IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, ATTORNEY GENERAL CHARLES J. CRIST, JR. in his official capacity, FLORIDA DEPARTMENT OF HEALTH, JOHN AGWUNOBI, M.D., Secretary, in his official capacity, and FLORIDA BOARD OF MEDICINE,

Appellants,

v.

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.
_____/

Case No.: SC02-2186
L.T. Case No.: 4D 02-4485

AMENDED ANSWER BRIEF

On Appeal From a Decision of the District Court of Appeal,
Fourth District, State of Florida

Attorneys for Appellees, Presidential Women's Center and Michael Benjamin, M.D.

Marshall J. Osofsky, Esq.
Moyle, Flanigan, Katz,
Raymond and Sheehan, P.A.
625 N. Flagler Drive, 9th Fl.
P.O. Box 3888
West Palm Beach, FL 33402-3888
(561) 659-7500
facsimile: (561) 659-1789

Bebe J. Anderson, Esq.*
Nan Strauss, Esq.**
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600
facsimile: (917) 637-3666

*Admitted *pro hac vice*
** *pro hac vice pending*

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STATEMENT OF THE CASE AND FACTS

This action was instituted by the Plaintiffs as a Complaint for Injunctive Relief and Declaratory Judgment challenging the validity of Public Law 97-151, Laws of Florida (CS/HB1205), which amended Chapter 390, Florida Statutes (the "Act" or "§ 390.0111(3)"). (A copy of the statute is appended to this Brief at Appendix 1). (R.1-51). Plaintiffs challenged the Act under both the Constitutions of the State of Florida and the United States. The Act, scheduled to take effect July 1, 1997, changed the informed consent standards applicable to physicians performing abortions, by requiring that the physician who is to perform the procedure or the referring physician has, at a minimum, orally and in person informed the woman of:

> (a) The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.
> (b) The probable gestational age of the fetus at the time of termination of pregnancy is to be performed.
> (c) The medical risks to the woman and fetus of carrying the pregnancy to term.

§ 390.0111(a)1, Fla. Stat. (2005). In addition, before an abortion can be performed,

> Printed materials prepared and provided by the Department [must] have been provided to the pregnant woman, if she chooses to view these materials, including:
> (a) A description of the fetus.
> (b) A list of agencies that offer alternatives to terminating the pregnancy.

> (c) Detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neo-natal care.

Id., subsection (a)2.

Following the filing of the Complaint, a hearing was held on Plaintiffs' Motion for Emergency Temporary Injunction (R-53-99) which resulted in the trial court entering a temporary injunction on July 2, 1997, enjoining the Defendants (hereinafter collectively referred to as "the State") from enforcing the Act. (R-246-251). The State appealed the temporary injunction to the Fourth District Court of Appeal. On February 18, 1998, the Fourth District Court of Appeal issued an opinion affirming the temporary injunction in State v. Presidential Women's Ctr., 707 So. 2d 1145 (Fla. 4th DCA 1998), *as clarified by*, 23 Fla. L. Weekly D953 (April 15, 1998) ("Presidential Women's Ctr. I"). Thereafter, on January 11, 2002, Plaintiffs Presidential Women's Center and Michael Benjamin, M.D. (hereinafter collectively referred to as "Presidential") filed a Motion for Summary Judgment and Memorandum of Law in Support Thereof. (R. 627-633). On March 19, 2002, the trial court entered an order setting the hearing on the Motion for Summary Judgment to take place on the non-jury docket commencing May 6, 2002. (R. 830). On April 5, 2002, the case was reassigned by the Clerk of the Court from Division AG to Division AA (R. 1020), requiring the Plaintiffs to seek a rescheduling of the Motion for Summary Judgment hearing in front of the new

judge. On May 7, 2002, the new presiding judge, the Honorable Ronald Alvarez, issued his order setting the hearing on the Motion for Summary Judgment for the non-jury trial docket commencing August 12, 2002. (R. 1139-1143). The State sought to strike the Motion for Summary Judgment (R. 1396-1410) and to stay the Summary Judgment proceedings (R. 1438); however, both motions were denied (R. 1454-1455, 1456). Prior to the hearing on the Plaintiffs' Motion for Summary Judgment, Presidential timely filed its Supplemental Motion for Summary Judgment and Memorandum of Law in Support Thereof. (R. 1500-1537). On August 15, 2002, Defendants filed their Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment. (R. 1564-1619). On August 19, 2002, the trial court heard Plaintiffs' Motion for Summary Judgment/Supplemental Motion for Summary Judgment. Presidential argued that the Act was facially unconstitutional. In so arguing, Presidential did not rely upon any affidavits. Rather, Presidential argued that as a matter of law, with the support of this Court's earlier opinion in Presidential Women's Ctr., 707 So. 2d 1145, and language contained within the Florida Supreme Court opinion of Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036 (Fla. 2001), summary judgment should be granted in the favor of Presidential because the Act violated Florida's constitutional right to privacy, as well as being unconstitutionally void for vagueness.

Specifically, Presidential argued that the State could not demonstrate that the Act served a compelling State interest as the Florida Supreme Court has recognized only two State interests as "compelling" in the abortion context, namely, the promotion of maternal health and the potentiality of life in a viable fetus. Presidential stressed that under Florida law, neither of these interests is compelling throughout the entire pregnancy, that the State's interest in safeguarding women's health becomes compelling only after the first trimester of pregnancy, and that the State's interest in potential life of the fetus becomes compelling only after the fetus becomes viable, which generally does not occur before the third trimester of pregnancy. However, Presidential noted that the Act by its terms does not limit itself to *any* particular stage of the pregnancy, but rather intruded upon a woman's right to obtain abortion at any stage. Additionally, Presidential argued that the State could not demonstrate that the Act served a compelling State interest through the least intrusive means in that the Act illogically restricted the categories of physicians authorized to provide informed consent information to an abortion patient and infringed upon a woman's ability to receive her physician's opinion as to what is best for her considering her circumstances. In addition, Presidential argued that the Act was unconstitutionally vague on its face in that the Act required a physician to satisfy a unique and confusing "reasonable patient" standard or risk licensure sanctions. Further,

Presidential argued that the Act is unconstitutionally vague on its face as the language contained in the Act is ambiguous as to whether the physician is required to inform the patient of non-medical risks associated with undergoing or not undergoing an abortion.

The Court, after having reviewed the memoranda submitted by all parties and after hearing extensive argument from all counsel, granted Plaintiffs' Motion for Summary Judgment/Supplemental Motion for Summary Judgment (R. 1854-1863). Thereafter, a Final Judgment was entered declaring Section 390.0111(3), Fla. Stat. unconstitutional and permanently enjoining the State from enforcing the Act. (R. 1897-1898). The State thereafter timely filed a Notice of Appeal with the Fourth District Court of Appeal. (R. 1962-1965).

On October 13, 2004, the Fourth District Court of Appeal entered its Opinion affirming the trial court's order granting summary judgment in favor of Presidential and North Florida Women's Health and Counseling Services, Inc. (NFWHCS). [1] State v. Presidential Women's Ctr., 884 So. 2d 526 (Fla. 4th DCA

[1]NFWHCS had joined in Presidential's Supplemental Motion for Summary Judgment. In addition, contrary to the State's Statement of the Case and Facts, original Co-Plaintiffs, the Birth Control Center and Feminists Women's Health Center did not file voluntary dismissals due to a their failure to "cooperate in discovery and reveal the nature of their consent practices," (Initial Brief of Appellants ["Appellants' Br."] at 9-10 n.4),but rather chose to dismiss their claims after their attorney had to withdraw from representing them due to having taken another position, and those two entities chose for whatever reason not to obtain new counsel.

2004) ("Presidential Women's Ctr. II") (Appendix 2). The Fourth District Court of Appeal in affirming the trial court's ruling specifically noted in response to the State's claim that a factual record was necessary, that even if the State could develop factual evidence in support of its positions, "as a matter of law, the Act is unconstitutional because on its face, it imposes significant obstacles and burdens upon the pregnant woman which improperly intrude upon the exercise of her choice between abortion and childbirth." Id., at 530.

The State claims in its Statement of the Case and Facts that in Presidential I, the Court anticipated the need for development of a factual record when the Court stated that the State had the burden on remand of demonstrating that the Act serves a compelling State interest and does so through the least intrusive means. (See Appellants' Br., p. 5-6). However the Court's statement was not made with respect to the establishing of a factual record, but rather, it was made, as the Court stated, because "[t]he State, in its initial brief, relies on the wrong standard of review arguing that the burden is on the one asserting unconstitutionality of a statute to demonstrate clearly that the statute is invalid." Presidential Women's Ctr., 707 So. 2d 1145, 1149. There is no question that in affirming the lower court's temporary injunction in Presidential I, the Fourth District based its opinion in part on the evidence presented. However, in reviewing the permanent injunction based upon the supplemental motion for summary judgment, the Fourth District Court of

Appeal understood that the case was in a different procedural posture, as the trial court's order had been decided as a matter of law on summary judgment. The Fourth District Court of Appeal specifically acknowledged that examination of evidence was not necessary as the Act was unconstitutional on its face. Presidential Women's Ctr., 884 So. 2d 526, 530.

In its Opinion, the Fourth District Court of Appeal went on to correctly apply the "strict scrutiny" standard as it pertained to whether the Act impermissibly infringed upon the State's constitutional right to privacy, and concluded that the Act ran "afoul of Florida law in several ways," adopting many of the findings set forth in the trial court's final order. Id., at 531-35. The Fourth District Court of Appeal in so doing expressly found that the Act infringed upon the State's constitutional right to privacy and was unconstitutionally vague. Id., at 531-35. The Court concluded by noting that the trial court's final order, "which relied heavily on our prior decision in Presidential Women's Center I, is legally correct" and affirmed the trial court's order. Id., at 535. It is from this Opinion that the State seeks review by the Florida Supreme Court.

Finally, it should be noted that the State raises the Fourth District Court of Appeal's granting of Presidential's motion for attorney's fees as an additional ground for error. This argument raised by the State and referenced within its Statement of the Case and Facts is improper in that it was the State itself which

chose not to have the attorney's fee ruling by the trial court made reviewable. The State did so when it moved to prevent the trial court from making the order final when the State sought a stay in determining the amount of attorney's fees to which Presidential would be awarded. By doing so, the Fourth District Court of Appeal could not weigh in on the merits of the trial court's ruling on entitlement and properly granted Presidential's motion for attorney's fees conditioned upon the trial court determining that Presidential was the prevailing party. The State has itself created the procedural quagmire that it is now in. The State's own conduct prevented the attorney's fee order from becoming final, thereby preventing review of same by the Fourth District Court of Appeal; therefore, the issue is not ripe and the State should not now be allowed to have this Court decide that matter on substantive grounds.

SUMMARY OF ARGUMENT

As the State concedes, existing Florida law already requires that physicians obtain full and adequate informed consent from their patients before providing medical services. In doing so, the physician must provide the patient with information sufficient for her to understand, *inter alia*, the risks associated with the contemplated medical procedure. That requirement has applied to physicians performing abortions and will continue to apply to those physicians, in the absence of the statute challenged in this case. The Act changes the informed consent

requirements for abortion providers, imposing unclear requirements that will interfere with women's ability to obtain abortion services.

The lower courts correctly concluded that the Act is facially unconstitutional due to its interference with fundamental privacy rights and its violation of due process by reason of vagueness. The Act interferes with physician-patient consultation, thus going beyond the constitutionally permissible bounds of an informed consent law in the abortion context. It does so by requiring that the physician inform the woman of standardized information geared to the interests of some hypothetical "reasonable patient," not tailored to the circumstances of that patient, and possibly confusing or inappropriate for that patient. Because the Act implicates and interferes with Florida's fundamental right to privacy, it is unconstitutional unless the State can establish that the Act furthers a compelling state interest by the least intrusive means. Based on this Court's precedent, the lower courts correctly concluded that the State could not, as a matter of law, satisfy that stringent strict scrutiny test here.

In addition, the Act is facially vague, thus violating the Due Process Clause of the Florida Constitution. Because the Act infringes upon constitutionally protected conduct and imposes quasi-criminal penalties on physicians, due process requires a high degree of clarity in the Act. However, the Act lacks such clarity, as is apparent when its language is compared to Florida's existing informed consent

law and basic principles of statutory construction are applied. Unlike Florida's existing informed consent law, and the informed consent laws of numerous other states, the Act requires the provision of information without reference to the "circumstances" or "position" of the individual patient. On its face, the Act changes the informed consent requirements for abortion providers from provision of information that is material based on the patient's circumstances, without any guidance on how to determine what information a hypothetical patient would consider "material." This Court must reject the State's request that it cure the Act's vagueness by reading into it words that the Legislature omitted. As the lower courts found, the Act is facially void for vagueness.

Additionally, all of the Defendants are proper parties to the action. Contrary to the State's assertions, it has already conceded that the Department of Health and the Board of Medicine are proper parties, and the State itself is proper in that Sovereign immunity does not exempt the State from a constitutional challenge. Further, the Attorney General is a proper party in that as both a matter of law and historically, the Attorney General may be named as party in a constitutional challenge, and it is usually the Attorney General's duty to uphold the constitutionality of an act of the legislature. Finally, it is improper for the State to argue the merits of the award of entitlement of attorney's fees to the Appellees. The State took steps in the trial court to ensure that the attorney's fee award could

not become final, thus preventing the award from being reviewed by the Fourth District Court of Appeal. Thus, any argument relating to the validity of the award is not properly before this Court, as the issue is not ripe.

ARGUMENT

I. STANDARD OF REVIEW

Presidential agrees that the rulings below are subject to *de novo* review by this Court and that if there are genuine issues of material fact, the matter must be decided by the factfinder. (See Appellants' Br. at 19.)

II. THE COURT OF APPEAL CORRECTLY HELD THAT THE ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES FLORIDA'S RIGHT TO PRIVACY.

A. The Act Implicates Florida's Fundamental Right to Privacy and Therefore Must Meet the Stringent Compelling State Interest Test.

The fact that the Act is an informed consent law does not insulate it from close scrutiny by this Court. (See Appellants' Br. at 21-24.) The State's argument to the contrary overstates the government's right to intrude into the abortion decision.

It is now well established that the Florida Constitution is more protective of the right to privacy than is the United States Constitution. See, e.g., N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 634-35 (Fla. 2003) ("NFWH&CS"); Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998); In re T.W., 551 So. 2d 1186, 1191-92 (1989); Winfield v. Div. of Pari-Mutuel

Wagering, 477 So. 2d 544, 548 (Fla. 1985). As this Court has pointed out numerous times, the Florida Constitution, unlike the United States Constitution, contains an explicit right to privacy, providing that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life . . . ." Art. I, § 23, Fla. Const.

This Court has recognized that this fundamental right of privacy encompasses personal decision-making as it relates to medical treatment generally, see, e.g., In re Dubreuil, 629 So. 2d 819, 822 (Fla. 1994); In re Guardianship of Browning, 568 So. 2d 4, 11-12 (Fla. 1990), and, in particular, encompasses a woman's legitimate expectation of privacy in making and effectuating a decision to terminate a pregnancy. See NFWH&CS, 866 So. 2d at 620-22; Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036, 1041 (Fla. 2001); In re T.W., 551 So. 2d at 1192-93. Under Florida's Constitution, "adult females have protected liberty and privacy interests to engage in independent private medical and surgical decision processes free from unwarranted governmental intrusion." NFWH&CS, 866 So. 2d at 661 (Lewis, J., concurring). As this Court has stated, "few decisions are more private and properly protected from government intrusion than a woman's decision whether to continue her pregnancy." NFWH&CS, 866 So. 2d at 632; accord, In re T.W., 551 So. 2d at 1192 ("We can conceive of few more personal or private decisions concerning one's body that one can make in the

course of a lifetime."). Because the Florida Constitution is so protective of the right to privacy, this Court models its analysis of abortion restrictions after the United States Supreme Court's approach in Roe v. Wade, 410 U.S. 113 (1973), and specifically rejected the "undue burden" analysis adopted by that Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).[2] See NFWH&CS, 866 So. 2d at 634-635; In re T.W., 551 So. 2d at 1193-94.

The State's argument that only statutes that "significantly" restrict a woman's fundamental reproductive choice trigger the strict scrutiny test (see Appellants' Br. at 24-25) is based on a selective and ultimately incorrect reading of this Court's precedents and seeks to lower the level of protection afforded this fundamental right by the Florida Constitution to the level of the less protected federal right. Although this Court spoke in terms of "significant restrictions" on the right to abortion in both NFWH&CS, 866 So. 2d at 631, and In re T.W., 551 So. 2d at 1193, it has very clearly stated that, "[u]nlike the federal Constitution, . . ., *the Florida Constitution requires a "compelling" state interest in all cases where the right to privacy is implicated*." In re T.W., 551 So. 2d at 1195 (emphasis added). In fact, as this Court has further noted, "Florida courts consistently have

[2] In Casey, the United States Supreme Court replaced the approach it adopted in Roe with the less restrictive "undue burden" test, under which courts examine whether a restriction on abortion places a "substantial obstacle" in the path of a woman seeking an abortion. See Casey, 505 U.S. at 846.

applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity." NFWH&CS, 866 So. 2d at 635 (footnotes omitted); see also id. at 635 n.53 (citing cases applying strict scrutiny and distinguishing cases in which that test was not applied because the right to privacy was not "implicated"); B.B. v. State, 659 So. 2d 256, 258-59 (Fla. 1995) ("Having determined that this statute does implicate B.B.'s right to privacy, the "stringent test" enunciated in Winfield must be applied to the statute."). Under that standard, the State must establish that the challenged restriction "furthers a compelling state interest" *and* that it does so "through the least intrusive means." In re T.W., 551 So. 2d at 1193. Where, as here, legislation intrudes on a fundamental right and triggers strict scrutiny review, it "is presumptively invalid." NFWH&CS, 866 So. 2d at 635; accord, id. at 647 ("Just as our obligation to exercise restraint when reviewing statutes is paramount under rational basis review, our obligation to protect fundamental rights is paramount under strict scrutiny") (Pariente, J., concurring).

The State also attacks a straw man of its own making when it claims that Presidential and the courts below have argued that the State may not constitutionally require informed consent in first trimester abortions. Neither Presidential nor the lower courts have taken that position. See, e.g., Presidential Women's Ctr. II, 884 So. 2d at 530 (stating that the State may constitutionally

"require[] that a woman give what is truly a voluntary and informed consent to a medical procedure.") (citing In re T.W., 551 So. 2d 1186, 1197 (1989) (Ehrlich, J., concurring)).[3] Informed consent – that is, informing a patient of the nature of the procedure, its alternatives, and its risks and hazards – is required throughout medical practice, whether by common law, statute, or medical ethics. As the United States Supreme Court recognized in Roe v. Wade, until the point at which state interests provide compelling justification for intervention,

> the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Roe, 410 U.S. at 165-66.

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[3] The State's innuendo that Plaintiffs have argued to the contrary is simply spurious and part of the State's tactic of distorting Plaintiffs' positions in this lawsuit and engaging in *ad hominem* attacks. (See, e.g., Appellants' Br. at 30, 33.)

Similarly, Amicus Curiae Christian Medical Association and Catholic Medical Association ("Amici") use their contention that Presidential lacks standing to assert the interests of its patients in this suit as a vehicle to attack the plaintiff abortion providers. (See Amici Br. at 2-6.) In doing so, Amici misstate Presidential's claims, ignore the real hindrances that women face in challenging abortion restrictions, and distort federal case law. Of course, under Florida law, Amici cannot properly raise this standing issue on appeal. Lack of standing is an affirmative defense that must be raised by a defendant before the trial court, and the failure to raise it generally results in waiver. See, e.g., Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 842 (Fla. 1993); Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, 814 n.2 (Fla. 1988); accord State v. Famiglietti, 817 So. 2d 901, 903 (Fla. 3d DCA 2002) (ruling that objection to asserted third party standing was waived because it was not raised in trial court).

Because this Court applies Roe's approach and not the Casey "undue burden" analysis, United States Supreme Court decisions issued after Roe and before Casey that applied strict scrutiny to informed consent regulations provide useful guidance to this Court.[4] As the United States Supreme Court explained, informed consent requirements imposed on first trimester abortions "may not interfere with physician-patient consultation *or* with the woman's choice between abortion and childbirth" and the State does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion." City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 430 & 443 (1983) ("Akron") (emphasis added), overruled in part by Casey, 505 U.S. at 881-83 (1992). Rather, "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, *depending on her particular circumstances*." 462 U.S. at 443 (emphasis added). Applying those principles, the Court found unconstitutional a provision that,

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Here, the State did not assert such a defense. (See R. 531-33) Accordingly, this Court should disregard Amici's third party standing argument.

[4] Under the less restrictive "undue burden" analysis adopted in Casey, federal courts have found some abortion restrictions constitutional which, under Roe, had been found unconstitutional. 505 U.S. 833. Because this Court does not apply that less protective standard to Florida's fundamental right to privacy, NFWH&CS, 866 So. 2d at 634, the analysis in Casey and later federal court cases does not apply here. And, for that reason, the original trial judge's quotation from Casey as to the standard for a "permissible" informed consent provision (quoted in Appellants' Br. at 22-23) must be disregarded.

among other failings, required the physician to provide information to his patient "regardless of whether in his judgment the information [was] relevant to her personal decision," while upholding a provision that required the physician to inform the patient of the risks "associated *with her own* pregnancy" and of "such other information which in his medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term." Id. at 444-46 (emphasis added). In Thornburgh v. American College of Obstetricians & Gynecologists, the Court held that informed consent provisions requiring physicians to provide information regardless of its appropriateness to their patients' circumstances and without regard to their judgment as to the information's relevance to their patients' decision-making failed strict scrutiny. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 762-64 (1986). In contrast, in Planned Parenthood of Central Mo. v. Danforth, the United States Supreme Court upheld a requirement that a woman certify in writing that she was consenting to the procedure and that her consent was "informed," "freely given," and "not the result of coercion." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 65-67 (1976), overruled in part by Casey, 505 U.S. at 881-83. In so ruling, the Court noted that its approval of that informed consent requirement hinged on the understanding that, in that context, "informed consent" meant only "the giving of information to the patient as to just what would be done

and as to its consequences." Id. at 67 n.8. The Court was careful to point out that "[t]o ascribe more meaning than this," and thus to require some additional information, "might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." Id.

Florida's existing informed consent law, § 766.103, Fla. Stat., which requires that a physician inform the patient of information related to her circumstances and allows the physician to get the patient's written consent, comports with what this Court in In re T.W. and the United States Supreme Court in Akron, Thornburgh, and Danforth considered constitutional in the abortion context. Under Florida's preexisting law, a physician must provide information such that

> [a] reasonable individual, . . ., under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians . . . in the same or similar community who perform similar treatments or procedures.

§ 766.103, Fla. Stat. (2005) ("Medical Consent Law"). Thus, it aligns with the type of informed consent law allowable under this Court's precedent and Akron, Thornburgh, and Danforth, in which the physician uses medical judgment and informs the patient of information that is medically relevant to that patient for her decision-making. That is why Presidential has not challenged that law's constitutionality.

In contrast, the Act at issue here requires exactly what the Akron line of cases forbade, that is, that the physician who is to perform the abortion or the referring physician inform the woman of information that is *not* specific to her circumstances. The Act specifies that, before a physician performs an abortion, that physician or a referring physician must inform the woman of "[t]he nature and risks of undergoing or not undergoing the proposed procedure that *a reasonable patient would consider material* to making a knowing and willful decision of whether to terminate a pregnancy." § 390.0111(3)(a)1.a, Fla. Stat. (2005) (emphasis added). Thus, all patients must be informed of what a hypothetical "reasonable patient" would consider material, without regard to the appropriateness of that information to the individual patient's circumstances and to the physician's medical judgment. In addition, standard printed materials developed by the State must at least be offered to every patient, irrespective of her reasons for seeking an abortion or her stage of pregnancy. Id., subsection (3)(a)2.c. At a minimum, those state-prepared materials must set forth a "description of the fetus;" a "list of agencies that offer alternatives to terminating the pregnancy;" and "detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care." Id.

Although the Act does not prevent the physician from providing additional information that he deems material to his individual patient, in each case he also

must provide the state-mandated information, even where it is not in the patient's best interests. See § 390.0111(3). As the United States Supreme Court noted in Thornburgh, requiring a physician to provide information "that well may be out of step with the needs of the particular woman . . . places the physician in an awkward position and infringes upon his or her professional responsibilities." Thornburgh, 476 U.S. at 763. The standardized information may be not only irrelevant or meaningless to the individual patient, but also conflicting and confusing to her, compared to information she receives that is tailored to her circumstances. Thus, receiving standardized information may be detrimental both to the physician-patient relationship and to the woman's ability to make her decision, without being so threatening to her life or health that the physician would have a defense for failure to comply with the Act. See § 390.0111(3)(c).

Accordingly, as the District Court of Appeal held, the law challenged here intrudes into the relationship between a physician performing an abortion and her patient. See Presidential Women's Ctr. II, 884 So. 2d at 532-33. With the Act, the State has interjected new requirements for the provision of abortions, which "'infringe[] on the woman's ability to receive her physician's opinion as to what is best for her, considering her circumstances.'" Id. at 533 (quoting Presidential Women's Ctr. I, 707 So. 2d at 1150. Those requirements go far beyond the requirements of informed consent that already apply under Florida law to

physicians performing abortions, to require information that is not appropriate to the individual patient and not necessarily in her interests. As this Court noted in contrasting the Medicaid funding restriction at issue in Renee B. v. Florida Agency for Health Care Administration with other abortion-related laws,

> "[i]n both [In re] T.W.[, 551 So. 2d 1186, 1192 (Fla. 1989,)] and [State v.] Presidential Women's Center, [707 So. 2d 1145 (Fla. 4th DCA 1998),] the government affirmatively imposed some barrier or obstacle between a woman and her physician in terms of making a decision as to whether to have an abortion."

Renee B., 790 So. 2d at 1040 (quoting trial court and adopting its reasoning). Therefore, as the District Court of Appeal ruled, the Act must satisfy the strict scrutiny test to be found valid.[5]

B. The District Court of Appeal Correctly Held that the State Cannot Demonstrate that the Act Furthers a Compelling State Interest.

As the State acknowledges, this Court has held that "because the State does not have a compelling interest in maternal health during the first trimester, it 'must leave the abortion decision to the woman and her doctor . . . .'" (Appellants' Br. at 21 [quoting In re T.W., 551 So. 2d at 1190].) As discussed above, the Act – unlike the Florida Medical Consent Law – does not do so. Rather than simply ensure that the woman's consent is "informed," the Act interferes with the physician-patient

[5] If this Court concludes that even greater interference with the right of privacy must be shown than is apparent from the face of the Act and that the Act is not vague, Plaintiffs' privacy claim would need to be remanded for trial.

relationship, in particular by requiring that the patient be told information that is not tailored to her circumstances. Moreover, by its terms, the Act is not limited to a particular stage of pregnancy; rather, it intrudes upon a woman's right to obtain an abortion at any stage. Thus, the State could not possibly justify the Act based on the two state interests that this Court has recognized as "compelling" in the abortion context: the State's interest in promotion of maternal health, which is only "compelling" after the first trimester, and the State's interest in the potential life of the fetus, which is only "compelling" after the fetus becomes viable, which generally does not occur before the third trimester of pregnancy. See 551 So. 2d at 1193-94. Accordingly, the District Court of Appeal correctly held that, as a matter of law, the Act does not serve a compelling state interest.

C. The District Court of Appeal Correctly Held that the State Cannot Demonstrate that the Act Furthers a Compelling State Interest by the Least Intrusive Means.

The District Court also correctly concluded that even if the State could establish that the Act furthers a compelling state interest, it could not establish that it does so by the least intrusive means. Presidential Women's Ctr. II, 884 So. 2d at 532-33. Such a showing is thwarted by the very language of the statute, which: (1) infringes on a woman's ability "'to receive her physician's opinion as to what is best for her, considering her circumstances;'" and (2) illogically restricts the

categories of physicians authorized to provide informed consent information to an abortion patient. Id. (quoting and adopting trial court findings).

First, as discussed above, the Act standardizes the information that must be provided to an abortion patient, without regard to the individual patient's circumstances, and thus interferes with the physician-patient relationship and with the patient's ability to obtain relevant, unconfusing information from the physician. See id. The goal of educating a patient about the risks of a particular procedure is more properly achieved by having the Medical Consent Law continue to govern the standard for obtaining of informed consent for abortions. As the State itself acknowledges, its interest in ensuring that abortion patients provide informed consent before abortions are performed is furthered by the Medical Consent Law.[6] (See Appellants' Br. at 31-32.) That law, which is understood by Florida's physicians and does not single out the provision of abortion for special burdens, is a less intrusive means of serving the State's interests.

Second, "allow[ing] only the physician performing the abortion, or a referral physician, to give the woman the information she needs to make a decision," §

[6]The State's assertion that Presidential was not complying with Florida's Medical Consent Law is a red herring. (See, e.g., Appellants' Br. at 33.) Even if that were true, it would neither justify replacing that law with the Act nor illuminate whether the Act is constitutional.

390.0111(3)(a)1., is not the least intrusive means of serving an interest in the woman's health. As the District Court of Appeal explained, the Act

> "allows a referring physician, who may be a pediatrician or an orthopedic surgeon, and who may have no training or experience in the field, to provide the information, but prohibits a board certified obstetrician/gynecologist who works with the physician performing the abortion from [doing so]."

Presidential Women's Ctr. II, 884 So. 2d at 533 (quoting and adopting trial court findings). Thus, the Act restricts the categories of physicians allowed to give the required information such that well-qualified physicians -- such as those who work at an abortion clinic, but are not performing the procedure on the particular woman -- are precluded from satisfying the statute's mandates. At the same time, on its face, it is satisfied if a referring physician provides the information, irrespective of the qualifications of that person. Thus, the mandate as to which physician must provide information to the patient is unrelated to who knows the patient's specific circumstances or who knows about abortion risks, and therefore as a matter of law cannot be the "least intrusive means" of satisfying an interest in the patient's health.

The State argues that the strict scrutiny test does not apply because this restriction of the categories of physicians who can provide the required information does not "significantly restrict" the patient's decision. (See Appellants' Br. at 25-28.) But as Presidential has shown above, this is not the standard that triggers

application of strict scrutiny. Rather, the physician restriction, like the limitation on physician discretion, triggers strict scrutiny because it implicates the right to privacy, for the reasons discussed above. See Section II.A, supra.

Similarly, because Presidential need not show that this restriction "significantly restricts" the woman's decision, the State's contention that there must be evidence in the record showing the effects of this restriction on women seeking abortions is simply wrong. (See Appellants' Br. at 26-27.) That is why the lower courts were correct in resolving the issue of the Act's facial unconstitutionality without reference to the affidavits submitted by the State.[7]

The facial validity of a statute that implicates Florida's right to privacy can be, and has been, determined without reference to facts regarding its application. See, e.g., Richardson v. Richardson, 769 So. 2d 1036 (Fla. 2000) (resolving

[7] The State's proferred affidavits were "unrebutted" (Appellants' Br. at 14, 26) because Presidential sought summary judgment as a matter of law and the irrelevant facts put forth by the State did not raise genuine issues of material fact. Accordingly, Presidential did not submit evidence to rebut the State's irrelevant affidavits. Moreover, the State inaccurately characterized the affidavits. (Compare Appellants' Br. at 27 & 27 n.9 (stating that Board of Medicine allows only the operating surgeon to explain the procedure and obtain informed consent) with Appellants' Br., App. I (stating Department of Health's understanding that, under referenced statutes and Board rules, "the generally accepted standard of practice" for informed consent for surgery in Florida is for the "operating surgeon, *or equivalently trained doctor of medicine or osteopathy*, or [certain] surgical resident[s] or fellow[s]" to discuss the risks and benefits of surgery with the patient.") (emphasis added).) The Act, in contrast, does not allow "equivalently trained" physicians to provide the information.

constitutionality of custody statute without reliance on factual record); In re T.W., 551 So. 2d 1186 (Fla. 1989) (resolving constitutionality of parental consent for abortion statute without reliance on factual record); Dep't of Revenue v. Fla. Home Builders Ass'n, 564 So. 2d 173, 175 (Fla. 1st DCA 1990) (ruling that facts regarding appellee's specific contracts, while perhaps relevant to a contention that law was unconstitutional *as applied*, were unnecessary to a determination of *facial* constitutionality).[8] This Court did not hold to the contrary in NFWH&CS, but rather simply noted that in some cases it is "preferable" to have a factual record developed by the trial court and that, where there are mixed questions of fact and law, the trial court's factual findings, unlike its legal conclusions, are not subject to *de novo* review. See NFWH&CS, 866 So. 2d at 626 (quoted in Appellants' Br. at 26 n.8). This Court has not laid down a blanket rule that all questions concerning the facial constitutionality of a statute require a factual record.[9] Here, where the

[8] Although in both Richardson and In re T.W. there were factual records from a custody trial and bypass hearing, respectively, this Court evaluated the constitutionality of the challenged statutes without consideration of those facts. See Richardson, 766 So. 2d at 1038-40; In re T.W., 551 So. 2d at 1190-201.

[9] For example, in Bush v. Holmes (cited in Appellants' Br. at 26 n.8), the court ruled that the constitutionality of the challenged statute could be determined as a matter of law as to one claim, based on the language of the statute and the applicable constitutional provision; however, other claims as to its constitutionality constituted mixed questions of law and fact and therefore required remand to the trial court for resolution. Bush v. Holmes, 767 So. 2d 668, 673-77 (Fla. 1st DCA 2000).

unconstitutionality of the Act can be determined purely as a matter of law, no factual record was needed.

III. THE DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE ACT IS UNCONSTITUTIONALLY VAGUE.

The District Court of Appeal correctly held that the Act was unconstitutionally vague. In an attempt to save the Act from its vagueness, both the State and Amicus Curiae Christian Medical Association and Catholic Medical Association ("Amici") alternately ignore and mischaracterize Florida's existing Medical Consent Law and re-write the Act. Their arguments must be rejected.

A. Due Process Requires Certainty of Application in Laws That, Like the Act, Implicate Constitutionally Protected Conduct and Are Penal in Nature.

It is "an essential element of due process of law" under Article I, section 9 of the Florida Constitution that statutes "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." Aztec Motel, Inc. v. State, 251 So. 2d 849, 854 (Fla. 1971). The same analytical principles are applied in analyzing vagueness claims under the Florida and United States Constitutions. See, e.g., State v. DeLeo, 356 So. 2d 306, 307-08 (Fla. 1978) (applying same analysis to find statute unconstitutionally vague under both constitutions); D'Alemberte v. Anderson, 349 So. 164, 166-67 (Fla. 1977) (same).

A statute is void for vagueness "if [its] language does not convey sufficiently definite warnings of the proscribed conduct when measured by

common understanding and practice." D'Alemberte, 349 So. 2d at 166; accord, e.g., State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980). A statute which fails to provide such certainty, or whose terms encourage arbitrary and discriminatory enforcement, is unconstitutionally vague. State v. Mark Marks, P.A., 698 So. 2d 533, 537-39 (Fla. 1997); accord Kolender v. Lawson, 461 U.S. 352, 357 (1983) (same, under United States Constitution); Colautti v. Franklin, 439 U.S. 379, 390 (1979) (same). As this Court has stated, "[n]o matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards must appear expressly in the law or be within the realm of reasonable inference from the language of the law." Aztec Motel, 251 So. 2d at 854.

Lack of clarity is of particular concern in statutes that threaten to inhibit the exercise of constitutionally protected rights. See, e.g., Wyche v. State, 619 So. 2d 231, 234 (Fla. 1993) (law restricting "fundamental and basic rights . . . must be drawn as narrowly as possible"); Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498-99 (1982); Colautti, 439 U.S. at 391. Furthermore, statutes that pose the risk of license sanctions or loss of license are considered penal in nature, and therefore must be strictly construed in determining whether they violate the Due Process Clause of the Florida Constitution. See, e.g., Whitaker v. Dep't of Ins. & Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996) (finding statutes that provided basis for suspension or revocation of insurance license unconstitutionally vague);

cf. D'Alemberte, 349 So. 2d at 168 (non-criminal penalties such as impeachment, suspension, or removal from office are significant and substantial); see also Village of Hoffman Estates, 455 U.S. at 499 (holding that statutes that are "quasi-criminal" in nature -- such as those that impose licensure penalties -- warrant a relatively strict test, due to their prohibitory and stigmatizing effect); Women's Med. Ctr. of NW Houston v. Bell, 248 F.3d 411, 422 (5th Cir. 2001) (same).

As discussed above, the Act implicates a fundamental constitutional right. See Section II.A. Moreover, violation of the Act is grounds for disciplinary action against the physician under Sections 458.331 and 459.015 of Florida Statutes. See § 390.0111(3)(c). Such disciplinary action may include, *inter alia*, suspension or permanent revocation of a physician's license to practice medicine, restriction of the physician's practice, and fines. § 456.072(2), Fla. Stat. (2005) Therefore, the Act must be strictly construed in determining whether it violates the Florida Constitution's Due Process Clause.

By requiring a physician to guess how to comply with the Act, at the risk of licensure penalties if he or she guesses incorrectly, the Act violates the Due Process Clause of the Florida Constitution as a matter of law.

B. The District Court of Appeal Correctly Found That the Act's Informed Consent Standard is Vague.

A statute is vague when the meaning of statutory terms cannot be ascertained from the statute itself, other statutes, or by considering common

understanding and practice. See, e.g., Mark Marks, 698 So. 2d at 537 (concluding that statute penalizing attorneys for providing "incomplete" information regarding client's insurance claims was vague); Cuda v. State, 639 So. 2d 22, 23-24 (Fla. 1994) (striking down as vague statute that used terms "improper or illegal"). Here, the Act fails to provide guidance, conflicts confusingly with the informed consent law with which Florida physicians have had to comply for years, and is contrary to those physicians' understanding and practice.

1. The Act Imposes a Vague Standard Based on a Hypothetical Patient, Divorced From Consideration of the Patient's Circumstances.

In the absence of the Act, all physicians in Florida, including those performing abortions, have had to comply with the Florida Medical Consent Law, § 766.103(3), Fla. Stat. (2005). That law sets forth how Florida physicians must obtain valid informed consent, to wit:

> *The action of the physician* . . . in obtaining the consent of the patient . . . *was in accordance with an accepted standard of medical practice* among members of the medical profession with similar training and experience in the same or similar medical community; *and*
>
> *A reasonable individual*, from the information provided by the physician . . . *under the circumstances, would have a general understanding* of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians . . . in the same or similar community who perform similar treatments or procedures.

§ 766.103(3)(a), Fla. Stat. (2005) (emphasis added).

Therefore, under Florida's existing informed consent law, the physician *both* must act in accordance with accepted medical standards *and* provide the information that a reasonable person in the patient's circumstances would need in order to understand the procedure, its risks, and alternatives.[10] Id. Although looking to medical community standards for identification of, *inter alia*, possible outcomes of a procedure, the Medical Consent Law also recognizes the "personal autonomy of patients" and is "concerned that the patient be the person who decides on the medical procedure." Gouveia v. Phillips, 823 So. 2d 215, 228 (Fla. 4th DCA 2002) (cited in Appellants' Br. at 32-33); see also Gassman v. U.S., 589 F. Supp. 1534, 1545 (M.D. Fla. 1984) (holding that Florida medical providers have both of the following duties: "(1) that the consent be obtained in accordance with an accepted standard within the medical community, and (2) that a reasonable person under the circumstances would have a general understanding of the treatment and the risks and dangers involved.") (internal citations omitted), aff'd, 768 F.2d 1263 (11th Cir. 1985). Therefore, by discussing the Act as if it replaces an existing "medical community standard" for informed consent with a

[10] While acknowledging physicians' obligation under the Medical Consent Law to inform their patients of relevant risks, the State inexplicably argues that the lower courts believed that physicians could avoid mentioning medical risks. (See Appellants' Br. at 30-33.) The lower courts did not make that error. See Presidential Women's Ctr. II, 884 So. 2d at 533-34; Appellants' Br., App. J at p. 6 ¶ 20 & p. 8 ¶¶ 28, 30.

"reasonable patient standard," the State and Amici distort Florida's existing informed consent law. (See Appellants' Br. at 33-35; Amicus Curiae Brief by Liberty Counsel ["Amici Br."] at 6-16.)

The Act imposes a different informed consent requirement on one group of physicians: those performing abortions. In contrast to Florida's Medical Consent Law, the Act does not refer to the patient's circumstances or to standards of the medical community. Rather, it imposes a new requirement: physicians performing abortions -- unlike other physicians -- must provide information that a "reasonable patient would consider material." Specifically, the statute provides that, before a physician performs an abortion, that physician or a referring physician must inform the woman of "[t]he nature and risks of undergoing or not undergoing the proposed procedure that *a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy*." § 390.0111(3)(a)1.a (emphasis added). Thus, as the District Court of Appeal noted, "'[t]he language of [the Act] requires that a physician provide information targeted to some hypothetical 'reasonable patient' rather than the patient who is actually in front of him or her, without any guidance on how to do so.'" Presidential Women's Ctr. II, 884 So. 2d at 534 (quoting and adopting trial court findings).

Nonsensically, the State responds to the clear differences between the Act and the Medical Consent Law by claiming that the phrases "a reasonable patient"

and "a reasonable individual *under the circumstances*" mean the same thing. (See Appellants' Br. at 34 [claiming that the Act "requires that physicians tell the patient of the risks and alternatives that a reasonable person in the patient's position would want to know"], 37 [asserting that adding the words "in the patient's circumstances" to the Act would be "conceptually redundant"].) But under well-established principles of statutory construction, courts may not read into the Act words that are not there or ignore the differences in language between the two laws. See, e.g., Seagrave v. State, 802 So. 2d 281, 287 (Fla. 2001) (observing that "courts 'are not at liberty to add words to statutes that were not placed there by the Legislature'") (internal citation omitted); State v. Byars, 804 So. 2d 336, 338 (Fla. 4th DCA 2001) (observing that "[i]n construing a statute, courts must follow what the legislature has written and neither add, subtract, nor distort the words written"); cf. Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004) (noting that a court may not place a saving construction on a statute that "effectively rewrite[s] the statute").

Moreover, the State's argument ignores that not all abortion patients are alike and the information that would be material to their decision-making is not identical. As the trial court noted, the information that would be material to, for example, "a 14-year old rape victim who is pregnant" is likely to be different from the information that would be material to "a mature woman who could have a

variety of reasons for seeking an abortion." (Appellants' Br., App. J at 7 ¶ 27.) Of course, both women need to be informed of the risks of the abortion procedure, but the specific information that a reasonable patient in those two very different circumstances would find material cannot be expected to be identical. Yet, the Act requires that the same information be provided to all abortion patients, without regard to their individual circumstances. See § 390.0111(3).

The most "logical construction" of the Act is not one that impermissibly re-writes it by adding words the Legislature included in the earlier informed consent statute -- and therefore must be presumed to be aware of -- but specifically omitted in the Act. (See Appellants' Br. at 37-38.) Rather, the logical construction is that the Legislature has changed the informed consent standard for abortion providers: eliminating from the required information any consideration of the individual patient's circumstances, yet providing no guidance as to what information would be material to a patient if her specific circumstances were disregarded.

The lack of guidance in the Act is especially troubling in the context of the politically controversial provision of abortion services. Without more specificity, enforcement of the Act could be manipulated to further the political, social or moral agenda of those charged with enforcing the statute. See, e.g., Colautti, 439 U.S. at 390-94 (finding that vague abortion law presents "serious problems of notice, discriminatory application, and chilling effect on the exercise of

constitutional rights"). A physician's opportunity to engage in his or her chosen profession should not be subject to such uncertainties and vagaries.

2. The Informed Consent Standard Imposed by the Act Differs From That Imposed by Other States' Informed Consent Laws.

Not only have the State and Amici attempted to ignore the central and significant differences between the Act and Florida's existing informed consent statute, but they have done the same with regard to informed consent standards of numerous other states. (See Appellants' Br. at 33-39; Amici Br. at 7-18.) Strikingly, the State and Amici suggest that the Act and the informed consent standards of other states apply the same "reasonable patient standard." But examination of those other states' standards shows that characterization to be incorrect. In fact, those informed consent standards are actually much closer to the "reasonable individual under the circumstances" formulation of Florida's Medical Consent Law, allowing the same "tailoring" of information.

As the State discusses at page 34-35 of its Brief, many states require that physicians tell their patients what "a reasonable person *in the patient's position* would want to know." Appellants' Br. at 34 (emphasis added). For example, in Canterbury v. Spence, the court ruled that information about risks must be disclosed if "a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to [that

information]" in making the decision whether to have the medical treatment. Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972) (internal quotation omitted) (cited in Appellants' Br. at 35; see also Amici's Br. at 8, 16-17 (discussing Canterbury as the forerunner of the trend towards adopting a "reasonable patient standard" for informed consent)). This is what Florida's Medical Consent Law -- and not the Act -- requires. [11] Yet, in asserting that the "reasonable patient" formulation in the Act is identical to that adopted in numerous other states, both the State and Amici cite to states which require a physician to disclose information about medical risks and alternative procedures that a reasonable person, in the patient's "position," "situation," or "condition," would consider significant -- formulations not present in the Act. Compare Appellants' Br. at 34-35, 37, and Amici Br. at 10-17 with Korman v. Mallin, 858 P.2d 1145, 1149 (Alaska 1993); Arato v. Avedon, 858 P.2d 598, 607 (Cal. 1993); Hammer v. Mount Sinai Hosp., 596 A.2d 1318, 1324 (Conn. App. Ct. 1991); Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972); Pauscher v. Iowa Methodist Med. Ctr., 408 N.W.2d 355, 361-62 (Iowa 1987); Brandt v. Engle, 791 So. 2d 614, 619 (La. 2001); Sard v. Hardy, 379 A.2d 1014, 1022 (Md. 1977); Harnish v. Children's

[11] Moreover, under the Canterbury decision, the information that needs to be disclosed -- "the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains

Hosp. Med. Ctr., 439 N.E.2d 240, 243 (Mass. 1982); Russell v. Johnson, 608 N.W.2d 895, 898 (Minn. App. Ct. 1981); Howard v. Univ. of Med. & Dentistry of N.J., 800 A.2d 73, 79 (N.J. 2002); Nickell v. Gonzalez, 477 N.E.2d 1145, 1148-49 (Ohio 1985); Gouse v. Cassel, 615 A.2d 331, 333 (Pa. 1992); Lauro v. Knowles, 739 A.2d 1183, 1186-87 (R.I. 1999); Wheeldon v. Madison, 374 N.W.2d 367, 375 (S.D. 1985); Wash. Rev. Code § 7.70.050(2) (West 2005); Backlund v. Univ. of Wash., 975 P.2d 950, 956 n.3 (Wash. 1999); Cross v. Trapp, 294 S.E.2d 446, 454-56 (W. Va. 1982); Johnson v. Kokemoor, 545 N.W.2d 495, 502-05 (Wis. 1996). Cf. Carr v. Strode, 904 P.2d 489, 495-99 (Hawaii 1995) (adopting approach in Canterbury v. Spence, 464 F.2d 772, and quoting Canterbury's "patient's position" language); but see Kan. Stat. Ann. § 65-6709 (West 2005) (abortion-specific statute omitting reference to patients' position or circumstances); La. Rev. Stat. § 40:1299.35.6 (West 2005) (same); 18 Pa. Cons. Stat. § 3205 (West 2005) (same). Thus, the State's and Amici's contention that the Act sets forth a standard that is well accepted and understood among physicians in numerous other states is simply wrong.

Nor does the fact that a "reasonable person" standard is used in other contexts, such as the crimes of assault and aggravated stalking, say anything about its use in the context of medical informed consent. In those criminal contexts, use

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untreated," Canterbury, 464 F.2d at 787-88 -- matches that specified in Florida's

of the "reasonable person" standard means that a criminal defendant will not be convicted for "entirely innocent social contact" that causes distress to "an unduly sensitive victim." Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995); accord Pallas v. State, 636 So. 2d 1358, 1361 (Fla. 3d DCA 1994), aff'd, 654 So. 2d 127 (Fla. 1995) (cited in Appellants' Br. at 36). As this Court has noted, criminal statutes "which impose a 'reasonable person' standard upon the citizenry" require them to conform their conduct to the "norms of the community." L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997). In contrast, here replacement of the focus on a "reasonable individual under the circumstances" with a focus on simply a "reasonable patient" will require a physician to provide information to his or her patient that is not geared to that patient's circumstances. Moreover, the Act requires physicians performing abortions to conform their conduct to an informed consent standard different from that applicable to the rest of the medical community and applicable to them when they perform medical services other than abortions.

As this Court has observed, "[t]he decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." In re T.W., 551 So. 2d at 1193. Under the Medical Consent Law, abortion providers have been required to provide information on the medical aspects of abortion that take into account the

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Medical Consent Law, § 766.103, Fla. Stat. (2005).

circumstances of the individual patient. By replacing that standard with one focused on a hypothetical "reasonable patient," the Act leaves Presidential and other medical care providers without guidance as to what information they must give to their patients.

C. The District Court of Appeal Correctly Found That the Act is Also Vague Because it Fails to Inform Physicians With Sufficient Certainty Whether They Must Inform Their Patients of Non-Medical Risks.

As the District Court of Appeal concluded, the Act is also vague because "[i]t is unclear whether the physician is required to inform the patient of the non-medical risks associated with undergoing or not undergoing an abortion." Presidential Women's Ctr. II, 884 So. 2d at 534. This lack of clarity is apparent from the language of the Act itself.

The statutory construction principle *expressio unius est exclusio* holds that the mention of one thing implies the exclusion of another. See, e.g., Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (explaining that "where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned"); Moonlit Waters Apartments v. Cauley, 651 So. 2d 1269, 1270-71 (Fla. 4th DCA 1995) (observing that legislature's omission of specific term from provision in question was governed by statutory construction maxim *expressio unius est exclusio alterius* and therefore failure to add specific term was intentional), aff'd,

666 So. 2d 898 (Fla. 1996). Moreover, "'the legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.'" Mark Marks, 698 So. 2d at 541 (internal citation omitted); accord, e.g., Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995) (stating that "[w]hen the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.").

Subsection (3)(a)1.c of the Act requires the physician to inform the patient of "the *medical risks* to the woman and fetus of carrying the pregnancy to term." § 390.0111(3)(a)1.c (emphasis added). Thus, based on the maxim *expressio unius est exclusio alterius*, subsection (3)(a)1.c requires *only* the provision of information about *medical risks*.

In contrast, subsection (3)(a)1.a provides that a physician must inform the patient of "[t]he nature and *risks* of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy." § 390.0111(3)(a)1.a (emphasis added). The plain language of *this* subsection indicates that the required information is not limited to "medical" risks. Yet the Act "provides no guidance as to what types of non-medical risks a physician must disclose nor on how to determine which economic, social, emotional or other risks associated with

childbirth or terminating a pregnancy would be 'material' to a 'reasonable patient.'" Presidential Women's Ctr. II, 884 So. 2d at 534 (quoting and adopting trial court findings).[12]

The State's response is, in essence, that the wording of the Act does not matter: the word "medical" must be read in wherever the Legislature left it out, because the Act "is a medical consent statute" and "[t]hose governed by it are trained physicians." (See Appellants' Br. at 39-40.) However, that argument impermissibly asks this Court to re-write what the Legislature wrote. See, e.g., State v. Bodden, 877 So. 2d 680, 686 (Fla. 2004) (holding that, where statute used phrases "an approved chemical test" and "a urine test," Court could not apply the modifier "approved" to the latter, by inserting it between "a" and "urine"). Moreover, that re-writing also asks this Court to ignore the clear indications that the Legislature intended that abortion patients be provided with information about non-medical matters. That intention is apparent not only from the omission of "medical" in the phrase "nature and risks," § 390.0111(3)1.a, but also from the

[12] It is beyond dispute that women consider matters in addition to medical issues in deciding whether to terminate a pregnancy or carry it to term. See, e.g., Appellants' Br. at 23 (quoting In re T.W., 551 So. 2d at 1193, referring to "economic implications"); Casey, 505 U.S. at 872 (referring to social and philosophical considerations); American Acad. of Pediatrics v. Lungren, 940 P.2d 797, 813 (Cal. 1997) (observing that decision may have implications for a woman's moral, religious, and philosophical concerns, as well as educational and economic implications).

Act's requirement that the physician offer the patient written materials containing, *inter alia*, "[d]etailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care."[13] § 390.0111(3)(a)2.

The logical reading of subsection (3)1.a is that it requires the provision of information about *both* medical and non-medical risks, in contrast to subsection (3)(a)1.c, which only requires information about medical risks. Yet just what non-medical information will suffice to satisfy the statute is totally unclear. Similarly, in Karlin v. Foust, the only reported decision addressing a vagueness challenge to language like that used in the Act, the court found the statutory language "[a]ny other information that a reasonable patient would consider material and relevant to a decision of whether or not to carry a child to birth or to undergo an abortion" vague under the United States Constitution. Karlin v. Foust, 975 F. Supp. 1177, 1227-28 (W.D. Wis. 1997), aff'd in part and rev'd in part on other grounds, 188 F.3d 446 (7th Cir. 1999). In finding that section unconstitutionally vague, the federal district court stated:

> There is no way physicians will be able to know whether they have complied with this section. The provision requires physicians to divine what "reasonable patients" would want to know in this situation, a task that entails substantial guesswork at the pain of heavy penalties if the guess is wrong.

[13] This Court may look to other sections of the Act to discern legislative intent. See, e.g., Bodden, 877 So. 2d at 687.

Id. at 1228.[14] Here, also, physicians performing abortions will have to guess at what information about non-medical risks a "reasonable patient" would want to know, in order to comply with the Act and avoid licensure penalties.

In this way also, the Act leaves abortion providers uncertain how to ensure that they provide all the information that a hypothetical "reasonable patient" would consider material.

IV. ALL OF THE DEFENDANTS ARE PROPER PARTIES TO THE ACTION AND ANY ARGUMENT DIRECTED TO THE PROPRIETY OF THE TRIAL COURT AWARDING PLAINTIFFS ATTORNEY'S FEES IS IMPROPER.

The State has now claimed before this Court, without raising the argument in the Fourth District Court of Appeal, that the State of Florida, the Department of Health, The Board of Medicine and the Attorney General should have been dismissed from the action as they are not "persons" under 42 U.S.C. §1983. That argument should be rejected for at least four reasons.

First, in so arguing, the State is incredulously attempting to argue the merits of the trial court order awarding Presidential attorney's fees, when the State's own actions have prevented such an Order from becoming reviewable at this time. On

[14] Like the situation here, in Wisconsin -- absent the statute challenged in Karlin -- "what a physician must disclose is contingent upon what, *under the circumstances of a given case, a reasonable person in the patient's position* would need to know in order to make an intelligent and informed decision." Johnson, 545 N.W.2d at 504-05 (emphasis added).

January 27, 2003, the trial court entered its Order Granting Plaintiffs' Amended Motion for Entitlement to Attorney's Fees and Costs. Thereafter, in response to Plaintiffs' attempt to schedule a hearing on the amount of attorney's fees (which would then make the attorney's fee award order final and subject to appellate review), the State, on February 3, 2003, filed its Motion to Stay Determination of Attorney Fee Award Pending Outcome of Case on Appeal ("Motion to Stay")(See Appendix 3). The State argued in that Motion that, "[t]his January 27, 2003, determination is one of first impression in Florida and will be timely appealed when a final appealable order is rendered." (Motion to Stay, page 3). The State went even further, stating: "[m]oreover, following any final order determining the amount of fees - subject to dispositive result of the pending appeal from either the Fourth District Court of Appeal or the Florida Supreme Court - Defendants would necessarily notice an appeal of such attorney fee award with concurrent application of the automatic stay of that fee order pursuant to Rule 9.310(b)(2) Fl.R.Ap.Pr. " (Motion to Stay, pages 6-7) (emphasis added). The trial court granted the State's Motion and therefore to date, no final order regarding attorney's fees has been entered, nor has any notice of appeal of the attorney fee award been filed.[15] Thus,

[15] It should also be noted that following the Fourth District Court of Appeal's ruling, Plaintiffs renewed their motion for the trial court to determine the amount of attorney's fees in an attempt to have a final order entered subject to review. However, once again, the Plaintiffs were rebuked by the State: the State

despite the State being the party which prevented a final attorney's fee order from being final and subject to review, and despite its own representations made within its motions to the trial court that any review of any attorney fee order should come only after this Court's review of the underlying matter, the State now improperly attempts to have this Court review the merits of the trial court's non-final attorney's fee award.

Second, this new argument ignores the fact that Presidential brought other claims, in addition to any brought under 42 U.S.C. §1983, including claims alleging a violation of state constitutional rights, specifically the fundamental right to privacy afforded under the State Constitution and due process rights under that constitution. Third, each of these defendants is properly in this case. The State has already conceded that the Department of Health and the Board of Medicine are proper parties, having argued to the Fourth District Court of Appeal that "[t]he only necessary and proper parties to this suit are the Department [of Health] and the Board [of Medicine]. . ." (See, Appellants' Reply Brief filed with the Fourth District Court of Appeal, p. 19). The State is a proper party in that "Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will." Dep't of Revenue v. Kuhlein,

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renewed its motion for stay pending the outcome of the subject appeal before this

646 So. 2d 717, 721 (Fla. 1994).

Additionally, with respect to the Attorney General, he too is a proper party in the action in his official capacity, and therefore is properly named within the injunction order. It is uncontroverted that the Attorney General may be a party in an action in which the constitutionality of a statute is raised. See State ex rel. Chevin v. Kerwin, 279 So. 2d 836, 838 (Fla. 1973). Historically, the Attorney General of Florida has embraced defending the constitutionality of Florida statutes as part of his job as "chief state legal officer." For example, as the 1951 Biennial Report of the Attorney General stated, "[t]his office does not ordinarily pass upon the constitutionality of a statute. Indeed, it is usually the duty of the office to uphold the constitutionality of an act of the Legislature where it is questioned." 1951 Op. Atty. Gen. 051-414, 532, 535. In addition, as the Attorney General *may* intervene in a case challenging the constitutionality of a Florida Statute, this demonstrates that he clearly may be a party to any constitutional challenge of a state statute. See, e.g., Miami Health Studios, Inc. v. City of Miami, 491 F.2d 98, 100 (5th Cir. 1974). Thus, the Attorney General is clearly a proper party.

Finally, although the argument is not properly before the Court, out of an abundance of caution, it should be noted that as stated by the trial court, a state official acting in his or her official capacity, when sued for injunctive relief is a

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Court, which motion was granted by the trial court.

"person" under §1983 because official capacity actions for prospective relief are not treated as actions against the state. See Kentucky v. Graham, 473 U.S. 159 (1985). Further, attorney's fees under §1988 may be awarded under actions seeking prospective relief against the State, as an award of attorney's fees is ancillary to the prospective relief. See Missouri v. Jenkins, 491 U.S. 274 (1989).

Additionally, in actions brought against state officials, the §1983 requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment to the United States Constitution are identical. See, Lugar v. Edmundson Oil Company, Inc., 457 U.S. 922, 932 (1982). Conduct constituting state action that violates the Fourteenth Amendment also constitutes action under color of state law. See Lugar, 457 U.S. at 935. Presidential's claim that the Act is unconstitutionally vague properly raised a due process claim under the Fourteenth Amendment, and therefore also a §1983 claim. Accordingly, the Defendants were proper parties.

CONCLUSION

For all the reasons set forth above and in the amici briefs filed in support of Plaintiffs-Appellees' positions, this Court should affirm the District Court of Appeals decision, affirming the grant of summary judgment to Plaintiffs-Appellees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of March, 2005, a copy of the foregoing has been furnished by U.S. Mail to the following:

CHARLES J. CRIST, JR.
Attorney General
Office of the Attorney General
PL-01-The Capitol
Tallahassee, FL 32399-1050

JOHN J. RIMES, III
Senior Assistant Attorney General
Office of the Attorney General
PL-01-The Capitol
Tallahassee, FL 32399-1050

JAMES A. PETERS
Special Counsel
Office of the Attorney General
PL-01-The Capitol
Tallahassee, FL 32399-1050

CHRISTOPHER M. KISE
Solicitor General
Office of the Attorney General
PL-01-The Capitol
Tallahassee, FL 32399-1050

LOUIS F. HUBENER
Chief Deputy Solicitor General
Office of the Attorney General
PL-01-The Capitol
Tallahassee, FL 32399-1050

BARRY SILVER
1200 S. Rogers Circle, Suite 8
Boca Raton, FL 33487

TERESA STANTON COLLETT
Professor of Law
University of St. Thomas School of Law
TMH, Suite 440
1000 LaSalle Avenue
Minneapolis, MN 55403-2005

DONNA LEE
Planned Parenthood Federation Of America
434 W. 33rd Street
New York, New York 10001

MATHEW D. STAVER
ERICK W. STANLEY
ANITA L. STAVER
Liberty Counsel
210 East Palmetto Avenue
Longwood, FL 32750

KOTZEN LAW
JO ANN BARONE KOTZEN
Counsel for American College of
Obstetrics & Gynecology, FL
224 Datura Street, Suite #1115
West Palm Beach, FL 33401

BEBE J. ANDERSON, ESQ.
NAN E. STRAUSS, ESQ.
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005

MOYLE, FLANAGAN, KATZ,
RAYMOND & SHEEHAN, P.A.
625 N. Flagler Drive, 9th Floor
West Palm Beach, FL 33401
(561) 659-7500

MARSHALL J. OSOFSKY, ESQ.
Florida Bar No.: 739730

CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Fla. R. App. P. 9.210(a)(2), counsel for Appellees hereby certifies that the Amended Answer Brief is computer-generated, using Times New Roman 14-point font.

MOYLE, FLANIGAN, KATZ, et al.
Co-Counsel for Appellees
625 North Flagler Drive, 9th Floor
West Palm Beach, Florida 33401
(561) 659-7500

Marshall J. Osofsky
Florida Bar No.: 739730