and it is the basis of physician practice.

The right of qualified physicians to practice their profession is a liberty interest, protected by the Due Process Clause. A state cannot revoke or reduce that privilege without a compelling cause. No such compelling cause exists here. HB702 elevates the interests of one class of persons – those who wish to provide health care services without taking reasonable steps to protect the persons to whom care is given – above and to the detriment of those most in need of care.

HB702 places physicians in an intolerable bind: they must choose between being faithful to their patients and their profession or conforming to a law that serves little or no purpose in a doctor's office. HB702 strips physicians of the essence of their practice, the privilege of placing service to patients above interests that the politics of the moment may find attractive. The Due Process Clause forbids it.

ARGUMENT

I. Physicians Have a Constitutionally Protected Right to Practice Medicine According to Core Ethical Standards.

The Due Process Clause of the Fourteenth Amendment protects the right to earn a livelihood without undue or repressive restrictions of state governments. *See Baker v. Daly*, 15 F.2d 881 (D. Ore. 1926) (Oregon Cosmetic Therapy Law unconstitutional as applied to persons who waved women's hair). This principle should certainly apply to physicians who wish to practice medicine according to the core ethical standards of their profession.

In *Nguyen v. Washington Dep't of Health Medical Quality Assurance Comm'n*, 144 Wash. 2d 516, 534, 29 P.3d 689, 697 (2001) the Supreme Court of Washington observed that a physician has a constitutionally protected liberty interest in the practice of medicine. This is complementary to but may in some cases go beyond the ordinary property interest in earning a living. The court found:

The interest of the medical practitioner ... is much more than ... a specific job. It involves the professional's substantial interest to practice within his profession, his reputation, his livelihood, and his financial and emotional future.

Id. In performing their duties, the physicians are obliged to maintain “sound professional standards of conduct for the purpose of protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public.” *Id.* at 528, 29 P.3d at 694.

Similarly, *Greenlee v. District of Columbia Bd. of Medicine*, 813 F. Supp. 48, 57 (D.D.C. 1993) found that a physician has a liberty interest in the right to practice medicine. Other courts have also found that a physician's medical license is constitutionally protected. *Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992); *Ramirez v. Ahn*, 843 F.2d 864, 867 (5th Cir. 1988); *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983). *See also Becker v. Illinois Real Estate Admin. and Disciplinary Bd.*, 884 F.2d 955, 957 (7th Cir. 1989) (right to sell real estate was a constitutionally protected liberty interest).

When physicians are constrained from practicing ethically, it affects not only themselves and their patients, but it affects the medical profession as a whole and, in some sense, society's fundamental democratic values and well-being. The liberty interest in the practice of medicine thus deserves stronger constitutional protection than an ordinary property interest.

Doctors help patients make deeply personal decisions, and an unabridged patient-physician relationship is crucial for that purpose. *Wollschlaeger v. Governor of Florida*, 848 F. 3d 1293, 1328 (11th Cir. 2017) (*en banc*) (W. Pryor, concurring). Government-mandated corruption of medical ethics has historically served as a bellwether for a wider loss of personal liberties. In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018), the Supreme

Court observed that government ordered violations of physicians' ethical principles have repeatedly been used to increase state power and suppress minorities --

For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government exploited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. ... Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS. [Citing Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U.L. Rev. 201, 201-202 (1994)].

The instant case shows the readiness of Montana lawmakers to sacrifice the health of patients with deficient immune systems in service of the political cause of the moment. The Fourteenth Amendment does not allow it.

II. HB702 Deprives Physicians of Their Right to Practice Ethical Medicine by Forcing Them to Endanger Their Patients' Health.

“Ensuring patient safety is at the heart of the Hippocratic Oath: First, Do No Harm.” L. Fleischer, MD, *et al*, <https://www.cms.gov/blog/first-do-no-harm>, (March 16, 2023). It follows that “physicians and, frankly, all those working in the health care system, have a fundamental obligation to patients by getting vaccinated for preventable diseases such as COVID 19.” Lubell, *Why COVID-19 Vaccination Should Be Required for Health Professionals*, Am. Med. Ass’n. (July 27, 2021)

(Quoting Audiey Kao, MD, PhD, AMA VP of Ethics), <https://www.ama-assn.org/delivering-care/public-health/why-covid-19-vaccination-should-be-required-health-professionals>. Similarly, the physician-philosopher Edmund Pellegrino has observed that, at the heart of medicine, physicians are committed to the needs and promoting the welfare of patients. See Pellegrino, ED. *Professionalism, Profession and the Virtues of the Good Physician*, Mt. Sinai J. of Med., 2002; 69(6): 378-384. HB702 forces physicians to violate that core ethical principle and thus compromise their professionalism by exposing the most vulnerable patients to infectious diseases when those patients appear for office visits.

The *Code of Medical Ethics*, in statement after statement, makes clear that physicians must protect their patients. Patient health should not be sacrificed in the service of a political objective. Thus –

-- *Principle of Medical Ethics VIII* states that, while caring for a patient, the physician must regard responsibility to the patient as paramount.

-- Opinion 1.1.1, *Responsibilities of Physicians and Patients*, states that the clinical encounter between a patient and a physician arises fundamentally from the physician's imperative to care for patients and alleviate suffering, above the physician's obligations to others.

-- Opinion 1.1.6, *Quality*, states that physicians have an obligation to ensure that the care their patients receive is safe.

-- Opinion 1.2.3, *Consultation, Referral, and Second Opinions*, states that physicians have a fiduciary obligation to promote patients' best interests and welfare.

-- Opinion 8.4, *Ethical Use of Quarantine and Isolation*, states that physicians should take appropriate protective and preventive measures to minimize transmission of infectious diseases from physician to patient.

-- Opinion 8.7, *Routine Universal Immunization of Physicians*, states that, as professionals committed to promoting the welfare of individual patients and the health of the public, physicians have an ethical responsibility to take appropriate measures in their own practice to prevent the spread of infectious disease. During outbreaks of vaccine-preventable disease for which there is a safe, effective vaccine, their responsibility may extend to requiring immunization of their staff.

HB702, though, erodes this most fundamental aspect of medical practice. Patients can no longer trust that physicians are devoted to their health and welfare. When physicians are unable to assure their patients that they are doing everything possible to protect their patients, they are no longer practicing full-bodied medicine.

Amicus does not suggest that the Montana legislature is constitutionally required to adhere to the entirety of the *Code of Medical Ethics*. Rather, it is the core principle of placing patients first, above political goals unrelated to health care, that merits protection.

Also, *amicus* does not suggest that, should this Court reverse the trial judge decision and reinstate HB702 for physician offices, physicians who follow that law would then be practicing unethically. Montana physicians *would* be practicing ethically if they make the best of the circumstances imposed on them by the legislature. The point is that the law places physicians in an intolerable bind: give up the core “do no harm” mandate or cease practice altogether.

CONCLUSION

This Court should affirm the trial court for the persuasive reasons set forth in that court’s order. If for some reason, though, this Court sees the matter otherwise, *amicus* urges the Court to consider the constitutional and ethical arguments raised in this brief.

The Fourteenth Amendment protects the liberty interest that physicians have in the practice of medicine. That liberty interest includes the right and the duty of physicians to place patient health above the state’s political goals of the moment. HB702, if enforced in physicians’ offices, would jeopardize the health of patients with compromised immune systems, who are most in need of medical care.

Physicians practice ethical medicine by choosing to serve their patients according to the best of their abilities, even when the governing law impedes their efforts. “All individuals deserve to receive healthcare that is safe and emblematic of medicine’s founding Oath: First, Do No Harm. Anything else is unacceptable.” L. Fleischer, MD, *et al*, <https://www.cms.gov/blog/first-do-no-harm>, (March 16, 2023).

For these reasons and for the reasons set forth by the trial court and by the Appellees, the trial court order should be affirmed and HB702 should be held unenforceable in the offices of Montana physicians.

Dated: September 21, 2023

Respectfully submitted,

/s/ Leonard A. Nelson

Leonard A. Nelson
Office of General Counsel
American Medical Association
330 N. Wabash Ave.
Suite 39300
Chicago, IL 60611
Phone: 312-464-5532
Leonard.Nelson@ama-assn.org

Attorney for American Medical Association,
Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit R. 32-1 because this brief contains 2,143 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

Dated: September 21, 2023

/s/ Leonard A. Nelson
Leonard A. Nelson

CERTIFICATE OF SERVICE

I certify that on September 21, 2023, I served the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of filing to all registered CM/ECF users.

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