

ROSA ACUNA, Individually,	:	SUPREME COURT OF NEW JERSEY
<i>Plaintiff-Respondent,</i>	:	DOCKET NO. 59,525
	:	
	:	CIVIL ACTION
	:	
vs.	:	On appeal from the DECISION OF THE
	:	SUPERIOR COURT OF THE NEW
SHELDON C. TURKISH, M.D., and the	:	JERSEY APPELLATE DIVISION
OBSTETRICAL AND	:	Docket No. A-4022-03T5
GYNECOLOGICAL GROUP OF PERTH	:	Docket No. A-4023-03T5
AMBOY-EDISON, P.C.,	:	
	:	Sat below: Judges Rodriguez, Cuff,
<i>Defendants-Petitioners.</i>	:	and Hoens
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	:	
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AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES  
UNION OF NEW JERSEY *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-  
PETITIONERS' PETITION FOR CERTIFICATION

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## **INTEREST OF AMICI CURIAE**

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization founded in 1920, that has over 500,000 members. The ACLU of New Jersey (ACLU-NJ) is the state affiliate of the ACLU founded in 1960, and has approximately 15,000 members in the State of New Jersey. The ACLU and the ACLU-NJ are dedicated to defending the guarantees of liberty and equality found in the state and federal Constitutions. The ACLU and the ACLU-NJ have a long history of vigorously defending the right to privacy, including reproductive rights, through litigation and advocacy. This history makes the ACLU and the ACLU-NJ well positioned to assist this Court in its consideration of this case.

## **REASONS FOR GRANTING CERTIFICATION**

This Court should grant certification because this case raises questions of general public importance that have not been but should be settled by this Court. The Appellate Division’s decision, if allowed to stand, would have a profound impact on physicians and their patients throughout New Jersey, and likely the nation. The outcome of this case will dictate what non-medical “information” physicians must tell their patients before performing an abortion, regardless of their patient’s individual medical circumstances, and their religious, cultural, and personal beliefs.

Plaintiff’s lawsuit is an attempt to impose a new regime of “informed consent” on physicians and their patients by requiring physicians to impart a particular moral judgment about abortion to their patients. Since physicians are under no duty to discuss non-medical issues with their patients, the Law Division properly rejected Plaintiff’s

claims as a matter of law. The Appellate Division, however, reversed that decision. By allowing the case to go to trial, the Appellate Division improperly concluded that, as a matter of law, Defendant's duty to provide material medical information encompasses moral judgments about whether an embryo or a fetus is a human being. PCa15.<sup>1</sup> Indeed, the Appellate Division never suggested that Plaintiff was denied *actual medical information*, but rather, cloaking moral determinations as "material medical information," has left a jury to decide what value-laden statements must be relayed to a patient seeking an abortion. *Id.*

Furthermore, Plaintiff's proposed alteration to New Jersey's informed consent doctrine violates both the federal and state constitutions, and is contrary to New Jersey's public policy of providing the utmost protection for reproductive rights. Moreover, since this case is a concerted attack on reproductive health providers and their patients, it has a chilling effect on those providers, and will potentially impact other reproductive health services outside the abortion context. Accordingly, this Court should grant certification, reverse the Appellate Division's decision, and reinstate the Law Division's order rejecting Plaintiff's claims.

**I. If Allowed to Stand, the Appellate Division's Decision Would Impose a New Non-Medical "Informed Consent" Doctrine Upon Physicians and Their Patients.**

Under Plaintiff's view, the only way a physician can discharge his or her duty to obtain informed consent from a patient seeking an abortion is to tell her that in ending her pregnancy, she would kill a "complete, separate, unique and irreplaceable human being." PCa28 (quoting Plaintiff's Complaint). If this Court allows Plaintiff's claim to go to trial – regardless of the outcome in that particular trial – physicians and other providers will

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<sup>1</sup> "PCa" refers to the Defendants-Petitioners' Appendix filed in support of their petition for certification.

have to impart that information simply to avoid the risk of liability and a medical malpractice trial. This would greatly, and unconstitutionally, alter New Jersey's informed consent doctrine. Plaintiff makes no "stand-alone claim" that Defendant "did not more specifically advise her of the stage of development of her fetus." PCa45. Nor does Plaintiff allege that she did not understand that she was pregnant, PCa5; that she does not understand English; that she suffers from mental impairments; or that "the abortion was performed against her will," PCa11. As the Law Division correctly recognized, "[a]bsent a serious cognitive problem, every pregnant woman knows that she is carrying developing human life growing within her and that the abortion will result in the termination of that life." PCa35. Accordingly, the Law Division concluded that

plaintiff is seeking to require the doctors to say something more than the obvious facts we all know to be true. Saying one is terminating the life of a living human being conjures up quite a different image than saying one is terminating the life of a living human fetus or a living human embryo. Plaintiff's demand that the doctor tell her that an embryo or fetus is a living human being expresses the value laden view that the embryo or fetus is equivalent in all material ways to a person born and alive.

PCa37.

Thus, as the Law Division correctly found, Plaintiff's claims are premised on Defendant's failure to provide *non-medical* information. *Id.* A physician's duty under New Jersey law, however, is clearly limited to the disclosure of *medical* information. PCa34 ("duty of disclosure is limited to providing *medical* risks and information, the kind of information the physician, due to his expertise in medicine, is expected to have"); *see also* Def.'s Pet. for Certif. at 7-15 (the informed consent doctrine requires physicians to convey material *medical* information, which is not at issue in this case). Other states similarly limit the informed consent doctrine to medical information. For example, in

upholding a state law requiring certain counseling prior to abortion, the Florida Supreme Court held that the informed consent doctrine only requires the disclosure of *medical* risks. *State v. Presidential Women's Center*, -- So. 2d --, 2006 WL 870497 (Fla. Apr. 6, 2006). The court stated:

The doctrine of medical informed consent is rooted in the concepts of bodily autonomy and integrity and it is logical that physicians be required to inform the patient only and exclusively of the medical risks of terminating or not terminating a pregnancy. Physicians are not sociologists, economists, theologians, or philosophers, and it is implausible to conclude that the Legislature intended that physicians be required to venture far beyond their professional specialty and expertise to advise patients of nonmedical matters . . . .

*Id.*, at \*5 (internal citation omitted); *see also Arato v. Avedon*, 5 Cal. 4th 1172, 1189, 858 P.2d 598, 609 (Cal. 1993) (given the “therapeutic limitation inherent in the doctrine of informed consent” physicians are not under duty to disclose “every contingency that might affect the patient’s *nonmedical* rights and interests”). Given this absence of a legal duty to impart the non-medical information Plaintiff insists upon, the Law Division properly ruled that Defendant was entitled to judgment as a matter of law.

The Appellate Division’s contrary holding – that “the standard against which [Defendant’s] communications with [Plaintiff] should be measured is not a legal issue” – is simply incorrect. PCa15. The Appellate Division itself recognized that the “physician has a duty to explain . . . all material *medical* information and risks,” PCa14-15 (emphasis added), but it subsequently disregarded this rule of law in reversing the Law Division’s ruling and remanding for a trial. The Appellate Division’s decision thus improperly sets the stage for a courtroom performance, where Plaintiff will adduce voluminous evidence in an attempt to prove that “between the embryonic age of 5 ½ to 8

weeks old, an unborn child is a human being as a matter of biological fact.”<sup>2</sup> Pl.’s Opp’n to Pet. for Certif. at 9. And the outcome of this trial is undoubtedly subject to the jurors’ moral beliefs on the issue of when human life begins. By allowing such a trial to go forward, the Appellate Division has paved the way for the creation of a new informed consent doctrine, requiring physicians to recite Plaintiff’s scripted, value-based, judgment about abortion: that an embryo or fetus is a “complete, separate, unique and irreplaceable human being,” and that terminating the pregnancy entails killing an existing family member. PCa27.

The decision below notwithstanding, whether an embryo does indeed have this status is not a “factual” issue properly sent to the jury. It is, rather, a personal, moral, and philosophical issue, the resolution of which cannot be mandated by the courts. Indeed, as elaborated in Point II *infra*, this state-mandated view of morality has no place in women’s intimate abortion decisions. In upholding the central tenets of *Roe v. Wade*, the Court in *Planned Parenthood v. Casey* held:

Our obligation is to define the liberty of all, not to mandate our own moral code. . . . At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

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<sup>2</sup> Plaintiff’s counsel has envisioned a jury trial where he will attempt to “‘prove, that in fact, as a matter of biology and science, that the embryo and fetus . . . in the first trimester, is a whole unique member of the species homo sapiens. The doctor has a duty to disclose that fact in terms and in ways that a reasonable patient can understand. A jury will have to decide what is the nature of the fetus.’” 1010 WINS, *Jury to Consider Whether Doc Misled on Abortion* (Apr. 7, 2006), <http://1010wins.com/pages/23089.php?> (quoting Plaintiff’s counsel, Harold J. Cassidy). Indeed, Plaintiff has enlisted numerous experts to testify at trial, including a pediatric geneticist, a molecular biologist, a fetal surgeon, a pediatric neurologist, and other physicians and psychologists. PCa29-31.

505 U.S. 833, 850-51 (1992). Accordingly, the Appellate Division’s decision reversing the Law Division’s ruling and remanding for a trial should be reviewed by this Court and reversed as a matter of law.

**II. Plaintiff’s Version of “Informed Consent” Violates the State and Federal Constitutions.<sup>3</sup>**

Plaintiff’s proposed “informed consent” requirement would violate New Jersey’s Constitution, which is highly protective of reproductive rights. *See, e.g., Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609 (2000); *Right to Choose v. Byrne*, 91 N.J. 287 (1982). As this Court held in *Farmer*:

The language of [Article 1, Paragraph 1 of the New Jersey Constitution] is more expansive than that of the United States Constitution. It incorporates within its terms the right of privacy and its concomitant rights, including a woman’s right to make certain fundamental choices. Thus, in New Jersey, we have a long-standing history that begins even prior to *Roe v. Wade*, demonstrating a commitment to the protection of individual rights under the State Constitution.

165 N.J. at 629 (internal quotation marks and citations omitted). Plaintiff’s “informed consent” standard would violate the New Jersey Constitution since it interferes with a woman’s right to make fundamental choices about whether to terminate her pregnancy, and it singles out abortion from all other medical treatment. Indeed, Tennessee, which has similarly strong state constitutional protection for abortion, has struck down its statutory informed consent requirement, which, unlike the requirement Plaintiff seeks here, did not go so far as to require physicians to impose one moral view on their patients. *See, e.g., Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).

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<sup>3</sup> Contrary to Plaintiff’s claim, Opp’n to Pet. for Certif. at 12, neither the Appellate Division nor the Law Division reached this constitutional defense. PCa32. Accordingly, at minimum this Court should instruct the Law Division on remand to first consider this defense before proceeding with trial.

In addition, Plaintiff's "informed consent" standard is so extreme it would violate the federal constitutional right to privacy encompassed in the Fourteenth Amendment, and the right to free speech under the First Amendment. The Supreme Court has held that a state may require physicians to make available certain "truthful and not misleading" information to the patient prior to the abortion. *Casey*, 505 U.S. at 882. The statute upheld in *Casey* required physicians to inform the patient of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the embryo or fetus. *Id.* Plaintiff in this case, however, seeks to impose a requirement that is in sharp contrast to the statute at issue in *Casey*. *See supra* at 2-6. Whether an embryo or fetus is a separate, complete, unique, and irreplaceable human being, with whom the pregnant woman has an existing relationship, is a moral, philosophical, and religious determination for the woman to make, not a "medical fact" as Plaintiff insists. A state-mandated imposition of one moral view – Plaintiff's – is misleading, and because a moral judgment cannot by definition be truthful or untruthful, Plaintiff's proposed requirement imposes an unconstitutional undue burden under *Casey*. *See* Def.'s Pet. for Certif. at 15-19. This analysis is not altered by the Appellate Division's decision to let a *jury* decide the contours of what physicians must say to women seeking abortions in order to obtain their informed consent. Courts cannot allow juries to impose requirements that are not mandated by law and that are, as in this case, unconstitutional.

Plaintiff's claim that the Constitution requires New Jersey to mandate the disclosure of non-medical, moral views about abortion, Pl.'s Opp'n to Certif. at 19-20, is meritless, and was properly rejected in another lawsuit filed by Plaintiff and her counsel.

See *Marie v. McGreevey*, 314 F.3d 136 (3d Cir. 2002), *cert. denied*, 539 U.S. 910 (2003).

The court in that case held:

[Plaintiffs] contend consent requirements should include informing the pregnant woman that “her child is already in existence,” that her fetus is a “complete, separate . . . unique” human being; and that her child, if eight weeks or older, may feel pain. The woman should also be required to view a sonogram and listen to the child’s heartbeat, according to plaintiffs. . . . [W]e see no basis for a due process violation. . . . [T]he Constitution does not require that New Jersey mandate the heightened consent requirements urged by plaintiffs.

314 F.3d at 142-43. Plaintiff’s argument in this case should be rejected for the same reasons the *Marie* court rejected it.

Plaintiff’s “informed consent” requirement would also violate the First Amendment, which is the basis for a decision blocking a similar law in South Dakota. *Planned Parenthood Minn. v. Rounds*, 375 F. Supp. 2d 881 (D.S.D. 2005), *appeal argued*, No. 05-3093 (8th Cir. Apr. 20, 2006). The statute at issue in *Rounds* requires physicians to convey to their patients the same information Plaintiff here demands: “the abortion will terminate the life of a whole, separate, unique, living human being; [and] [t]hat the pregnant woman has an existing relationship with that unborn human being and that relationship enjoys protection under the United States Constitution and under the laws of South Dakota.”<sup>4</sup> 375 F. Supp. 2d at 884 (quoting H.B. 1166, 2005 Leg. Sess. (S.D. 2005)). In issuing the preliminary injunction, the court held:

South Dakota may not . . . violate the First Amendment rights of abortion providers by compelling them to espouse the State’s ideology. See *Wooley [v. Maynard]*, 430 U.S. [705], 714 [1977]. Unlike the truthful, non-misleading medical and legal information doctors were required to disclose in *Casey*, the South Dakota statute requires doctors to enunciate

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<sup>4</sup> Plaintiff’s counsel in this case is also counsel for defendant-intervenor aiding in the defense of the statute in the South Dakota case. *Planned Parenthood Minn. v. Rounds*, No. 05-4077 KES, 2005 WL 2338863 (D.S.D. Sept. 23, 2005) (granting motion to intervene).

the State's viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a human being.

375 F. Supp. 2d at 886-87. Accordingly, since Plaintiff's demands would impose an unconstitutional requirement on physicians and their patients, Plaintiff's claims must fail as a matter of law.

### **III. Imposing Plaintiff's Concept of "Informed Consent" on Physicians and Their Patients Is Antithetical to New Jersey's Public Policy of Protecting Reproductive Rights.**

Forcing patients to listen to non-medical, moral judgments from their physicians prior to obtaining an abortion directly conflicts with New Jersey's long history of protecting reproductive rights. Indeed, New Jersey leads the nation in ensuring women's access to reproductive health care. For example, only 10% of New Jersey counties lack an abortion provider, in sharp contrast to the average 87% of the nation's counties that lack an abortion provider. *See* NARAL Pro-Choice America, *Who Decides?: The Status of Women's Reproductive Rights in the United States*, at 60 (Jan. 2006) (New Jersey Profile) (hereinafter "*Who Decides?*");<sup>5</sup> Guttmacher Institute, *An Overview of Abortion in the United States*, at 38 (May 2006).<sup>6</sup> Similarly, New Jersey is one of only 17 states that provide low-income women with access to abortion. *See Right to Choose*, 91 N.J. 287; *Who Decides?* at 21 (discussing low-income women's access to abortion). In addition, New Jersey is one of only 7 states that require emergency rooms to provide sexual assault victims with emergency contraception if requested by the patient. *See* N.J. Stat. Ann. §§ 26:2H-12.6b-12.6g; Guttmacher Institute, *State Policies in Brief: Emergency*

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<sup>5</sup> Available at [http://www.prochoiceamerica.org/choice-action-center/in\\_your\\_state/who-decides/state-profiles/new-jersey.html](http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-profiles/new-jersey.html).

<sup>6</sup> Available at [http://www.guttmacher.org/presentations/abort\\_slides.pdf](http://www.guttmacher.org/presentations/abort_slides.pdf).

*Contraception* (June 2006).<sup>7</sup> And, as discussed above, the New Jersey Constitution provides greater protection for a woman's right to access abortion than does the United States Constitution. *See supra* at 6.

Certainly Plaintiff and her counsel are aware of these protections, and have thus resorted to bringing medical malpractice lawsuits in an attempt to accomplish what they cannot accomplish in the New Jersey Legislature. For example, state representatives have repeatedly introduced bills requiring certain counseling before abortion, but these bills have never garnered enough votes to pass.<sup>8</sup> *See, e.g.*, Assemb. B. 1405, 211th Leg., 2004-2005 Sess. (N.J. 2004); Assemb. B. 2275, 209th Leg., 2000-2001 Sess. (N.J. 2000); S.B. 811, 208 Leg., 1998-1999 Sess. (N.J. 1998). Undoubtedly frustrated that the Legislature and Governor are protective of women's rights, Plaintiff and her counsel have made repeated attempts to create abortion restrictions and redefine the concept of "personhood" via the backdoor. *See, e.g., Marie*, 314 F.3d at 142-43; *Alexander v. Whitman*, 114 F.3d 1392, 1400-01 (3d Cir. 1997) (rejecting argument – made by same counsel representing Plaintiff here – that stillborn fetuses are human beings entitled to equal protection under the Fourteenth Amendment); Transcript of Motion Hearing Before the Honorable John J. Hughes, United States Magistrate Judge at 50, *Planned Parenthood v. Veniero*, No. CV-97-6170 (July 13, 1998) (same counsel representing Plaintiff here aided in defense of New Jersey ban on abortion procedures by arguing fetus is "complete, separate, unique irreplaceable human being.") (on file with United States District Court for the District of New Jersey). Plaintiff and her counsel's attempt to

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<sup>7</sup> Available at [http://www.guttmacher.org/statecenter/spibs/spib\\_EC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf).

<sup>8</sup> None of these bills, however, mandated the type of information Plaintiff insists upon. The only "informed consent" abortion restriction in the nation that requires what Plaintiff seeks has been preliminarily enjoined by a federal court. *See supra* at 8-9.

impose their moral judgments on New Jerseyans – in direct conflict with New Jersey’s public policy – must be rejected.

#### **IV. This Court Should End the Concerted, Chilling Attack On Reproductive Health Care Providers.**

Since this lawsuit was filed eight years ago, physicians in New Jersey have been unclear as to what they must say to their patients to discharge their duty under the courts’ decisions in this case. Physicians who perform abortions do so under the specter of being sued for failing to give non-medical information to their patients. Given the fear over liability and litigation, physicians may simply choose to stop performing abortion procedures.<sup>9</sup> *Cf.* Albert L. Strunk & Linda Esser, *Overview of the 2003 ACOG Survey of Professional Liability*, ACOG Clinical Rev., Vol. 9, Issue 6, at 16 (Nov.- Dec. 2004) (2003 survey indicated 12.3% of obstetricians-gynecologists decreased gynecologic surgical procedures as a result of the risk of professional liability or litigation).<sup>10</sup> Until this Court finally decides the issue, this case will have a chilling effect on the reproductive health community.

The chill is compounded by the most recent, and confusing, decision by the Appellate Division. On the one hand, the Appellate Division recognized that a physician is obligated to provide only *medical* information in order to discharge his or her duty under the informed consent doctrine. PCa14-15. On the other hand, given that the

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<sup>9</sup> Indeed, a faction of the anti-choice movement explicitly targets abortion providers with lawsuits in an attempt to drive them out of practice. One anti-abortion organization boasts, “Our Abortion Malpractice (ABMAL) program provides litigation support services to attorneys in medical malpractice cases against abortion clinic operators and abortionists.” *About Life Dynamics*, [http://www.lidi.org/Pro-life\\_Group](http://www.lidi.org/Pro-life_Group) (last visited June 12, 2006); *see also* Charles Rice, *The Malpractice Option*, *The Wanderer* (Mar. 3, 1994) (“the malpractice option may be an effective way to deter baby killers by separating them from that which they prize most, i.e., money.”), available at <http://www.priestsforlife.org/articles/malpractice.html>.

<sup>10</sup> Excerpts of the survey findings, including the cited statistic, are available at [http://www.acog.org/from\\_home/publications/press\\_releases/nr07-16-04.cfm](http://www.acog.org/from_home/publications/press_releases/nr07-16-04.cfm).

information that Plaintiff claims she was deprived of is non-medical, *see supra* at 4, the Appellate Division’s holding is confusing. It can only be reasoned that the Appellate Division paved the way for a trial on whether a physician is obligated to tell his or her patient that terminating a pregnancy will kill a complete, separate, unique, and irreplaceable human being – in other words, non-medical information – which physicians have no legal duty to disclose. *See supra* at 3-4.

Like unconstitutionally vague statutes, the Appellate Division’s tautology fails to provide adequate notice to physicians regarding what they must do to discharge their duty of obtaining informed consent. *Cf. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000) (striking abortion ban with civil penalties as void for vagueness; vague laws present “‘serious problems of notice, discriminatory application, and [a] chilling effect on the exercise of constitutional rights.’” (quoting *Colautti v. Franklin*, 439 U.S. 379, 394 (1979))). The Law Division readily decided Plaintiff’s claims as a matter of law, and the Appellate Division’s ruling needlessly subjects physicians to imprecise guidelines for complying with the law, and thereby has a chilling effect on the provision of a constitutionally-protected medical procedure.

**V. The Outcome of This Case Will Also Impact Other Reproductive Health Services.**

The effect of this case is not limited to abortion, but rather extends to contraceptives and other reproductive health technologies. For example, this case implicates access to hormonal contraceptives and the intrauterine device (IUD). Hormonal contraceptives include oral contraceptives, sometimes called birth control pills, and thus include emergency contraception, which is a concentrated dose of oral contraceptive pills. Both hormonal contraceptives and the IUD generally act by

prohibiting ovulation or fertilization. *See, e.g.*, James Trussell, et al., *The Role of Emergency Contraception*, 190 Am. J. of Obstetrics & Gynecology S30 (2004) (hereinafter “Trussell”);<sup>11</sup> Mayo Clinic, *Copper IUD: A Safe, Effective Birth Control Option* (hereinafter “Mayo Clinic”).<sup>12</sup> These forms of contraception may, however, also act by preventing the implantation of a fertilized egg on the uterine wall. Trussell at S32 (“Some studies have shown . . . that [emergency contraception] may act by impairing endometrial receptivity to implantation of a fertilized egg.”); Mayo Clinic (“If fertilization occurs, the device [IUD] prevents the embryo from attaching to the uterine wall.”). Medically, a pregnancy does not occur until a fertilized egg implants on the uterine wall.<sup>13</sup> But under Plaintiff’s view, since a fertilized egg could be expelled by these forms of contraception, a physician who prescribes them is required to inform his or her patient that her birth control method may kill a complete, separate, unique, and irreplaceable human being.<sup>14</sup> *See* Pl.’s Br. in Opp’n to Def.’s Mot. for Summ. J. at 31 (seeking admission from Defendant at his deposition that a “human being” exists at fertilization). Pharmacists who dispense birth control pills and emergency contraception similarly may be required to recite such a speech, as would emergency room personnel treating sexual assault survivors who request emergency contraception.

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<sup>11</sup> Available at <http://www.urmc.rochester.edu/obgyn/residency/media/documents/07-11-05EContraception.pdf>.

<sup>12</sup> <http://www.mayoclinic.com/health/birth-control-copper-iud/BI00023> (last visited June 14, 2006).

<sup>13</sup> As defined by leading medical authorities, such as the National Institutes of Health and the American College of Obstetricians and Gynecologists (ACOG). *See* 45 C.F.R. § 46.202(f); Trussell at S32.

<sup>14</sup> Indeed, many anti-choice activists equate – albeit incorrectly – these forms of contraception with abortion. *See, e.g.*, American Life League, *Birth Control: The Abortion Connection*, <http://www.all.org/article.php?id=10125> (last visited June 12, 2006) (if a contraceptive device prevents a fertilized egg from implanting on the uterine wall, it is an “early, chemical abortion.”).

Furthermore, patients who seek assisted reproductive technology will also be impacted by this case. For example, in vitro fertilization (IVF) often results in additional fertilized eggs – called preembryos or prezygotes – that are stored in an IVF clinic or physician’s office, and sometimes later destroyed. *See J.B. v. M.B.*, 170 N.J. 9 (2001) (holding that frozen preembryos should be destroyed over objection of ex-husband to protect ex-wife’s right not to procreate). The outcome of this case could effectively require physicians to inform IVF patients and their partners that once preembryos or prezygotes are created, a complete, separate, unique, and irreplaceable human being exists, and destruction of that preembryo or prezygote will kill an existing human being. Such an outcome objectionably infringes on the physician-patient relationship.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant Defendant's petition for certification, reverse the Appellate Division's decision, and reinstate the Law Division's decision.

Respectfully submitted,

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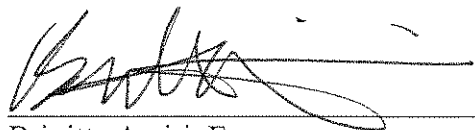
\*Motion for admission *pro hac vice* granted.

Certificate of Service

I hereby certify that on August 1, 2006, I caused to be served by First Class U.S. Mail, Postage Prepaid two true and correct copies of the American Civil Liberties Union and American Civil Liberties Union of New Jersey *Amici Curiae* Brief in Support of Defendants-Petitioners' Petition for Certification on each of the following counsel of record:

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