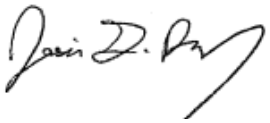
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

RINAT DRAY, *Plaintiff-Appellant*, -against- STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, P.C., and JAMES J. DUCEY, *Defendants-Respondents*.	:	**NOTICE OF MOTION FOR LEAVE TO FILE PROPOSED BRIEF OF AMICUS CURIAE** App. Case No. 2019-12617 Kings County Clerk's Index No. 500510/14

PLEASE TAKE NOTICE that, upon the annexed affirmation of Jessica Perry, dated December 4, 2020, and the exhibits annexed thereto, a motion will be made at a term of this Court to be held at 45 Monroe Place, Brooklyn, New York, 11201 on December 14, 2020, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order granting the New York Civil Liberties Union leave to file the proposed Brief of Amicus Curiae in Support of Plaintiff-Appellant Rinat Dray, attached hereto as Exhibit A. Pursuant to 22 NYCRR §§ 670.4 and 1250.4, this motion will be submitted on the papers and personal appearance in opposition to the motion is neither required nor permitted.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214 [b], answering papers, if any, shall be served upon the undersigned counsel at least two (2) days prior to the return date of this motion.

Dated: New York, NY
December 4, 2020



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

RINAT DRAY, *Plaintiff-Appellant*, -against- STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, P.C., and JAMES J. DUCEY, *Defendants-Respondents*.	:	**AFFIRMATION OF JESSICA PERRY IN SUPPORT OF MOTION FOR LEAVE TO FILE PROPOSED BRIEF OF AMICUS CURIAE** App. Case No. 2019-12617 Kings County Clerk's Index No. 500510/14

JESSICA PERRY, an attorney duly admitted to practice before this Court, affirms under penalty of perjury pursuant to CPLR 2106, as follows:

1. I am a member of the bar of the State of New York and am a Staff Attorney at the New York Civil Liberties Union (the "NYCLU"), the proposed amicus curiae. I am not a party to this action and am in good standing in the Courts of the State of New York.

2. Pursuant to this Court's Rule of Practice 1250.4 [f], the NYCLU requests permission to appear as amicus curiae in the above-captioned case.

Background and Procedural History

3. This case raises the question of whether the lower court's vacatur and reversal of its prior decision granting Plaintiff-Appellant Rinat Dray's motion to

amend her complaint was proper.

4. In this case, Ms. Dray was forced by Defendants-Respondents, pursuant to a discriminatory Staten Island University Hospital ("SIUH") Maternal Refusal Policy ("Maternal Refusal Policy"), to undergo a highly invasive cesarean surgery without her consent. In 2014, Ms. Dray sued Defendants-Respondents.

5. In May 2018, Ms. Dray moved to amend her complaint to add additional causes of action, including violations of her civil rights under the New York City Human Rights Law ("NYCHRL"), State Human Rights Law ("NYSHRL"), and Civil Rights Law § 40. On January 7, 2019, the lower court found that Defendants-Respondents failed to demonstrate prejudice and granted Ms. Dray's motion to amend. On February 13, 2019, Defendants-Respondents moved for leave to reargue their opposition to the motion to amend and their cross-motion to dismiss. On October 4, 2019, the lower court granted re-argument, vacated its January 7, 2019 decision, and reversed its prior decision granting Ms. Dray's motion to amend. Ms. Dray now moves this Court to reverse the lower court's decision.

6. The lower court improperly denied Ms. Dray's motion to amend to add sex and/or gender discrimination claims under the NYCHRL, NYSHRL, and Civil Rights Law by erroneously concluding that Defendant-Respondent SIUH's Maternal Refusal Policy did not constitute sex discrimination. In reaching this conclusion, the lower court failed to recognize that Ms. Dray unquestionably

asserted a sex discrimination claim under the framework articulated by the Court of Appeals in *Elaine W. v Joint Diseases N. Gen. Hosp., Inc.*, 81 NY2d 211, 217 [1993], so clearly met CPLR 3205 [b]'s liberal pleading standard. This was improper because Ms. Dray sufficiently pleaded a meritorious sex discrimination claim.

7. Additionally, the lower court improperly relied on a State *parens patriae* interest in a fetus to conclude that SIUH's Maternal Refusal Policy was not discriminatory. But the State is not a party to this case, so the lower court's invocation of a State *parens patriae* interest in the fetus was entirely improper.

8. Even if the lower court could have relied on a State interest here, which it could not, its decision goes against long-established, controlling law that clearly supports the common law right of all competent adults to refuse unwanted medical interventions. Accordingly, even if the State's interest was properly invoked, state appellate courts across the country have held that this interest cannot override a competent pregnant person's refusal of a surgery in these circumstances. Nor can it justify the SIUH Maternal Refusal Policy's discriminatory treatment of pregnant women who reject unwanted medical treatment.

Statement of Interest of Proposed Amicus Curiae

9. The New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union, and a non-profit, non-partisan organization with

over 180,000 members. The NYCLU has long fought to protect and expand the civil liberties guaranteed to New Yorkers under state and federal law, including the rights of women and other pregnant people to due process, equality, and reproductive freedom under the law.

10. The NYCLU has litigated and participated as amicus curiae in numerous pregnancy discrimination cases. (*See People v Murphy*, —AD4d—, 2020 NY Slip OP 06640 [4th Dept 2020] (amicus curiae in case of a woman sentenced to prison because of a treatment court's one-strike rule for pregnant women who relapse); *Lochren v Cty. of Suffolk*, 2006 WL 5304626, No 01-Civ-3925 [EDNY, June 2, 2006] (case challenging a policy in the Suffolk County Police Department that denied pregnant women "light duty" assignments, forcing them to take leave without adequate protective equipment); *People v Gilligan*, No 2003-1192 [Sup Ct, Warren County 2003] (counsel for amicus curiae in case of a woman charged with child endangerment on allegations that she consumed alcohol toward the end of her pregnancy); *McCusker v St. Rose of Lima Parish School, Roman Catholic Diocese of Brooklyn* [EEOC 2005] (represented a woman fired from a Catholic school because she was pregnant and unmarried).)

11. The NYCLU respectfully requests to file the proposed Brief of Amicus Curiae, a true and correct copy of which is included with this submission as **Exhibit A**.

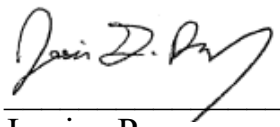
12. As is clearly articulated in the proposed brief, amicus curiae brings special expertise in the relevant law regarding the right of pregnant people to be free from discrimination on the basis of sex and gender, as is embodied in the City and State Human Rights Law and Civil Rights Law. Amicus curiae also has expertise and a strong interest in ensuring the correct analysis and resolution of questions directly implicating the common law and constitutional rights of pregnant New Yorkers to refuse unwanted medical interventions.

13. As required by this Court's Rule of Practice 1250.4, a true and correct copy of the Notice of Appeal with proof of filing is included with this submission as **Exhibit B**.

14. As required by this Court's Rule of Practice 1250.4, a true and correct copy of the Decision and Order appealed from with proof of filing is included with this submission as **Exhibit C**.

WHEREFORE, the proposed amicus curiae the NYCLU respectfully requests that it be permitted to file its proposed brief and, based on the arguments contained herein and in the enclosed brief, that this Court vacate the order issued below.

Dated: New York, NY
December 4, 2020



Jessica Perry

EXHIBIT A

Appellate Case No. 2019-12617

New York Supreme Court

Appellate Division – Second Department

RINAT DRAY,

Plaintiff-Appellant,

-against-

STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, P.C., and JAMES J. DUCEY,

Defendants-Respondents.

PROPOSED BRIEF OF AMICUS CURIAE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFF-APPELLANT

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Dated: December 4, 2020
New York, NY

Kings County Clerk's Index No. 500510/14

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PRELIMINARY STATEMENT

The decision of how to give birth is a deeply personal choice that is central to a pregnant person's right to bodily autonomy and integrity. Every competent adult has a right to make decisions about when to seek or refuse medical care. People do not lose these rights when they become pregnant. But despite these well-established protections, doctors at Staten Island University Hospital ("SIUH"), pursuant to a once-secret Maternal Refusal Policy, forced Plaintiff-Appellant Rinat Dray to undergo a highly invasive abdominal cesarean surgery without consent in violation of her right to refuse an unwanted medical intervention.

In denying Ms. Dray's motion to amend her complaint to add claims under the New York City and State Human Rights Laws ("NYCHRL" and "NYSHRL") and Civil Rights Law, the lower court erroneously held that the SIUH Maternal Refusal Policy did not constitute sex discrimination against pregnant women because it "present[ed] an attempt to comply with the law" and "only affects pregnant woman [sic] . . . under circumstances such that the distinctions it makes are not solely based on a pregnant woman's condition, but rather, take into account concern for the fetus." (A-16).[1] In reaching this conclusion, the lower court failed to recognize that Ms. Dray unquestionably asserted a sex discrimination claim, so clearly met CPLR 3205 [b]'s liberal pleading standard, which warrants reversal.

[1] Citations to "A-" are citations to the Appendix on appeal.

Additionally, the lower court relied on decades-old, doctrinally flawed trial court caselaw to recognize a blanket State interest in controlling pregnancy outcomes to justify forcing pregnant people to accept unwanted medical interventions. But the State is not a party to this case, so the lower court's invocation of the State's *parens patriae* interest in the fetus was entirely improper. Furthermore, the lower court's decision flies in the face of long-established, controlling federal and state law that clearly supports the common law right of all competent adults to refuse unwanted medical interventions. Accordingly, even if the State's interest was properly invoked, this interest, as state appellate courts across the country have held, cannot override a competent pregnant person's refusal of a surgical intervention in these circumstances.

Ms. Dray has plainly alleged facts that the SIUH Maternal Refusal Policy singles out pregnant women to override their right to refuse medical treatment, which constitutes sex and/or gender discrimination in violation of the NYCHRL, NYSHRL, and Civil Rights Law. We therefore urge this Court to reverse the denial of Ms. Dray's motion to amend and remand for further proceedings.

RELEVANT FACTS & PROCEDURAL HISTORY

Like many pregnant people, Ms. Dray chose a vaginal birth to deliver her third child after enduring long and difficult recoveries from cesarean surgeries to deliver her first two children. (A-71). Consistent with prevailing medical guidelines, she and

her obstetrical providers together discussed her options and agreed to a birth plan that specified she would attempt a vaginal birth after prior births by cesarean ("VBAC") (A-71–72).[2] But on her delivery day, the SIUH physician on duty, Dr. Leonid Gorelik, immediately urged that she have a cesarean surgery. (A-72, 76, 466–68). Dr. Gorelik repeatedly pressured and even threatened Ms. Dray to agree to the surgery, but she consistently refused to consent to the procedure. (A-72–74, 195, 198, 476, 524–25).

Unbeknownst to Ms. Dray, the hospital maintained a risk-management policy titled, "Managing Maternal Refusals of Treatment Beneficial for the Fetus" ("Maternal Refusal Policy"), which permits the "overriding of a pregnant patient's refusal to undergo treatment recommended for the fetus by the attending physician" by any "means necessary to override a maternal refusal of . . . treatment" that is "medically indicated for her fetus." (A-8–9, 190–93). Pursuant to this policy, the head of Maternal-Fetal Medicine Dr. James Ducey and SIUH's General Counsel gave Dr. Gorelick permission to override Ms. Dray's refusal. (A-525, 541–42, 731).

[2] The American College of Obstetricians and Gynecologists ("ACOG") strongly supports a trial of labor after cesarean delivery ("TOLAC"). A TOLAC is a planned attempt to deliver vaginally by a pregnant person who has had a previous cesarean delivery. VBAC is associated with a decrease in maternal morbidity, in future pregnancy complications, and in the cesarean delivery rate. ACOG urges a pregnant person in consultation with their providers to assess the likelihood of VBAC as well as individual risks when determining who is an appropriate candidate for TOLAC. *See* ACOG Comm. on Practice Bulletins, *ACOG Practice Bulletin No. 205: Vaginal Birth After Cesarean Delivery* (Feb. 2019), https://pubmed.ncbi.nlm.nih.gov/30681543/. Ms. Dray engaged in this risk assessment with her providers and she was cleared to proceed to TOLAC. (A-71–72).

Hospital staff noted in Ms. Dray's chart: "[T]he woman has decisional capacity" and hospital staff "decided to override the patient's decision not to have a C-section." (A-74–75, 373–79). Hospital staff forced Ms. Dray to endure a cesarean surgery against her will. (A-4–5, 74–75). Ms. Dray was deeply traumatized by this experience. She also suffered a bladder injury during the surgery that necessitated additional surgery at the end of the delivery.[3] It took months for Ms. Dray to recover from the cesarean delivery and the bladder injury and repair. (*Id.*)

This case now raises the question of whether the lower court's vacatur and reversal of its prior decision granting Plaintiff-Appellant Rinat Dray's motion to amend her complaint, including violations of her civil rights under the NYCHRL, NYSHRL, and Civil Rights Law § 40, was proper.[4]

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[3] Although rare, surgical injuries to the bladder or bowel can occur during cesarean surgery, necessitating additional surgery. *See* Mayo Clinic, C-Section, https://www.mayoclinic.org/tests-procedures/c-section/about/pac-20393655 [last visited Nov. 23, 2020].

[4] In May 2018, Ms. Dray moved to amend her complaint to add additional causes of action, including violations of her civil rights under the New York City Human Rights Law ("NYCHRL"), New York State Human Rights Law ("NYSHRL"), and New York Civil Rights Law § 40. (A-7, 56–69). These civil and human rights laws are "an exercise of the police power of the state for the protection of the . . . health and peace of the people" of New York and "its fulfillment of the provisions of the . . . constitution." NY Executive Law § 290 [2]. Each of these laws bars pregnancy discrimination which is construed as discrimination on the basis of "gender" or "sex." (*See Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 NY2d 211, 216 [1993] (finding that hospital distinctions based on a pregnancy can constitute sex discrimination under the NYSHRL); *Krause v Lancer & Loader Grp., LLC*, 40 Misc 3d 385, 395 [NY Cty Sup Ct 2013] (allegations of pregnancy discrimination under the NYSHRL are "equally sufficient for" a "claim under the even broader protection of the City HRL"); NY Civil Rights Law § 40-c ("No person shall, because of sex, . . . gender identity . . . as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his or her civil rights.").)

On January 7, 2019, the lower court found that Defendants-Respondents failed to demonstrate

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union, and a non-profit, non-partisan organization with over 180,000 members. The NYCLU has long fought to protect and expand the civil liberties guaranteed to New Yorkers under state and federal law, including the rights of women and other pregnant people to due process, equality, and reproductive freedom under the law. The NYCLU has litigated and participated as amicus curiae in numerous pregnancy discrimination cases. (*See People v Murphy*, —AD4d—, 2020 NY Slip OP 06640 [4th Dept 2020] (amicus curiae in case of a woman sentenced to prison because of a treatment court's one-strike rule for pregnant women who relapse); *Lochren v Cty. of Suffolk*, 2006 WL 5304626, No. 01 Civ 3925 [EDNY, June 2, 2001] (case challenging a policy in the Suffolk County Police Department that denied pregnant women "light duty" assignments, forcing them to take leave without adequate protective equipment); *People v Gilligan*, No 2003-1192 [Sup Ct, Warren County 2003] (counsel for amicus curiae in case of a woman charged with child endangerment on allegations that she consumed alcohol toward the end of her pregnancy); *McCusker v St. Rose of Lima Parish School, Roman Catholic Diocese of Brooklyn* [EEOC 2005] (represented a woman fired

prejudice or surprise and granted Ms. Dray's motion to amend. (A-161–65). On February 13, 2019, Defendants-Respondents moved for leave to reargue their cross-motion to dismiss. (A-3–17). On October 4, 2019, the lower court granted re-argument, vacated its January 7, 2019 decision and denied Ms. Dray's motion to amend. [*Id.*]

from a Catholic school because she was pregnant and unmarried).) Amicus curiae brings expertise in the relevant law and has a strong interest in ensuring the correct analysis and resolution of questions directly implicating the common law and constitutional right of pregnant New Yorkers to refuse unwanted medical interventions.

ARGUMENT

I. Ms. Dray Pleads Sex Discrimination Under the NYCHRL, NYSHRL, and Civil Rights Law, and the Lower Court Improperly Invoked a State Interest, Warranting Reversal.

Over two decades ago, the New York Court of Appeals held that the appropriate test for whether a hospital policy discriminates against pregnant patients on the basis of sex or gender is if it "singles out pregnant women for treatment different from treatment afforded those with other medical or physical impairments." (*Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 NY2d 211, 217 [1993]; NY Executive Law § 296 [2]). In deciding whether to vacate or affirm its prior decision granting Ms. Dray's motion to amend her complaint to add sex discrimination claims, the lower court's inquiry was limited to whether the proposed amendment was "palpably insufficient," "patently devoid of merit," or would directly "prejudice or surprise" the opposing party. (*Lucido v Mancuso*, 49 AD3d 220 [2d Dep't 2008];

CPLR 3025 [b]; *see also Murray v City of New York*, 43 NY2d 400, 405–06 [1977]).[5] As this Court has held, when deciding whether to grant leave to amend pleadings, the "legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt." (*Lucido*, 49 AD3d at 227.) Here, even though a determination on the merits of the proposed amendments is not required under CPLR 3205 [b]'s liberal standard, Ms. Dray sufficiently pleaded a meritorious pregnancy discrimination claim under the standard articulated in *Elaine W.* because she pleaded that SIUH's Maternal Refusals Policy "singled out pregnant women for treatment different from those with other medical or physical impairments" and "singled out pregnant women as the only class of patient who could be forced into surgery without consent." (A-183). Defendants-Respondents entirely failed to articulate how the lower court's prior decision granting Ms. Dray leave to amend prejudiced or surprised them in any way.[6] This Court should

[5] In New York, CPLR 3025 [b] provides that a party's leave to amend a pleading shall be "freely given" at any time in "the absence of prejudice or surprise resulting directly from the delay in seeking leave" so long as "the proposed amendment" is not "palpably insufficient or devoid of merit." (*Lucido v Mancuso*, 49 AD3d 220, 222–23 [2d Dep't 2008]; *Bennett v Long Island Jewish Med. Ctr.*, 51 AD3d 959, 960–61 [2d Dept 2008]; *see also Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014] (citing *Murray v City of New York*, 43 NY2d at 405–06).) As described *infra*, Ms. Dray plainly meets this liberal pleading standard.

[6] The only prejudice Defendants-Respondents raise is Ms. Dray's delay in moving to amend the complaint. (Gorelick Defs'-Resp't's Br. at 29–30; SIUH & Ducey Defs'-Respt's' Br. at 33–40.) But, as this Court has previously recognized, delay in seeking leave to amend a pleading alone without a showing of "genuine" and "significant prejudice" to the opposing party is "not a barrier" to amendment. (*Abrahamian v Tak Chan*, 33 AD3d 947, 949 [2d Dept 2006] (*quoting Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957 [1983]).) Further, an opposing party cannot "legitimately claim surprise or prejudice, where the proposed amendments were premised on the

therefore reverse.

Beyond failing to apply the appropriate legal standard, the lower court improperly relied on a State interest to conclude that SIUH's Maternal Refusal Policy is not discriminatory. This is deeply misguided. The State is not a party to this case. There is no legal basis for the conclusion that SIUH—a private hospital—can invoke the State's purported interests against its patients. (*See, e.g.*, *Stamford Hosp. v Vega*, 236 Conn 646, 659 [1996] ("[A] private health care facility may not assert the state's interests in opposing a patient's refusal of medical treatment, because to permit such a facility to do so would . . . place the facility in an inherently conflicted position of opposing its patient's competently expressed desires."); *Harrell v St. Mary's Hosp., Inc.*, 678 So 2d 455, 458 [Fla. Dist. Ct. App. 1996] (holding that a private hospital "cannot act on behalf of the State to assert the state['s] interests" to override a competent pregnant patient's refusal of a blood transfusion on religious grounds).) It is entirely improper for the lower court to rely on any interest of the State to dismiss Ms. Dray's sex discrimination claims.

Additionally, the lower court's dismissal of Ms. Dray's Civil Rights Law § 40 claim on the basis that "sex" or "gender" are not protected categories is clear legal error. The plain language of § 40-c prohibits discrimination "because of sex" and

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same facts, transactions or occurrences alleged in the original complaint," and it is clear here that the discrimination claims were premised on the same facts, transactions, or occurrences in the original complaint. (*Janssen v Inc. Vill. of Rockville Ctr.*, 59 AD3d 15, 27–28 [2d Dept 2008] (citations omitted).)

"gender identity." Discrimination claims made pursuant to § 40-c are evaluated under the same standard as those made under the NYSHRL. (*See Gordon v PL Long Beach, LLC*, 74 AD3d 880, 885 [2d Dep't 2010] ("[F]acts sufficient to sustain a cause of action under Executive Law § 296 will support a cause of action under Civil Rights Law § 40–c.") (citations omitted).) Thus, the lower court's dismissal of Ms. Dray's Civil Rights Law § 40 claim must also be reversed.

II. Targeting Pregnant People for Exercising Their Right to Refuse Medical Interventions, Including Cesarean Surgery, Violates Their Right to Bodily Autonomy and Integrity.

Even if SIUH could have properly asserted a State interest, which it cannot, such an interest does not justify the Maternal Refusal Policy's discriminatory treatment of pregnant women who reject unwanted medical treatment.

A. All Competent Adults Have a Right to Reject Medical Treatment Under Well-Established Federal and New York Common Law.

The U.S. Supreme Court has recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others." (*Union Pac. Ry. Co. v Botsford,* 141 US 250, 251 [1891] (recognizing common law right to bodily autonomy of an injured woman who refused to undergo an invasive medical examination at the defendant's request).) For over a century, New York courts have recognized the common law right of every competent adult to refuse unwanted medical care. (*See Schloendorff v Soc'y of New York Hosp.*, 211

NY 125, 129–30 [1914] ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body.").)

When the Court of Appeals decided *Rivers v Katz*, it unequivocally held that the Due Process Clause of Article 1, § 6 of the New York Constitution[7] includes the right to bodily autonomy and protects the right of competent adults to reject medical treatment. (67 NY2d 485, 493 [1986].) Just a few years later in *Cruzan v Director, Missouri Dep't of Health*, the Supreme Court similarly recognized that the Due Process Clause of the Fourteenth Amendment confers a significant liberty interest in avoiding unwanted medical procedures, including the right to be free from unwanted and even lifesaving treatment. (497 US 261, 278–79, 287, 289 [1990]).

Under *Schloendorff* and *Rivers*, it is indisputable that in New York "every individual of adult years and sound mind" has a "right to determine what shall be done with [their] own bod[ies]," (211 NY 129; 67 NY2d at 493 (quotation marks omitted)).[8] Competent *pregnant* people are no exception. Indeed, the U.S. Supreme

[7] Article I, § 6 of the New York Constitution provides that "no person shall be deprived of life, liberty or property without due process of law." Protection for certain fundamental rights is implicit within this crucial constitutional clause. (*Hope v Perales*, 83 NY2d 563, 575 [1994]).The New York State Constitution has historically provided an independent and even broader basis for a fundamental right of privacy than that provided under federal law, affording New Yorkers expansive rights in matters of bodily integrity and control over the course of one's medical treatment.

[8] Additionally, New York hospitals are required by state statute and regulation to respect the rights of pregnant patients to refuse unwanted medical treatment. The New York Hospital Patient Bill of Rights requires hospitals to afford patients "treatment without discrimination as to . . . sex, gender identity," and other protected categories. (10 NYCRR § 405.7 [b] [2].) The Patient Bill of Rights also explicitly requires hospitals to afford all patients the right to "give informed consent prior to

Court has consistently recognized that a person's fundamental rights are not diminished by pregnancy, even when the State itself acts in the interest of protecting fetal health and life. (*See Cleveland Bd. of Ed. v LaFleur*, 414 US 632, 639–640 [1974]; *Ferguson v City of Charleston*, 532 US 67, 81–86 [2001]).[9]

There is simply no pregnancy override exception to the right to refuse unwanted medical treatment. But here, the lower court recognized an interest in certain pregnancy outcomes to force pregnant people to accept unwanted medical interventions. (*See* A-16). The lower court misconstrued *Roe v Wade*, 410 US 113, 163 [1973], to recognize a State interest in the protection of potential life post-viability, (A-15). But *Roe* only stands for the narrow proposition that in the context of post-viability abortion, the State's interest in potential life is sufficiently compelling to justify certain abortion bans. However, *Roe* and its progeny, in particular *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 [1992] (plurality opinion), make clear that the State's interest in potential life is insufficient to override a pregnant person's life or health. (*See Roe*, 410 US at 165; *Casey*, 505 US at 879–80). The fact that the State may claim an interest in protecting

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the start of any nonemergency procedure," "refuse treatment to the extent permitted by law and to be informed of the reasonably foreseeable consequences of such refusal" and to receive from the hospital "information necessary to give informed consent prior to withholding medical care and treatment." (10 NYCRR §§ 405.7 [b] [9]–[11].)

[9] As discussed further *infra*, the U.S. Supreme Court's abortion jurisprudence does not compel a different conclusion. The Court's longstanding recognition that a person's Fourteenth Amendment rights are not diminished by pregnancy has long co-existed with its separate jurisprudence on the right to an abortion.

fetal life in the specific context of post-viability abortion *so long as the pregnant person's right to life and health remains paramount* does not translate into the plenary power to override a pregnant person's fundamental right to refuse medical treatment embodied in the SIUH Maternal Refusal Policy.

To support its improper extension of *Roe*, the lower court cites two decades-old non-precedential cases, *Matter of Jamaica Hosp.*, 128 Misc 2d 1006 [Queens Ct. Sup Ct. 1985]), and *Crouse v. Irving Mem'l Hosp., Inc. v Paddock*, 127 Misc 2d 101 [Onondaga Cty. Sup. Ct. 1985], both of which involve refusal to consent to a blood transfusion on religious grounds. To start, *Crouse* is inapplicable because it concerned a parent's right to withhold medical care from a child after it was born, not the constitutional right of a pregnant person to refuse medical care. Moreover, *Jamaica Hospital*, which was litigated in a timespan of hours at a patient's hospital bed, entirely misconstrued the *Roe* viability standard when it ordered a blood transfusion of a person who was pregnant with a fetus that was indisputably pre-viability. This case simply does not stand for the far-reaching proposition that a private hospital may enforce a policy that targets pregnant women to disregard their rights without even minimal due process to force them to undergo a highly invasive surgery. Further, while it would be error to override a pregnant person's decision to refuse medical care regardless of whether the case is about a medical procedure like a blood transfusion, or about risky surgical intervention like a cesarean surgery, that

Ms. Dray was subjected to a highly invasive surgery underscores the severity of the intrusion onto her right to bodily autonomy.[10]

B. Courts Across the Country Routinely Refuse to Sanction a Judicial Override of a Pregnant Person's Right to Refuse Medical Treatment.

Courts across the country overwhelmingly agree that the State cannot assert an interest sufficiently compelling to override a pregnant person's right to refuse cesarean surgery in these circumstances, especially not as a basis for singling out pregnant women for differential treatment. State appellate courts have routinely held that a state's interest in fetal health is not sufficient to override a pregnant person's right to refuse medical care, even care deemed necessary to save the life of the pregnant patient or that of the fetus. (*See In re A.C.*, 573 A2d 1235, 1252 [DC 1990] (holding that where a pregnant patient with a viable fetus is near death, due process

[10] The lower court cites two additional cases that are inapposite. First, the fact that New York allows a born child to sue for injuries sustained during pregnancy, *Ward v Safejou*, 145 AD3d 836 [2d Dep't 2016], has no bearing on the question of whether the hospital here could ever assert an interest in fetal health sufficiently compelling enough to override Ms. Dray's refusal. Relatedly, Defendants-Respondents' reliance on *Broadnax v Gonzalez*, 251 AD2d 440 [2d Dept 1998], is also inapposite. (SIUH & Ducey Defs'-Resp't's Br. at 57–58.) At most, *Broadnax* stands for the proposition that in medical malpractice cases, physicians owe a duty of care to the pregnant patient—the only patient—that may entitle the pregnant patient to emotional distress damages. That case does not go so far as to say that a fetus is a patient, rather it is clear that the pregnant person is "the patient," not the fetus.

Second, the lower court's reliance on *Matter of Stefanal Tyesha C.*, 157 AD2d 322 [1st Dept 1990], is similarly misplaced because the Court of Appeals has previously held that a positive toxicology report alone is insufficient to reach a finding of neglect under Section 1012 [f] [i] [B] of the Family Court Act, *Nassau Cty. Dep't of Soc. Servs. on Behalf of Dante M. v Denise J.*, 87 NY2d 73, 79 [1995], so could also not justify the State's intrusion onto a pregnant person's fundamental right to refuse medical care.

requires that "*in virtually all cases* the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus") (emphasis added); *In re Baby Boy Doe*, 260 Ill App 3d 392, 392 [1994] (holding that courts may not balance "whatever rights a fetus may have against the rights of a competent woman to refuse medical advice to obtain a cesarean section for the supposed benefit of her fetus," and "that a woman's competent choice to refuse medical treatment as invasive as a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to the fetus"); *In re Brown*, 294 Ill App 3d 159, 171 [1997] (holding that the State may not override a pregnant woman's competent treatment decision, including refusal of recommended invasive medical procedures to potentially save the life of the viable fetus); *Commonwealth v Pugh*, 462 Mass 482, 504 [2012] (holding that pregnant women retain their right to forego medical treatment even in life-threatening situations); *Taft v Taft*, 388 Mass 331, 332, 334 n 4 [1983] (recognizing right to bodily integrity where a pregnant woman refused surgery recommended solely to protect a fetus); *New Jersey Div. of Youth & Family Servs. v L.V.*, 889 A2d 1153, 1159 [NJ Super Ct, Ch Div 2005] (recognizing right to refuse antiretroviral medication during pregnancy is part of woman's right to control her own body, even where refusal could kill the fetus and/or the pregnant person).) Their analyses are instructive.

The D.C. Court of Appeals struck down a lower court's order permitting a

hospital to perform cesarean surgery on a pregnant woman who was terminally ill and near death and had previously refused to consent to the surgery. (*In re A.C.*, 573 A2d at 1237). There, the court held that "*in virtually all cases* the question of what to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus." (*Id.* (emphasis added)). In reaching its decision, the court recognized that in cases "involving life-or-death situations," while courts have considered "four countervailing interests" when weighing whether to override a competent adult's refusal of treatment—"preserving life, preventing suicide, maintaining the ethical integrity of the medical profession, and protecting third parties,"—none of those interests were compelling enough to override the patient's refusal to consent to cesarean surgery. (*Id.* at 1245–46). Ultimately, the Court struck down the lower court's order permitting the surgery, and concluded that absent "truly extraordinary or compelling reasons to override them," courts "must determine the patient's wishes by any means available, and must abide by those wishes unless there are truly extraordinary or compelling reasons to override them." (*Id.* at 1247.)

The Illinois Appellate Court reached a similar conclusion in the case of a pregnant woman who refused to consent to a cesarean surgery on religious grounds, finding that "[t]he woman's decision, not the fetus's interest, is the *only* dispositive factor." (*Baby Boy Doe*, 260 Ill App 3d at 401–03 (emphasis added).) The court

reasoned that a pregnant person's "right to refuse invasive medical treatment . . . is not diminished during pregnancy. The woman retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant. The potential impact upon the fetus is not legally relevant." (*Id.* at 403.) In reaching its decision, the court again considered the same four state interests, and found that the prevention of suicide was "irrelevant" as was "preservation of life" because courts "traditionally examine the refusal of treatment as it impacts . . . the preservation of the life of the maker of the decision," the pregnant person. (*Id*. at 404.) The court also dismissed the interest in "third parties" because this doctrine refers not to a fetus, but to living "family members . . . of the person refusing treatment." (*Id.*) Finally, the court found that the final factor, "the ethical integrity of the medical profession" weighed in the pregnant patient's favor because "the medical profession strongly supports upholding the pregnant woman's autonomy in medical decision-making." (*Id.*)

If "*in virtually all cases* the question of what to be done must be decided by . . . the pregnant woman," what Ms. Dray endured was certainly one of these cases. As an initial matter, Ms. Dray clearly pleads that she repeatedly refused to consent to the surgery, so her lack of consent was not in question.

Second, the lower court improperly relied on *Matter of Fosmire* to conclude that by virtue of the fact that the State may intervene in certain circumstances when

an "individual's conduct threatens injury to others," this rule somehow extends to a fetus. (A-15). As in *Baby Boy Doe*, the third-party doctrine in New York refers to living family members, not a fetus. (*See, e.g.*, *Matter of Fosmire*, 144 AD2d 8 [2d Dept 1989] (applying third party doctrine to living minor dependents), *aff'd*, 75 NY2d 218 [1990].) In *Fosmire*, a hospital sought a court order to override a Jehovah's Witness's refusal on religious grounds to consent to a blood transfusion following the birth of her child by cesarean delivery. The State's principal argument was that the patient's refusal should be overridden because she had just given birth to a child and had a duty to care for her minor child. Unlike here, in *Fosmire*, the State was a party to the case *and* the patient had already given birth to a child. But even then, affirming the decision of the Second Department, the Court of Appeals concluded that the patient still "had a right to determine the course of her own treatment, which included the right to decline blood transfusions" and there was "no showing the State had a superior interest, in preventing her from exercising that right." (*Matter of Fosmire*, 75 NY2d at 231).

Third, as in *Baby Boy Doe*, the "ethical integrity of the medical profession" weighs in Ms. Dray's favor because leading professional medical organizations like ACOG have clearly stated that a "decisionally capable pregnant woman's decision

to refuse recommended medical or surgical interventions should be respected."[11] The ACOG Committee on Ethics advises that "[p]regnancy is not an exception to the principle that a decisionally capable patient has the right to refuse treatment, even treatment needed to maintain life."[12] ACOG explicitly warns that a physician's "use of coercion" to "influence patients toward a clinical decision" is "not only ethically impermissible but also medically inadvisable because of the realities of prognostic uncertainty and limitations of medical knowledge."[13] Importantly, ACOG additionally notes that "[c]oercive policies directed toward pregnant women may be disproportionately applied to disadvantaged populations" and "[i]n cases of court-ordered cesarean deliveries, for instance, most court orders have been obtained against women of color or of low socioeconomic status."[14] SIUH's Maternal Refusal Policy and the coercive conduct of hospital staff fell very short of this ethical framework advanced by medical professional organizations.

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[11] ACOG Comm. on Ethics, Opinion 664, *Refusal of Medically Recommended Treatment During Pregnancy* [June 2016], https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/06/refusal-of-medically-recommended-treatment-during-pregnancy; *see also* ACOG Comm. on Ethics, Opinion 439, *Informed Consent* [Aug. 2009], https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2009/08/informed-consent; Lisa Cosgrove & Akansha Vaswani, *Fetal Rights, the Policing of Pregnancy, and Meanings of the Maternal in an Age of Neoliberalism*, 40 J Theoretical & Philosophical Psychology 43, 43-53 [2020]; *see also* Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harv Women's LJ 9, 58 [1987].

[12] ACOG Comm. Opinion 664, *supra* note 12.

[13] *Id.*

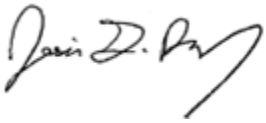
[14] ACOG Comm. Opinion 664, *Refusal of Medically Recommended Treatment During Pregnancy* [June 2016], https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/06/refusal-of-medically-recommended-treatment-during-pregnancy.

CONCLUSION

For the foregoing reasons, amicus curiae urges this Court to reverse the lower court's decision vacating its prior motion granting Ms. Dray's motion to amend to add claims for sex and/or gender discrimination under the NYCHRL, NYSHRL, and Civil Rights Law, and remand for further proceedings.

Dated: December 4, 2020
New York, NY

Respectfully Submitted,



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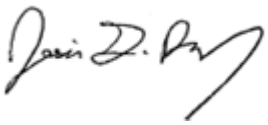
PRINTING SPECIFICATIONS STATEMENT

I certify in compliance with Rule 1250.8(j) of the Practice Rules of the Appellate Division that this brief was prepared on a computer using Microsoft Word, the typeface is Times New Roman, the font-size is 14-point type, and the text is double-spaced. The brief contains 5,210 words, excluding the sections listed in Rule 1250.8(f)(2).

Dated: December 4, 2020
New York, NY



Jessica Perry

EXHIBIT B

NOTICE OF APPEAL, DATED OCTOBER 30, 2019

FILED: KINGS COUNTY CLERK 10/31/2019 03:17 PM INDEX NO. 500510/2014
NYSCEF DOC. NO. 340 RECEIVED NYSCEF: 10/31/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

RINAT DRAY,

Plaintiff(s),

-against-

NOTICE OF APPEAL

STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, PC. and JAMES J. DUCEY

Defendant(s).

Index No. 500510/14

----------x

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Supreme Court Appellate Division in and for the Second Judicial Department from an Order made in this action dated October 1, 2019 by the Hon. Genine D. Edwards, Justice of the Supreme Court and entered in the office of the County Clerk on or about October 4, 2019.

Plaintiff hereby appeals from every part of the order from which she is aggrieved.

Dated: Brooklyn, NY
October 30, 2019

Yours, etc.,

Michael M. Bast, P.C.
Attorney for Plaintiff
by:
26 Court Street, Suite 1811
Brooklyn, NY 11242
(718) 852-2902

To:

Belair & Evans, LLP Attorneys for Defendants Gorelik and Metropolitan 90 Broad Street, 14th floor New York, NY 10004 (212) 344-3900	Gerspach Sikoscow LLP Attorneys for Defendants SIUH and Ducey 40 Fulton Street New York, NY 10038 (212) 422-0700

EXHIBIT C

A-3

DECISION AND ORDER OF THE HONORABLE GENINE D. EDWARDS, DATED OCTOBER 1, 2019, AND ENTERED ON OCTOBER 4, 2019, APPEALED FROM, WITH NOTICES OF ENTRY [A-3 - A-20]

FILED: KINGS COUNTY CLERK 10/04/2019 INDEX NO. 500510/2014
NYSCEF DOC. NO. 336 RECEIVED NYSCEF: 10/09/2019

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of October 2019.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

----------X

RINAT DRAY,

Plaintiff,

- against -

Index No. 500510/14

STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, P.C., AND JAMES J. DUCEY,

Defendants.

----------X

The following e-filed papers read herein:	NYSCEF Docket No.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	264-265, 273-274
Opposing Affidavits (Affirmations)	306
Reply Affidavits (Affirmations)	334, 335

Upon the foregoing papers, defendants Staten Island University Hospital (SIU Hospital) and James J. Ducey, M.D. (Dr. Ducey), move for an order: (1) pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), dismissing with prejudice Rinat Dray's (plaintiff) causes of action sounding in breach of contract, fraud, false advertising and gender discrimination (the sixth through twelfth causes of action); or, in the alternative, (2) pursuant to CPLR 2221 granting leave to reargue SIU Hospital and Dr. Ducey's prior cross-motion to dismiss these

MS 18, 19

claims which was denied in this Court's order dated January 7, 2019, and, upon reargument, granting dismissal of the above noted causes of action. Defendants Leonid Gorelik, M.D. (Dr. Gorelik), and Metropolitan Ob-Gyn Associates, P.C., (Metropolitan), similarly move for an order, pursuant to CPLR 3211 (a) (7), dismissing the sixth through the twelfth causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

On July 26, 2011, Dr. Gorelik delivered plaintiff's third child by way of a cesarean section at SIU Hospital over her express objection and despite her desire to give birth by way of a spontaneous vaginal delivery. In order to proceed with a vaginal delivery despite the two preceding cesarian sections, plaintiff chose non-party Dr. Dori, an Obstetrician-Gynecologist (Ob-Gyn) employed by or associated with Metropolitan, who told plaintiff that he was willing to let plaintiff try to proceed by way of a vaginal delivery.

At around 8:00 a.m., on July 26, 2011, plaintiff, who was experiencing contractions, proceeded to SIU Hospital, but found that Dr. Dori was not available. Dr. Gorelik, another Ob-Gyn associated with Metropolitan, was present and examined plaintiff. While Dr. Gorelik initially told plaintiff that she should proceed by way of a cesarean section, he later agreed to let plaintiff try to proceed by way of a vaginal delivery. By early afternoon, however, Dr. Gorelik told plaintiff that it wasn't good for the baby and that plaintiff should proceed by way of a cesarean section. Thereafter, Dr. Gorelik consulted with Dr. Ducey, SIU Hospital's director of obstetrics, who likewise agreed that plaintiff should undergo a cesarean

section, and he attempted to convince plaintiff to undergo such procedure. Plaintiff refused to grant her consent, and Dr. Ducey, after consulting with Arthur Fried (Fried), senior vice president and general counsel of SIU Hospital, determined that it would take too long to obtain a court order allowing the procedure over plaintiff's objections, and, with the concurrence of Fried, Dr. Gorelik made the decision to proceed with a cesarean section despite plaintiff's objections. A cesarean section was performed by Dr. Ducey and Dr. Gorelik. Plaintiff's son was healthy upon delivery. Plaintiff, however, suffered a cut to her bladder, the repair of which required additional surgery immediately following the completion of the C-section. SIU Hospital discharged plaintiff on July 31, 2011.

Plaintiff commenced the instant action on January 22, 2014 by filing a summons and complaint. In an amended verified complaint, plaintiff alleged causes of action for negligence, medical malpractice, lack of informed consent, violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7, and punitive damages based on allegations that defendants, among other things, performed the cesarean section against plaintiff's will, caused or allowed the injury to plaintiff's bladder during the cesarean section and failed to properly repair the laceration to her bladder, and failed to properly evaluate plaintiff and the fetal monitoring strips in choosing to proceed with a cesarean section rather than allowing a vaginal delivery. Defendants, in separate motions, moved to dismiss, as untimely, plaintiff's causes of action to the extent that they were based on the performance of the cesarean section over the objection of plaintiff, and to dismiss the fourth cause of action

based on violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7, for failing to state a cause of action. As is relevant here, in an order dated October 29, 2015, the Court (Jacobson, J.) granted the portions of defendants' motions that were based on statute of limitations grounds, but, in an order dated May 12, 2015, the Court (Jacobson, J.) denied the portions of the motions seeking dismissal of the fourth cause action based on violations of Public Health Law § 2803-c (3) (e) and 10 NYCRR 405.7.

On appeal of these orders, the Appellate Division, Second Department, affirmed the dismissal of the action to the extent that it was based on the performance of the cesarean section over plaintiff's objection, emphasizing that the essence of that claim is an intentional tort for which a one-year statute of limitations applies, and that plaintiff "could not avoid the running of the limitations period by attempting to couch the claim as one sounding in negligence, medical malpractice, or lack of informed consent." *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 614, 75 N.Y.S.3d 59 (2d Dept. 2018); *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 620, 74 N.Y.S.3d 69 (2d Dept. 2018). The Second Department, however, found that the Court erred in denying the portion of the motion to dismiss the fourth cause of action. In doing so, the Second Department held that it was clear from the statutory scheme that Public Health Law § 2803-c applies to nursing homes and similar facilities and does not apply to hospitals. The Second Department also held that, while 10 NYCRR 405.7, which requires patients be afforded certain rights, applies to hospitals and may be cited in support of a medical malpractice cause of action, it does not give rise to an independent private right

of action. *See Dray*, 160 A.D.3d 614, 75 N.Y.S.3d 59; *Dray*, 160 A.D.3d 620, 74 N.Y.S.3d 69.

As a result of these determinations, plaintiff's claims against defendants were effectively limited to a negligence action relating to the failure to follow hospital rules relating to summoning a patient advocate group and a bioethics panel, medical malpractice relating to whether it was necessary to perform the cesarean section instead of the vaginal delivery,[1] and medical malpractice relating to the injury to her bladder. Plaintiff thereafter moved to amend the complaint to add causes of action for: (1) breach of contract; (2) fraud; (3) violations of consumer protection statutes (General Business Law §§ 349 and 350); (4) violations of equal rights in public accommodations (Civil Rights Law § 40); and violations of the New York State and City Human Rights Laws (Executive Law art 15; Administrative Code of the City of NY § 8–101, et seq.). These causes of action are all primarily based on documents plaintiff appended to the then proposed amended complaint, which are made a part thereof under CPLR 3014, and which include SIU Hospital's internal administrative policies relating to "Managing Maternal Refusals of Treatment Beneficial for the Fetus" (Maternal Refusal Policy), documents SIU Hospital gave plaintiff upon her admission, and plaintiff's own affidavit dated September 11, 2014.

The documents SIU Hospital provided to plaintiff included the patient bill of rights,

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[1] In other words, the medical malpractice in this respect does not relate to any issue of consent, but rather relates to whether the decision to proceed with the cesarean section was a departure from accepted medical practice.

a form all New York hospitals are required to provide to patients upon admission (10 NYCRR 405.7 [a] [1], [c]), which, as relevant here, informed plaintiff that as a patient, "you have the right, consistent with law, to," among other things, "[r]efuse treatment and be told what effect this may have on your health," and the form plaintiff signed in which she consented to the performance of the vaginal delivery. Of note, in addition to specifically mentioning the vaginal delivery, the consent form contains a provision stating, as relevant here, that "I understand that during the course of the operation(s) or procedure(s) unforeseen conditions may arise which necessitate procedure(s) different from those contemplated" and one stating "I acknowledge that no guarantees or assurances have been made to me concerning the results intended from the operation(s), or procedure(s) or treatment(s)." SIU Hospital also provided plaintiff with a consent form for the cesarean section that plaintiff refused to sign.

In addition to these documents provided to plaintiff, SIU Hospital's internal Maternal Refusal Policy provided for the overriding of a pregnant patient's refusal to undergo treatment recommended for the fetus by the attending physician when: (a) the fetus faced serious risk; (b) the risks to the mother were relatively small; © there was no viable alternative to the treatment, the treatment would prevent or substantially reduce the risk to the fetus, and the benefits of the treatment to the fetus significantly outweighed the risk to the mother; and (d) the fetus was viable based on having a gestational age of over 23 weeks and having no lethal untreatable anomalies. This policy also required, among other things,

that the attending physician consult with SIU Hospital's director of maternal fetal medicine, that the ultimate decision was to be made in consultation with a representative of the SIU Hospital's office of legal affairs, and that a court order be obtained if time permitted.

After receipt of plaintiff's motion to amend, SIU Hospital and Dr. Ducey cross-moved, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), to dismiss the proposed causes of action and Metropolitan and Dr. Gorelik cross-moved for an order denying the proposed amendments and for costs and counsel fees for the motion. This Court, in an order dated January 7, 2019, granted plaintiff's motion to amend, and denied defendants' cross motions. In doing so, the Court found that defendants failed to meet their burden of demonstrating the insufficiency of plaintiff's proposed claims. Following the Court's order, plaintiff filed the second amended complaint on January 23, 2019.

It is in this context that defendants' instant motions must be considered. As this Court finds that the sufficiency of plaintiff's proposed amendments and whether they are barred by documentary proof warrants reargument. *See Castillo v. Motor Veh. Acc. Indem. Corp.*, 161 A.D.3d 937, 78 N.Y.S.3d 162 (2d Dept. 2018); *Ahmed v. Pannone*, 116 A.D.3d 802, 984 N.Y.S.2d 104 (2d Dept. 2014); CPLR 2221 (d) (2).

While a motion for leave to amend the complaint should be freely given, such a motion should be denied where the proposed claim is palpably insufficient, such as where the proposed claim would not withstand a motion to dismiss under CPLR 3211 (a) (7). *See Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008); *Norman v. Ferrara*,

107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept. 1985); *See also Perrotti v. Becker, Glynn, Melemed & Muffly LLP*, 82 A.D.3d 495, 918 N.Y.S.2d 423 (1st Dept. 2011). In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *Mawere v. Landau*, 130 A.D.3d 986, 15 N.Y.S.3d 120 (2d Dept. 2015) (internal quotation marks omitted); *see Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007).

BREACH OF CONTRACT

"A breach of contract claim in relation to the rendition of medical services by a hospital [or physician] will withstand a test of legal sufficiency only when based upon an express promise to affect a cure or to accomplish some definite result." *Catapano v. Winthrop Univ. Hosp.*, 19 A.D.3d 355, 796 N.Y.S.2d 158 (2d Dept. 2005); *see Detringo v. South Is. Family Med., LLC*, 158 A.D.3d 609, 71 N.Y.S.3d 525 (2d Dept. 2018); *Nicoleau v. Brookhaven Mem. Hosp. Ctr.*, 201 A.D.2d 544, 607 N.Y.S.2d 703 (2d Dept. 1994). Here, contrary to plaintiff's assertions, a definite agreement not to perform a cesarean section cannot be found by a reading of the patient bill of rights form, the consent forms and other documents provided to plaintiff upon her admission. Notably, the consent form that plaintiff did sign expressly states that other procedures for which consent is not expressly given might be necessary and states that the consent form itself is not a promise or a guarantee of a

particular result. Further, plaintiff's refusal to sign the consent form for the cesarean section does not create an agreement by defendants accepting her refusal. Finally, the "provisions of the 'Patient Bill of Rights' do not constitute the requisite 'express promise' or special agreement with the patient so as to furnish the basis for a breach of contract claim." *Catapano*, 19 A.D.3d 355, 796 N.Y.S.2d 158; *see Detringo*, 158 A.D.3d 609, 71 N.Y.S.3d 525.

FRAUD

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Euryclea Partners, LP v. Seward & Kissel, LLP*, 12 N.Y. 553, 883 N.Y.S.2d 144 (2009). Here, plaintiff's fraud claim is premised on the above noted consent forms and the patient bill of rights, which plaintiff asserts constitute a representation that plaintiff would be entitled to proceed with a vaginal delivery and could refuse the cesarean section. Plaintiff further asserts that this representation was knowingly false in view of the Maternal Refusal Policy, the provisions of which allow for the overriding of maternal refusal of consent under certain circumstances. Accepting this view of the documents, however, plaintiff's fraud claim is insufficient to state such a claim, as any fraudulent inducement was not collateral to the purported contract. *See Joka Indus., Inc. v. Doosan Infacore Am. Corp.*, 153 A.D.3d 506, 59 N.Y.S.2d 506 (2d Dept. 2017); *Stangel v. Chen*, 74 A.D.3d 1050, 903 N.Y.S.2d 110 (2d Dept. 2010).

Moreover, as discussed with respect to plaintiff's contract claims, the consent forms do not constitute a promise that plaintiff would not have to undergo a cesarean section or that her refusal would not be overridden. Similarly, the patient bill of rights, the provisions of which every hospital is mandated to provide to patients under 10 NYCRR 405.7 (a) (1), ©, does not constitute a promise by SIU Hospital or the defendant doctors. Also, by expressly stating that a patient's right to refuse treatment is definitive to the extent that the right is "consistent with law," the patient bill of rights suggests that the right to refuse treatment may not be an absolute right. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 704 N.Y.S.2d 177 (1977). Plaintiff has thus failed to plead that there was any misrepresentation. In any event, plaintiff, in her own affidavit that was submitted in support of the motion to amend and which can be considered as a basis for dismissal, *see Held v. Kaufman*, 91 N.Y.2d 425, 671 N.Y.S.2d 429 (1998); *Norman*, 107 A.D.3d 739, 484 N.Y.S.2d 600, asserts that Dr. Gorelik was resistant to her proceeding by way of a vaginal delivery from the time he first saw her in the hospital, an assertion that demonstrates that defendants were not misleading plaintiff, or at least that plaintiff could not justifiably rely on the patient bill of rights in this respect. *See Shalam v. KPMG, LLP*, 89 A.D.3d 155, 931 N.Y.S.2d 592 (1st Dept. 2011).

GENERAL BUSINESS LAW §§ 349 & 350

The protections against deceptive business practices and false advertising provided by General Business Law §§ 349 and 350 may apply to the provision of medical services. *See Karlin v. IVF Am.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999). These General Business

Law sections, however, are not implicated by plaintiff's allegations here, which, to the extent that they are based on the consent forms, relate only to her personal treatment and care and cannot be deemed to be consumer oriented. *See Greene v. Rachlin*, 154 A.D.3d 814, 63 N.Y.S.3d 78 (2d Dept. 2017); *Kaufman v. Medical Liab. Mut. Ins. Co.*, 92 A.D.3d 1057, 938 N.Y.S.2d 367 (3d Dept. 2012). Without an ability to rely on these consent forms, plaintiff's deceptive business practices claims rest solely on the provisions of the patient bill of rights. 10 NYCRR 405.7 (a) (1) and ©. As 10 NYCRR 405.7 does not give rise to an independent private right of action, *See Dray*, 160 A.D.3d 614, 75 N.Y.S.3d 59, plaintiff may not circumvent this legislative intent by bootstrapping a claim based on a violation of 10 NYCRR 405.7 onto a General Business Law §§ 349 or 350 claim. *See Schlesenger v. Valspar Corp.*, 21 N.Y.3d 166, 969 N.Y.S.2d 416 (2013); *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107 (2d Cir. 2017).

In any event, the regulatory mandated dissemination of the patient bill of rights simply cannot be compared to the multi-media dissemination of information that the Court of Appeals found in *Karlin* to constitute deceptive consumer oriented conduct in violation of General Business Law §§ 349 and 350. *Karlin*, 93 N.Y.2d 282, 690 N.Y.S.2d 495. And, as noted with respect to the discussion of the fraud claims, by expressly stating that a patient's right to refuse treatment is conditioned upon that right being "consistent with law," the patient bill of rights suggests that the right to refuse treatment is not an absolute right. As such, the representations of the patient bill of rights in conjunction with SIU Hospital's

internal Maternal Refusal Policy did not mislead plaintiff or other patients in any material way. *See Gomez-Jimenez v New York Law Sch.*, 103 A.D.3d 13, 956 N.Y.S.2d 54 (1st Dept. 2012); *Andre Strishak & Assoc. v. Hewlett Packard Co.*, 300 A.D.3d 608, 752 N.Y.S.2d 400 (2d Dept. 2002); *Abdale v. North Shore-Long Is. Jewish Health Sys., Inc.*, 49 Misc. 3d 1027, 19 N.Y.S.3d 850 (Sup Ct, Queens County 2015).

CIVIL RIGHTS AND HUMAN RIGHTS LAWS

Plaintiff cannot state a cause of action based on Civil Rights Law § 40, which applies to discrimination in public accommodations, because that statute pertains only to discrimination against "any person on account of race, creed, color or national origin" and does not extend to gender discrimination or discrimination based on a plaintiff's pregnancy. *See DeCrow v. Hotel Syracuse Corp.*, 59 Misc. 2d 383, 298 N.Y.S.2d 859 (Sup Ct, Onondaga County 1969); *Seidenberg v. McSorleys' Old Aile House, Inc.*, 317 F. Supp. 593 (SDNY 1970).

On the other hand, the State and City Human Rights Laws bar discriminatory practices in places of public accommodations because of sex or gender and extend to distinctions based solely on a woman's pregnant condition. *See Elaine W. v Joint Diseases N.Gen. Hosp.*, 81 N.Y.2d 211, 597 N.Y.S.2d 617 (1993); *see also Chauca v. Abraham*, 30 N.Y.3d 325, 67 N.Y.S.2d 85 (2017); Executive Law § 296 (2) (a); Administrative Code of the City of NY § 8–107 (4). In the proposed pleading, plaintiff's causes of action based on the City and State Human Rights Laws are based solely on a claim that SIU Hospital's Maternal

Refusal Policy facially violates these provisions. The determination of whether the Maternal Refusal policy is one that makes distinctions based solely on a woman's pregnant condition turns on a patient's rights in refusing treatment.

Under the long held public policy of this state, a hospital cannot override the right of a competent adult patient to determine the course of his or her medical care and to refuse treatment even when the treatment may be necessary to preserve the patient's life. *See Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990); *Matter of Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266 (1981). The Court of Appeals, however, noted that when an "individual's conduct threatens injury to others, the State's interest is manifest and the State can generally be expected to intervene." *See Matter Fosmire*, 75 N.Y.2d 218, 551 N.Y.S.2d 876. While a fetus is not a legally recognized person until there is a live birth, Penal Law § 125.05 (1); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 335 N.Y.S.2d 390 (1972), the State recognizes an interest in the protection of viable fetal life after the first 24 weeks of the pregnancy, *see Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) (state has compelling interest in protecting fetal life at the point of viability),[2] by holding a mother liable for neglect for drug use during a pregnancy, *Matter of Stefanal Tyesah C.*, 157

[2] In this respect, the Court notes that, until January 22, 2019, the Penal Law criminalized abortions and self abortions that took place after 24 weeks of gestation where the life of the mother was not at risk. *See* former Penal Law §§ 125.05 (3), 125.40, 125.45, 125.50, 125.55 and 125.60, repealed by L. 2019, ch. 1, § 5-10. Although these amendments decriminalized abortion, they specifically allow an abortion to be performed only if the fetus is not viable, if the mother's health is at risk, or if it is within 24 weeks of the commencement of the pregnancy. *See* Public Health Law § 2500-bb; L. 2019, ch. 1, § 2.

A.D.2d 322, 556 N.Y.S.2d 280 (1st Dept. 1990), and by allowing an infant born alive to sue for injuries suffered in utero. *See Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Ward v. Safejou*, 145 A.D.2d 836, 43 N.Y.S.3d 447 (2d Dept. 2016).

New York trial courts have found that this interest in the well being of a viable fetus is sufficient to override a mother's objection to medical treatment, at least where the intervention itself presented no serious risk to the mother's well being. *See Matter of Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup Ct, Queens County 1985); *Matter of Crouse-Irving Mem. Hosp. v. Paddock*, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup Ct, Onondaga County 1985), and the Appellate Division, Second Department, has also so found, albeit in dicta. *Matter of Fosmire v. Nicoleau*, 144 A.D.2d 8, 536 N.Y.S.2d 492 (2d Dept. 1989), *affd.* 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990).

In view of this legal background, and regardless of whether it is ultimately determined that a mother may refuse consent to medical procedures regardless of the risk the procedure may present to the fetus, SIU Hospital's Maternal Refusal Policy clearly presents an attempt to comply with the law relating to the refusal to consent to procedures where the rights of a viable fetus are at stake. As such, while the Maternal Refusal Policy only affects pregnant woman, the policy's interference in a pregnant woman's refusal decision only applies under circumstances such that the distinctions it makes are not solely based on a woman's pregnant condition, but rather, take into account concern for the fetus, and thus, the policy does not constitute discrimination based solely on sex or gender under the City and State Human

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Rights Laws.

CONCLUSION

In conclusion, this Court grants reargument, vacates it's January 7, 2019 decision and order to the extent that the Court found that plaintiff's proposed causes of action sufficient to state causes of action, and denies plaintiff's motion to amend her complaint.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. GENINE D. EDWARDS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

RINAT DRAY, *Plaintiff-Appellant*, -against- STATEN ISLAND UNIVERSITY HOSPITAL, LEONID GORELIK, METROPOLITAN OB-GYN ASSOCIATES, P.C., and JAMES J. DUCEY, *Defendants-Respondents*.	:	**AFFIDAVIT OF SERVICE** App. Case No. 2019-12617 Kings County Clerk's Index No. 500510/14

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

I, LOURDES CHAVEZ, being duly sworn, depose and say that:

1. I am not a party to the above-captioned action, am 18 years of age or older, and am an employee of the New York Civil Liberties Union.
2. On the 4th day of December, 2020, I served one true and correct copy of each of the following documents on each party in the above-captioned matter:
    a. Notice of Motion for Leave to Appear as Amicus Curiae;
    b. Affirmation of Jessica Perry in Support of Motion for Leave to Appear as Amicus Curiae;
    c. Proposed Brief of Amicus Curiae the New York Civil Liberties Union in Support of Plaintiff-Appellant (Exhibit A);
    d. Notice of Appeal and proof of filing (Exhibit B);
    e. and the lower court's opinion on appeal (Exhibit C).
3. The method of service was by UPS Overnight Delivery and electronic mail.
4. The names of the individuals served and the addresses at which service was made are as follows:

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Dated: December 4, 2020
New York, NY

Lourdes Chavez

Sworn to before me this

4th day of December, 2020

NOTARY PUBLIC

JESSICA PERRY
NOTARY PUBLIC-STATE OF NEW YORK
No. 02PE6392775
Qualified in Kings County
My Commission Expires 06-03-2023