# IN THE SUPREME COURT OF FLORIDA

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| **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. SC04-2186** |
| | ) | **LT No. 4D02-4485** |
| **PRESIDENTIAL WOMEN'S CENTER, MICHAEL BENJAMIN, M.D., NORTH FLORIDA WOMEN'S HEALTH AND COUNSELING SERVICES, INC., ET AL.,** | ) | |
| Appellees. | ) | |

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## REPLY BRIEF OF APPELLANTS

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

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## REPLY TO APPELLEES' STATEMENTS OF THE CASE AND FACTS

Neither of the appellees' answer briefs disputes the essential material facts set forth in the State's initial brief. They thus concede that physicians at neither clinic obtained informed consent from any woman at any stage of pregnancy under any law, and that irreversible second (and perhaps, third) trimester abortions were begun at the Presidential clinic before a patient even saw a physician. They also do not dispute the fact they submitted no affidavit from any physician saying the reasonable patient standard of section 390.0111(3)(a)1.a., Florida Statutes, was confusing, nor any evidence supporting the contention that requiring either the referring or treating physician to obtain informed consent restricted the woman's decision, added to costs, or caused delays.

Contrary to the assertion on page 1 of the North Florida Women's Health and Counseling Services brief, violation of section 390.0111(3) is not criminal. Violation of that subsection subjects a physician to disciplinary action, no more. § 390.0111(3)(c), Fla. Stat. The criminal penalty applies to violations of other subsections. § 390.0111(10), Fla. Stat.

The brief of Presidential Women's Center ("PWC") correctly points out that the memorandum of the Board of Medicine would permit an "equivalently trained" physician rather than the

operating surgeon to obtain informed consent for other types of surgery. See PWC Br. at 25, n. 7, and the State's Init. Br., App. I. The undersigned counsel misread the memorandum. In any case, as argued infra, this does not change the analysis because neither appellee has shown, or even argued, that the requirement that the referring or performing physician obtain informed consent to an abortion restricts a woman's decision.

**REPLY ARGUMENT**

PWC claims that it has never taken the position that the State may not constitutionally require informed consent for a first trimester abortion. PWC Ans. Br. at 14. To the contrary, PWC's argument has been crystal clear on this point. It asserted in the lower court and argues here that **i)** the State has no compelling interest in the health of the woman during the first trimester, and **ii)** the compelling state interest test applies to any law that in any way affects the woman's decision to terminate her pregnancy. PWC Ans. Br. at 4, 13, 14, 22. It is easy enough to connect the dots. If PWC is correct, the State could not, in the absence of an interest, constitutionally require informed consent for a first trimester abortion, because "[t]he validity of an informed consent requirement . . . rests on the state's interest in protecting the health of a pregnant woman." See City of Akron v. Akron Center for Reproductive

Health, 462 U.S. 416, 443 (1983).

As shown infra, PWC and its amici have misread both this Court's decisions and those of the Supreme Court.

## I. THE WOMEN'S RIGHT TO KNOW ACT IS NOT FACIALLY UNCONSTITUTIONAL.

### A. The Compelling State Interest Test Does Not Apply Unless The Act Significantly Restricts The Woman's Decision.

PWC's argument disregards the plain language of In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989), and North Florida Women's Health and Counseling Service v. State, 866 So. 2d 612, 621, 631 (Fla. 2003) ("NFWH&CS"). Those decisions state that only a legislative act that imposes a "significant restriction" on the right to seek an abortion must further a compelling state interest through the least intrusive means. The language PWC quotes from NFWH&CS, 866 So. 2d at 635, did not retract what the Court stated at 631. Indeed, the footnote authority plainly supports the State's interpretation. See 866 So. 2d at 635, n. 53. Of the cases cited in the footnote, two concern abortion. In In re T.W. this Court applied strict scrutiny because the parental consent requirement restricted the minor's right to an abortion. In Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036 (Fla. 2001), the Court did not apply strict scrutiny, saying it would be necessary only "if it is first determined that the challenged [agency] rules violate the

petitioners' right of privacy." Id. at 1040.

Thus, at least in the context of abortion, the right to privacy is not "implicated" unless, as In re T.W. and NFWH&CS hold, a state law "significantly restricts" the woman's decision. If PWC's gloss on these cases were correct, the State could not require informed consent for a first trimester abortion.

Relying on this Court's statements in NFWH&CS, 866 So. 2d at 634, 635, PWC attempts to further confuse the issue by arguing that it is the strict scrutiny standard of In re T.W. rather than the lesser "undue burden" standard of Planned Parenthood v. Casey, 505 U.S. 833 (1992), that controls. But as NFWH&CS makes clear, strict scrutiny applies only when state law "significantly restricts" the woman's decision. NFWH&CS does not waive this predicate, and appellees did not prove it.

In any case, the Act does not offend the pre-Casey Supreme Court decisions on which PWC and its amicus, Planned Parenthood, rely. For example, in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Supreme Court upheld a Missouri requirement, applicable to first trimester abortions, that a woman consent in writing to the procedure and certify that her consent was informed and freely given. Id. at 66-67. And it did so despite the fact that Missouri did not require informed written consent

for other types of surgery. Id. Other parts of the Missouri law found unconstitutional, e.g., spousal consent and parental consent for minors, have no counterpart in Florida's Act.

In City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Court upheld part of a law that required the attending physician to inform the woman

> of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

Id. at 446 (quoting section 1870.06(C), Akron Codified Ordinances). The Court held this information "clearly related to maternal health and to the State's legitimate purpose in requiring informed consent." Id. The Court did hold invalid section 1870.06(B) of the ordinance but noted that four of its subsections requiring that the patient be told she was pregnant and informed of the gestational age of the fetus, the availability of information on birth control and adoption, and the availability of assistance during pregnancy and after childbirth, were not in themselves objectionable. Id. at 446, n. 37. The Court declined to sever these subsections only

because it believed such information could be given by a qualified person assisting the physician, rather than the physician. Id.

Section 390.0111(3)(a)1. clearly passes muster under these pre-Casey decisions. Although the Florida Act does require the physician to inform a patient of the probable gestational age of the fetus, appellees have not even argued that this requirement, which would take no more than a few seconds time, significantly restricts a patient's decision. Indeed, it would be absurd to contend that the woman's decision would be restricted if the physician told her but not if a qualified assistant did so. Understandably, the Supreme Court overruled this aspect of the Akron decision in Casey. 505 U.S. at 884-885.

The Pennsylvania law at issue in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), required the physician to provide information that was clearly intended to influence a woman's decision and also to offer printed materials intended to influence the decision.[1] The Court invalidated these provisions but soon thereafter substantially

[1]For example, the law directed that the printed materials describe "the probable anatomical and physiological characteristics of the unborn child at two-week gestation increments from fertilization to full term, including any relevant information on the possibility of the unborn child's

overruled both Akron and Thornburgh insofar as they would prohibit a state from giving "truthful, nonmisleading information" about abortion, "even when in so doing the State expresses a preference for childbirth over abortion." Casey, 505 U.S. at 882, 883. Moreover, as Casey held, a state could properly require a physician to provide such information. Id. at 884-885.

Appellees and their amici broadly argue that because this Court rejected Casey's "undue burden" standard, the decisions in Danforth, City of Akron and Thornburgh control this case and require invalidation of the Florida Act under article 1, section 23 of the Florida Constitution. But the requirements the Florida Act imposes on physicians in section 390.0111(3)(a)1. relative to informed consent differ in no significant way from those laws the Supreme Court had previously approved in Danforth and City of Akron. In fact, they differ in no significant way from Standard 2 of the Clinical Policy Guidelines of the National Abortion Federation.[2]

Nor do appellees or their amici compare the printed materials a woman may choose to see--or not--under section

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survival." 476 U.S. at 761.

[2] Available at http://www.prochoice.org/pubs_research/publications/clinical_policy.html.

390.0111(3)(a)2. with those at issue in Thornburgh. In fact, the Department had not finalized these materials, and the appellees' summary judgment motions did not raise this issue. The printed materials required by the Florida Act include only **i)** a description of the fetus, **ii)** a list of agencies that offer alternatives to terminating the pregnancy, and **iii)** detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care. The Act does not require a physician to offer these materials.

It defies logic to think that entities such as Planned Parenthood who claim to do a thorough job of abortion counseling do not routinely offer exactly the information prescribed in **ii** and **iii**, i.e., information on adoption agencies and possible sources of medical care and benefits if the woman should choose not to have the abortion. Indeed, Planned Parenthood's amicus brief, at pp. 1-2, confirms that it offers precisely such information. And it further defies logic to conclude that the offer of such information restricts the woman's decision. The Supreme Court indicated in Akron that states could require that such information be provided. See 462 U.S. at 446, n. 7.

Finally, the State acknowledges that a description of the fetus may tend to influence the woman's decision. Again, however, the summary judgment motions did not challenge this

aspect of the statute, and there is no description in the record for the Court to review because the State did not finalize one before the Act was enjoined. In any case, being given a choice to view or not view such a description does not significantly restrict the decision, and neither appellees nor the amici have so argued.

**B. The Act Does Not Significantly Restrict A Woman's Decision.**

PWC's distorted reading of NFWH&CS, Danforth, Akron and Thornburgh leads it to assert in Part II. B. and C. of its brief that the Act does not meet the compelling state interest/least intrusive means test. As shown, this is not the applicable test. PWC's analysis, in any event, fails on its own terms.

PWC claims that unlike the Medical Consent Law, section 766.103, Florida Statutes, the Act applies to some hypothetical patient, not the patient being treated. Apparently, by this PWC means that a physician, to properly obtain informed consent, must explain every conceivable risk the abortion procedure might entail regardless of applicability to the patient being treated. This wholly illogical interpretation violates the cardinal principle that statutes are not construed to reach absurd or unintended results. Woodall v. Travelers Indemnity Co., 699 So. 2d 1361, 1363 (Fla. 1997), and State v. Pope, 113 So. 629 (Fla.

1927).

PWC next contends that the Act "standardizes" the information presented and does not permit it to be tailored to the woman's individual circumstances. This argument ignores provisions that permit the colloquy to be expansive or limited, as the health of the patient might require. See § 390.0111(3)(a) and (c), Fla. Stat.

PWC finally argues that allowing only the performing or referring physician to obtain informed consent violates the least intrusive means component. PWC disregards the fact that the Supreme Court in Akron approved a law that required the attending physician to obtain informed consent. It also ignores the fact that it never attempted by argument or evidence to demonstrate that this requirement restricted the woman's decision. And, finally, PWC conveniently forgets that it successfully thwarted the State's effort to discover whether the requirement made any difference in the operation of abortion clinics.[3]

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[3]A dubious proposition at best as it is unlikely that having two physicians in the same clinic evaluate a patient would somehow be more efficient. (The State assumes the performing physician would always evaluate the patient, as would any second physician advising the patient of her medical risks in the

## II. THE WOMAN'S RIGHT TO KNOW ACT IS NOT UNCONSTITUTIONALLY VAGUE.

PWC does not dispute the fact that many other states have a "reasonable patient" standard for informed consent, nor does it contend that such a standard would be unconstitutionally vague. Rather, it clings to the argument that the Act requires the physician to address the risks to a hypothetical patient, not the patient presenting herself. Again, this is an incongruous reading of the Act. The language of the Act presumes the physician is addressing the woman who presents herself for an abortion. Therefore, what "reasonable patient" could the statute possibly contemplate other than the one presenting herself? Indeed, it is PWC, not the State, who attempts to rewrite the statute by inserting the word "hypothetical."

Nor does the Act suffer by comparison to the Medical Consent Law, section 766.103(3), Florida Statutes. That law appears to embody <u>two</u> different standards, one for the medical community and one for the reasonable patient. But as shown in the State's initial brief, the true reasonable patient standard is oriented to the patient, not the medical community. The Florida Act eliminates the ambiguity of section 766.103(3).

Finally, the contention that the Act requires physicians to

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course of procuring informed consent.)

inform the patient of non-medical risks is patently an unacceptable construction that merits no discussion. See Woodall and Pope, supra.

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

PWC contends that the State did not raise before the Fourth District the question of whether defendants were persons under 42 U.S.C. § 1983, and then, inexplicably, accuses the State of seeking review of the trial court order awarding attorney's fees. In fact, Part IV of the initial brief asked this Court to vacate the Fourth District's order awarding fees, not the trial court's. Neither court has determined the amount of fees to award.

The Fourth District's order must be vacated as to the State of Florida, the Department of Health, and the Board of Medicine because they are not persons under 42 U.S.C. § 1983. The State addressed this point on page 48 of its initial brief to the Fourth District and in its "Opposition to Motion to Tax 42 U.S.C. § 1988 Attorney's Fees" filed in that court which referenced all the defenses and motions it had filed in the trial court demonstrating that the above defendants were not persons. Appellees do not dispute that "[u]nder United States

Supreme Court precedent, when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant . . . ." ACLU v. The Florida Bar, 999 F.2d 1486, 1490 (11th Cir. 1993).[4]

Because the Act is not unconstitutionally vague, appellees' federal claim fails and the order must also be vacated as to the Secretary. Appellees cite not a single case holding that when a federal claim fails under § 1983 a plaintiff may nevertheless be awarded § 1988 fees for prevailing on a state claim (assuming their article I, section 23 argument is successful). There is no authority for that proposition. See Mateyko v. Felix, 924 F.2d 824, 828, (9th Cir. 1990)("[a]ll circuits that have considered the issue have held that a plaintiff...who loses on his federal claim and recovers only on a pendent state claim is not a prevailing party under section 1988 and may not be awarded

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[4] Appellees have not shown the Attorney General has any ability to enforce the Act and do not attempt to defend the erroneous allegations of paragraph 6 of the complaint. See RI:5. Moreover, whether the Attorney General is a proper party in a chapter 86 declaratory judgment action is not relevant to the 42 U.S.C. § 1988 fees motion. Pertinent authority, however, holds that the Attorney General is not a proper defendant in a chapter 86 constitutional challenge. Mayo v. National Truck Brokers, Inc., 220 So. 2d 11, 13 (Fla. 1969), and Martin Memorial Medical Center, Inc. v. Tenet Healthsystems Hospitals, Inc., 875 So.2d 797 (Fla. 1st DCA 2004).

fees"). See also American Automobile Mfrs. Ass'n v. Cahill, 53 F.Supp. 2d 174, 180 (N.D.N.Y. 1999) (holding issue "settled"). Accordingly, the order of the Fourth District must be vacated.

## IV. THE ACT DOES NOT LACK AN ADEQUATE EXCEPTION FOR MEDICAL EMERGENCIES.

The amicus brief of Planned Parenthood contends the Act is unconstitutional because it purportedly lacks an adequate exception for medical emergencies. The summary judgment motions did not raise or address this issue, nor did either of the lower courts. An amicus may not inject an issue not presented by the parties. Lamz v. Geico General Ins., 803 So. 2d 593 (Fla. 2001); Michels v. Orange County Fire/Rescue, 819 So. 2d 158 (Fla. 1st DCA 2002); Turner v. Tokai Financial Services Inc., 767 So. 2d 494 (Fla. 2d DCA 2000). The argument, in any case, is without merit.

Planned Parenthood correctly acknowledges that section 390.0111(3)(b) permits a physician to act to protect the life of a pregnant woman in the case of medical emergency but does not mention her health. However, section 390.0111(3)(c) provides:

> (c) Violation of this subsection by a physician constitutes grounds for disciplinary action under § 458.331 or § 459.015. Substantial compliance or reasonable belief that complying with the requirements of informed consent would

> threaten the life or health of the patient is a defense to any action brought under this paragraph.

(Emphasis added). Hence, if the physician reasonably believes that failing to terminate the pregnancy would endanger the woman's health, he could do so without informed consent in an emergency situation.

Planned Parenthood contends this exception is inadequate, citing only two cases, Women's Medical Prof'l Corp. v. Voinovich, 130 F.3d 187, 205 (6th Cir 1997), and Colautti v. Franklin, 439 U.S. 379 (1979). The Ohio law at issue in Voinovich required the physician to determine "in good faith and in the exercise of reasonable medical judgment" whether a medical emergency existed and whether a post-viability abortion was necessary. Planned Parenthood cites these two cases for the apparent conclusion that any "objective standard" (the physician exercised "reasonable medical judgment") is unconstitutional, and only a subjective standard (the physician made a "good faith" determination) is constitutional. Planned Parenthood is wrong.

As Colautti points out, the Supreme Court has upheld state laws that require a physician to determine that an abortion is necessary based on his "best clinical judgment." See id., 439 U.S. at 394 (citing Doe v. Bolton, 410 U.S. 179, 191-192

(1973)). The Court has also upheld the "appropriate medical judgment" standard, noting that it does not require unanimity of medical opinion but encompasses the judicial need to tolerate responsible differences of medical opinion. Stenberg v. Carhart, 530 U.S. 914, 936 (2000).[5] On precisely this basis, the Court approved the Pennsylvania statute at issue in Casey. The Pennsylvania law, set forth in the appendix to the decision, is similar to section 390.0111(3)(c) and provides:

> No physician shall be guilty of violating this section for failure to furnish the information required [for informed consent] if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physician or mental health of the patient.

Casey, 505 U.S. at 904 (emphasis added). Alluding to this language, the Supreme Court stated that "the statute does not prevent the physician from exercising his or her medical judgment." Id. at 883-884. Moreover, as the Casey decision points out, Roe v. Wade, 410 U.S. 113, 164-165 (1973), imposed a health exception based on "appropriate medical judgment." 505

[5] "'Clinical judgment'" is physician's unassailable subjective determination, but professional conduct in making judgment is subject to objective standard of care." A Woman's Choice – East Side Women's Clinic, Inc. v. Newman, 671 N.E. 2d 104, 109 (Ind. 1996) (quoting Kurzner v. Sanders, 627 N.E. 2d 564, 568-569 (Oh. App. 1993).

U.S. at 879.

If, as Planned Parenthood seems to argue, the physician should have unfettered discretion, the informed consent law would be meaningless. The constitutional standard, therefore, is not confined to mere good faith; the attending physician may be required to use his or her best "clinical" or "medical" judgment. The Supreme Court construed the phrase "reasonably believed" to embody this standard, and so may this Court construe the "reasonable belief" language of section 390.0111(3)(c).

## CONCLUSION

This Court should reverse the decision of the Fourth District and hold the Act facially constitutional.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

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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