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.	)	

INITIAL BRIEF OF APPELLANTS

On Appeal From A Decision Of The District Court Of Appeal, Fourth District, State of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA CONSTITUTION

FLORIDA STATUTES

OTHER STATE STATUTES

FLORIDA RULES OF CIVIL PROCEDURE

UNITED STATES CODE

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The State of Florida and all other defendants appeal a decision of the Fourth District Court of Appeal holding Florida's informed consent law for abortions, the "Women's Right to Know Act," facially unconstitutional. See § 390.0111(3), Florida Statutes, as amended by ch. 97-151, Laws of Florida. The Fourth District adopted the opinion of the trial court and held the law violated the right to privacy, article I, section 23, Florida Constitution, and was in part unconstitutionally vague. (App. A).

The Fourth District also granted plaintiffs' motion for attorney's fees on appeal, pursuant to 42 U.S.C. § 1988, as to all defendants, conditioned on the trial court's determining that plaintiffs were prevailing parties, and leaving it to the trial court to determine the amount. (App. B).[1]

A. The Woman's Right to Know Act.

The Women's Right to Know Act (the "Act") provides that consent to abortion surgery is voluntary and informed only if the physician performing the surgery or a referring physician "orally, in person" informs the woman of: (a) the nature and risks of

[1]The plaintiffs/appellees in the district court of appeal were Presidential Women's Center ("PWC"), Michael Benjamin, M.D., and North Florida Women's Health & Counseling Services ("NFWH&CS"). In the course of the trial court proceedings, two other plaintiffs, the Birth Control Center of Tallahassee and Feminist Women's Health Center of Tallahassee, took voluntary dismissals. R V: 853.

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

The Act further requires that the Department of Health prepare printed informational materials to include a description of the fetus, a list of agencies offering alternatives to abortion, and medical assistance benefits that may be available if the woman chooses to carry to term. These printed materials are made available to the patient only if the patient chooses to view them. § 390.0111(3)(a)2., Fla. Stat. The Act expressly permits the physician to provide "any additional information which the physician deems material to the patient's informed decision to terminate her pregnancy." The Act also provides for an exception to the consent process in the event of a medical emergency. § 390.0111(3)(b), Fla. Stat.

Violation of section 390.0111(3) constitutes grounds for non-criminal disciplinary proceedings against physicians' licenses by the Board of Medicine or the Board of Osteopathic Medicine pursuant

to section 458.331 or section 459.015, Florida Statutes.[2] § 390.0111(3)(c), Fla. Stat. Subsection (3)(c) provides, however, that "substantial compliance or reasonable belief that complying with the requirements of physician obtained informed consent would threaten the life or health of the patient" is a defense to board action against a physician's license.

B. Course of Proceedings in the Courts Below.

1. Pleadings

The plaintiffs filed their complaint for declaratory and injunctive relief in June 1997. The complaint alleged the Act imposed substantial burdens on the right to abortion and thus violated the right to privacy under article I, section 23, of the Florida Constitution. The complaint also alleged the Act violated due process in that the reasonable patient standard was impermissibly vague. R I:001-037. (The complaint also argued violations of equal protection and the First Amendment, but these were not pursued in the trial court proceedings.) The named defendants were the State of Florida, Robert A. Butterworth in his official capacity as Attorney General, the Florida Department of Health, the Department's Secretary, James T. Howell, M.D., in his

[2]The Act provides for the Board of Medicine and the Board of Osteopathic Medicine to enforce the Act as to their respective licensees.

official capacity, and the Florida Board of Medicine.

The complaint sought attorney's fees under 42 U.S.C. § 1988. It did not refer to 42 U.S.C. § 1983 or allege it was filed under authority thereof. R I: 034.

Defendants' amended answer denied all allegations of unconstitutionality and also denied that the complaint stated any claim under 42 U.S.C. § 1983, pointing out that the State of Florida, the Florida Department of Health, and the Florida Board of Medicine are not "persons" under § 1983. R III: 520-533. The Attorney General by motion asserted he was improperly joined as a party as he had no formal or informal role in enforcing the Act. R III: 412. His motion was denied. R III: 480. The defendants continued to assert that they were not proper parties under § 1983. R VII: 1233; R VII: 1245; R VII: 1254; R VII: 1249. The individual members of the two boards of medicine, who enforce the Act and who would be "persons" under § 1983, were never made parties.

2. The Temporary Injunction

Immediately after filing the complaint plaintiffs moved for a temporary injunction, supporting their motion with affidavits from Dr. Benjamin and Mona Reis, the president, owner, and director of Presidential Women's Center ("PWC"). R I: 100-162. (App. D & E). The affidavits were notarized but unsworn. Dr. Benjamin's affidavit stated in conclusory terms the perceived affect of the

Act on his practice--not on the woman's decision. He asserted that if he, a physician, had to obtain informed consent from patients more of his time would be required and the cost of abortions would increase. After a hearing in which the affidavits were presented, the trial granted the motion and enjoined enforcement of the Act, finding it potentially vague and in violation of an abortion patient's right to privacy. R II: 246. The trial court acknowledged, however, the "substantial government interest" in protecting the physical and psychological health of a woman by ensuring that her decision is fully informed. Id. at 248-249.

On appeal, the Fourth District, with one judge dissenting, sustained the injunction under the abuse of discretion standard. State v. Presidential Women's Center, 707 So. 2d 1145 (Fla. 4th DCA 1998) (App. F). The Fourth District ruled that evidence in the record (i.e., Dr. Benjamin's affidavit) established that allowing only the referring physician or the physician performing the abortion to obtain informed consent would make it "more difficult" for a woman to obtain an abortion. Id. at 1149 & 1150. The court also opined that the Act did not permit the physician to conform the information provided the patient to her individual needs, and that the reasonable patient standard, which did not refer to a woman's particular circumstances, "arguably" left the physician "with no standards to comport to." Id. at 1150-51. Anticipating

the need for development of a factual record such as was presented this Court in North Florida Women's Health and Counseling Servs., Inc. v. State, 866 So. 2d 612 (Fla. 2003), the Fourth District said that "[t]he State is going to have to recognize, on remand, that it has the burden of demonstrating that legislation infringing on the right to privacy serves a compelling state interest and does so through the least intrusive means." 707 So. 2d at 1149.

Obviously, the Fourth District expected that on remand the trial court would permit development of a record on the issues. That is not what happened.

3. The Summary Judgment Motions and the Defendants' Evidence.

Following remand, plaintiffs filed motions for summary judgment in early 2002 that relied on the Fourth District's opinion, the two affidavits attached to the motion for summary judgment, and the deposition of Dr. Benjamin, even though they had not allowed defendants to complete the deposition. R IV: 627; R V: 829. This evidence was to prove highly problematic for the plaintiffs.

The Reis affidavit revealed that for first trimester patients at PWC, informed consent was obtained only by an abortion counselor. R II: 100, Ex. B ¶ 6. (App. E). Second trimester abortions, which involved a two-day procedure, were begun on

Wednesdays with the insertion of an osmotic dilator or laminaria into the patient's cervix. That procedure was performed by a nurse, not a physician. There was no physician in the office on Wednesdays. Id. ¶¶ 6,17,15, 17-19.

Dr. Benjamin's affidavit confirmed that abortion counselors at the PWC clinic obtained the patients' consent, and he focused only on "remaining questions or concerns." R II: 100, Ex. C ¶ 5. (App. D). Elaborating in his deposition on the PWC procedures, Benjamin admitted the consent sheet was signed before he saw the patient. Benjamin depo at 50. He saw patients for the first time on the operating table. Typically, he spent only two minutes with a patient in the unsedated state and five minutes total. Typically, patients did not ask questions; his discussion with patients did not involve informed consent, but only "do you have any additional questions?" Id. at 40,43.[3]

The evidence established that irreversible second trimester abortions were begun before the patient even saw a physician at PWC. Ultrasounds to determine the trimester and the extent of

[3]The depositions of Dr. Benjamin and Ms. Reis were filed in the trial court and docketed by the clerk's office. Inadvertently, they were omitted from the record sent to the district court of appeal. The referenced deposition pages were included in the appendix to defendants' initial brief in the district court and were not objected to by the plaintiffs. In their depositions, both Ms. Reis and Dr. Benjamin testified that their previously filed affidavits were "true and correct."

fetal development were taken at PWC, but Dr. Benjamin did not see them until he arrived on Thursday. Benjamin depo. at 11, 38-41. With respect to the PWC procedure, the defendants presented a physician's affidavit to the trial court that stated:

> 7. I have also reviewed a June 27, 1997 document [the affidavit submitted in support of the motion for temporary injunction] signed by Mona Reis. In it she states that abortions at Presidential Women's Center are a two stage process that begins on a Wednesday upon insertion of a device by an "advanced registered nurse practitioner" and that "we do not have a doctor present in the office on Wednesday."
>
> The 2nd trimester patient consent document for Presidential Women's Center, Exhibit C, however states the first part of the two stage abortion procedure is accomplished when "on her first visit, the physician inserts" an osmotic dilator.
>
> From these texts it appears the 2nd trimester abortion begins at this clinic before the patient has seen the physician and before the physician has obtained informed consent. It appears the patients who signed the consent form to the two stage second trimester abortion cannot have consented to the first stage as it was done by a nurse and not by a physician
>
> It is not apparent from these documents how, if at all, the physician can personally determine the stage of the pregnancy before the 2nd trimester abortion is commenced. That determination has significant implications at the end of the second trimester of pregnancy and at the beginning of the third trimester because this is when viability of the fetus begins. <u>Upon the insertion of the dilator the abortion process has begun.</u> <u>That process is then irreversible.</u>

Affidavit of Rufus S. Armstrong, M.D. R VIII: 1544 ¶ 7 (emphasis added). (App. G). In other words, because Dr. Benjamin did not see the ultrasound until the process was irreversible, Dr. Armstrong could not discount the possibility that a PWC patient was aborting a viable, third-trimester fetus before any physician saw her.

Because the opinion of the Fourth District had alluded to the Benjamin affidavit's claim that the Act would increase the costs of abortions and make them more difficult to obtain, treating this as a fact issue, see 707 So. 2d at 1149, 1150, the state defendants undertook discovery in an effort to ascertain the extent of such burdens. Specifically, defendants sought to establish the details of patient consent practices from all plaintiffs, as well as the actual effect on physicians' time and the costs of obtaining the consent required by the Act. R IV: 730-787; R VII: 1426-27; 1457-63, 1514-23; R VI: 1032-39; 1040-55; 1057-77. After the preliminary depositions of Ms. Reis and Dr. Benjamin, plaintiffs essentially refused further cooperation. Rather than cooperate in discovery and reveal the nature of their consent practices, the Birth Control Center and the Feminist Women's Health Center took voluntary dismissals. R V: 853.[4]

[4]The Birth Control Center and Feminists Women's Health Center refused to appear at deposition. (R V: 807-22.) PWC, Benjamin,

From the limited information provided by NFWH&CS, it appeared informed consent procedures there were little better than those of PWC. The clinic relied on written forms provided by its physicians. As at PWC, the physician's obligation to engage the patient was satisfied by asking whether she had any questions. R. Supp. 2043-46.

The summary judgment motions that plaintiffs filed in early 2002 had asserted reliance on the 1997 temporary injunction record and Dr. Benjamin's deposition. They claimed that "[p]laintiffs have met their burden in demonstrating a complete absence of genuine issue of material fact." R IV: 627-633; R V: 828-829. At a June 14, 2002 case management conference, defendants set out the nature of the discovery and other disputes and requested a hearing on them and the opportunity to develop an appropriate record. R X: 2104-37. At that point, plaintiffs PWC and Benjamin argued that the pending summary judgment motions presented a facial challenge

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and NFWH&CS, after February 2002, objected to all discovery and answered no discovery. NFWH&CS destroyed records after the defendants requested their production. (R Supp. 2004,2005,2007, & Exh. 1.) Numerous discovery disputes that were never resolved arose from that record destruction, plaintiffs' filing of unsworn interrogatory responses, and plaintiffs' discovery objections alleging, among other things, lack of relevancy. Discovery controversies generated 17 motions to compel between Fall 2001 and Summer 2002 that were never heard. (See enumeration of pending motions and unresolved issues in Second Amended Case Management Report, R VIII: 1411-37.)

and that further discovery was unnecessary. R X: 2133. The trial court subsequently determined that its two scheduling orders, R VI: 1082 and R VIII: 1439, did not require the activities and deadlines prescribed therein and denied defendants' objection to being placed on the non-jury trial docket for disposition of plaintiffs' summary judgment motions and their discovery requests. R VI: 1123 (objection) and R VIII: 1438 (order); R VIII: 1535 (order).

Thereafter, PWC and Benjamin filed a "supplemental motion" for summary judgment and memorandum that presented a facial challenge under the privacy and due process clauses of the Florida Constitution. R VIII: 1500-07. NFWH&CS joined the supplemental motion. R VIII: 1699. This motion did not address any of the issues raised by defendants' amended answer or their individual cross motions for summary judgment filed in May and June 2002.[5]

Defendants then filed a motion under authority of Rule 1.510(d), Fla. R. Civ. P., asking the trial court to determine what facts were in dispute and what were not. They also filed a number of affidavits, including those of Drs. Shadigian and Armstrong, and

[5]None of plaintiffs' various summary judgment motions challenged that portion of the Act that provides for a patient to view printed materials prepared by the Department of Health, if she chooses to do so. See § 390.0111(3)(a)2., Fla. Stat. At the time of the summary judgment hearing, the Department of Health was still in the process of developing those materials. Only a draft had been submitted at the temporary injunction hearing.

a comprehensive memorandum in opposition to plaintiffs' various motions for summary judgment. R VIII: 1564-1619. The affidavits addressed those issues that the Fourth District had indicated would require a record: the extent to which a woman's decision was burdened or assisted by the Act; whether the Act permitted tailoring of the information provided; and whether physicians would understand the reasonable patient standard. (App. G & H).

In his affidavit, Dr. Armstrong, who is board certified in obstetrics and gynecology, opined that "the reasonable patient standard is appropriate and one to which physicians adhere," and that section 390.0111(3), Florida Statutes, would not increase costs or time for the consent process for physicians who were obtaining informed consent from their patients. Id. at ¶¶ 3,4. He stated the information required to be given the patient was medically appropriate and should be presented by the physician to the patient to obtain informed consent. Id. The Act permitted the exercise of professional discretion by the abortion physician "to accommodate particular patient needs." Id. In his opinion, the Act promoted the integrity of the practice of medicine on this group of patients--"emotionally vulnerable women." Id. at 9.

The defendants also presented the affidavit of Elizabeth Shadigian, M.D., who practiced obstetrics and gynecology. Dr. Shadigian opined that the Act provided for medically appropriate

information and allowed for the exercise of discretion by the physician "to act on specific needs"; that the Act should cause no increase in time to obtain genuine informed consent; that informed consent should be obtained by the performing physician or one with appropriate credentials and should be accomplished face to face; and that the physician should spend 5-10 minutes to obtain informed consent: "women in abortion situations deserve more time from a physician, not less." R VIII: 1552, ¶¶ 1-5.

Dr. Shadigian concluded, as did Dr. Armstrong, that the procedure followed by PWC for second trimester abortions did not result in informed consent obtained by the physician, and the procedure was "wholly inappropriate and improperly and unnecessarily exposes these patients to risks for which informed consent has not been accomplished." Id. at ¶¶ 10-12. Dr. Shadigian also agreed that section 390.0111(3) advanced the integrity of the practice of medicine on a population of vulnerable patients.

Dr. Shadigian and Dr. Armstrong concurred that paragraph 11 of the PWC consent form was contrary to acceptable medical practice and to a responsible and proper patient-physician relationship. R VIII: 1552 ¶ 8; R VIII; 1544 ¶ 6.[6]

[6]Paragraph 11 of the PWC consent form provided:

The defendants' affidavits were not rebutted. At the summary judgment hearing, plaintiffs' counsel argued only that the Act was facially unconstitutional under the Florida Constitution's privacy and due process clauses. R IX: 1715-93.

C. The Decisions of the Lower Courts

The trial court found the Act facially unconstitutional and gave no consideration to defendants' affidavits. It enjoined the enforcement of section 390.0111(3) in its entirety even though plaintiffs' several motions raised no issue as to section 390.0111(3)(a)2. relating to a patient's voluntary decision to review printed materials. The ruling relied almost entirely on the Fourth District's previous decision sustaining the temporary injunction. R X: 1854-63. It did not mention the defenses raised in defendants' amended answer or their various cross motions. On appeal of the summary judgment, the Fourth District, despite its earlier decision calling for record development, affirmed the trial

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> 11. I agree to make no claims against the Physician or Center for complications which may occur except in the event of gross negligence on their part. If I should make any other claims, I agree to be responsible for the payment of all costs and attorney's fees incurred by the Physician and/or Center in investigating or defending the claims, and to post a bond in advance for such sums.

R VIII: 1550 (Ex. B to Armstrong Affidavit).

court and adopted that court's decision as its own. (App. A).

In essence, the lower courts found the Act facially violated the right to privacy because it did not further a compelling state interest through the least intrusive means. They held the State has no compelling interest in protecting the health of the mother or furthering the potentiality of life in the fetus during the first trimester and the Act imposed "significant obstacles and burdens" at all stages. R V: 1858 & App. A, p. 2. In particular, the lower courts held the Act improperly restricted the categories of physicians who could obtain consent to the referring physician or the physician performing the abortion, and did not permit the physician to conform the information presented to the patient's circumstances or the accepted standard of medical practice in the same or similar community. Id. at 1859 & App. A, pp. 4,5. The Act thus imposed an "obstacle" between the woman and her physician, and hence did not use the least intrusive means as a matter of law. Id. at 1859.

The trial court and the Fourth District also held the "reasonable patient" standard unconstitutionally vague, contending that physicians were not "readers of minds." Disregarding the word "arguably" in the Fourth District's earlier opinion and the affidavits of Drs. Armstrong and Shadigian, both courts held that the Act provided the physician with "no standards to comport to."

Id. at 1861-62 & App. A, p. 5. They also found the Act unclear in whether it required a physician to inform a patient of non-medical risks. Finally, they ruled that the challenged portions of the statutes could not be severed. Id. at 1863 & App. A, p. 5.

The Fourth District granted plaintiffs' motion for attorney's fees under 42 U.S.C. § 1988 despite the defendants' continued argument that plaintiffs' case rested on the Florida Constitution, not 42 U.S.C. § 1983, and that the plaintiffs had not sued proper § 1983 defendants.

SUMMARY OF THE ARGUMENT

I. The lower courts erred in holding that the State had no interest in maternal health during the first trimester and declaring the Act facially invalid on that ground. Under established precedent the State clearly has an interest in maternal health sufficient to require informed consent to abortion surgery at any stage of pregnancy. The State may impose this requirement for first trimester abortions as long as it does not "significantly restrict" the woman's decision. The plaintiffs failed to prove the Women's Right To Know Act significantly restricts that decision.

II. A woman's decision is not "significantly restricted" by the requirement that either the referring physician or the performing physician provide the requisite information for informed consent. Plaintiffs abandoned any attempt to prove this requirement

increases costs or otherwise significantly restricts the decision. The State's evidence showed it did not. Plaintiffs' principal objection, adopted by the lower courts, was that a referring physician may not be qualified to advise a patient of medical risks. This argument ignores the fact that under Florida law a physician may not undertake tasks for which he or she is not qualified.

Contrary to the lower courts' rulings, the Act indisputably allows physicians to "tailor" the information provided the patient. The lower courts ignored plain language that permits a physician to provide any additional information deemed material to the decision or to limit information as the patient's health might dictate. Plaintiffs' reliance on the general Medical Consent Law, section 766.102(3), Florida Statutes, as setting the only acceptable standard for consent is inapposite. That law does not excuse a physician from explaining to a patient the risks of surgery and its alternatives. Moreover, plaintiffs adduced no evidence showing what the standard of any community of physicians would be with respect to informing an abortion patient of risks and alternatives under the Medical Consent Law.

III. The "reasonable patient" standard is well established in the law of at least 20 states. The Act is not unconstitutionally vague simply because it does not refer to a reasonable patient "in the

patient's circumstances." It is thoroughly illogical to assume, as the lower courts did, that the reasonable patient is not the one in the circumstances of the patient being treated. Unsurprisingly, the plaintiffs presented no evidence from any physician who said he or she would make that assumption, whereas the State produced two affidavits from physicians who found the statutory language perfectly comprehensible. The Act may be given a constitutional construction, and this Court has an obligation to do so.

IV.- V. This action should have been dismissed as to four of the defendants who are not "persons" under 42 U.S.C. § 1983. Accordingly, the order of the Fourth District awarding attorney's fees should be vacated as to the State of Florida, the Department of Health, the Board of Medicine, and the Attorney General. Further, because the "reasonable patient" standard is not unconstitutionally vague, plaintiffs' federal due process claim fails, and the award of fees should therefore be vacated as to the Secretary of the Department of Health.

STANDARD OF REVIEW

A summary judgment determination is subject to de novo review, Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000), and may be sustained only when there are no genuine issues of material fact conclusively shown from the record and the movant is entitled to judgment as a matter of law. Reeves v. North Broward Hosp. Dist., 821 So. 2d 319 (Fla. 4th DCA 2002). A finding of facial unconstitutionality is subject to de novo review on appeal. See In re Estate of Caldwell, 247 So. 2d 1, 3(Fla. 1971).

ARGUMENT

Throughout this case the plaintiffs have contended that the Act is facially invalid because the State has no interest whatsoever in maternal health during the first trimester of pregnancy. Both of the lower courts accepted this assertion as one reason for facially invalidating the Act. The contention is incorrect as a matter of law. If it were true, the State would be powerless to regulate the medical treatment of pregnant women by unqualified persons or in inadequate facilities until the second trimester. Even if the contention were not otherwise settled, however, it would surely be refuted by the treatment accorded PWC patients who see a physician for a skant two minutes in an unsedated state, some when the abortion process is irreversible. The inclination of any patient to report this treatment or complications attributable to a physician's failure to adequately advise the patient would certainly be deterred by such measures as paragraph 11 of the PWC consent form. See R VIII: 1550 (Ex. B).

The consent practices of PWC and other parties were of no interest to the lower courts, who saw no need for development of facts. But it cannot be disputed that PWC's practices underscore what the initial trial judge in this case recognized--the substantial government interest in ensuring a woman's informed consent.

I. THE LOWER COURTS ERRED AS A MATTER OF LAW IN HOLDING THE ACT FACIALLY INVALID ON THE GROUNDS THAT A STATE HAS NO INTEREST IN MATERNAL HEALTH DURING THE FIRST TRIMESTER OF PREGNANCY.

Contrary to the arguments and holdings below, this Court's decision in In re T.W., 551 So. 2d 1186 (Fla. 1989), does not stand for the proposition that the State may not require informed consent for first trimester abortions. What this Court held was that because the State did not have a compelling interest in maternal health during the first trimester, it "must leave the abortion decision to the woman and her doctor; . . ." Id. at 1190.

The Woman's Right To Know Act does precisely that. It leaves the decision to the woman and her physician and requires only that the decision be informed. The Act does not restrict, interfere with, or attempt to direct that decision. The standard that applies to the review of the Act, therefore, is not the compelling state interest/least intrusive means test. As In re T.W. stated:

> We nevertheless adopt the end of the first trimester as the time at which the state's interest in maternal health becomes compelling under Florida law because it is clear that prior to this point no interest in maternal health could be served by significantly restricting the manner in which abortions are performed by qualified doctors, whereas after this point the matter becomes a genuine concern. Under Florida law, prior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state.

> Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests.

551 So. 2d at 1193 (emphasis added).

Under the T.W. standard, regulations that do not interfere with the decision are permissible if justified by important state health objectives. As then–Justice Ehrlich stated, "[e]xamples of regulations permissible during the first trimester are requiring informed consent and the maintenance of certain records." Id. at 1197 (Ehrlich, J., concurring). The initial trial court judge in this case, quoting from a decision of the U.S. Supreme Court, stated what is plainly a matter of common sense:

> [There is] a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth.
>
> It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be

permissible.

R II: 248-249 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 882 (1992)).

As this Court itself has observed, the decision whether to obtain an abortion "is fraught with specific physical, psychological, and economic implications. . . ." North Florida Women's Health & Counseling Serv. v. State, 866 So. 2d 612, 621 (Fla. 2003) (hereafter "NFWH&CS"). Despite this indisputable concern and the clear language in In re T.W., plaintiffs have contended that any law that even "implicates" the decision to terminate a pregnancy must be examined under the compelling state interest/least restrictive means test. In essence, plaintiffs' argument asserts that there is no compelling state interest in maternal health in the first trimester, see In re T.W., 551 So. 2d at 1193, and therefore the State cannot require informed consent during that period.[7]

It defies all logic, particularly on the basis of the clinic

[7]Curiously, while insisting that no State interest could support the Act, PWC and Dr. Benjamin argued to the Fourth District that another informed consent law, section 766.103, Florida Statutes, applies to physicians performing abortions. See PWC Ans. Br. at 8,19,23,27. The record is clear that physicians at PWC did not obtain informed consent under any statute. Of course, if the Court concludes that the State has no interest in maternal health during the first trimester, section 766.103 awaits the challenge of abortion providers.

practices revealed in this record, for plaintiffs to suggest there is no state interest in women's health sufficient to justify an informed consent requirement for the first trimester without regard to whether the law significantly restricts the woman's decision. Such a conclusion is directly contrary to the language of In re T.W.. Further, there is no evidence in this record, and no argument has even been made, that health and psychological considerations are unimportant when it comes to terminating first trimester pregnancies. The Act cannot be held facially invalid simply because it requires informed consent for first trimester abortions.

II. THE ACT IS NOT FACIALLY UNCONSTITUTIONAL.

The State does not dispute that a law that "violates" or "infringes upon" the constitutional right to privacy must pass muster under the compelling state interest/least intrusive means test. The question is when that test applies. The State submits that on the basis of what this Court held in In re T.W., and reiterated in NFWH&CS, that the test does not apply unless a law restricts the woman's decision, and not in some minor or tangential way but significantly. As this Court said of its decision in In re T.W.:

> The Court ultimately held that (a) if a legislative act imposes a significant restriction on a woman's (or minor's) right to

> seek an abortion, the act must further a compelling State interest through the least intrusive means;. . . .

NFWH&CS, 866 So. 2d at 621. And the Court began its analysis in NFWH&CS by inquiring first whether the Parental Notification Act imposed a significant restriction on the minor's right to privacy, and if so, whether it furthered a compelling state interest through the least intrusive means. Id. at 631.

NFWH&CS therefore did not change the "significant restriction" predicate. Nevertheless, without explaining how the Act significantly restricted a woman's decision, or restricted it at all, the courts below held the Act invalid under the least intrusive means test because it 1) limited the categories of physicians who could provide the information necessary to obtain informed consent, and 2) did not allow the physician to tailor the information provided to the woman's particular circumstances according to the medical community standard. They erred in invalidating the Act for these reasons.

A. Limiting The Categories Of Physicians Does Not Significantly Restrict A Woman's Decision.

The Act provides that except in cases of medical emergency the "physician who is to perform the procedure or the referring physician" must obtain informed consent. § 390.0111(3)(a), Fla. Stat. The decision below held this was not the least intrusive

means of serving women's health because it would exclude an obstetrician/gynecologist who worked in an abortion clinic from obtaining informed consent if he or she were not performing the abortion. (App. A, p. 4, ¶ 17).

The decision necessarily concedes that, contrary to plaintiffs' practices, the State may require that a physician obtain the woman's informed consent. It does not explain how the physician limitation restricts, burdens or impedes the woman's decision, significantly or insignificantly. There is no evidence in the record that shows this limitation affects the woman's decision, slows clinic procedures, or adds to costs. That might have been a fact issue, but plaintiffs preferred not to pursue it or allow defendants to pursue it. The unrebutted affidavits of Drs. Armstrong and Shadigian, however, affirmed that the Act would not increase the time or costs for physicians who were properly obtaining informed consent. R VIII: 1544, ¶ 4 & 1552, ¶¶ 2-4.[8]

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[8]Facts can be adduced in support of a facial challenge. "To assist the appellate courts in evaluating a trial court's ruling concerning the constitutionality of a statute, it oftentimes is preferable to have a record developed in the lower court before a finder of fact." NFWH&CS, 866 So. 2d at 626. See also Bush v. Holmes, 767 So. 2d 668, 677 (Fla. 1st DCA 2000) (citing Glendale Fed. Sav. and Loan Ass'n v. State, Dep't of Ins., 485 So. 2d 1321 (Fla. 1st DCA 1986), and Homeowner's Corp. of River Trails v. Saba, 626 So. 2d 274, 275 (Fla. 2d DCA 1993) ("Although the facial constitutionality of a statute is a question for determination by the court and not a jury, it is frequently a mixed question of fact and law that can only be resolved after consideration of the

Furthermore, with respect to other types of surgery, the Board of Medicine has required that the operating surgeon explain the procedure and obtain the informed consent of the patient. The Act is therefore consistent with the established practice for other forms of surgery, a fact the lower courts ignored.[9] Moreover, as pointed out, their assumption that this requirement imposes an "obstacle" in the abortion context was not based on any evidence. Their further apparent assumption–-that the only acceptable medical practice is the cheapest practice–-finds no support in logic or record facts.

In the absence of such evidence, it must be concluded that the Act furthers the State's and the woman's interest in her health. Providing the required information enhances rather than restricts the woman's ability to make an informed decision and avert those "devastating" consequences that might attend a decision that is uninformed. Having no basis for finding otherwise, the lower courts leapt to the least intrusive means test in a search for some alternative procedure the Act could have prescribed. It is always

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relevant evidence.").

[9]The defendants established by affidavit how the Board of Medicine interprets section 458.331(1)(t) and (w), Florida Statutes, and its rules. It is the operating physician who must explain the procedure and obtain informed consent. The single exception is for a physician practicing within a Board approved postgraduate training program. R VIII: 1559-63. (App. I).

a simple matter for courts to postulate alternatives under the least intrusive means rubric and find that something else could have been done--here, that some other available physician should be allowed to procure consent. But that is not a valid approach if the necessary predicate is not first established--that the law as written imposes some significant restriction on the woman's decision. Here, it was not.

Also unfounded is the lower courts' objection that a referring physician who obtains informed consent might be unqualified. The Act does not require any referring physician to obtain informed consent. If a physician is not qualified to inform a patient of medical risks and medical alternatives, then that physician is not permitted by law to do so. See § 458.331(1)(v), Fla. Stat. Moreover, it would seem highly unlikely that a performing physician would not obtain informed consent for his or her own protection. In any case, if the Court determines that a referring physician should not be allowed, categorically, to perform this task, that portion of the Act can be severed under the criteria set forth in Cramp v. Bd. of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962).[10]

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[10]One pre-Casey federal court invalidated an informed consent law precisely because it did not contain a provision that allowed the referring physician to obtain the patient's informed consent. See Charles v. Carey, 627 F.2d 771, 784-785 (7th Cir. 1980).

B. The Act Allows Physicians To Tailor The Information Presented.

The lower courts held the Act invalid because it does not allow the physician to conform the information to the patient's circumstances, but instead "standardizes" the information and "removes the discretion accorded physicians in all circumstances other than abortion." (App. A, p. 5)

The lower court misread both the Act and the Florida Medical Consent Law. In the first place, the prescribed information is minimal. The Act requires the physician to inform the woman of:

> **1.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 the termination of pregnancy is to be performed.
>
> **c.** The medical risks to the woman and fetus of carrying the pregnancy to term.

§ 390.0111(3)(a)1.a.-c., Fla. Stat. The lower courts held these provisions restricted the woman's decision because they "infringe on the woman's ability to receive her physician's opinion as to what is best for her, considering her circumstances." (App. A, p. 5)

This conclusion is simply not true. First, the Act expressly allows the physician to provide any additional information deemed

material to the woman's informed decision, thereby allowing the physician to make the presentation more expansive. § 390.0111(3)(a), Fla. Stat. Second, the Act provides that "[s]ubstantial compliance or reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any action brought under paragraph," thus permitting the physician to narrow his presentation to take into account the health of individual patients. § 390.0111(3)(c), Fla. Stat.

Plaintiffs have argued that presenting any of the required information would insult or injure a rape victim or a patient whose fetus was abnormal. They protest far too much. A patient has the right to know and should know the medical risks of undergoing or not undergoing a surgical procedure. The Act does not require any medically contraindicated or meaningless information, and hence does not facially burden the decision. In fact, the Act requires that the physician convey only that minimal degree of information the Supreme Court approved in Planned Parenthood v. Danforth, 428 U.S. 52, 66-67 & n. 8 (1976), and City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 446-447 (1983). In those cases the Court construed "informed consent" to mean "the giving of information to the patient as to just what would be done and as to its consequences," which in Akron included "the particular risks of

[the woman's] pregnancy and the abortion technique to be used, and . . . general instructions on proper post abortion care." 462 U.S. 446-447.

Section 390.0111(3)(a)1.a.-c. requires nothing more except that the patient be told the probable gestational age of the fetus. The gestational age of the fetus must be known in order to decide what abortion procedure to follow, and that information is likely to be obtained from the patient in the first instance and corroborated by an ultrasound. In any case, subsection(3)(c) permits the physician to omit any information that would threaten the patient's health. The lower courts did not even allude to subsections (3)(a) and (c) much less provide a reasoned discussion of their effects.[11]

Moreover, to the extent the lower courts believed the general Medical Consent Law less "burdensome" because it permits physicians to tailor the information to avoid any mention of medical risks, they also misread that statute. Section 766.103(3)(a)1. and 2. are written in the conjunctive. Although a physician may follow the standard of the appropriate medical community, the patient must

[11]The Pennsylvania informed consent law at issue in Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986), included a requirement that the woman be informed of the probable gestational age of the fetus. Id. at 760. Although the Court held the law unconstitutional, it did not rule that part invalid.

still be informed of the medical risks and alternative procedures:

> (3) No recovery shall be allowed in any court in this state against any physician . . . in an action brought for treating, examining, or operating on a patient without his or her informed consent when:
> (a)1. The action of the physician . . . obtaining the consent of the patient or another person authorized to give consent for 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***
> 2. 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 of procedures, which are recognized among other physicians. . . in the same or similar community who perform similar treatments or procedures. . . .

§ 766.103(3)(a)1. and 2., Fla. Stat.(emphasis added). This statute does not relieve a physician from informing a patient of risks and alternative procedures. To the contrary, it "is designed to insure that consent to . . . surgery is reasonably informed by the patient's knowledge of the nature and extent of the procedure involved, as well as the risks and benefits, and possible outcomes. Only practitioners with knowledge about the medical subject involved are competent to prescribe what information must be imparted." Gouveia v. Phillips, 823 So. 2d 215, 228 (Fla. 4th DCA

2002). See also Cedars Medical Center, Inc. v. Ravelo, 738 So. 2d 362, 366-367 (Fla. 3d DCA 1999)(only a treating physician has the training, experience, skill and background facts regarding the patient's condition to obtain from the patient an informed decision and to evaluate and explain risks of a particular operation).

The lower courts did not explain how section 766.103(3)(a)1. and 2. would allow a physician to avoid mention of risks and alternatives in the case of rape or fetal abnormality. Nor have plaintiffs ever done so; they did not even comply with this law. One might reasonably speculate on the basis of the record that the medical community standard of physicians in abortion clinics is to tell their patients virtually nothing about risks and alternatives. Again, however, plaintiffs have presented no evidence of that standard and thus have failed to show how section 766.103(3)(a)1. and 2. differs materially from corresponding provisions of the Act or burdens a woman's decision. The lower courts therefore erred in concluding that the information requirements of the Act imposed a significant restriction on the woman's decision at any stage of pregnancy.

III. THE REASONABLE PATIENT STANDARD IS RECOGNIZED IN MANY STATES AS THE BASIS OF INFORMED CONSENT AND IS NOT UNCONSTITUTIONALLY VAGUE.

Without bothering to acknowledge or discuss the extensive case law on the reasonable patient standard or the fact that

approximately 20 states have adopted it, the lower courts dismissed the standard out of hand as "unique" and "confusing." Specifically, they held the statute was vague, because without language referring to the circumstances of the patient and the standard of conduct within the medical community, it left the physicians "with no standards with which to conform." (App. A, pp. 5,6)

The Fourth District ignored ample authority to the contrary. The reasonable patient standard is widely recognized as "objective." Instead of allowing patients to be told only what the relevant medical community thinks they should be told, it requires that physicians tell the patient of the risks and alternatives that a reasonable person in the patient's position would want to know. One court has described this standard as based on "patient sovereignty":

> The doctrine does not place upon the physician a duty to explain all possible risks, but only those of serious nature. The guide for disclosure is the test of materiality, which is an objective one, but incorporates the underlying concept of "patient sovereignty." That is, if a reasonable person in the patient's position would attach significance to a risk in deciding treatment, the risk is material.

Backlund v. University of Washington, 975 P.2d 950, 956 n. 3 (Wash. 1999). Many other states follow this standard. See Brandt v.

Engle, 791 So. 2d 614 (La. 2001); Howard v. University of Medicine and Dentistry, 800 A.2d 73, 78 (N.J. 2002); Schreiber v. Physicians Ins. Co. of Wis., 588 N.W. 2d 26, 30 (Wis. 1999); Pauscher v. Iowa Methodist Med. Ctr., 408 N.W. 2d 355, 361 (Ia. 1987); Carr v. Strode, 904 P.2d 489, 499 (Haw. 1995); Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972). "[T]he modern trend is to measure the physician's duty of disclosure by what a reasonable patient would need to know in order to make an informed and intelligent decision." Korman v. Mallin, 858 P.2d 1145, 1149 (Al. 1993).[12]

There is nothing sacrosanct about a standard based on what a particular community of physicians thinks a patient should know. See generally Annotation, Modern Status of Views As To General Measure of Physician's Duty to Inform Patients of Risks of Proposed Treatment, 88 A.L.R. 3d 1008, §§ 3,6-7 (1979 and Supp. 1997). To the contrary, by requiring physicians to focus on what a reasonable patient "would consider material to making a knowing and willful decision of whether to terminate a pregnancy," the Act enhances the patient's decision-making ability.

There is no basis for holding the reasonable patient standard vague. As a general matter, a law is unconstitutionally vague if

[12]Additional cases and authorities are cited in the amicus brief of the Christian Medical Association and the Catholic Medical Association.

it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995) (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)). Statutes that require a person to understand what is "reasonable" in different circumstances have routinely been upheld against vagueness challenges.

This Court in Bouters upheld an anti-stalking statute and rejected the contention that the statutory definition of "harasses" as causing "substantial emotional distress" in the victim was vague. The Court held the issue was correctly addressed in Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994):

> In our view the statute creates no such subjective standard, but in fact creates a "reasonable person" standard. The stalking statute bears a family resemblance to the assault statutes. Under the assault statutes, it is settled that a "well-founded fear" is measured by a reasonable person standard, not a subjective standard.

Bouters, 659 So. 2d at 238 (quoting Pallas, 636 So. 2d at 1361). See also L. B. v State, 700 So. 2d 370, 372 (Fla. 1997)(statutes which impose a "reasonable person" standard upon the citizenry appeal to the norms of the community, which is precisely the gauge by which vagueness is to be judged"). Given that the objective

"reasonable patient" standard is well-established in the law, any suggestion that it is vague is simply untenable.

Plaintiffs quarrel with the reasonable patient standard essentially because it does not include four words. They contend that section 390.0111(3)(a) should say that consent is voluntary and informed if the physician has informed the woman of "[t]he nature and risks of undergoing or not undergoing the procedure that a reasonable patient in the patient's circumstances would consider material. . . ." But this emendation is conceptually redundant. What reasonable patient would a physician consider other than one in the patient's circumstances? Certainly it would not be a reasonable patient about to undergo brain surgery or a heart transplant.[13]

More to the point, any physician, as a matter of medical common sense, would tailor the information according to whether the woman in his care was one month or six months pregnant, and

[13]At least three states, Pennsylvania, Kansas, and Louisiana, have abortion informed consent laws that are very similar to Florida's. They refer to a "reasonable patient" but omit the redundant phrase "in the patient's circumstances." See 18 Pa.C.S. § 3205; K.S.A. § 65-6709; La.R.S. 40: 1299-35.6. The general medical informed consent laws of at least two states, Alaska and Hawaii, do not refer to a "reasonable patient" but have been judicially interpreted to embrace that standard. See Korman v. Mallin, 858 P.2d 1145, 1148-49 (Al. 1993) (interpreting Alaska Stat. § 09.55.556); Carr v. Strode, 904 P.2d 489, 499 (Haw. 1995) (interpreting H.R.S. § 671-3).

according to any other special consideration she presented. That is the most logical construction of the statute, and one that should be adopted in light of the Court's duty to construe a statute so that it does not conflict with the constitution. See Florida Dep't of Children and Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004), and Doe v. Mortham, 708 So. 2d 929, 935 (Fla. 1998). See also Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1102 (Fla. 1989)("our obligation is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute"), and Holley v. Adams, 238 So. 2d 401, 404 (Fla. 1970) (if legislative act can be rationally interpreted to harmonize with the constitution, it is the duty of the Court to adopt that construction and sustain the act).

Plaintiffs have not unearthed a single decision holding the reasonable patient standard vague. In fact, the one case they have adduced underscores the weakness of their vagueness argument. They rely on a federal district court case, 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), that held vague a portion of a statute requiring physicians to inform abortion patients of "[a]ny other information that a reasonable patient would consider material and relevant to a decision of

whether to carry a child to birth or to undergo an abortion." 975 F. Supp. at 1227 (emphasis added).

But this is not the reasonable patient standard that is properly concerned with the risks and alternatives a patient should know. It requires the physician to guess at what "any other information" would be. The federal district court rightly held that there was no way physicians would be able to know if they had complied with the requirement. Accordingly, the Karlin decision does nothing to undermine the reasonable patient standard in the Act.

The lower courts concluded the Act was vague for the additional reason that it was "unclear whether the physician is required to inform the patient of non-medical risks associated with undergoing or not undergoing an abortion." (App. A, p. 6) Their analysis referred to the use of the term "medical risks" in section 390.0111(3)(a)1.c., in contrast to the use of the term "risks" in section 390.0111(3)(a)1.a., when describing what information was to be imparted to a patient.

But what is section 390.0111(3)(a)1.a. about if not the medical risks of undergoing the procedure? This is a medical consent statute. Those governed by it are trained physicians. Those who enforce it regulate the practice of medicine. A reasonable statutory construction relying upon the context of the

Act, the physicians to whom it applies, and the medical boards that enforce the Act, could only conclude that physicians are to inform their patients of the medical risks of the procedure. It would be absurd to hold that section 390.0111(3)(a)1.a. requires physicians to advise their patients of the non-medical economic and social risks of the procedure. That would result in the patients being given virtually no information relevant to the medical risks of the procedure. It is an elementary principle that statutes are not interpreted to yield absurd results. State v. Iacovone, 660 So. 2d 1371, 1372 (Fla. 1995). Moreover, as pointed out, courts have a duty to construe a statute so that it does not offend the constitution. F.L., supra, and Mortham, supra.

IV. THE STATE OF FLORIDA, THE DEPARTMENT OF HEALTH, THE BOARD OF MEDICINE, AND THE ATTORNEY GENERAL ARE NOT PERSONS UNDER 42 U.S.C. § 1983 AND SHOULD HAVE BEEN DISMISSED FROM THIS ACTION.

Despite defendants' repeated efforts to show the trial court they were not proper parties under 42 U.S.C. § 1983, the court enjoined each one--the State of Florida, the Attorney General, the Department of Health, the Secretary of the Department of Health, and the Board of Medicine--from enforcing the Act. It did not even address their arguments. R X: 1862-63; 1897-98. After entering judgment, the trial court, pursuant to 42 U.S.C. § 1988, granted a motion for attorney's fees against all defendants without

determining an amount. The Fourth District also granted a motion for appellate fees. (App. B).[14]

Categorically, the State of Florida, and the Department of Health and the Board of Medicine as agencies of the State, are not "persons" under 42 U.S.C. § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Accordingly, they should have been dismissed from this action.

Furthermore, the Attorney General should have been dismissed because he was sued in his official capacity, and a state official sued in his or her official capacity is not a "person" under 42 U.S.C. § 1983. Will, supra; Hafer v. Malo, 501 U.S. 21 (1991). The Attorney General has no responsibility whatever for enforcing the Act, and the complaint neither accused him of any attempt to do so nor set out any legal authority for him to do so.[15] It is obvious that he was sued simply because he is the Attorney General. That is the essence of an official capacity suit.

Moreover, the suit fails even should plaintiffs now claim they

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[14]The order of the Fourth District left it to the trial court to determine whether plaintiffs were "prevailing parties." It would appear that having already decided the fees liability of all defendants, the trial court has determined that plaintiffs are prevailing parties.

[15]With respect to the Attorney General, the complaint alleged that he could order "State and County Attorneys" "to initiate criminal prosecutions and/or disciplinary proceedings under Florida Statute § 458.331." R I:5, ¶ 6. That is a gross misstatement of the law. Section 458.331 is administered by the Board of Medicine.

sued the Attorney General in his personal capacity. Injunctive relief does not lie against a state official when the enforcement of a statute is the responsibility of others. Women's Emergency Network v. Bush, 323 F.3d 937, 949-50 (11th Cir. 2003). Although the Attorney General has a responsibility to defend constitutional challenges to laws administered by state officials when requested to do so, he is not an all-purpose defendant for every such challenge. It makes no sense for the lower courts to enjoin the Attorney General from doing that which he has no authority to do and never attempted to do, and then award attorneys fees against him. The Attorney General should have been dismissed from this action.

V. THE ORDER OF THE FOURTH DISTRICT AWARDING ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988 SHOULD BE VACATED.

Because the State of Florida, the Department of Health, the Board of Medicine, and the Attorney General in his official capacity are not persons under 42 U.S.C. § 1983, the Fourth District's order awarding attorney's fees should be vacated as to them. The plaintiffs cannot be prevailing parties under 42 U.S.C. § 1988 as to those defendants who are not persons under 42 U.S.C. § 1983.

Although the Secretary of the Department of Health has enforcement responsibilities and may be sued in his official

capacity for injunctive relief, Hafer v. Melo, 501 U.S. at 27, fees may not be awarded against him unless plaintiffs prevail on their claim that the reasonable patient standard is unconstitutionally vague. That is the only federal constitutional claim they litigated. If defendants prevail on this issue there is no basis for awarding attorney fees even if the Act violates the right to privacy under the Florida Constitution. See McDonald v. Doe, 748 F.2d 1055, 1056 (5th Cir. 1984) (42 U.S.C. § 1988 "does not authorize an award of fees to a party who recovers on a pendant state claim but loses on his civil rights claim"). As this 1984 decision points out, four other federal circuits had similarly ruled. Id. at 1057 & n. 13.

Accordingly, because the reasonable patient standard is not vague, the order of the Fourth District awarding attorney fees pursuant to § 1988 should be vacated.

CONCLUSION

For all the foregoing reasons, this Court should reverse the decision of the Fourth District and hold the Act constitutional.

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I certify that this brief was prepared with Courier New 12-point in compliance with Fla. R. App. P. 9.210(a)(2).

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APPENDIX

INDEX TO APPENDIX