New York Supreme Court
Appellate Division – Second Department

Docket Nos.:
2015-12064
2015-12068

RINAT DRAY,

Plaintiff-Appellant-Respondent,

– against –

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES J. DUCEY,

Defendants-Respondents-Appellants,

– and –

LEONID GORELIK and METROPOLITAN OB-GYN ASSOCIATES, PC,

Defendants-Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF THE NEW YORK CITY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT-RESPONDENT

THE NEW YORK CITY BAR ASSOCIATION
Amicus Curiae
42 West 44th Street
New York, New York 10036
(212) 607-3375

Kings County Clerk's Index No. 500510/14

NEW YORK SUPREME COURT APPELLATE DIVISION
SECOND DEPARTMENT

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RINAT DRAY,

Plaintiff-Appellant-Respondent,

Docket Nos.: 2015-12064; 2015-12068

-against-

NOTICE OF MOTION

Oral Argument Not Requested

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES J. DUCEY

Defendants-Respondent-Appellants

-and-

LEONID GORELIK, and METROPOLITAN OB-GYN ASSOCIATES, P.C.,

Defendants-Respondents.

----------X

NOTICE OF MOTION OF THE NEW YORK CITY BAR ASSOCIATION TO FILE AN *AMICUS CURIAE* BRIEF

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Mirah Curzer, dated October 24, 2016 together with the Exhibit annexed thereto, the undersigned will move this Court, located at 45 Monroe Place, Brooklyn, New York, 11201 on the 4th day of November 2016 at 9:30 am of that day or as soon as counsel can be heard, for an order granting The New York City Bar Association leave to file an *amicus curiae* brief. A copy of the proposed brief is annexed hereto as Exhibit A.

Pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least 7 days before the return date of this motion.

Respectfully submitted,

The New York City Bar Association

Dated: New York, NY
October 24, 2016

By: Katharine Bodde
(*Chair, Sex and Law Committee*)
Mirah Curzer
Bridgette Dunlap
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NEW YORK SUPREME COURT APPELLATE DIVISION
SECOND DEPARTMENT

----------X

RINAT DRAY,

Plaintiff-Appellant-Respondent,

Docket Nos.: 2015-12064; 2015-12068

-against-

AFFIRMATION OF
Mirah Curzer

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES J. DUCEY

Defendants-Respondent-Appellants

-and-

LEONID GORELIK, and METROPOLITAN OB-GYN ASSOCIATES, P.C.,

Defendants-Respondents.

----------X

Mirah Curzer, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am a volunteer attorney for the New York City Bar Association's Sex and Law Committee and licensed to practice before the courts of the State of New York. I submit this affirmation in support of the motion by the New York City Bar Association (the "Association") for leave to file an *amicus curiae* brief in this matter in support of Plaintiff-Appellant Rinat Dray's appeal. I am authorized by the proposed amicus to bring this motion and to submit the proposed brief attached to this motion as Exhibit A.
2. Pursuant to Rule 670.11, the Association requests permission to appear as *amicus curiae* in the above-captioned action.

3. The Association is a professional organization of over 24,000 attorneys and law students who practice not only in the New York City metropolitan area, but also across the United States and internationally.
4. The Association seeks to promote legal reform and improve the administration of justice through its more than 160 standing and special committees.
5. The Association's Sex and Law Committee addresses issues pertaining to gender and the law in a variety of areas that aim to reduce barriers to gender equality in health care, the workplace, and civic life. The Association's Bioethical Issues Committee examines the ethical as well as legal implications of health related matters.
6. Given our legal expertise in matters of gender and the law and our interest in the administration of justice, the Association is well positioned to submit an *amicus curiae* brief in this matter. Both Committees named above have joined in preparing this brief on behalf of the Association, as *amicus curiae,* in support of Plaintiff-Appellant in this case.
7. Given our legal expertise in matters of gender and the law and our interest in the administration of justice, the Association is well positioned to submit an *amicus curiae* brief in this matter. Both Committees named above have

joined in preparing this brief on behalf of the Association, as *amicus curiae,* in support of Plaintiff-Appellant in this case.

8. Pursuant to CPLR 2106, I subscribe and affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability.

WHEREFORE, on behalf of the proposed *amicus curiae* New York City Bar Association, I respectfully request that this Court grant the Association's Motion for Leave to File Brief as *Amicus Curiae* in the above-captioned case.

Respectfully submitted,

Mirah Curzer

Counsel for Amicus Curiae

Dated: New York, NY
October 24, 2016

EXHIBIT A

New York Supreme Court
Appellate Division – Second Department

Docket Nos.:
2015-12064
2015-12068

RINAT DRAY,

Plaintiff-Appellant-Respondent,

– against –

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES J. DUCEY,

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BRIEF OF THE NEW YORK CITY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT-RESPONDENT

THE NEW YORK CITY BAR ASSOCIATION
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Kings County Clerk's Index No. 500510/14

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York (the "Association"), through its Committee on Sex & Law and Committee on Bioethical Issues, submits this *amicus curiae* brief in support of Plaintiff-Appellant Rinat Dray in this case.

The Association is a professional organization of over 24,000 attorneys and law students who practice not only in the New York City metropolitan area, but also across the United States and internationally. The Association seeks to promote legal reform and improve the administration of justice through its more than 160 standing and special committees. The Association's Sex and Law Committee addresses issues pertaining to gender and the law in a variety of areas that aim to reduce barriers to gender equality in health care, the workplace, and civic life. The Association's Bioethical Issues Committee examines the ethical as well as legal implications of health related matters. Given our legal expertise in matters of gender and bioethics and our interest in the administration of justice, the Association is well positioned to submit an *amicus curiae* brief in this matter. Both Committees named above have joined in preparing this brief on behalf of the Association, as *amicus curiae,* in support of Plaintiff-Appellant in this case.

PRELIMINARY STATEMENT

The United States Constitution, as well as the New York State Constitution and state common law, protect an individual's right to direct the course of his or her own medical treatment, including the right to refuse medical treatment. Briefs submitted by other *amici curiae* in support of Plaintiff-Appellant address the constitutional due process issues, and we respectfully direct the Court to the arguments made therein, with which we agree. Rather than reiterate those points here, we respectfully submit this brief in order to address the failure of Defendant-Appellee Staten Island University Hospital ("SIUH" or the "Hospital") to provide notice of its "Managing Maternal Refusals" policy – a policy that flies in the face of established legal rights as well as medical ethical standards – to Plaintiff-Appellant Rinat Dray.

ARGUMENT

HOSPITALS HAVE A DUTY TO DISCLOSE POLICIES THAT FUNDAMENTALLY IMPACT THE PROVISION OF CARE THAT A PATIENT SEEKS

New York law demonstrates the State's commitment to ensuring a patient makes informed decisions about health care and that those decisions are respected. In particular, New York law and policy recognize the importance of having adequate access to information so that decisions about pregnancy-related health care are informed and autonomous. Information about a health care facility's patient care policies – particularly policies that may implicate patients'

constitutional and statutory rights in favor of recommendations or decisions of the medical institution and/or its staff – is crucial for patients to make informed decisions about where to receive care. SIUH's failure to disclose its "Managing Maternal Refusals" policy violated Ms. Dray's right to sufficient information to make an informed decision about where to receive health care services, which led directly to medical procedures that were performed on her against her will and in violation of New York law.

I. New York Statutes and Case Law Demonstrate the State's Public Policy of Honoring Patients' Decisions in the Provision of Health Care

Defendants-Appellees claim they had not only the power, but also a duty – as articulated in the Hospital's written policies – to override Ms. Dray's right to refuse medical treatment because of concerns over fetal health. (A-308 – 11 in Joint Appendix). The policy not only conflicts with constitutional due process protections that preserve patients' rights to bodily integrity and the ability to refuse unwanted medical care,[1] but also contravenes the public policy of this State, which clearly prioritizes honoring the patient's wishes in the provision of health care.

The Hospital's four-page policy, entitled "Managing Maternal Refusals," provides detailed guidelines with respect to the manner in which the Hospital's physicians and staff should handle a pregnant woman's refusal to submit to

[1] *See* brief submitted by *amicus curiae* National Advocates for Pregnant Women, dated October 21, 2016 ("NAPW Amicus") at 4 – 13.

medical interventions that, in their professional opinion, they deem advisable or necessary for the health and well-being of the mother, the fetus, or both. The written policy states, in pertinent part:

> If a pregnant patient refuses treatment in the hospital that is recommended by the Attending Physician(s) as medically indicated for her fetus, the Attending shall make the following evaluation of the situation:
>
> a. That there is a reasonable certainty that the fetus is at risk of serious harm without the treatment.
> b. That the risks to the woman of the treatment are relatively small.
> c. That there is no viable alternative treatment which may reasonably be expected to protect the fetus from the risk.
> d. That there is a high probability that the intervention may prevent or substantially reduce the risk to the fetus.
> e. That the fetus is reasonably judged to be viable based on gestational age of >23 weeks and absence of lethal untreatable anomalies.
> f. That the probable benefits of the treatment to the fetus significantly outweigh the possible risks to the woman.
>
> ...
>
> EMERGENT NEED:
>
> If the Attending Physician judges that there is emergent need to treat the fetus, and reasonably determines that waiting for the consultation with the Director of Maternal Fetal Medicine and the Office of Legal Affairs could pose significant additional risk to the fetus, the Attending Physician may choose to take the measures necessary to override the refusal and protect the medical welfare of the fetus without further delay.

(A-308 – 9).

Most notably, it authorizes physicians to use "the means necessary" to compel a woman to undergo cesarean surgery if, in their medical opinion, the probable risks to the fetus outweigh the possible risks to the woman. In other words, even where a woman with "decisional capacity" does not consent to

undergo abdominal surgery, the Hospital's written policy purportedly authorizes its staff to override the patient's wishes and subject her to an unwanted medical procedure – with its attendant risks of harm and even death (*see* NAPW Amicus at 19) – if they deem the risks to the woman to be small in comparison to the risks to the fetus of not performing the surgery.

The Hospital's written policy with respect to cesarean surgeries – and, in particular, the balancing test it directs hospital staff to apply between the interests of the fetus and the interests of the pregnant patient, and the fact that, unlike other patients, pregnant patients' wishes may not be respected if hospital staff has concerns about the well-being of the fetus – was not disclosed to Plaintiff-Appellant at the time she was admitted to the Hospital or at any time while she was under the Hospital's care. (A-164 – 68). This failure to provide adequate and timely notice of the policy violates the laws and public policy of New York State.

As an initial matter, the New York Patients' Bill of Rights law, 10 NYCRR 405.7, which the Hospital did provide to Ms. Dray upon her admission, explicitly includes the right to "[r]efuse treatment and be told what effect this may have on your health" 10 NYCRR § 405.7[c][l l]. It also provides for the right to "[r]eceive considerate and respectful care," to "[r]eceive complete information about your diagnosis, treatment and prognosis," and to "[r]eceive all the information that you need to give informed consent for *any* proposed procedure or treatment."

10 NYCRR § 405.7[c][3], [8], and [10] (emphasis added). It further provides for the right to "[p]articipate in *all* decisions about your treatment." 10 NYCRR § 405.7[c][14] (emphasis added). The legislative intent of the Patients' Bill of Rights law is clear: health care providers have a duty to provide patients with the information they need to make informed choices concerning their health care and medical treatment. Moreover, the law provides for informed consent by *all* patients for *any* procedure or treatment; it does not carve out an exception for pregnant patients, cesarean surgeries, or any other medical decisions that could impact the health or wellbeing of another – much less that of a fetus that is not yet born.

New York's Public Health Law provides a religious refusal option for private hospitals that excuses them from honoring patients' health care decisions "if they contradict a formally adopted policy based on sincerely held religious beliefs or moral convictions that are central to the hospital's operating principles." However, the law is clear that "[t]he hospital must inform the patient or the patient's representative of the policy *before or at the time of admission*, if possible. The patient must be promptly transferred to another hospital that is willing to honor the patient's decision. The hospital must provide certain care while the transfer is pending." N.Y. Pub. Health Law § 2994-n (emphasis added). Furthermore, the public health law allows individual health care providers to refuse

to honor a patient's health care decision "if it is contrary to the health care provider's sincerely held religious beliefs or moral conviction *and the health care provider has promptly informed the patient and the hospital of such refusal*." *Id.* (emphasis added). Thus, where medical providers and entities may refuse treatment on religious, moral or other grounds in a manner that may impinge on patients' rights to make medical decisions, the law is clear that health care providers and medical institutions must promptly inform patients about policies that would impact the patients' ability to get the care they seek.

Likewise, New York courts have held that when hospital policies interfere with the patient's right to decide the course of her own medical care, the patient is entitled to notice. In other words, where an institution's policies impact a patient's decision-making, the facility must disclose that policy ahead of time. *See e.g., Elbaum by Elbaum v. Grace Plaza of Great Neck, Inc.*, 148 A.D.2d 244, 248–49, 544 N.Y.S.2d 840, 843 (2d Dep't. 1989) (holding that, unless a transfer to a willing alternative health care provider could be obtained, physicians must withdraw life support in accordance with the patient's wishes, in part because the patient's family was not informed upon admission of the nursing home's policy against

removing life support).[2]

For example, in *Elbaum*, the plaintiff sought to have his wife's feeding tube removed, in accordance with her previously expressed wishes, of which the doctor employed by the nursing home was fully aware. The doctor refused to honor the plaintiff's request, on the grounds that the withdrawal of the feeding tube was contrary to the "dedication, to the law and to the policies and philosophy of [the nursing home]." The nursing home attempted without success to find a suitable facility to which to transfer the patient which would honor the request to remove her feeding tube, but maintained that removal of the feeding tube was contrary to its own policy and continued to refuse to comply. During a hearing, a representative of the nursing home acknowledged that the policy about withdrawal of feeding tubes was only put in writing after Mrs. Elbaum's case arose, but insisted that the policy had always existed and that any patient or family member who inquired would have been informed as much. The court weighed the compelling state interest, *viz.* preserving what the nursing home perceived to be the

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[2] For over twenty years, the New York City Bar Association has taken the firm position that the fundamental right to medical decision-making must be carefully protected, and courts should not create or allow health care providers to create policies that infringe on that right. *See* Brief of the Association of the Bar of the City of New York as Amicus Curiae in *Grace Plaza of Great Neck, Inc. v. Elbaum*, 1994 WL 16044732 (N.Y.) (arguing against imposition of a clear and convincing evidence standard for withdrawal of life-sustaining treatment in action brought by nursing home seeking unpaid fees for the services provided to maintain life support after the facility refused to honor patient's family's request to remove it.), rev'd by *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 623 N.E.2d 513 (1993) (holding the facility did not forfeit its right to payment as a result of failing to honor the patient's wishes).

ethical integrity of the facility and the medical profession, against the patient's right to self-determination, and found that, "if the patient's right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession as a whole." *Id.* In reaching this conclusion, the court found "significant the fact that the defendants failed to make the facility's policy on this issue known to the Elbaum family until after the family requested the removal of the gastrointestinal tube. Thus, the Elbaum family had no reason to believe that Mrs. Elbaum was relinquishing her right of self-determination with regard to her medical care upon her admission to the facility." *Id.* at 256. The court ordered the nursing home to remove the feeding tube in accordance with the patient's wishes unless it could find another suitable facility within ten days.

As in *Elbaum*, the Hospital's failure to inform Ms. Dray of the potential consequences of choosing to give birth in their facility was a violation of her right to self-determination in her health care decisions. And, as demonstrated above, its failure to provide timely notice of its policy with respect to overriding maternal refusals of medical treatment contravenes the State's policy of providing full and sufficient information to patients to enable them to make informed medical decisions.

II. New York State and Local Policy Demonstrate a Commitment to Ensuring Autonomy and Access to Information in the Context of Pregnancy in Particular

Beyond the general commitment to ensuring patient autonomy described above, the New York legislature has demonstrated a special commitment to access to information – provided to patients by hospitals and health care providers – to facilitate autonomy in decision-making around pregnancy at all stages.

For example, N.Y. Civ. Rights Law § 79-i requires health care providers to put refusals to provide pregnancy termination services in writing, setting forth the reasons for the refusal, and to file such writing in advance with the appropriate and responsible employer hospital or medical provider.[3] N.Y. Comp. Codes R. & Regs. tit. 10, § 405.9(b)(10) requires hospitals to inform patients of decisions regarding refusals to provide pregnancy termination services and to provide appropriate resources for services or information.[4] N.Y. Pub. Health Law § 2805-p(2) requires hospitals providing emergency treatment in post sexual assault

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[3] The statute states, in pertinent part: "When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor with the appropriate and responsible hospital, person, firm, corporation or association, and no such hospital, person, firm, corporation or association shall discriminate against the person so refusing to act." N.Y. Civ. Rights Law § 79-i(1).

[4] The code section provides: "No hospital shall be required to admit any patient for the purpose of performing an induced termination of pregnancy, nor shall any hospital be liable for its failure or refusal to participate in any such act, provided that the hospital shall inform the patient of its decision not to participate in such an act or acts. The hospital in such event shall inform the patient of appropriate resources for services or information." 10 NYCRR 405.9(b)(10).

circumstances to provide patients with both oral and written information regarding emergency contraception and to provide such contraception to patients upon request.[5] And New York City Local Law 17 requires pregnancy services centers purporting to provide health care for pregnant women but which do not provide emergency contraception or pregnancy termination services – so-called "Crisis Pregnancy Centers" – to disclose whether they have licensed medical providers on staff so that women may make informed decisions about where to seek medical advice about their pregnancies. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir 2014) (upholding validity of "Status Disclosure" provision of Local Law 17). Furthermore, New York's Maternity Information Act (N.Y. Pub. Health Law § 2803-j(2)(a-m) (2015)) requires all hospitals to disclose and disseminate rates of cesarean surgery, vaginal birth after cesarean, and other maternity care procedures for the purpose of permitting women to make informed choices about where to give birth and effectuate their medical decisions surrounding childbirth.

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[5] The statute provides, in pertinent part: "Every hospital providing emergency treatment to a rape survivor shall promptly: (a) provide such survivor with written information prepared or approved, pursuant to subdivision three of this section, relating to emergency contraception; (b) orally inform such survivor of the availability of emergency contraception, its use and efficacy; and (c) provide emergency contraception to such survivor, unless contraindicated, upon her request. No hospital may be required to provide emergency contraception to a rape survivor who is pregnant." N.Y. Pub. Health Law § 2805-p(2).

Thus, the New York legislature has made its commitment to patients' autonomy in decision-making extremely clear and, in particular, its commitment to providing pregnant patients with sufficient and timely notice of information relevant to making informed decisions and giving consent. The Hospital's failure to give timely and adequate notice of its "Managing Maternal Refusals" policy to Ms. Dray contravened the State's demonstrated commitment to providing pregnant women with the information they need to make informed medical decisions.

III. The Right to Informed Consent Includes the Right to Be Informed of Hospital Policies that Fundamentally Impact Patient Care

A. Courts should recognize that medical facilities have a duty to disclose non-standard or controversial policies that are likely to impact care

Medical professionals are legally required to obtain informed consent prior to providing treatment. Pub. Health Law § 2805-d.[6] This entails disclosing to the patient alternatives to treatment and the reasonably foreseeable risks and benefits involved in either undergoing a particular treatment or forgoing treatment. *Id.* Although New York courts have yet to determine whether informed consent requires health care entities such as hospitals to disclose internal policies that fundamentally impact the care the patient seeks, this disclosure is an essential part of a patient's ability to make an informed decision as to whether to undergo

[6] Medical professionals are also ethically required to obtain informed consent. *See* Am. Med. Ass'n, OPINION. 8.08 – INFORMED CONSENT (2006), http://journalofethics.ama-assn.org/2012/07/coet1-1207.html ("The patient should make his or her own determination about treatment.").

treatment at a particular health care facility, and as such, is an essential part of the informed consent legal requirement. Further, disclosing hospital policies that fundamentally impact the care the patient seeks serves New York public policy as described in the previous section and ensures that patients have notice of policies contrary to the type of care sought and standard medical practices, as well as policies that pose foreseeable risks to a patient's health or right to medical self-determination.

While it is a medical professional's legal duty to ensure a patient's medical decision-making is fully informed, *Salandy v. Bryk*, 55 A.D.3d 147, 152 (2d Dep't 2008), the law should also recognize the role a health care facility plays in the determination and provision of care. Inherent to a health care provider's ability to secure informed consent – and thus fulfill the provider's legal duty – is a duty on the part of health care facilities to disclose policies to patients and health care providers that foreseeably and directly impact the treatment available at that facility. A duty to obtain informed consent that rests exclusively with the medical professional is insufficient to protect the patient's right to self-determination.[7] New York law recognizes this relationship by requiring health care providers *and* facilities to disclose religious policies that impact the care the patient seeks. *See supra* section II (discussing N.Y. Pub. Health Law § 2994-n).

[7] *See generally* Nadia N. Sawicki, *Mandating Disclosure of Conscience-Based Limitations on Medical Practice*, 42 AM. J. L. AND MED. 85 (2016).

Here, the Hospital failed to disclose a policy that not only went to the heart of Ms. Dray's ability to receive the health care she sought, but further tainted the initial consent she gave to receive care at the Hospital.

B. Failures to disclose hospital policies that fundamentally impact care subject patients to avoidable injuries and distress

The *Elbaum* court recognized that patients have the right to have their treatment wishes honored despite the existence of conflicting policies that have not been disclosed to them. 544 N.Y.S.2d at 843. Other courts that have held that healthcare facilities must disclose their policies have gone even further by implicitly recognizing that patients have the right not just to have their wishes honored, but to avoid unnecessary ordeals stemming from undergoing treatment at an inappropriate facility, such as having to be transferred to a different one that will honor the patient's medical decisions. *See In re Jobes*, 529 A.2d 434, 450 (N.J. 1987) (refusing to permit a religiously-affiliated facility to transfer a patient in a vegetative state to another facility and ordering withdrawal of life support)[8]; *see also In re Requena*, 517 A.2d 886, 889 (N.J. Super. Ct. 1986) (noting it would be "emotionally and psychologically upsetting" for the patient to have to go to a different hospital to have her wish not to be fed through a nasogastric tube honored). Without advance notice of relevant policies, patients and their families

[8] *Citing* George J. Annas, *At Law: Transferring the Ethical Hot Potato*, 17 HASTINGS CTR. REP. 20, 20-21 (1987))\.

cannot avoid unnecessary hardships such as hospital transfers, treatment delays, withholding of accepted treatment options, having to argue with physicians for medically-accepted care, or having to seek or oppose court orders.

A variety of harms have befallen patients unaware of how undisclosed policies may impact their treatment. In a recent example, a miscarrying patient made multiple trips to a hospital in "excruciating pain," and ultimately underwent an unnecessarily risky delivery because she was unaware that physicians would withhold vital information – that her fetus had little chance of survival and that continuing the pregnancy was a threat to her life – due to the hospital's policy against providing or discussing pregnancy termination.[9] At hospitals with similar policies, patients with ectopic pregnancies – a life threatening condition involving a pregnancy outside of the uterus that cannot come to term – have undergone surgeries that are more invasive than necessary and may render them infertile, and have experienced delays that can result in rupture of the fallopian tube.[10] Information about testing for fetal anomalies may be withheld from expectant parents due to the possibility that such tests could lead to pregnancy termination.[11]

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[9] *Means v United States Conf. of Catholic Bishops*, 2016 U.S. App. LEXIS 16498, at *2-4 (6th Cir Sep. 8, 2016, No. 15-1779).

[10] Angel M. Foster et al., *Do Religious Restrictions Influence Ectopic Pregnancy Management? A National Qualitative Study*, 21 WOMEN'S HEALTH ISSUES 104, 106 (2011).

[11] Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1521 (2012).

At hospitals with policies against the discussion or use of contraception, victims of sexual assault have been denied the opportunity to take timely action to prevent pregnancy resulting from rape,[12] and participants in trials of drugs that may cause fetal anomalies have not been provided with contraception or advised to use it.[13] Hospitals have also had policies in place against advising HIV-positive patients to use condoms and clean needles for intravenous drugs to prevent transmission.[14] Due to a hospital policy of which even the treating physician was not previously aware, the family of one vegetative patient was unable to donate his organs in accordance with his wishes.[15]

For patients to avoid these and other harms, medical facilities must disclose policies that are likely to cause the hospital to withhold, or require, certain types of medical interventions in contravention of standard medical practices and the patient's right to informed consent.

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[12] Steven S. Smugar et al., *Informed Consent for Emergency Contraception: Variability in Hospital Care of Rape Victims*, 90 AM. J. PUB. HEALTH 1372, 1372, 1373 (2000) (employees in twelve of twenty-seven Catholic hospitals surveyed reported that their institutions prohibit the discussion of emergency contraception with rape victims).

[13] Sepper, *supra* note 11, at 1521.

[14] *Id.*

[15] Bridgette Dunlap, *Self-Certification and the Contraceptive Coverage Rule: What Does it Mean for an Institution to "Hold Itself Out as Religious?"*, REWIRE (Apr 1, 2013), https://rewire.news/article/2013/04/01/the-problem-with-self-certification-in-the-new-contraceptive-coverage-rule-what-does-it-mean-for-an-institution-to-hold-itself-out-as-religious/.

C. Ms. Dray was deprived of her right to make informed medical decisions even prior to the unconsented surgery.

The Hospital's failure to disclose its written policy to pressure or force unwilling women to have caesarean surgeries when it deemed the procedure to be advisable or necessary to promote the well-being of the fetus – even at the expense of the woman's health – deprived Ms. Dray of the opportunity to avoid treatment at a facility where her treatment goals would not be respected. Ms. Dray made a well-considered, well-researched decision to attempt a vaginal birth after two previous caesarean sections and deliberately sought out a practice group and hospital that would support her decision. Had the Hospital disclosed its "Managing Maternal Refusals" protocol – in accordance with the spirit of New York State law, which requires notice and disclosure of hospital policies that may limit or curtail patients' rights to make medical decisions on religious or other grounds – it would have been clear to Ms. Dray that the hospital was an entirely unsuitable place for her to give birth.

The Hospital's failure to disclose its policy with respect to cesarean surgeries – a policy that itself contravenes state and federal constitutional law, New York statutory law and accepted medical standards (*see* NAPW Amicus at 4 –21)[16]

[16] *See Refusal of Medically Recommended Treatment During Pregnancy,* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (2016), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co664.pdf?dmc=1&ts=20161015T2211109026 ("The use of coercion is not only ethically impermissible but also medically inadvisable because of the realities of prognostic uncertainty and the limitations of medical knowledge. As such, it is never

– violated Ms. Dray's rights under New York law. Ms. Dray's right to informed consent was violated from the moment she was admitted to the maternity ward and became subject to the Hospital's undisclosed policy of forcing pregnant women to undergo unwanted cesarean surgeries in spite of her clearly stated wish and intent to deliver vaginally. In accordance with the Patients' Bill of Rights and other New York laws, as well as prevailing medical ethical standards, Ms. Dray should have been provided with information and assistance in effectuating her choices with respect to medical treatment, not subjected to undisclosed hospital policies designed to undermine pregnant patients' health care decisions.[17] At the very least, Ms. Dray was entitled, under New York law, to notice of the Hospital's policy so that she could exercise her right to informed consent.

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acceptable for obstetrician–gynecologists to attempt to influence patients toward a clinical decision using coercion. Obstetrician–gynecologists are discouraged in the strongest possible terms from the use of duress, manipulation, coercion, physical force, or threats, including threats to involve the courts or child protective services, to motivate women toward a specific clinical decision.").

[17] *See The Limits of Conscientious Refusal in Reproductive Medicine*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS 5 (2007), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co385.pdf?dmc=1&ts=20161015T2241010779 (recommending that where physicians "deviate from standard practices [. . .] they must provide potential patients with accurate and prior notice of their personal moral commitments.").

CONCLUSION

For the reasons discussed above and in the briefs submitted by Plaintiff-Appellant and Amici Curiae, this Court should reverse the decision of the court below and grant Ms. Dray the relief she requests.

Dated: New York, New York
October 24, 2016

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