IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, ATTORNEY GENERAL CHARLES J. CRIST, JR., in his official capacity, FLORIDA DEPARTMENT OF HEALTH, and JOHN AGWUNOBI, M.D., SECRETARY, in his official capacity, and FLORIDA BOARD OF MEDICINE,	)	
Appellants,	)	Case No.: SC 04-2186
	)	L.T. No. 4D02-4485
vs.	)	
PRESIDENTIAL WOMEN'S CENTER, MICHAEL BENJAMIN, M.D., and NORTH FLORIDA WOMEN'S HEALTH AND COUNSELING SERVICES, INC., on behalf of themselves and their patients.	)	
Appellees.	)	

BRIEF OF *AMICI CURIAE* FLORIDA ASSOCIATION OF PLANNED PARENTHOOD AFFILIATES, PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, PLANNED PARENTHOOD OF SOUTH PALM BEACH AND BROWARD COUNTIES, PLANNED PARENTHOOD OF THE PALM BEACH AND TREASURE COAST AREA, PLANNED PARENTHOOD OF COLLIER COUNTY, PLANNED PARENTHOOD OF NORTH CENTRAL FLORIDA, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AND AMERICAN CIVIL LIBERTIES UNION REPRODUCTIVE FREEDOM PROJECT

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] submit this brief in support of Appellees, ~~Florida Association of Planned Parenthood Affiliates ("FAPPA"), Planned Parenthood of Southwest and Central Florida, Planned Parenthood of South Palm Beach and Broward Counties, Planned Parenthood of the Palm Beach and Treasure Coast Area, Planned Parenthood of Collier County, Planned Parenthood of North Central Florida (collectively, "Planned Parenthood"), the American Civil Liberties Union of Florida ("ACLU of Florida") and the American Civil Liberties Union~~ Reproductive Freedom Project ("ACLU Reproductive Freedom Project"), submit ~~this brief in support of Plaintiffs-Appellees. *Amici* urg~~inge this Court to affirm the October 13, 2004, judgment of the District Court of Appeal for the Fourth District, which affirmed the trial court's grant of ~~the trial court's decision granting~~ summary judgment to ~~Plaintiffs-~~Appellees and a permanent~~ly~~ injunction~~enjoining~~ against enforcement of Florida Public Law, Chapter 97-151 (CS/HB 1205) (codified at Section 390.0111(3), Florida Statutes) (hereinafter the "Act").

~~,~~ The ~~because it impermissibly interferes with a woman's right under the Florida Constitution to choose to terminate her pregnancy and is unconstitutionally vague. See State v. Presidential Women's Ctr., 884 So. 2d 526~~

[1] *Amici curiae* are listed on the cover of this brief.

~~(Fla. 4th DCA 2003) (hereinafter "PWC"). Counsel for each of the parties to this appeal have consented to the filing of this amicus brief.~~

~~——~~Florida Association of Planned Parenthood Affiliates ("FAPPA") is an organization comprised of the eight Florida-based Planned Parenthood health centers affiliated with Planned Parenthood Federation of America~~, namely: Planned Parenthood of Northeast Florida; Planned Parenthood of Southwest and Central Florida; Planned Parenthood of South Palm Beach and Broward Counties; Planned Parenthood of the Palm Beach and Treasure Coast Area; Planned~~ Parenthood of Greater Orlando; Planned Parenthood of Collier County; Planned ~~Parenthood of North Central Florida; and Planned Parenthood of Greater Miami and the Florida Keys.~~

~~——~~. Of those affiliates, *amici* Planned Parenthood of North Central Florida, Planned Parenthood of Southwest and Central Florida, and Planned Parenthood of South Palm Beach and Broward Counties are the only members of FAPPA that currently provide abortion services. However, all of the Planned Parenthood health centers serve patients who have decided to terminate their pregnancies. When a patient of a Planned Parenthood health center that does not offer abortion services expresses a desire for that service, the patient is referred to an appropriate provider ~~of abortion care~~. If the patient has not determined how she wants to deal with her

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pregnancy, the patient is offered non-directive counseling about her options for proceeding with the pregnancy, including adoption, carrying the pregnancy to term, and abortion. During such options counseling, patients are given as much accurate information as possible regarding each option, except for those options about which the patient indicates she does not want any information.

Patients at the Planned Parenthood health centers who choose to have an abortion receive extensive counseling about their decision prior to the procedure. ~~The primary goal of such pre-abortion counseling is to explain in detail the~~ components of the abortion procedure. According to Planned Parenthood protocols, such pre-abortion counseling includes a description of the abortion procedure, possible complications and after-care instructions. During counseling, the counselor and the patient review the patient's decision, how it was made, her comfort level with her decision, why she chose abortion, and whether she feels certain it is the right choice. They discuss the patient's feelings about abortion and expectations for coping after the abortion. The counselor provides support, validation and empathy for the patient with respect to any choice she freely makes. The counselor then discusses future contraception options with the patient. The informed consent forms are thoroughly explained to the patient before they are signed.

Both the options counseling and pre-abortion counseling are provided by trained counselors.[2] Physicians are also available to answer patients' questions. The counseling is far more extensive than that mandated by the Act, but does not require the provision of erroneous, biased or misleading information, and may be performed by appropriately trained non-physicians.

If the information mandated by the Act had to be given by physicians it would severely strain the resources of the Planned Parenthood health centers. Doctors trained and willing to perform abortions are in short supply in Florida, as elsewhere in the country. Requiring them to fulfill the Act's requirements would reduce the already limited time they have to perform abortions, and thus would ~~inevitably~~ reduce the number of women they could serve. ~~Moreover, there is no need for doctors to provide the mandated information because counselors are trained and able to provide precisely the type of information required by the Act.~~ In addition, requiring doctors to provide the information in all cases (as opposed to

[2] Counselors at Planned Parenthood's health centers typically are professionals or paraprofessionals. They are selected for and trained in listening and communication skills. ~~They must respect, understand and empathize with the woman as an individual, and must have a sincere belief in the right of the woman to make her own decision after exploring all options.~~ Counselors also receive extensive training regarding the medical aspects of the abortion procedure, its risks, its benefits and all alternatives including carrying the pregnancy to term and keeping the child or placing it up for adoption.

only when the patient requests it)—when counselors are trained and able to provide the precise type of information required by the Act---would inevitably force the Planned Parenthood health centersorganizations to raise the cost of providing abortion services. Already, some women are unable to afford the cost of an abortion. If the price increased, more women would be denied access to abortions services.

In addition, because the counseling provided by Planned Parenthood's trained counselors is far more extensive than that required by the Act, the Act does not serve the patient's interest in obtaining complete and accurate information about her options for managing her pregnancy, including or about abortion, if that is the option she chooses.

The Planned Parenthood organizations appears as *amici curiae* in this appeal because if the Act takes effect it will interfere with the medical discretion of Planned Parenthood physicians and will thus adversely affect the health of their patients seeking abortions, and will interfere with the ability of some women to obtain abortions.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members dedicated to the constitutional principles of liberty and equality embodied in the Constitution. The

ACLU of Florida is its state affiliate. This case raises important questions about the state right of privacy, a woman's right to choose to terminate her pregnancy, and the ability of women to access abortion services and reproductive health care free from unconstitutional state regulation. The ACLU of Florida and the ACLU Reproductive Freedom Project appear as *amici curiae* ~~in this appeal~~ because the ACLU has fought for these rights in numerous contexts over the years through the efforts of, among others, the ACLU of Florida and the ACLU Reproductive Freedom Project, and the proper resolution of this case is therefore a matter of substantial concern to the ACLU and its members.

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SUMMARY OF ARGUMENT

The Florida Supreme Court has held that pursuant to the Florida Constitution, a woman's right to decide to terminate her pregnancy is a fundamental constitutional right. Accordingly, a state law interfering with that right is unconstitutional unless it meets strict scrutiny review – i.e., it serves a compelling state interest through the least intrusive means.

The Act does not pass muster under this standard of review. As the U.S. Supreme Court and other federal courts have held based on strict scrutiny review, statutes that dictate the content of the informed consent dialogue in the abortion context – as the Act does – impermissibly interfere with a woman's right to abortion, because such requirements intrude on the medical discretion of the physician to ensure that the information provided to the patient is relevant to her decision between abortion and childbirth, in light of her particular circumstances.

In addition, federal courts applying the strict scrutiny standard have also struck down requirements that the physician provide the mandated information, because the patient's interests may be better served if the patient received such information from an appropriately trained counselor. First, trained professionals with counseling skills are often more effective in obtaining truly informed consent than the physician~~, and thus improve the quality of the counseling and medical care~~

~~the patient receives~~. Second, allowing trained counselors to provide the counseling and informed consent duties permits the physician to use his time for the surgical services that only he can perform. This promotes efficient use of the physician's time and helps keep the cost of an abortion as low as possible, thereby ensuring that more women who choose abortion can afford the cost of an abortion.

Furthermore, because the Act does not allow the physician to deviate from the mandated information, and does not permit the physician to delegate the informed consent requirement to an appropriately trained professional – even when either would be in the physician's best medical judgment– the Act is not the least intrusive means of ensuring informed consent, and therefore fails strict scrutiny.

Finally, the Act is unconstitutional, under both the Florida and U.S. Constitutions, because~~, contrary to U.S. Supreme Court precedent,~~ it lacks an exception for medical emergencies arising when the woman's health is at risk. Furthermore, the Act's affirmative defense provided for physicians against whom a disciplinary action is brought for alleged violations of the Act is unconstitutional. The defense may be invoked if the physician "substantial[ly] compli[ed]" with the Act, or had a "reasonable belief" that the woman's life or health would be endangered by complying with the Act. The prospect that a disciplinary board would disagree that "substantial compliance" or "reasonable belief" existed,

however, would impermissibly chill physicians' willingness to perform abortions otherwise permitted by the Act.

Because the Act impermissibly interferes with a woman's right under the Florida Constitution to choose to terminate her pregnancyan abortion, the lower court properly affirmed summary judgment to ~~Plaintiffs-~~Appellees. This Court should ~~therefore~~ affirm ~~the lower court's~~that decision.

ARGUMENT

POINT I: THE ACT VIOLATES THE FLORIDA CONSTITUTION.

A. The Florida Constitution Requires That Restrictions On The Right to Reproductive Choice Serve A Compelling Interest Through The Least Intrusive Means.

Article I, section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Relying on this provision, in 1989, this Court invalidated a state law requiring young women to obtain parental consent to before a physician could perform an abortion. In re T.W., 551 So. 2d 1186 (Fla. 1989). The Court held that the state constitutional ~~right to privacy "is clearly implicated in a woman's decision of whether or not to continue her pregnancy." In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989). It further recognized that the Florida Constitution embodies the principle that "'[f]ew decisions are more personal and intimate, more properly private, or more basic to~~

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individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy,'" Id. at 1193 (quoting Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986) (alteration in original)).

In re T.W. was based on this Court's ruling that Florida's privacy right "'is a fundamental right which we believe demands the compelling state interest standard.'" Id. at 1192 (citations omitted). Under the compelling state interest standard, any state law that interferes with a woman's fundamental right to terminate her pregnancy is unconstitutional unless the state can prove that the law "furthers a compelling state interest through the least intrusive means." Id., 551 So. 2d at 1193.

———Applying strict scrutiny, the Court concluded that the parental consent requirement did not further a compelling state interest or constitute the least intrusive means of furthering any state interest. The Court emphasized that the state had singled out abortion for regulation without compelling justification.:

> In light of [the] wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned.

Id., 551 So. 2d at 1195.

———IIn addition, the Court found that the parental consent requirement was not the least intrusive means of furthering any state interest. In particular, the statute

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made no provision for minors seeking a judicial bypass of the consent requirement to have appointed lawyers, nor did the statute provide for creating a record of the judicial bypass hearing for purposes of appeal, nor did it provide an exception for abortions performed in a medical emergency. See iId.Id. at 1195-96.

Recently, this Court relied on, and expressly reaffirmed, In re T.W. in a case challenging Florida's statute requiring parental notice for abortions performed on minors. This Court struck down the statute as unconstitutional because it implicated a woman's right to choose without furthering a compelling state interest. North Florida Women's Health and Counseling Services v. State, 866 So. 2d 612, 618-622, 639 (Fla. 2003) (hereinafter "NFWHCS"), and . In so doing, this Court emphasized that '"[t]he right of privacy is a fundamental right which we believe demands the compelling state interest standard.'" Id. at 626 (quoting Chiles v. State Employees Attorneys Guild, 734 So. 2d 1030, 1033 (Fla. 1999)).

As recognized in In re T.W., and reaffirmed in NFWHCS, the Florida Constitution is far more protective of the right to choose abortion than the U.S. Constitution. See In re T.W., 551 So. 2d at 1191-92; NFWHCS, 866 So. 2d at 619. In contrast to the Florida Constitution, pursuant to which intrusions on the right to abortion are subject to strict scrutiny, the U.S. Supreme Court held in 1992 that under federal law abortion restrictions would no longer be reviewed under the strict scrutiny standard as they were pursuant to Roe v. Wade, 410 U.S. 113

(1973). See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992). Rather, under Casey's formulation, intrusions on the right to abortion are now reviewed – for purposes of assessing constitutionality under the U.S. Constitution – under the less protective "undue burden" standard. See Casey, 505 U.S. at 877 (a regulation is an undue burden, in violation of the federal due process clause, if its purpose or effect is to "plac[e] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

~~As this Court correctly concluded in NFWHCS, the undue burden standard is less protective of the right to choose abortion than the strict scrutiny standard used to review abortion restrictions under the Florida Constitution. NFWHCS, 866 So. 2d at 634-636.~~ Because Casey reviewed abortion restrictions under a more deferential standard than is mandated by the Florida Constitution, neither Casey nor subsequent federal cases addressing state-mandated counseling ~~provide analyses that~~ are relevant to this Court's review of the Act. Instead, as the Florida Constitution requires, the lower court properly used the strict scrutiny standard in finding that the Act is unconstitutional. See State v. Presidential Women's Ctr., 884 So. 2d 526, 530-31 (Fla. 4th DCA 2003) (hereinafter "PWC"). ~~PWC, 884 So. 2d at 530-31, 532-33.~~

B. The Act Straitjackets Physician Discretion and Does Not Serve A Compelling State Interest.

The lower courts correctly concluded that the Act unconstitutionally straitjackets physicians by rigidly dictating the manner in which informed consent to abortion is achieved. PWC, 884 So. 2d at 533. Between 1973 and 1992, when abortion restrictions were reviewed under strict scrutiny to assess their constitutionality under federal law, numerous federal cases held that dictating the content of an informed consent dialogue in the context of abortion – as the Act does – impermissibly interferes with a physician's medical judgment. The reasoning of these decisions applies in this case because pursuant to the Florida Constitution's explicit right to privacy, laws regulating abortion are subject to strict scrutiny review. See In re T.W.

Under the strict scrutiny analysis established in Roe v. Wade (and applicable here pursuant to In re T.W.), the U.S. Supreme Court repeatedly linked the right to choose abortion with a physician's unimpeded ability to exercise responsible professional judgment in determining the need for and the method of effectuating the abortion. This is because the woman's exercise of her abortion right is encumbered "by placing obstacles in the path of the doctor upon whom she [is] entitled to rely for advice in connection with her decision." Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977). For example, in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), overruled in part, Casey, 505 U.S.

at 882-83, the U.S. Supreme Court struck down an ordinance that mandated a specific informed consent dialogue prior to an abortion. The Court held:

> It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. [Our prior] recognition of the State's interest in ensuring that this information be given [in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)] will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.

462 U.S. at 443-44 (emphasis added) (footnote omitted).[3] The Court observed that one of its primary objections to the Akron ordinance was "its intrusion upon the discretion of the pregnant woman's physician." Id. at 445. The Akron ordinance,

> [S]pecifie[d] a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision. For example, even if the physician believe[d] that some of the risks are nonexistent for a particular patient, he remain[ed] obligated to describe them to her."

Id.

"By insisting upon recitation of a lengthy and inflexible list of information," the Court found that the ordinance "unreasonably ha[d] placed 'obstacles in the path of

[3] The Akron Court carefully distinguished the provision upheld in Danforth, which required only that an abortion patient give written informed consent to the abortion, with the Akron ordinance which mandated the specific information a physician had to provide to achieve informed consent, and mandated that only the physician could provide that information. Akron, 462 U.S. at 442-43. Under In re T.W., the Danforth-type general requirement of informed consent would be constitutional (for the same reasons it was upheld by the U.S. Supreme Court in Danforth under strict scrutiny), whereas for the reasons stated herein the physician-strait-jacketing provisions of the Act do not pass muster.

the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" Id. (quoting Whalen, 429 U.S. at 604 n.33).

The Akron Court also invalidated a provision of the ordinance similar to the Act that required "the attending physician" to be the one who informed the woman of certain medical information about her pregnancy, the abortion procedure, and post-abortion care. While not finding the content of this information objectionable because it "properly leaves the precise nature and amount of this disclosure to the physician's discretion and 'medical judgment,'" id. at 447, the Court struck down the provision because it had to be provided by the attending physician, and could not be provided by other qualified individuals. The Court held:

> Requiring physicians personally to discuss the abortion decision, its health risks, and consequences with each patient may in some cases add to the cost of providing abortions . . . . We are not convinced . . . that there is as vital a state need for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request [as there is for a physician to perform the abortion]. The State's interest is in ensuring that the woman's consent is informed and unpressured~~; the critical factor is whether she obtains the necessary~~ information and counseling from a qualified person, not the identity of the ~~person from whom she obtains it~~ . . . . [O]n the record before us we cannot say that the woman's consent to the abortion will not be informed if a physician delegates the counseling task to another qualified individual.

Id. at 447-48.

Three years later in Thornburgh, 476 U.S. 747 (1986), overruled in part, Casey, 505 U.S. at 882-83,[4] the Court reaffirmed its holdings in Akron, striking down a Pennsylvania statute that imposed a rigid informed consent dialogue. The Thornburgh Court struck down a provision similar to Florida's that required a physician to describe fetal characteristics at two-week intervals. It held: "no matter how objective, [the requirement] is plainly overinclusive. This is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice." Thornburgh, 476 U.S. at 762. The Court also objected to a provision similar to Florida's requiring the physician to give the woman a state-published list of agencies offering alternatives to abortion. It held that the list "contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities." Id. at 763. In addition, the Court disapproved of the requirement that the woman be advised that medical assistance benefits may be available and that the father is responsible for child support. Compare § 390.0111(3)(a)2.c (requiring printed materials to include

[4] Applying the undue burden standard, Casey overruled Akron and Thornburgh to the extent they prohibited the government from giving "truthful, nonmisleading information" about abortion, "even when in so doing the State expresses a preference for childbirth over abortion." 505 U.S. at 882, 883.

"[d]etailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care"). It held that these statements

> are poorly disguised elements of discouragement for the abortion decision. Much of this would be nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate. . . . Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.

Thornburgh 476 U.S. at 763.

Applying the reasoning of these cases under strict scrutiny as mandated by the Florida Constitution, this Court must decide that the lower courts correctly concluded that the Act's informed consent requirements are unconstitutional.

1. The Act Impermissibly Requires the Mandated Information to be Provided by Physicians.

Like the ordinance struck down in Akron, the Act impermissibly straitjackets physicians' discretion by requiring that the mandated information be provided by a physician or a referring physician, even when in the physician's best judgment, the patients' interests would be better served if he or she delegated that duty to a nurse or appropriately trained counselor.[5]

It is the practice of virtually all Planned Parenthood clinics around the country[6] – including those in Florida – for informed consent to abortion to be

[5] This aspect of Akron was also overruled by Casey under the undue burden standard. 505 U.S. at 884-85.

obtained by trained counselors, with physicians available to answer any questions the woman may have. This decision has been made for two reasons. First, it is good medical practice for relevant medical information to be provided by trained and supervised "paraprofessionals." As a federal court held in an identical context:

> Much of the testimony at trial indicates that the national trend is toward the use of trained and supervised "paraprofessionals" to deliver the information and counselling that leads to informed consent for any surgical procedure. This trend has developed in response to a national desire to lower the cost of medical care and to offset a national shortage of doctors, and in recognition of the fact that doctors often are not the best people to perform this function. Several doctors who testified in this case indicated that they felt that a trained counsellor could be much more effective in obtaining truly informed consent than could the attending physician. This is particularly true in the area of abortions where counselling skills may be as important to the success of the procedures as is surgical technique. Counsellors may also be better at searching out ambivalence or anxiety than would a physician.

Women's Med. Ctr. of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1148 (D. R.I. 1982), overruled in part, Casey, 505 U.S. 833.

Second, if the informed consent for abortion at Planned Parenthood clinics were provided by physicians, it would make abortions more expensive and thus unaffordable ~~available to~~ for some ~~women who have made the decision to terminate their pregnancies~~. As t~~T~~he Rhode Island federal ~~district~~ court summarized ~~this effect well~~:

> A primary component of the cost of an abortion is the cost of the doctor's time. One way to cut some of the costs of surgery is to restrict the use of

~~[6] There are approximately 875 Planned Parenthood health centers in 49 states and the District of Columbia.~~

> doctor-time to those services that *only* the doctor can provide . . . [plaintiff] clinics keep the costs of abortions down by attempting to utilize doctor-time only for the actual surgery. The counselling and informing functions are performed by other professionals whose time is not as expensive as a doctor's. By not "under-employing" doctors, these clinics provide an abortion at its optimal cost.

Roberts, 530 F. Supp. at 1148 (emphasis added).

Because delegation of the requirements of the Act to a trained counselor would improve the quality of medical care patients receive, and keep the price of abortions down thus enabling more women to effectuate their informed choice to terminate their pregnancies, there is no compelling state interest in requiring – as the Act does – that the mandated information be provided by physicians.

2. The Act Impermissibly Requires Physicians To Provide All the Mandated Information Even When They Believe It Is Not Medically Appropriate To Do So.

Like the provisions invalidated in Akron and Thornburgh, the Act requires a physician to provide all the mandated information regardless of whether it is against his best medical judgment to do so. See Akron, 462 U.S. at ~~[~~447~~]~~ ~~(information in one provision of the ordinance was not objectionable because it "properly leaves the precise nature and amount of this disclosure to the physician's discretion and 'medical judgment'")~~; Thornburgh, 476 U.S. at 762 (impermissible to mandate that a "specific body of information be given in all cases, irrespective of the particular needs of the patient"). There are situations—such as when a woman is terminating a much-wanted pregnancy due to a serious fetal anomaly--

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in which a physician might conclude that describing to a woman the medical risks to her and the fetus of carrying the pregnancy to term, or giving a woman a brochure that provides a detailed description of the fetus at different gestational ages, both of which the Act requires, would be irrelevant to her abortion decision and cause undue anxiety. The Act, however, does not permit the physician to withhold such information based on his medical discretion. ~~For example, even if the woman is terminating a much-wanted pregnancy due to a serious fetal anomaly, has already undergone extensive counseling regarding an abortion with her genetics counselor, and will become emotionally distraught if reminded of the "medical risks to the . . . fetus of carrying the pregnancy to term," § 390.0111(3)(a)1.c, the physician must nonetheless give her that information, and provide her with a generic brochure carrying descriptions of fetuses. See § 390.0111(3)(a)2.a.~~

As the U.S. Court of Appeals for the First Circuit stated in striking down a requirement that women read a description of the fetus's development prior to obtaining an abortion:

> First, the information is not directly material to any medically relevant fact, and thus does not serve the concern for providing adequate medical information that lies at the heart of the informed consent requirement. Second . . . requiring women seeking abortions to read this information would cause many [women] emotional distress, anxiety, guilt, and in some cases increased physical pain . . . . Finally . . . most women would not want to hear such a description just prior to having an abortion and . . . most physicians would not consider it good medical practice to provide one.

Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1021-22 (1st Cir. 1981) (footnotes omitted); see also Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980) ("The prospect of such 'required reading' for the woman who elects to abort a fetus because of serious genetic defects or because her own health is in danger is punitive to the woman and compromising to the physician's efforts to do what is best for her").

In sum, the state lacks any compelling interest for mandating an across-the-board provision of information that may not be medically relevant and that can heighten the anxiety and thus increase the medical risks of the abortion procedure for some patients without any legitimate justification. See Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 655 F.2d 848, 868 (8th Cir. 1981), rev'd on other grounds, 462 U.S. 476 (1983) ("There is no rational reason, much less a compelling state interest, that justifies forcing physicians to give women information that the physicians consider injurious to the woman's health or simply untrue").

C. The Act Is Not The Least Intrusive Means Of Ensuring Informed Consent ~~to Abortion~~.

Even if this Court concludes that there is a compelling state interest to justify the Act's intrusion into the physician's discretion, it may only uphold the Act if it is the least intrusive means of accomplishing its alleged purpose of ensuring

informed consent to abortion. See In re T.W., 551 So. 2d at 1193; NFWHCS, 866 So. 2d at 620. Given the numerous ways, however, that the State could ensure adequate informed consent to abortion without stripping physicians of their medical discretion, as the Act does, the lower court correctly held that the Act's informed consent requirements are not the least intrusive means. As the U.S. Supreme Court held in Akron:

> ~~[W]e do not suggest that the State is powerless to vindicate its interest in making certain the "important" and "stressful" decision to abort "is made with full knowledge of its nature and consequences" . . . .~~ A State may define the physician's responsibility to include verification that adequate counseling has been provided and that the woman's consent is informed. In addition, the State may establish reasonable minimum qualifications for those people who perform the primary counseling function . . . . In light of these alternatives, we believe that it is unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent.

462 U.S. at 448-49 (citations and footnotes omitted). In addition, as discussed in note ~~2~~3, supra, a state is also free to mandate that the patient state in writing that she has voluntarily given informed consent. See Danforth, 428 U.S. at 85.

Here, the Act is not the least intrusive means of effectuating the State's interest in ensuring adequate informed consent because it: 1) does not allow physicians to delegate ~~fulfilling~~ the requirements of the Act to an appropriately trained paraprofessional acting under the physician's discretion; 2) does not allow physicians to modify or delete any part of the mandated script if in their good faith medical judgment doing so is necessary for the health of the patient; 3) requires the

provision of information relating to "medical assistance benefits," which may mislead the woman into believing that she is likely to receive such benefits; 4) does not require that the printed materials be neutral as to what decision the pregnant woman makes, see § 390.0111(3)(a)2, and; 5) is in fact designed to dissuade the patient from having an abortion. The Act thus cannot withstand strict scrutiny.

POINT II: UNDER THE U.S. AND FLORIDA CONSTITUTIONS, THE ~~-~~ACT IS UNCONSTITUTIONAL BECAUSE IT LACKS AN ADEQUATE ~~-~~EXCEPTION FOR ME DICAL EMERGENCIES.

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~~Under § 390.0111(3)(b) of the Act, when a "medical emergency" exists, the physician may proceed to terminate the pregnancy if he "has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman."[7]~~

~~The Act does not define, or distinguish between the terms "medical~~ emergency" and "medical necessity," and appears to equate both terms with the situation where "to a reasonable degree of medical certainty the continuation of the ~~pregnancy would threaten the life~~ of the pregnant woman." ~~§ 390.0111(3)(b) (emphasis added).~~ ~~Thus, t~~he Act provides a "medical emergency" exception to its

[7] The Act further provides that if "no second physician is available for a corroborating opinion, the physician may proceed but shall document reasons for the medical necessity in the patient's medical records." § 390.0111(3)(b).

requirements only when the pregnant woman's life, but not her health, is at risk. See § 390.0111(3)(b) (medical emergency exists in circumstances where continuation of pregnancy "would threaten the life of the pregnant woman.")

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This exception is unconstitutional. Under the federal constitution, a state may not restrict access to an abortion that is necessary for a woman's life or health. Clearly a state also may not do so under the more protective right to privacy afforded by the Florida Constitution. As the U.S. Supreme Court has repeatedly held, the state may not regulate or proscribe abortion "'where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" Casey, 505 U.S. at 879 (quoting Roe v. Wade, 410 U.S. at 164-65). See ~~Most recently, the U.S. Supreme Court invalidated a state abortion ban because it "lack[ed] any exception for the preservation of the . . . health of the mother."~~ Stenberg v. Carhart, 530 U.S. 914, 930-31 (2000) (invalidating statute because it lacked health exception~~quotations and citations omitted~~).[8]

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[8] ~~See also Planned Parenthood of Northern New England v. Heed 390 F.3d 53 (1st Cir. 2004) (affirming permanent injunction against law requiring parental notice for minors' abortions without a health exception); Planned Parenthood of the Rocky Mountains v. Owens, 287 F.3d 910, 918 (10th Cir. 2002) (affirming a permanent injunction against a law imposing a forty-eight hour delay for minors' abortions that lacked a health exception); Jane L. v. Bangerter, 61 F.3d~~ 1493, 1504 (10th Cir. 1995) ("The importance of maternal health is a unifying ~~thread that runs from Roe to Thornburgh and then to Casey."), rev'd in part on~~ other grounds and remanded, Leavitt v. Jane L., 518 U.S. 137 (1996).

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~~———~~The Act is thus unconstitutional because it ~~fails to protect maternal health in all situations by~~ requir~~es~~ing physicians to follow the rigid ~~rigid~~ informed consent regimen of the Act even where doing so would threaten the patient's health. See § 390.0111(3)(b). This result is plainly unconstitutional under well-~~established federal law. See Casey, 505 U.S. at 880; Stenberg, 550 U.S. at 930-31.~~

The Act is not saved by the affirmative defense in § 390.0111(3)(c), which provides: "Substantial compliance or reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any [disciplinary] action brought under this paragraph." ~~This affirmative defense provides little if any solace to physicians who – in order to avail themselves of the opportunity to simply invoke the defense – would have to endure the stigma and risk of appearing before a disciplinary board.~~ First, ~~———~~the physician would have to endure the stigma and risk of appearing before a disciplinary board to invoke this defense. Second, e~~E~~ven when the physician in good faith believes his patient's life or health would be at risk if he complied with the Act (such as if the patient is unconscious), because the affirmative defense contains an objective standard ("substantial compliance" or "reasonable belief"), the disciplinary board could ~~simply~~ decide that the physician was not in "substantial compliance" or his belief was not "reasonable," and revoke his license. See Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 205 (6th Cir. 1997)

~~(under objective standard, physician may be penalized "as long as others later decide that the physician's actions were . . . unreasonable," which "could have a profound chilling effect on the willingness of physicians to perform abortions") (quotations and citations omitted).~~

This objective standard is unconstitutional. The U.S. Supreme Court has repeatedly emphasized that abortion regulations must be governed by a subjective standard. See, e.g., ~~In~~ Colautti v. Franklin, 439 U.S. 379, 396 (1979) (~~, for example, the Court~~ invalidat~~ing~~ed s~~a~~ statutory provision requiring ~~a physician to adopt a~~ particular standard of care when "'there [was] sufficient reason to believe that the fetus may be viable~~,'~~," because prospect of disagreement by experts as to whether fetus was viable, in conjunction with civil and criminal penalties for erroneous determinations, would have chilling effect on physicians' performance of abortions near point of viability). Id. at 389, 396. ~~Id. at 389, stating. Pointing to the hazards of the "reason to believe" standard, the Court stressed:~~

> ~~It is not unlikely that experts will disagree over whether a particular fetus . . . [i]s . . . viab[le]. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in~~ the manner indicated by their best medical judgment.

~~Id. at 396.~~ So here, it is not unlikely that at any disciplinary hearing for an alleged violation of the Act, ~~in hindsight,~~ experts will disagree over whether an abortion

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provider's belief that his patient's life or health was at risk was "reasonable." In order to avoid that situation ~~and to preserve their ability to continue practicing~~ medicine, some abortion providers may comply with the strict letter of the Act, even when in their good faith medical judgment their patient's life or health is at risk. This result is constitutionally impermissible.

CONCLUSION

~~For the foregoing reasons, t~~The District Court of Appeals properly affirmed the trial court's decision granting summary judgment to Appellees~~Plaintiffs~~ and permanently enjoining enforcement of the Act. Accordingly, *amici curiae* ~~Planned Parenthood, the ACLU of Florida, and the ACLU Reproductive Freedom Project~~ respectfully urge this Court to affirm the decision of the lower court.

Dated: March~~February~~ 16~~–~~ ~~23~~, 2005 Respectfully submitted,

/s/ Donna Lee~~/s/ Donna Lee~~

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