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,	)	
vs.	)	**Case No. SC02-2186**
	)	**LT No. 4D02-4485**
PRESIDENTIAL WOMEN'S CENTER, MICHAEL BENJAMIN, M.D., NORTH FLORIDA WOMEN'S HEALTH AND COUNSELING SERVICES, INC., ET AL.,	)	
Appellees.	)	

AMICUS CURIAE BRIEF BY LIBERTY COUNSEL ON BEHALF OF CHRISTIAN MEDICAL ASSOCIATION AND CATHOLIC MEDICAL ASSOCIATION, IN SUPPORT OF THE APPELLANTS

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INTEREST OF AMICI CURIAE

Amicus curiae Christian Medical Association (CMA) was founded in 1941 and today represents over 14,000 members, with approximately 600 active members in Florida. Membership is comprised primarily of practicing physicians representing the entire range of medical specialties. Members share a common commitment to the principles of Biblical faith and the integration of these principles with professional practice. This organization views such principles as essential to protecting the lives and best interests of patients, the conscientious practice of medicine according to long-standing Hippocratic and religious principles, and to preserving the public respect accorded to physicians as guardians of health and life.

The Catholic Medical Association is a professional association of American and Canadian physicians, who seek to respond to the unique responsibility which belongs to all health-care personnel as guardians and servants of human life and human dignity. Its members are conscious of the fact that their patients entrust themselves to the knowledge acquired by physicians. This suggests an important tension. As John Paul, II noted in *On Faith and Reason*, "On the one hand, the knowledge acquired through belief can seem an imperfect form of knowledge, to be perfected gradually through personal accumulation of evidence; on the other hand, belief is often humanly richer than mere evidence, because it involves an

interpersonal relationship and brings into play not only a person's capacity to know but also the deeper capacity to entrust oneself to others. . . ." This capacity to entrust oneself to others lies at the heart of the patient-physician relationship, and at the heart of this case. The Catholic Medical Association has an interest in assisting the Court in properly understanding that relationship.

STATEMENT OF FACTS

Amici curiae adopt the Statement of the Case and Facts set forth in Appellants' Brief.

SUMMARY OF ARGUMENT

In enacting Fla. Stat. § 390.0111(3) (hereinafter "the Act"), the Florida legislature sought to safeguard women's right to privacy by assuring they consistently receive information that would be material to a reasonable patient considering whether to continue or terminate her pregnancy. The adoption of the "reasonable patient" standard brings Florida in line with the general standard employed in many other states having privacy protection through their state constitutions such as Alaska, Hawaii, Mississippi and New Jersey. The constitutionality of the "reasonable patient" standard is evidenced by the fact that it has been employed for over thirty years in some jurisdictions. Physicians in those jurisdictions have had little trouble complying with their disclosure duties. The referring physician or physician performing the abortion is required to make the statutory disclosures to assure that patients who seek abortions at clinics have the same opportunity for dialogue with their physicians as patients obtaining care in physicians' offices.

The attacks on the Act, if successful, will do nothing to secure women's ability to control the disposition of their pregnancies. Rather, if successful, women

will continue to be told only what the abortion providers' decide they should know, and then often only by physicians if the women are fortunate enough to be private-care patients, rather than women seeking care in an abortion clinic.

The judgment of the district court reflects a failure to recognize that a right exercised in ignorance is not freedom. It is just tyranny once removed. The Act seeks to assure that women's decisions are adequately informed. It is fully consistent with this state's right to privacy. The judgment affirming the trial court should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN PERMITTING ABORTION PROVIDERS TO ASSERT THE THIRD PARTY INTERESTS OF FLORIDA WOMEN IN AN ATTEMPT TO AVOID PROVIDING WOMEN INFORMATION REASONABLE PATIENTS IN SIMILAR CIRCUMSTANCES WOULD WANT.

The district court erred in permitting abortion providers to claim representation of Florida women in their attack upon the Act. As a general rule, one may not claim standing to vindicate the constitutional rights of another. *See Barrows v. Jackson*, 346 U.S. 249, 255 (1953). This is premised upon the fact that "courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff*, 428 U.S. 106, 113-114 (1976). In the present case, Plaintiffs' patients "may

not wish to assert" any constitutional infirmity in the Act which provides women greater information when deciding how to respond to their pregnancies. To the extent that the Act imposes a "reasonable patient" standard on informed consent for abortion, it guarantees Florida women a minimum amount of information regarding the procedure and if injured, frees them from the onerous requirement of finding expert testimony by another abortion provider in order to establish the "community standard of care" that is required in most informed consent cases in Florida.

In order for abortion providers to have standing to assert the rights of Florida women, they must satisfy three interrelated criteria: "The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Alterra Healthcare Corp. v. Estate of Shelly*, 827 So. 2d 936, 941 (Fla. 2002)(quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (internal quotation marks and citations omitted)). While Plaintiffs have pled injury in fact, and the existence of a close relation to their patients, Plaintiffs did not, and logically could not, establish that some hindrance exists to Florida women protecting their own interest. "Even where the relationship is close, the reasons for

requiring persons to assert their own rights will generally still apply." *Singleton*, 428 U.S. at 116.

In *Singleton*, the United States Supreme Court allowed abortion providers to assert the rights of their patients to state-funded abortions in cases where the abortions were "medically necessary." Unstated, but evident from the facts of the case, the abortion providers were asserting an interest they shared with their patients. Both desired government payments for abortion services. There is no such commonality of interests in the case before this Court.

Courts have recognized the ability of abortion providers to represent the interests of their patients when the object of the litigation is to avoid involvement of third parties, *see e.g. State v. North Fla. Women's Counseling Serv.*, 866 So. 2d. 612 (Fla. 2003), to require a third party to facilitate the availability of abortion through funding or access to facilities or services, *see e.g. Singleton*, 428 U.S. at 106, or to resist limitation or prohibition of particular abortion methods or procedures, *see e.g. Stenberg v. Carhart*, 530 U.S. 914 (2000). In each of these instances, the abortion providers and their patients shared a common interest.

The present case presents a radically different type of claim. Here, abortion providers seek to avoid providing information to the patient – information that would be material to the reasonable patient's decision to undergo an abortion. Patients desire information. Providers want to withhold information. The adversity

of the provider and patient's interest is patent. This adversity precludes Plaintiffs from asserting third party standing on behalf of their patients. *Cf. Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999)(abortion providers lacked standing to enjoin public officials from enforcing a statute creating remedies for abortions when only private litigants could seek those damages); *Okpalobi v. Foster*, 244 F.3d 405, 424-429 (5th Cir. 2001)(en banc) (abortion providers lacked standing to sue government officials where statute provided private cause of action and providers failed to show that the officials had the power to redress the injury); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001)(abortion providers lacked standing to challenge civil liability provisions in statutes related to partial birth abortions when suing government officials); and *Nova Health Systems v. Gandy*, 388 F.3d 744 (10th Cir. 2004)(abortion providers lacked standing to challenge statute creating only civil liability related to abortions performed on minors).

Florida courts have been reluctant to allow third parties to assert the privacy rights of others. *See e.g. Alterra Healthcare Corp. v. Estate of Shelly*, 827 So. 2d 936 (Fla. 2002). As Justice Pariente warned, "the courts also must be alert to the possibility of a litigant raising a claim of the privacy rights of others as a subterfuge to prevent the disclosure of relevant information." *Id.* at 947 (Pariente, J., concurring). While *Alterra* dealt with a dispute over the right to discovery of healthcare personnel files, Justice Pariente's concern is directly on point. Plaintiffs'

claim is a subterfuge to prevent the *requirement* to disclose more information to patients than they do under their present practice of inadequate disclosures. *See* Dep. of Dr. Michael Benjamin, pages 43-45, 50 (doctor spends approximately two minutes with patient while she is conscious and unmedicated, and does not "get involved in the counseling").

One exception to the general rule of "no third party standing" is when enforcement of a challenged restriction would adversely affect the rights of non-parties, and there is no effective avenue for third parties to preserve their rights themselves. *See State v. Long*, 544 So. 2d 219 (2nd DCA 1989) *aff'd Stall v. State*, 570 So. 2d 257, 258 (Fla. 1990). However, unlike the pornography purveyors in *Long*, Plaintiffs in the present case have challenged the statute as violating their own interests. In light of this fact, and in light of the conflicting interest of the providers and their patients regarding the disclosure of information, the district court erred in allowing the Plaintiffs to assert the privacy rights of Florida women, and its judgment should be reversed due to the providers' lack of standing.

II. THE ACT SAFEGUARDS A WOMAN'S ABILITY TO FREELY CHOOSE HER RESPONSE TO PREGNANCY BY GUARANTEEING SHE RECEIVES SUFFICIENT INFORMATION.

The foundation of the physician's duty to obtain informed consent is to insure that the patient, not the doctor, chooses the medical treatment. Professor

Peter Schuck summarized the relationship between individual choice and informed consent as:

> The most fundamental normative argument in favor of requiring health care providers to obtain patients' informed consent to medical treatments proceeds from the principle of autonomy - the notion that each mature individual has a right to make the basic choices that affect her life prospects. The more private the choice - that is, the more it concerns the integrity of the individual's own projects and self-conception and the less it directly affects others - the more robust this right should be. Few if any choices are more private and intimate than those that concern the use made of one's own body, and thus society should not permit bodily integrity to be threatened by another unless one has knowingly and voluntarily consented to (i.e., willed) the intrusion.

Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 924 (1994). A woman's response to a pregnancy is clearly a basic choice that "affects her life prospects." As Justice Shaw of the Florida Supreme Court has observed, "The 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 1186, 1193 (Fla. 1989) (Shaw, J. plurality opinion). By adopting the "reasonable patient" standard for disclosures related to abortion, the legislature of Florida sought to protect the uniquely personal nature of each woman's decision.

The Act adopts the "reasonable patient" standard for obtaining informed consent to the performance of an abortion, rather than the "medical community" standard contained in Section 766.103(3)(a)(2), governing general medical

consents. Under the Act, a woman seeking an abortion is "entitled to all information that a patient would want to know," while a woman under §766.103(3)(a)(2) seeking any other medical procedure would be entitled to "only the information that a physician would want to disclose." As Justice Blackmun observed in *Planned Parenthood v. Danforth*, "[t]he decision to abort is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." 428 U.S. 52, 67 (1976).

First fully articulated in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), the "reasonable patient" standard is grounded in the patient's right of self-determination. *Id*. at 784. Use of the "reasonable patient" standard is particularly appropriate when dealing with an elective procedure like abortion, where there is rarely a pre-existing patient-doctor relationship and the patient has multiple treatment options in responding to her condition. *See* Marjorie M. Schultz, *From Informed Consent to Patient Choice: a New Protected Interest*, 95 YALE L.J. 219 at 271 (1985), and Susan Oliver Renfer et al., *The Woman's Right to Know: A Model Approach to the Informed Consent to Abortion*, 22 LOY. U. CHI. L. J. 409, 414 (1991).

The absence of a pre-existing patient-doctor relationship in this case is established by deposition testimony filed of Mona Reis, owner and director of Presidential Women's Center who testified, "This situation is unique in the sense

that these are not patients of the physicians. These are not patients that have had a former relationship with the physician. They come to our facility meeting the physician for the first time." Dep. of Mona Reis, p. 81, lines 16-19. In the absence of any prior relationship, it is particularly important that the patient's judgment and values determine her course of action, not the stranger-physician.

In order for the patient to exercise her judgment, the Florida legislature has properly determined that a woman must receive all information that a reasonable patient would desire in order to make an informed decision. This need for information increases as the number of treatment options increase. The many realistic options available to a woman considering an abortion are superficially characterized as "the alternative of continuing the pregnancy to term" in Plaintiff Presidential Women's Center's *Request & Informed Consent to Treatment, Anesthetic, and Other Medical Services* attached at the end of Plaintiff's Ex. 1 contained in Dep. of Mona Reis. The *Consent for Non-Surgical Termination of Pregnancy* in Reis Def. Comp. Exhibit 1 more fully and accurately describes the options as "alternatives to medical abortion include surgical abortion, continuing the pregnancy and parenting, or continuing the pregnancy and seeking adoption services." Each of these options involves different medical and psychological considerations that a woman could only assess after being informed of those important matters.

Adopting the "reasonable patient" standard for informed consent cases related to abortion provides four benefits to women. First, this standard maximizes the freedom of choice exercised by women.

> The keystone of this doctrine [informed consent] is every competent adult's right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks however unwise his sense of values may be in the eyes of the medical profession, or even the community.
>
> Since the patient's right to make his decision in the light of his own individual value judgment is the very essence of his freedom of choice, [Professor James] contends that it should not be left entirely to the medical profession to determine what the patient should be told. He emphasizes, and we agree, that the *Natanson* rule [of disclosure] is designed to safeguard an individual's freedom of choice because it requires the physician to disclose to his patient the risks attendant upon a proposed course of treatment unless the doctor makes an affirmative showing that nondisclosure was in the best interests of the patient.

Wilkinson v. Vesey, 295 A.2d 676, 687-88 (R.I. 1972). "The duty to disclose serious risks should not be based upon the doctor's practices but upon the patient's need for full disclosure of serious risks and the feasibility of alternatives in order for the patient to make an intelligent and informed choice." *Congrove v. Holmes*, 308 N.E.2d 765, 771 (Ohio Ct. C.P. 1973). *See also Largey v. Rothman*, 540 A.2d 504, 509 (N.J. 1988). By requiring physicians provide women the information that a reasonable woman seeking an abortion would want, rather than merely the information that an abortion provider would customarily provide, the legislature

has enhanced women's ability to freely make their decisions regarding continuing or terminating their pregnancies.

Second, the "reasonable patient" standard is simply a matter of fairness. As the Maryland Supreme Court observed, "since the patient must suffer the consequences, and since [s]he bears all the expense of the operation and post-operative care, fundamental fairness requires that the patient be allowed to know what risks a proposed therapy entails, alternatives thereto, and the relative probabilities of success." *Sard v. Hardy*, 379 A.2d 1014, 1022 (Md. 1977). *See also Cooper v. Roberts*, 286 A.2d 647, 650 (Pa. Super. Ct. 1971)("As the patient must bear the expense, pain and suffering of any injury from medical treatment, his [or her] right to know all material facts pertaining to the proposed treatment cannot be dependent upon the self-imposed standards of the medical profession.")

Third, the "reasonable patient" standard provides some protections for women when the abortion providers' interests and the women's interests conflict. Approximately 93% of all abortions are performed at clinics, and of these 71% are performed at clinics where over half of the patient visits are for abortion services. Lawrence R. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. SEXUAL & REPROD. HEALTH 6, 12 (Jan./Feb. 2003). In the present case, Dr. Michael Benjamin testified that Presidential Women's Center does not provide prenatal services. Dep. of Dr. Michael

Benjamin, p. 69, lines 24-25 and p. 70, lines 1-9. The only choice most abortion providers offer, and therefore economically profit from, is the woman's choice to terminate the pregnancy. *Cf. Women's Med. Ctr. of N.W. Houston v. Archer*, 159 F. Supp. 2d 414, 425 (S.D. Tex. 1999) *aff'd in part rev'd in part* 248 F.3d 411 (5th Cir. 2001)("When non-physicians own abortion clinics, Hansen [a physician who provided abortions in both a clinic and a general obstetrical/gynecological practice setting] said he sees the possibility that quality medical care may be sacrificed to the 'bottom line.'") This creates the serious risk that some providers, operating on the profit motive, will manipulate the information women receive in order to influence their choices. *See, e.g., McCorvey v. Hill*, 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J. concurring) (noting case involved "about a thousand affidavits of women who have had abortions and claimed to have suffered long term emotional damage and impaired relationships"); *Clair v. Reprod. Health Servs.*, 720 S.W.2d 793 (Mo. Ct. App. 1986)("abortion" performed on female who was not pregnant); *Holtzman v. Samuel*, 495 N.Y.S.2d 583 (Sup. Ct. 1985)(abortion clinic property forfeit due to routinely advising patients they were pregnant regardless pregnancy tests results); *Pennsylvania Cas. Co. v. Simopoulos, M.D., Ltd.*, 369 S.E.2d 166 (Va. 1988)(abortion provider attempted to perform abortion on policewoman who was not pregnant); *Sherman v. District of Columbia Bd. of Med.*, 557 A.2d 943, 945 (D.C. 1989)("Dr. Sherman placed his patients' lives at

risk by using unsterile instruments in surgical procedures and by intentionally doing incomplete abortions (using septic instruments) to increase his fees by making later surgical procedures necessary."); and *Terra v. Dept of Health*, 604 N.Y.S.2d 644 (3 Dept. 1993)(physician suspended from medical practice after it was determined, among other things, that twenty-four abortions were performed on patients, only two of whom were actually pregnant). By adopting the "reasonable patient" standard for informed consent disclosures, the Act provides women an appropriate legal shield against the possibility of providers' illegitimately profiting from the inherent conflict of interest arising from the specialization of abortion-related service.

Fourth, the "reasonable patient" standard facilitates a woman's ability to recover if she is harmed by a physician's failure to obtain her informed consent to the abortion. Under the "medical community" standard of §766.103(3)(a)(2), the plaintiff must present expert testimony to establish "whether a reasonable medical practitioner in the community would make the pertinent disclosures under the same or similar circumstances." *See Thomas v. Berrios*, 348 So. 2d 905 (Fla. 2nd DCA 1977) and *Gouveia v. Phillips*, 823 So. 2d 215, 228 (Fla. 4th DCA 2002). This may preclude recovery in cases by a meritorious claimant if she cannot find a willing physician to act as an expert witness to establish that the treating physician breached the medical community's standard of care. Measuring the adequacy of

disclosures from the perspective of the "reasonable patient" insures that women who are not properly informed and subsequently seek legal relief are not disadvantaged by any "difficulty in finding a physician who would breach the 'community of silence' by testifying against the interest of one of his professional colleagues." *Wilkinson v. Vesey*, 295 A.2d 676, 687 (R.I. 1972). Unlike the "medical community" standard, the "reasonable patient" standard "provides the patient with effective protection against a possible conspiracy of silence, wherever it may exist among physicians." *Sard v. Hardy*, 379 A.2d 1014, 1022 (Md. 1977).

III. THE "REASONABLE PATIENT" STANDARD IS A COMMON LEGAL STANDARD AND IS UNDERSTOOD BY PHYSICIANS.

The District Court declared the statute void for vagueness on the basis of the trial court's characterization of the "reasonable patient" standard as unique and confusing. *State v. Presidential Women's Ctr.*, 884 So.2d 526, 533-34 (2004) citing ¶26 of the Trial Court Order. Yet the "reasonable patient" standard is neither unique nor confusing. It is the general standard for medical disclosures in at least twenty-one states and the District of Columbia. Anthony Szczygiel, *Beyond Informed Consent*, 21 OHIO N. U. L. REV. 171, 209-10 (1994).

The fact that approximately half the United States uses the "reasonable patient" standard evidences the ease of its administration and its lack of vagueness. *See id.; see also* Arnold J. Rosoff, *Book Review*, 22 J. LEGAL MED. 307, 308-09 (2001) (reviewing Fay A. Rozovsky, CONSENT TO TREATMENT: A PRACTICAL

GUIDE (2000)(the reasonable patient standard is followed in "roughly half of United States jurisdictions"). Under this standard, it is the physician's duty to inform the patient of the risks of a proposed treatment. Performance of that duty is measured by materiality of the information to the patient's decision whether to accept or reject the proposed treatment. *E.g.*, *Carr v. Strode*, 904 P.2d 489, 500 (Haw. 1995); *Harnish v. Children's Hosp. Med. Ctr.*, 439 N.E.2d 240, 243 (1982); *Holt v. Nelson*, 523 P.2d 211, 216 (Wash. App. 1974); *Howard v. Univ. of Med. & Dentistry of N.J.*, 800 A.2d 72, 78 (N.J. 2002), and *Korman v. Mallin*, 858 P.2d 1145, 1149 (Alaska 1993). It is particularly telling that, notwithstanding vigorous opposition initially by the medical community, no other court in the country has held the "reasonable patient" standard to be unconstitutionally vague. *Cf.* Nancy K. Kubasek, *Legislative Approaches to Reducing the Hegemony of the Priestly Model of Medicine*, 4 MICH. J. GENDER & L. 375 (1997)("medical community" standard supported by medical profession and maintains male dominance over female patients) and Emmanuel O. Iheukwumere, *Doctor, Are You Experienced? The Relevance of Disclosure of Physician Experience to a Valid Informed Consent*, 18 J. CONTEMP. HEALTH L. & POL'Y 373 (2002)(medical paternalism and resistance to patient self-determination dates back to early Greeks).

In adopting the "reasonable patient" standard of disclosure for informed consent related to abortion the Florida legislature enacted a standard that has been

in effect in other jurisdictions for over a quarter of a century. *See e.g. Canterbury v. Spence*, 464 F.2d 772 (D.C. 1992). Given the ease with which other jurisdictions have implemented the "reasonable patient" standard, and the ready ability of physicians in those jurisdictions to comply, the district court erred when it concluded that the Act violates due process and is otherwise void for vagueness.

IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT PHYSICIANS COULD NOT TAILOR THEIR INFORMATION TO THEIR PATIENTS' NEEDS UNDER THE "REASONABLE PATIENT" STANDARD.

Inherent in the "reasonable patient" standard is consideration of the circumstances of the patient.

> From these considerations we derive the breadth of the disclosure of risks legally to be required. The scope of the standard is not subjective as to either the physician or the patient; it remains objective with due regard for the patient's informational needs and with suitable leeway for the physician's situation. In broad outline, we agree that "[a] risk is thus material when a reasonable person, in what the physician knows or should know *to be the patient's position*, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy."

Canterbury v. Spence, 464 F.2d at 787 (quoting Waltz & Scheuneman, *Informed Consent to Therapy*, 64 N.W.U.L. REV. 628, 639-40 (1970)(emphasis added)). Drawing upon their medical training and experience with patients in similar circumstances, under the "reasonable patient" standard, physicians distill their knowledge into communications understandable by a patient in circumstances similar to those of the patient before them, and present that knowledge in a manner

to facilitate the decision-making by the patient. *Canterbury*, 464 F.2d at 787. This is the essence of the informed consent process.

As the Hawaii Supreme Court has observed:

> Ideally, and in the abstract, the physician-oriented standard--*i.e.*, what a reasonable physician believes should be disclosed to a patient prior to treatment in order for the patient to make an informed and intelligent decision regarding a course of treatment or surgery--and the patient-oriented standard - *i.e.*, what a reasonable patient needs to hear from his or her physician in order to make an informed and intelligent decision regarding treatment or surgery--would dictate the same scope of disclosure, barring the applicability of any of the exceptions to a physician's duty to disclose. We must assume, for purposes of fashioning a prospective rule, that physicians seek to provide their patients with the same amount and quality of risk information prior to treatment that the patient would need to hear in order to make an informed and intelligent choice. Both standards, therefore, tempered by objectivity, seek to achieve the same goal, that is, to insure that the patient's decision to undergo a particular medical procedure is an informed and intelligent decision.

Carr v. Strode, 904 P.2d 489 at 498 (Hawaii 1995). Clearly the circumstances of the patients are an inherent part of evaluating the necessary disclosures under either standard.

The Act also, by its terms, recognizes the ability of the physician to tailor information to the needs of the patient. Fla. Stat. § 390.0111(3)(a)(3) provides, "Nothing in this paragraph is intended to prohibit a physician from providing any additional information which the physician deems material to the woman's informed decision to terminate pregnancy." This provision of the Act expresses the clear intent of the Florida legislature to protect the ability of physicians to

provide any information to their patients beyond the minimum required by the Act. The district court erred in its judgment that a physician is prohibited from tailoring the information given to his or her patients under the Act.

V. REQUIRING THE REFERRING PHYSICIAN OR THE PHYSICIAN PERFORMING THE ABORTION PROVIDE INFORMATION PROTECTS WOMEN'S RIGHT TO SELF-DETERMINATION.

Even the limited record in this case evidences the need to require that referring physicians or physicians performing abortions inform women of "the nature and risk of undergoing or not undergoing the proposed procedure." Fla. Stat. § 390.0111(3)(a)(1)(a). Plaintiff Dr. Michael Benjamin testified that he personally counsels, at least to some extent, his patients at his office practice in Broward County prior to performing abortions, but does not routinely provide medical information to the abortion patients at Presidential Women's Center during the few minutes they are unsedated before the abortion. *See* Dep. of Dr. Michael Benjamin, pages 29-34, 36-40, 43-45, 50. This disparity in treatment of private patients and clinic patients is consistent with that testified to by physicians in *Women's Med. Ctr. of N.W. Houston v. Archer*, 159 F. Supp. 2d 414 (S.D. Tex. 1999) *aff'd in part rev'd in part* 248 F.3d 411 (5th Cir. 2001). One physician who performs abortions characterized abortion clinics as having a "cattle herd mentality." *Id*. at 427. Another doctor, who also provides abortions, expressed concern that clinics were particularly likely to sacrifice patient care for profit. *Id*. at 425.

The Act insures that women seeking abortions in clinics, like Dr. Benjamin's private patients, will receive information from a physician who, not only knows their medical condition and history, but also can address specific concerns related to obtaining the abortion from a particular physician at a particular venue. The physician referring the patient to the abortion provider or the physician performing the abortion will have unique knowledge, not only of the patient's characteristics, but also of the physician's skills, the available procedures, and other relevant medical information. "The choice of abortion method greatly influences safety." David A. Grimes, *Sequelae of Abortion*, *in* MODERN METHODS OF INDUCING ABORTION 95, 99-100 (David T. Baird et al. eds., 1995). Some abortion providers will offer medical abortions; others will not. Lawrence R. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. SEXUAL & REPROD. HEALTH 6, 12-13 (Jan./Feb. 2003). By requiring that the referring physician or physician performing the abortion inform the woman of the risks of undergoing and abstaining from the procedure, a meaningful opportunity for patient-physician dialogue occurs. This is in sharp contrast to the abrupt inquiry, "Do you have any questions?' when a woman is barely garbed in the typical medical examination gown, her legs are in the surgical stirrups, and she is tensely awaiting the sedative to begin the procedure. Dep. of Dr. Michael

Benjamin, pages 43-45. Meaningful patient-physician dialogue regarding the patient's choices or her concerns is unlikely to occur under such circumstances.

Fla. Stat. § 390.0111(a)(1)(a) merely requires what Plaintiff Dr. Benjamin testified that he already does with his patients in Broward County — personal counseling by the physician performing the abortion. Contrary to the ruling of the district court, the Act's requirement is not a burden on women's right to privacy. It is a safeguard of their right to receive adequate information in the exercise of their right of privacy, whether they are a physician's private patient or a clinic patient.

CONCLUSION

Fla. Stat. § 390.0111(3) empowers women by assuring that physicians provide women necessary information to enable them to decide how best to respond to their pregnancies. The district court erred in its determination that the Act is unconstitutional, and should be reversed.

_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has been forwarded as indicated below this 23rd day of December, 2004, to the following counsel of record:

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the foregoing Amicus Brief was prepared using Times New Roman font, size 14 and that the Brief meets the requirements of Fla. R. App. P. 9.210.

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