

IN THE SUPREME COURT OF FLORIDA

Case Number: SC16-381
Lower Case No. 1D15-3048

GAINESVILLE WOMAN CARE, LLC, ET AL.
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

AMICI BRIEF
IN SUPPORT OF PETITIONERS

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I. STATEMENT OF INTEREST

Amici are a collection of six professors who teach medical ethics to medical students and/or physicians in universities, medical schools and clinical settings in Florida. The amici professors (“Amici”) include philosophers, physicians, and a theologian of different backgrounds who have a significant professional interest and commitment to studying and teaching medical ethics.¹ The Amici offer this brief in support of Petitioners to explain and describe the application of medical ethics principles to the waiting requirement imposed by 2015 Florida House Bill No. 633 (“H.B. 633” or the “Act”), Florida 179th Reg. Sess., § 1, amending Fla. Stat. § 390.0111. Specifically, Amici seek to advise the court on whether the requirements of H.B. 633 are consistent and congruent with the foundational principles of medical ethics. As Florida's legal principles underlying informed consent are rooted in medical ethics, a discussion of these principles of medical ethics, on which Amici are among Florida’s leading experts, is of utmost relevance to the interpretation of H.B. 633.

¹ Dr. Kenneth Goodman, who is the founder and director of the University of Miami Miller School of Medicine’s Institute for Bioethics and Health Policy and co-director of the University’s Ethics Program, also fully supports this brief. He declined to be a member of the Amici solely out of any possible concern that, given his prior declaration in support of Petitioners in this action, his views alongside these new amici parties could potentially be construed as less objective. *See* Declaration of Kenneth W. Goodman, Ph.D, attached to Pls.’ Mot. Temp. Inj. (June 11, 2015) as Exhibit B-4. Amici are objective scholars who weigh in here because their expertise is informative on the issue, not because they have a position on the legal and political issues involved.

As experts from a field outside of the law, Amici unite in this brief as friends of the court to share their insights based on their experience, knowledge, and teachings in the hope that they may assist this Court in its decision-making. Amici, who are listed below, have obtained the written consent of the parties to filing this brief.

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II. SUMMARY OF THE ARGUMENT

In this brief, Amici will demonstrate that H.B. 633, which amends the existing Florida law governing informed consent by adding a 24-hour waiting period between the provision of information specified by Fla. Stat. § 390.0111(3) and the procedure, undercuts four long-established and widely-accepted principles of medical ethics: Autonomy, Justice, Non-Maleficence, and the Patient-Physician Relationship. In each of these areas, the violations imposed by H.B. 633 are foundational, clear and uncontroversial for bioethicists. Because these principles of medical ethics inform the law of informed consent, their disruption by H.B. 633 is relevant to the Court's consideration of the soundness of this legal change.

Autonomy. First, H.B. 633 violates the moral foundation of informed consent by diminishing basic respect for individuals and their right to determine their own voluntary and informed medical decisions. By mandating a waiting period, H.B. 633 interferes with autonomous individuals' rights to make their own healthcare choices within the timeframe that they deem appropriate.

Justice. Second, justice demands that similarly-situated individuals be treated similarly. By singling out women's reproductive health care as requiring the coercive intervention of the State, H.B. 633 treats women differently than men, thus offending principles of equal treatment.

Non-Maleficence. Once a woman has made an informed decision about her health care and consulted with her physician, forcing a 24-hour waiting period can cause unnecessary hardship with no medical justification. It can also be expected that H.B. 633 will likely also cause more significant burdens for women of lower socioeconomic status and/or in medically underserved areas, such as rural areas. Furthermore, globally, women who experience sexual or domestic violence are considerably more likely to need abortion services than women who do not.

Patient-Physician Relationship. Fourth, H.B. 633 degrades the patient-physician relationship by interfering with the process by which the doctor counsels, advises and assists the patient in order to allow the patient to make an informed decision. There is no justification from a bioethical perspective for adding an arbitrary 24-hour delay to a treatment or procedure that was agreed-upon through the doctor-patient informed consent process.

III. ARGUMENT

By requiring a patient in a doctor's office to receive information regarding the termination of a pregnancy and then wait at least 24 hours to return to the office for the actual procedure, H.B. 633 undercuts four well-established, widely-accepted principles of medical ethics: Autonomy, Justice, Non-Maleficence, and the Patient-Physician Relationship. These principles are foundations of informed consent and H.B. 633 unequivocally violates each of these principles.

A. H.B. 633 Subverts Individual Autonomy

As an ethical doctrine rooted in individual autonomy, informed consent is a process of communication that enables a patient to make informed and voluntary decisions affecting his or her medical care. Informed consent is a foundational concept in clinical practice and integral to contemporary medical ethics. American College of Obstetricians and Gynecologists, *Informed Consent*, ACOG Committee Opinion No. 439, OBSTET GYNECOL (Aug. 2009), at 114:401–8; Tom L. Beauchamp and James F. Childress, *PRINCIPLES OF BIOMEDICAL ETHICS* 120-27 (7th ed. 2013).

The ethical concept of informed consent contains two major elements: (1) comprehension and (2) absence of coercion. Both of these elements constitute an important part of a patient's self-determination, i.e., "the taking hold of her own life and action, determining the meaning and the possibility of what she undergoes

as well as what she does.” American College of Obstetricians and Gynecologists, *Informed Consent*, ACOG Committee Opinion No. 439, OBSTET GYNECOL (Aug. 2009), at 114:401–08. Importantly, informed consent “includes *freedom from external coercion, manipulation*, or infringement of bodily integrity” and “freedom from being acted on by others when they have not taken account of and respected the individual’s own preferences and choice.” *Id.* (emphases added). The role of the physician in the process of informed consent is to counsel, advise, and assist the patient so that the patient, through comprehension, is enabled to express a decision that best reflects the balance her life choices. *Id.*

The foundation of our informed consent laws and norms resides in a basic respect for autonomous individuals and for their rights and capabilities to make their own important life choices. *Id.* See also The Nat’l Comm’n for the Protection of Human Subjects of Biomedical and Behavioral Research, “The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research,” C.1. (Apr. 18, 1979), *available at* <http://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/>, at C.1. In some cases of difficult or weighty decisions, physicians and patients together may decide that it is appropriate to have a discussion, have some waiting period to reflect, and then meet again to make a final decision. But that is for doctor and patient to decide. The decision to wait or not must itself be made with autonomy. By

injecting a mandatory waiting period into the informed consent process between physician and patient, without regard to the patient's health, safety, and experience, H.B. 633 undermines the basic principles of respect for autonomy.

B. H.B. 633 Subverts Justice

H.B. 633 subverts justice. Tom L. Beauchamp and James F. Childress, *PRINCIPLES OF BIOMEDICAL ETHICS* 250-51 (7th ed. 2013). Justice requires, at a minimum, that similarly situated individuals be treated similarly. This has a corollary that if individuals or groups are treated differently, then there must be a morally relevant difference justifying the unequal treatment. There are no relevant differences between men and women that would require only a woman to submit to a 24-hour waiting period to undergo a medical procedure—reproductive or otherwise—but not a man. Ruth Macklin, *Ethics and Reproductive Health: A Principled Approach*, *World Health Statistic Quarterly* 150 (1996), available at http://apps.who.int/iris/bitstream/10665/54277/1/whsq_49_1996_p148-153_eng.pdf. By subjecting one class of individuals—women seeking to terminate a pregnancy—to a 24-hour waiting period, H.B. 633 erroneously assumes that the decision to terminate a pregnancy is qualitatively different from all other medical decisions. Indeed, there is no similar waiting period required by Florida law for any other medical decisions, such as the decision to donate one's organs, nor in the

broader reproductive context, such as in the situation of a vasectomy or hysterectomy.

Critically, H.B. 633 singles out women undergoing the abortion procedure as being less capable of making their own decisions about their own bodies and lives than any other group of individuals in the State of Florida. This violates the ethical principle of justice by presuming that women are not sufficiently capable of making such decisions for themselves within the timeframe that the women themselves deem appropriate.

C. H.B. 633 Subverts the Principle of Non-Maleficence

Non-maleficence means to “do no harm” and is interpreted to require physicians to inflict the least harm possible to reach a beneficial outcome. *See* Tom L. Beauchamp and James F. Childress, *PRINCIPLES OF BIOMEDICAL ETHICS* 150-54 (7th ed. 2013); L. Snyder, *American College of Physicians Ethics Manual*, 156 (Pt. 2) *Ann. Intern. Med.* 73, 74-75 (6th ed. 2012). In other words, physicians must not do anything that would purposely harm patients unless the action is balanced by a proportional benefit.

H.B. 633 does not require a woman to obtain additional counseling or information during the mandatory 24-hour waiting period, and thus has no means to increase her knowledge about the upcoming procedure. Any attempt to justify a

24-hour waiting period as an assurance that women seeking to terminate their pregnancies will make an informed decision is dubious, because that assurance is already built into the process of informed consent. The additional mandatory waiting period provides no benefit, but rather, creates only burden. This is an unnecessary burden for any woman, but it may be even more magnified for women of lower socioeconomic status, women who live in medically underserved areas, and victims of intimate partner violence. *See, e.g.,* Audrey F. Saftlas et al., *Prevalence of Intimate Partner Violence Among an Abortion Clinic Population*, 100(8) *Am. J. Public Health* 1412, 1412-15 (Aug. 2010). The requirement of a second physician visit can be especially burdensome or even prohibitive for women in rural areas where they must travel large distances away from home to access these services and where transportation is not as available or is prohibitively expensive. *See* Deborah Karasek, Sarah C.M. Roberts & Tracy A. Weitz, *Abortion Patients' Experience and Perceptions of Waiting Periods: Survey Evidence Before Arizona's Two-Visit 24-Hour Mandatory Waiting Period Law*, 26:1 *Women's Health Issues* 63-65 (Jan - Feb. 2016).

D. H.B. 633 Interferes with the Patient-Physician Relationship.

H.B. 633 undermines the patient-physician relationship, which is one of the foundations of contemporary medical ethics. American Medical Association, *Opinion 10.015 - The Patient-Physician Relationship*, AMA Code of Medical

Ethics (issued June 2001), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion10015.page>? Included among the elements of such a relationship are open and honest communication between the physician and patient; commitment of the physician to be an advocate for the patient and to act in the patient's best interest without regard to any other interests; provision by the physician of that care which is necessary and appropriate for the health of the patient; and respect for the autonomy, privacy and dignity of the patient. American Medical Association, *Opinion 10.01 - Fundamental Elements of the Patient-Physician Relationship*, AMA Code of Medical Ethics (issued June 1990), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1001.page>.

H.B. 633 encroaches upon the doctor-patient relationship because it interferes with the process by which the doctor counsels, advises and assists the patient. Ethics standards dictate that a physician must use professional judgment with individualized consideration that allows each specific patient to achieve an ideal level of comprehension, thereby enabling the patient to make a decision that best serves his or her best interests. American Medical Association, *Opinion 8.08 - Informed Consent*, AMA Code of Medical Ethics (issued Mar. 1981), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code->

[medical-ethics/opinion808.page](#)? From a bioethical perspective, there is no benefit to adding a 24-hour delay to a treatment or procedure that was agreed-upon through the doctor-patient informed consent process. By dictating and manipulating the timeframe for this communication, H.B. 633 prevents physicians from delivering the type and quality of care that he or she believes best protects patients' well-being and interests.

IV. CONCLUSION

Amici respectfully urge this Court to consider these well-established principles of medical ethics, as they are central to the legal framework of informed consent in Florida. Rather than advancing any justifiable interest, H.B. 633 violates four basic and widely-accepted principles of medical ethics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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