NEW YORK SUPREME COURT APPELLATE DIVISION
SECOND DEPARTMENT

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RINAT DRAY,
Plaintiff-Appellant,

-against-

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES J. DUCEY
Defendants-Respondents

-and-

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

Docket No.: 2019-12617

NOTICE OF MOTION
Oral Argument Not Requested

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NOTICE OF MOTION OF IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE ET AL. TO FILE AN AMICUS CURIAE BRIEF

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Farah Diaz-Tello, dated December 4, 2020, together with the Exhibit annexed thereto, the undersigned will move this Court, located at 45 Monroe Place, Brooklyn, New York, 11201 on the 14th day of December 2020 at 9:30 a.m. of that day or as soon as counsel can be heard, for an order granting If/When/How: Lawyering for Reproductive Justice, the Center for Reproductive Rights, the Human Rights and Gender Justice Clinic at the City University of New York Law School (HRJG), the

White Ribbon Alliance, and Birthrights leave to file an amicus curiae brief. A copy of the proposed brief is annexed hereto as Exhibit A.

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

Respectfully submitted,

If/When/How: Lawyering for Reproductive Justice,
The Center for Reproductive Rights,
The Human Rights and Gender Justice Clinic (HRJG),
The White Ribbon Alliance, and
Birthrights

Dated: New York, NY
December 4, 2020

By: Farah Diaz-Tello
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----------X

Docket No.: 2019-12617

AFFIRMATION OF FARAH DIAZ-TELLO

Farah Diaz-Tello, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I make this affirmation on behalf of If/When/How: Lawyering for Reproductive Justice, the Center for Reproductive Rights, the Human Rights and Gender Justice Clinic at the City University of New York Law School (HRJG), the White Ribbon Alliance, and Birthrights in their application to file a brief of *amicus curiae* in this case. I am authorized by the proposed *amici* to bring this motion and to submit the proposed brief attached to this motion as Exhibit A.
2. Plaintiff-Appellant Rinat Dray moved this court to reverse the lower court's Order, dated October 4, 2019, dismissing her Second Amended Complaint.

Among the claims dismissed were discrimination claims brought under New York's Civil Rights Law, the New York State Human Rights Law, and the New York City Human Rights Law.

3. The court below improperly dismissed these claims based on concern for fetal wellbeing, denying Ms. Dray the opportunity to fully make out her case as to why the unconsented surgery and the policy that authorized it were sex-based discrimination prohibited under these laws. In so doing, it overlooked helpful precedent from sister states establishing that unconsented cesareans are a violation of fundamental rights protected by the Constitution, as well as international and foreign human rights doctrine directly relevant to adjudicating claims related to forced medical interventions upon pregnant patients. These precedents are critical to the court's interpretation of New York law consistent with the U.S.'s human rights obligations.
4. The issues presented by Ms. Dray's civil and human rights-based claims are not only of public interest, they are of international concern. As organizations engaged in domestic and international human rights advocacy, *amici* are uniquely qualified to present to the Court the global public health research and human rights jurisprudence articulating the state's obligation to provide avenues for redress for violations of birthing people's human rights, including unconsented medical invasions intended to benefit fetuses.

5. If/When/How: Lawyering for Reproductive Justice is a nonprofit legal advocacy organization that uses federal and state litigation, policy strategies, and human rights reporting to ensure that everyone has the rights and resources necessary to self-determine their reproductive lives with dignity and without coercion or punishment. If/When/How has an interest in participating in this case to ensure that pregnant people are afforded equal rights to all other patients in medical decision-making, and that the state provides opportunities for remediation of systematic and discriminatory violations of women's autonomy. It has been involved in efforts to apply a human rights approach to pregnancy and birth from the local to the global level.
6. The Center for Reproductive Rights is a global human rights organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, the Center focuses on ensuring reproductive autonomy for all and access to a full range of respectful, high-quality reproductive healthcare before, during, and after pregnancy. Since its founding in 1992, the Center has been involved in nearly all major litigation in the U.S. concerning reproductive rights in state and federal courts, including the U.S. Supreme Court. To carry out its work, the Center promotes the application

of international human rights standards and works to expand recognition of and respect for human rights in the context of maternal health care. The Center is well-suited to serve as *amicus* as it has a vital interest in ensuring that all individuals have equal access to reproductive healthcare services, free from coercion, violence, and discrimination.

7. Human Rights and Gender Justice Clinic ("HRGJ") is devoted to defending and implementing the rights of women under U.S. and international law and ending all forms of discrimination. HRGJ is part of Main Street Legal Services, a nonprofit, third year clinical program at the City University of New York School of Law. HRGJ engages in litigation and advocacy, in conjunction with women's rights advocates, human rights lawyers, and grassroots organizations to promote women's human rights and gender justice. HRGJ is widely recognized for its expertise and contributions to gender jurisprudence and human rights practice and frequently provides expert testimony and files amicus curiae briefs in cases involving women's rights and reproductive health issues, including cases involving forced sterilization, the rights of pregnant women and violence against women.
8. White Ribbon Alliance (WRA) is a network of advocates from around the world who are working to ensure the health and rights of women and girls around the world are realized. WRA works closely with governments to

support them in delivering respectful and dignified care to women in healthcare facilities, including through developing legislation, standards of care, and training curricula for healthcare providers. WRA is well-positioned to provide assistance to the court in determining issues critical to the resolution of this base, based on its international experience in research, advocacy, implementation and human rights education on the rights of people in pregnancy and childbirth.

9. Birthrights is the UK's only organization dedicated to improving women and birthing people's experience of pregnancy and childbirth by promoting respect for human rights. Birthrights believes that all women and birthing people are entitled to respectful maternity care that protects their fundamental rights to dignity, autonomy, privacy and equality. Birthrights supports the use of a human rights framework and legal intervention to protect these fundamental rights, and has intervened as *amicus curiae* in cases raising issues similar to this one. Birthrights also provides advice to individuals and training to healthcare professionals, and carries out research into rights violations in maternity care.
10. Based on this unique expertise, *amici* wish to provide authority from sister states and international human rights bodies that can assist in the adjudication of the issues presented by this case.

WHEREFORE, If/When/How: Lawyering for Reproductive Justice, the Center for Reproductive Rights, the Human Rights and Gender Justice Clinic at the City University of New York Law School (HRJG), the White Ribbon Alliance, and Birthrights respectfully request that this Court grant their motion to file an amicus curiae brief.

Respectfully submitted,

If/When/How: Lawyering for Reproductive Justice,
The Center for Reproductive Rights,
The Human Rights and Gender Justice Clinic (HRJG),
the White Ribbon Alliance, and
Birthrights

Dated: New York, NY
December 4, 2020

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EXHIBIT A

To be Submitted by:
FARAH DIAZ-TELLO

New York Supreme Court
Appellate Division – Second Department

Appellate Case No.: 2019-12617

RINAT DRAY,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents.

BRIEF FOR *AMICI CURIAE* IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, THE CENTER FOR REPRODUCTIVE RIGHTS, THE HUMAN RIGHTS AND GENDER JUSTICE CLINIC AT THE CITY UNIVERSITY OF NEW YORK LAW SCHOOL (HRJG), THE WHITE RIBBON ALLIANCE, and BIRTHRIGHTS

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Kings County Clerk's Index No. 500510/14

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Statement of Interest

If/When/How: Lawyering for Reproductive Justice, the Center for Reproductive Rights, the Human Rights and Gender Justice Clinic at the City University of New York Law School (HRJG), the White Ribbon Alliance, and Birthrights are organizations dedicated to advancing human rights-affirming reproductive healthcare through litigation and policy advocacy. Each has special expertise in human rights of pregnant and birthing people, as well as the constitutional dimensions of the right to make decisions about reproductive healthcare. Based on this expertise, amici are uniquely qualified to offer insights critical to assessing Ms. Dray's civil and human rights-based claims. Specifically, amici wish to bring to the court's attention jurisprudence from sister states and international human rights experts contextualizing policies and practices that subordinate pregnant patients' fundamental rights on the basis of concern for fetal wellbeing as impermissible gender-based discrimination and even violence.

Summary of Argument

The undisputed facts establish that Rinat Dray was forced to have a cesarean surgery over her repeated, competent objection. The surgery was carried out pursuant to Defendant Staten Island University Hospital's (SIUH) "Managing Maternal Refusals of Treatment Beneficial to the Fetus" policy ("maternal override policy"), which laid out a series of steps the hospital would take to override the

medical decision of a pregnant patient (A-190). Pursuant to this policy, none of the Defendants sought a court order to operate on an unwilling patient. Defendant SIUH claims that they were not only empowered, but required, to force Ms. Dray into surgery, and that failure to do so would violate New York law and "deprive those viable, unborn fetuses of their right to live" (Def.-Resp. SIUH Br. at 57). But New York law does not confer a legal personality on fetuses, much less a duty to operate over the protest of the women who carry them. Instead, it protects people from unwanted bodily intrusions, and from sex-based discrimination.

Ms. Dray raised causes of action under laws that provide relief for New Yorkers whose fundamental rights are violated by non-state actors: the New York Civil Rights Act, and the New York City and State Human Rights Laws. In its Order dated October 4, 2019, the Supreme Court dismissed these claims, ruling that a policy that singles out pregnant women for overrides of their medical decisions is not impermissible sex-based discrimination because "the rights of a viable fetus are at stake." Ct. Order at 14. This fails to take into consideration U.S. and international jurisprudence establishing that subordinating women's fundamental rights on the basis for concern for a fetus is the very heart of the sex-based discrimination these laws are intended to eradicate. In fact, eradication and remedy of coercion and mistreatment during childbirth — known as *obstetric violence* — are increasingly a matter of international concern. International

jurisprudence can and should inform courts' analysis of claims of unconsented procedures on pregnant patients. The civil and human rights-based claims should be reinstated to allow Ms. Dray to have the opportunity for redress afforded under New York law.

Argument

I. Forced Cesarean Surgery Violates Pregnant Patients' Civil Rights.

A. Subordinating a Pregnant Person's Rights for the Supposed Interest of a Fetus is Sex Discrimination.

Both the U.S. Constitution and New York law guarantee the right to equal protection of the law. Because of this guarantee, the law forbids policies and practices that discriminate on the basis of sex. Where a state policy discriminates on the basis of sex, the state must prove an "exceedingly persuasive justification" for the classification, and it must be "substantially related" to the actual — "genuine, not hypothesized" — achievement of an important government objective. *United States v. Virginia,* 518 U.S. 515, 534 (1996); see *People v. Liberta*, 64 NY2d 152, 168 (1984)(interpreting N.Y. Constitution as coextensive with U.S. Constitution). Classifications may be used to remediate harm, but not to "create or perpetuate the legal, social, and economic inferiority of women." *Virginia* at *533-34.*

In its order, the court below recognizes that Defendant Staten Island University Hospital's Maternal Refusal Policy "only affects pregnant women," which it acknowledges would ordinarily be considered discrimination on the basis of sex. Ct. Order at 12, However, the court found that the policy did not constitute impermissible discrimination under the NYSHRL and NYCHRL because it is implemented in circumstances that "take into account concern for the fetus." *Id.* Under this analysis, it is merely incidental to a policy authorizing surgical incursions on adult patients for the possible benefit of a fetus that women are the ones who become pregnant.[1]

To the contrary, concern for fetuses – real or hypothetical – has been the justification for sex-based discrimination that relegates women to a subordinate status throughout history. See e.g., *Muller v. Oregon*, 208 U.S. 412, 421 (1908)(women's work hours were capped in service of "proper discharge of [their] maternal functions"); *Bradwell v. State*, 83 U.S. 130, 141 (1873)(Bradley, J, concurring) (women forbidden from legal practice due to "duties, complications, and incapacities arising out of the married state"). These views are antiquated and have no place in today's society; and yet, the notion that forced surgery for the

[1] Society's understanding of gender has evolved to accept that people with a diverse array of gender identities give birth. *See generally*, Chase Strangio, *Can Trans Reproductive Bodies Exist,* 19 CUNY L. Rev. 223 (2016). Even against this contemporary understanding of gender, as explained *infra,* capacity for pregnancy has historically been the pretext for gender-based subordination.

benefit of another is a burden pregnant individuals – and no other class of persons – may be forced to bear relies on the same sentiments and has the same subordinating effect.

Fortunately, Supreme Court jurisprudence now rejects the notion that women may be deprived of opportunities or be forced to endure burdens because of notions of their roles as "mothers or mothers to be." *See Nevada Dep't of Human Res. v Hibbs*, 538 US 721, 736 (2003).[2] Courts have deemed policies created in the name of protecting fetuses to be impermissible discrimination. *See Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991)(polices prohibiting women from certain positions based on their ability to become pregnant violate the Pregnancy Discrimination Act); *AT&T Corp. v. Hulteen*, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting)("attitudes about pregnancy and childbirth" have historically "sustained pervasive, often law-sanctioned, restrictions" on women's place in society). It has also recognized the interconnectedness of gender equality and the right to reproductive self-determination. *See Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992)("[t]he ability of women to participate equally in the

[2] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 153–54 (2009) (noting that *Hibbs* teaches that pregnancy discrimination can constitute sex discrimination when "it reflects and reinforces traditional conceptions of women's sex and family roles.").

economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

The N.Y.C. Commission on Human Rights similarly recognizes that gender-based subordination may be cloaked in concern for fetal heath. In its guidance for enforcement of the NYCHRL, the Commission plainly states that "treating an individual less well than others because of their pregnancy [. . .] is discrimination and a violation of the NYCHRL." NYC Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy: Local Law No. 78 (2013); N.Y.C. Admin Code § 8-107(22),* 2 (2016). *See Elaine W. v. Joint Diseases N. General Hosp.* 81 N.Y.2d 211 (1993). It acknowledges that entities may attempt to justify policies that single pregnant people out by citing concerns for fetal health, but "using safety as a pretext for discrimination or as a way to reinforce traditional gender norms or stereotypes is unlawful." *Id.* at 3.

The discriminatory animus undergirding the maternal override policy and its application to Ms. Dray is evident in Defendants' briefing. They argue that the forced cesarean was performed as a part of a duty to a fetal "patient," and go so far as to call the actual patient's refusal "irrelevant" to this supposed duty (Def.-Resp. SIUH Br. at 52). This carries several harmful implications. First, even if a fetus is considered a "patient" in a specific medical context, the idea that it has rights that supersede those of the pregnant patient is based on retrograde notions that devalue

women. In fact, there is no circumstance in which a person can be forced to undertake a medical risk to benefit another person. *See In re A.C.*, 573 A.2d 1235, 1244 (1990)(posthumously overturning a fatal court-ordered cesarean, noting that "a fetus cannot have rights [. . .] superior to those of a person who has already been born"). Second, it reinforces the idea that pregnant people are singularly unqualified to make decisions, and physicians have superior knowledge of their best interest.[3] And finally, the fact that the policy self-authorized surgery suggests that the rights of pregnant patients are so negligible that they do not even warrant due process of law. The idea that a physician's forbearance that fails to reduce risk to a fetus is worse than an intervention that necessarily causes injury, and possibly death, to a pregnant woman evinces a discriminatory worldview. In such a view mothers should be self-sacrificing, or else be sacrificed. Permitting private actors to enforce such a view is fundamentally incompatible with New York's commitment to gender equality.

B. Pregnancy Does Not Create an Exception to the Right to Make One's Own Medical Decisions.

For more than a century, New York law has acknowledged that "[e]very

[3] The Defendants attempt to portray the maternal override policy as neutral because it nullifies the decision of the father or a legal surrogate who disagrees with medical advice (Def.-Resp. SIUH Br. at 54-55). But neither of these parties would have the right to override the pregnant woman's decision, and irrespective of who disagrees, the intervention is made on the woman's body. The idea that these are similarly-situated individuals "to whose care the well-being of a viable, full term baby is entrusted" *while still in utero* is patently absurd.

human being of adult years and sound mind has a right to determine what shall be done with his own body." *Schloendorff v Soc'y. of New York Hosp.*, 211 N.Y. 125, 129 (1914). A violation of this tenet would ordinarily be considered a battery. *Id.* But the Defendants' admitted conduct, and the policy by which it was authorized, hit at a much more fundamental violation than battery. The court below cast the maternal override policy as 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." Ct. Order at 14. This is wrong on several counts: it presumed an exception to the fundamental principle that all people have a right to make decisions about their health care, including refusal of care, that does not exist in law; and fetuses are not persons and do not have rights.

As the court below acknowledged, hospitals are forbidden from overriding the competent medical decisions of adult patients, even when the recommended care might save their lives. *See Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990); *Matter of Storar*, 52 N.Y.2d 363, 377 (1981) ("the patient's right to determine the course of [their] own medical treatment [is] paramount to what might otherwise be the doctor's obligation to provide needed medical care."). This is a right of constitutional magnitude, protected by the Fourteenth Amendment. *See Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986). ("In our system of a free government, where

notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment[.]"); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 289 (1990)(O'Connor, J., concurring)("[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment. . . .").

1) Pregnant Patients Retain the Right to Medical Decision-Making Throughout the Entirety of Pregnancy.

In examining this right with respect to pregnant individuals with viable or even at-term pregnancies, courts that have had the benefit of full briefing and presentation of arguments have typically ruled against using legal or physical force to impose treatments on unwilling patients.[4] The D.C. Court of Appeals has ruled that pregnant people in the third trimester maintain their right "under the common law and constitution to accept or refuse treatment." *In re A.C.,* 573 A.2d at 1238. That court found 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." *Id.* at 1237. Similarly, the Appellate Court of Illinois declined to impose a court ordered cesarean upon a woman carrying a term pregnancy believed to be in imminent danger if she did not deliver by cesarean surgery, finding that "a

[4] *See* Julie Cantor, *Court-Ordered Care — A Complication of Pregnancy to Avoid,* 67 (10) Obstetrical & Gynecological Survey 607 (2012).

woman's right to refuse invasive medical treatment [. . .] is not diminished during pregnancy." *In re Baby Boy Doe,* 632 N.E.2d 326, 332 (Ill. App. Ct. 1994). *See In re Fetus Brown,* 689 N.E.2d 397 (Ill. App. Ct. 1997)(extending *Baby Boy Doe* to apply to transfusions upon pregnant patients).

Rather than looking to this body of case law directly on point to a pregnant person's right to make decisions about their medical care, the order below wrongly relies on jurisprudence related to the right to end a pregnancy. Out-of-context reliance on *Roe v. Wade,* 410 U.S. 113 (1973) wrongly suggests that *any* fundamental right a pregnant person possesses may be extinguished in the interest of potential fetal life after viability.[5] This is not what *Roe* says. *Roe* articulates the constitutional underpinnings of the right to abortion, and guides state regulation of abortion care, which invariably leads to fetal demise. The distinction between a procedure that will certainly end a pregnancy and a decision that might create risk to a fetus is significant. Under *Roe* and its progeny, the right to electively end a pregnancy may yield at the point of viability, but the right to make decisions to benefit one's own health does not. *See Roe,* 410 U.S. at 163-64 (a state may, in the interest of protecting potential life, "go so far as to proscribe abortion during [the

[5] Incorrect application of the *Roe* framework has yielded idiosyncratic outcomes in trial level cases. *See, e.g., Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc*., 66 F. Supp. 2d 1247, 1251-52 (N.D. Fla. 1999). *But see Burton v. State,* 49 So.3d 263 (Fla. Dist. Ct. App. 2010)(reversing a lower court's decision ordering detention and forced bedrest on pregnant patient as incorrectly decided).

post-viability] period, *except when it is necessary to preserve the life or health of the mother*.")(emphasis added); *Casey*, 505 U.S. at 846 (1992)(reaffirming the principle that the state may "restrict abortions after fetal viability, *if the law contains exceptions for pregnancies which endanger the woman's life or health*."). This does not support the proposition that the state, much less a private party, may subject a pregnant woman to additional risk to their health, particularly where the risk to her may turn out to be great, even mortal, and the benefit to the fetus illusory.[6]

2) Fetal Protection Cannot Justify Violating the Right to Medical Decision-Making

The court below also wrongly conflates fetuses with children to be protected. Fetuses do not have constitutional rights because they are not legal persons. *Roe*, 410 U.S. at 158 (1973)("the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."); *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 203 (1972) ("the Constitution does not confer or require legal personality for the unborn."). The single New York case supporting a forced intervention upon a pregnant individual inexplicably contradicts this

[6] *See Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994)(court refused to grant an order for an unconsented cesarean when the term fetus was given "close to zero" chance of surviving vaginal birth; the baby was delivered healthy); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981) (emergency order for cesarean based on a "99 percent" chance that the fetus would not survive; baby was eventually delivered safely); United Press Int'l, *Pregnant Woman Believes Prayers Obviated Caesarean*, N.Y. Times, A, 12, (Jan. 26, 1981).

principle, finding an 18-week fetus to be a "human being, to whom the court stands in *parens patriae*." *Matter of Jamaica Hospital*, 128 Misc.2d 1006, 1008 (Sup. Ct. Queens County 1985).[7] This rule, devised in an emergency bedside hearing, stands alone and has never been endorsed by any appellate court. Rather than relying on this aberrant case, the court below should have instead adhered to New York law, which does not recognize a fetus as a person with rights that can nullify those of the pregnant patient within which it exists.

New York law does acknowledge some physician responsibilities in the care of pregnant patients that, if breached, may render them liable in tort to a child once born. *See Woods v. Lancet,* 303 N.Y. 349 (1951). But this duty in the provision of care to pregnant people does not "alter the legal rights or status of a fetus" or "create any new duties on the part of the physician." *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 156 (2004)(Read, J., dissenting). Notably, New York does not recognize a cause of action on behalf of a fetus that dies prior to delivery. *Endresz v. Friedberg*, 24 N.Y.2d 478 (1969). This undercuts the Defendant's claims of a duty to protect potential life by performing surgery on unwilling patients on a par

[7] The court below misconstrued *Crouse Irving Mem'l Hosp., Inc. v. Paddock*, 127 Misc.2d 101 (Sup. Ct. Onondaga County 1985). The case was filed while Mrs. Paddock was still pregnant, but the blood transfusions would have taken place after delivery (after the physician had cut into her placenta). *Id.* at 102-03. The *parens patriae* analysis of a transfusion to protect the health of "the baby" thus refers to the child after birth, not *in utero*. *Id.* at 104 ("Mrs. Paddock's freedom to direct the course of her own treatment shall be interdicted *only in the post-operative period*.")(emphasis added).

with a compelling state interest: if the fetus had died in utero, they would have no duty toward it at all.

Defendants misconstrue both the legal status of a fetus and the state's power to force a pregnant patient to undergo unwanted surgical intervention. In short, not only do the Defendants lack the authority to stand in the place of the state, the formula concocted in the maternal override policy would yield an unconstitutional result had it been carried out by the state. This is precisely why New York's Civil Rights Law exists: because private parties may not wield a power that even the state lacks – the power to discriminate against people in the exercise of their fundamental rights.

II. The Court Below Erred in Dismissing Ms. Dray's Human Rights Claims.

In ruling that Ms. Dray could not state a cause of action for discrimination under the New York City and State Human Rights Laws, the trial court essentially – and incorrectly – foreclosed the possibility that any pregnant patient could ever seek relief for discrimination under the New York City and State Human Rights Laws for forcible medical interventions at birth. However, a growing body of human rights doctrine specifically addressing mistreatment of pregnant patients giving birth urges otherwise. Examining the ruling of the court below in light of human rights standards reveals that it failed Ms. Dray — and all pregnant New

Yorkers — in two ways: it ignores the gravity of the harm caused by forced surgery, and denies her the ability to seek redress under the law for a violation of her fundamental rights.

Researchers and human rights authorities call urgent attention to manifestations of gender-based discrimination in childbirth. The call for a human rights-based approach to birth has even reached New York City.[8] This emerging consensus warns that forced interventions violate women's human rights, and are a form of gender-based violence known as obstetric violence. While the terminology may be new, the abuses themselves are not.[9] Nor are the rights they violate novel; the failure to remedy invasive procedures performed without the informed consent of the pregnant patient violates the rights to equality under the law, bodily autonomy, and even the right to health.[10] This Court may, in accordance with U.S. Supreme court precedent, look to the perspectives provided by human rights authorities for guidance, and reinstate the amended complaint to provide Ms. Dray the opportunity to have her human rights vindicated by the means afforded under New York law.

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[8] *See, e.g.*, New York City Dep't of Health & Mental Hygiene, *New York City Standards for Respectful Care at Birth* (2018).

[9] *See* Meghan A. Bohren et al. *The Mistreatment of Women during Childbirth in Health Facilities Globally: A Mixed-Methods Systematic Review,* 12(6) PLOS Medicine e1001847 (2015).

[10] World Health Org., *The Prevention and Elimination of Disrespect and Abuse During Facility-Based Childbirth,* WHO/RHR/14.23, 2 (2014).

A. International Human Rights Standards Can Help Courts Adjudicate State Law Claims.

Human rights are the rights inherent to every person, regardless of whether a jurisdiction's law formally recognizes the rights.[11] They include, among others, the right to life, security of the person, equality before the law, freedom from cruel, inhuman, or degrading treatment, and to redress for violations of their fundamental rights.[12] It is the longstanding practice of U.S. courts to look to human rights standards and the law of other nations in interpreting novel questions concerning rights to which there is a common commitment.[13] *E.g., Graham v. Florida,* 560 U.S. 48, 80 (2010)(acknowledging the practice of looking to consensus among nations to determine evolving standards against cruel and unusual punishment). *See also In re Mark C.H.,* 28 Misc.3d 765, 783 (N.Y. County Surr. Ct. 2010) (finding that "international human rights norms derived from treaties signed and ratified by the United States have relevance to [determination of state law claims] by virtue of the Supremacy Clause").

Human rights are not merely philosophical principles; in many instances, they are legal obligations. The U.S. has undertaken legal obligations by ratifying several international treaties that create commitments to respect, protect, and fulfill

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[11] Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [*hereinafter* UDHR].
[12] UDHR, *supra* note 11, arts. 2, 5, 7, 10.
[13] *See also* Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l Ll. 1 (2006) (discussing the U.S. Supreme Court's history of examining foreign law to aid in constitutional interpretation).

human rights. It is party to treaties that require states to protect individual's right to equality on the basis of sex,[14] and which have been interpreted to guarantee freedom from mistreatment in health care settings.[15] It has also signed treaties that require states to eliminate all forms of sex-based discrimination[16] and to ensure highest attainable standard of health.[17] Signing these treaties creates an obligation upon the signatory state to refrain from actions that would frustrate the object and purpose of the treaties.[18] Every level of government is responsible for upholding these basic rights.[19]

New York has historically been a leader in protecting human rights through state and local laws which in many cases provide greater protection than federal anti-discrimination laws.[20] These laws explicitly recognize that they are intended to

[14] International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171.
[15] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85. *See* Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/22/53 (Feb, 1, 2013).
[16] Convention on the Elimination of all Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].
[17] International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3.
[18] *See* Vienna Convention on the Law of Treaties, art. 18(a), 1155 U.N.T.S. 331.
[19] UDHR, *supra* note 11, art. 2
[20] Even prior to the adoption of the UDHR in 1948, New York was the first state to pass a human rights law and authorize the creation of the state Division of Human Rights. *See* N.Y. Division of Human Rights, Agency History, http://dhr.ny.gov/agency-history. N.Y.C.'s Human Rights Law was passed in 1965, with the N.Y.C. Commission on Human Rights' power dating back to 1955. N.Y.C. Comm'n on Human Rights, Commission's History, https://www1.nyc.gov/site/cchr/about/commissions-history.page

evolve to address inequities, and to be construed broadly to advance the "uniquely broad and remedial purpose" of the human rights and dignity of every New Yorker.[21]

Given this stated purpose, the trial court should have looked to precedent evaluating the human rights dimension of forced surgeries upon patients to illuminate Ms. Dray's human rights-based claims, rather than the sparse and ill-considered trial court cases purporting to establish rights for fetuses contrary to New York law. Human rights standards entitle a patient giving birth is entitled to the same respect for their autonomy and bodily integrity as a patient undergoing any other physiological process or medical procedure. By interpreting the New York City and State Human Rights Laws in a manner that conflicts with international human rights standards, the court below not only denied her access to justice, it endorsed a deprivation of Ms. Dray's right to be free from discrimination on the basis of sex.

B. Limiting a Patient's Autonomy on the Basis of Pregnancy Violates Their Human Rights.

The Defendants and the court below excuse the sex-based discrimination inherent in a policy that singles out pregnant patients as an exception to the

[21] Local Law No. 85 § 1 (2005) (similarly-worded state or federal protections are "a floor [. . .] rather than a ceiling")*; see* N.Y.C. Admin. Code § 8-130(a)*;* N.Y. Exec. Law Art 15 § 290 (3).

doctrine of informed consent and refusal on the basis of concern for fetal health. Human rights doctrine recognizes no such exception, and calls for *greater* vigilance toward protecting the human rights of pregnant patients, not less.[22]

United Nations (U.N.) bodies that oversee compliance with human rights and public health globally exhort governments to improve the health outcomes for pregnant people and their babies. But preventing possible adverse health outcomes must not come at the expense of denying the personhood and autonomy of the pregnant person. In technical guidance on the implementation of programs to reduce excess maternal mortality, the U.N. Office of the High Commissioner for Human Rights recommends a "human-rights based approach," which is "premised upon empowering women to claim their rights, and not merely avoiding maternal death or morbidity."[23] Furthermore, the World Health Organization (W.H.O.) has emphasized that respect for women's human rights – to freedom from discrimination, mistreatment, and harm – during maternity care is itself an important health outcome.[24]

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[22] CEDAW Comm., *Gen. Rec.24 (Art 12 – Women and Health)*, U.N. Doc. A/54/38/Rev.1, chap. I, ¶ 2 (1999).
[23] Office of the U.N. High Comm'r for Human Rights (OHCHR), *Technical Guidance on the Application of a Human Rights-Based Approach to the Implementation of Policies and Programmes to Reduce Preventable Maternal Morbidity and Mortality*, U.N. Doc. A/HRC/21/22, ¶ 12 (July 2, 2012)[hereinafter *U.N. Technical Guidance*].
[24] Rajat Khosla, Christina Zampas et al. *International Human Rights and the Mistreatment of Women During Childbirth*, 18(2) Health and Human Rights 131 (2016); World Health Org., *supra* note 10 at 3.

Human rights doctrine requires that reproductive health care, including care during pregnancy and birth, be available and accessible to all, acceptable, and of good quality, as well as free from discrimination, coercion, and violence.[25] As the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has noted, "acceptable" care is "delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, [. . .] and is sensitive to her needs and perspectives."[26] The CEDAW Committee has called upon states to fulfill women's human rights in seeking reproductive healthcare by ensuring the rights to autonomy, privacy, confidentiality, informed consent and choice.[27]

The fact that an individual is pregnant cannot be used to deprive them of their right to bodily integrity and proper informed consent. In a 2009 report on the importance of informed consent, the U.N. Special Rapporteur on the right to health called informed consent "a fundamental feature of respecting an individual's autonomy, self-determination and human dignity."[28] While health care providers may try to persuade patients to undergo treatments by "emphatically highlighting the medical consequences" of forgoing care, the right to informed consent "includes the right to refuse treatment, regardless of a procedure's advisability."[29]

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[25] CEDAW, *supra* note 16, at art. 12; CEDAW Comm., Gen. Rec. 24, *supra* note 22, ¶¶ 26, 27.
[26] *Id.* at ¶ 22.
[27] *Id.* at ¶ 31(e).
[28] Anand Grover, Report of the Special Rapporteur on the Right to Health, U.N. Doc. A/64/272, ¶ 18 (Aug.10, 2009).
[29] *Id.* at ¶ 28

This applies to pregnant patients as well; the Special Rapporteur specifically raised concerns that assertions of the "best interests of the unborn child" are sometimes used to justify violations of pregnant women's rights.[30] The report pointed to gender inequalities as the source of denial of information, coercion, and violations of autonomy in the health care setting, and called for "special protections guaranteeing a woman's right to informed consent."[31] Responses to so-called "maternal-fetal conflict," the report urged, should avoid harm to the fetus by providing proper counseling and support rather than restricting the pregnant person's autonomous decision-making.[32]

U.N. treaty bodies have urged nations to eliminate sex-based discrimination pregnant patients may face when accessing reproductive and pregnancy-related care,[33] and public health researchers have realized the need to study and measure the manifestations of discrimination during childbirth in order to eliminate them.[34] This research from around the world has provided a clearer picture of the extent of

[30] *Id.* at ¶ 54.
[31] *Id.* at ¶ 57.
[32] *Id.*
[33] CEDAW Comm., Gen. Rec. 24, *supra* note 22, at ¶ 2 (states must "eliminate discrimination against women in their access to health care services, throughout the life cycle, particularly in the areas of family planning, pregnancy, confinement and during the post-natal period").
[34] Lynn P. Freedman & Margaret E. Kruk, *Disrespect and Abuse of Women in Childbirth: Challenging the Global Quality and Accountability Agendas*, 384(9948) Lancet e42 (2014).

the abuse coercion, and violence women face when giving birth,[35] validating claims raised by activists calling for rights-affirming maternity care.

C. Forced Medical Procedures During Childbirth are Obstetric Violence, a Gender-Based Violation of Human Rights.

Ms. Dray is not alone in characterizing the forced cesarean section she experienced as a violation of her human rights. In fact, her claim is supported by global public health research, as well as the statements of human rights experts, and the work of a growing community of advocates worldwide. They recognize unconsented surgeries forced on unwilling patients during childbirth as a form of gender-based violence called *obstetric violence*. It is the coercion, threats, and even physical force, that women are subjected to when institutional obstetrical practices replicate gender inequities and exacerbate power imbalances between health care providers and patients.[36] In several jurisdictions in Latin America, it is explicitly defined in law as prohibited gender-based violence, and those who commit it are subject to fines and other penalties,[37] and the Council of Europe recently passed a

[35] Bohren et al., *supra* note 9.
[36] Gita Sen, Bhavya Reddy & Aditi Iyer, *Beyond Measurement: the Drivers of Disrespect and Abuse in Obstetric Care,* 53 Reproductive Health Matters 6, 7 (2018) (observing that violations of women's human rights are "enmeshed with institutional obstetric practice," and influenced by "the power inequality inherent in patient-provider interactions," and broader social inequities).
[37] *See, e.g.,* Rogelio Pérez D'Gregorio, *Obstetric Violence: A New Legal Term Introduced in Venezuela*, Int. J. Gynecology & Obstetrics 111 (2010); Caitlin R. Williams et al., *Obstetric Violence: A Latin American Legal Response to Mistreatment During Childbirth*, 125 BJOG 1208 (2018); Carlos Herrera Vacaflor, *Obstetric Violence: A New Framework for Identifying*

resolution calling for action to eliminate it. [38] Obstetric violence is not confined outside the nation's borders.[39] It is a problem that U.S. maternity care advocates have observed for decades,[40] likening it to other forms of gender-based violence.[41]

The robust body of research documenting obstetric violence and disrespect and abuse during childbirth reveals the phenomenon to be a subset of gender-based violence, which stems from gender inequality and women's historical subjugation to men.[42] While this research emerges from diverse global and theoretical perspectives,[43] all draw the connection between mistreatment women experience in

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Challenges to Maternal Healthcare in Argentina, 24 Reproductive Health Matters 65 (2016); Michelle Sadler et al, *Moving Beyond Disrespect and abuse: Addressing the Structural Dimension of Obstetric Violence*, 24 Reproductive Health Matters 47 (2016).

[38] Eur. Parl. Ass., *Resolution 2306: Obstetrical and Gynaecological Violence* (2019).

[39] *See*, Farah Diaz-Tello, *Invisible Wounds: Obstetric Violence in the United States*, 24 Reproductive Health Matters 56 (2016); Elizabeth Kukura, *Obstetric Violence*, 106 Georgetown L.J. 721 (2018).; Maria T.R. Borges, *A Violent Birth: Reframing Coerced Procedures During Childbirth as Obstetric Violence*, 67(4) Duke L.J. 827 (2018).

[40] Henci Goer, *Cruelty in Maternity Wards: Fifty Years Later*, 19 J. Perinat. Educ. 33 (2010).

[41] Susan Hodges, *Abuse in Hospital-Based Birth Settings?* 18(4) J. Perinatal Educ. 8, 8 (2009).

[42] Rachel Jewkes & Loveday Penn-Kekana, *Mistreatment of Women in Childbirth: Time for Action on This Important Dimension of Violence against Women*. 12(6) PLoS Med e1001849, 1 (2015).

[43] Within the body of public health research and human rights advocacy, a number of terms of art for this type of violations exist: "obstetric violence," *see* Sadler et al., *supra* note 37, "disrespect and abuse," *see* World Health Org., *supra* note 10; Lynn P. Freedman et al., *Defining Disrespect and Abuse of Women in Childbirth: A Research, Policy and Rights Agenda*, 92(12) Bulletin of the World Health Org. 915 (2014), "mistreatment in care," *see* Khosla, *supra* note 24; Joshua P. Vogel, et al. *Promoting Respect and Preventing Mistreatment During Childbirth*, 123 BJOG 671 (2016), and its converse, "respectful maternity care," *see* White Ribbon Alliance for Safe Motherhood, *Respectful Maternity Care: The Universal Rights of Childbearing Women* (2011); Suellen Miller et al., *Beyond Too Little, Too Late and Too Much, Too Soon: A Pathway Towards Evidence-Based, Respectful Maternity Care Worldwide*. 388(10056) The Lancet 2176 (2016). The nuanced distinctions in the terminology reflect the diversity of perspectives from the disciplines of study from which they emerged and the harms they identify. Sen et al., *supra* note 36, at 6.

labor and other forms of gender violence, highlighting "the medicalization of natural processes of childbirth, roots in gender inequalities, and the threat to women's rights and health."[44] Social science is beginning to understand the extent of the problem in the U.S, and how the intersection of gender and race affect individuals' experience of mistreatment.[45]

1) Human Rights Authorities Demand Action Against Obstetric Violence.

Amid increasing concern for the effects of this gender discrimination on the experiences of birthing people, the U.N. Special Rapporteur on violence against women (SRVAW) conducted a special investigation into obstetric violence.[46] The 2019 report synthesized international human rights law and jurisprudence, nearly a decade of research from health settings, and over 128 reports from state institutions and NGOs (including rom the U.S.).[47] The report explicitly recognized obstetric violence as a violation of the right to live a life free from violence, as well as a threat to the rights to life, health, bodily integrity, privacy, autonomy, and freedom from discrimination.[48]

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[44] Virginia Savage & Arachu Castro, *Measuring Mistreatment of Women During Childbirth: A Review of Terminology and Methodological Approaches,* 14 Reproductive Health 138 (2017).
[45] Saraswathi Vedam et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment during Pregnancy and Childbirth in the United States*. 16 Reproductive Health. 77 (2019).
[46] Dubravka Šimonović, *Report of the Special Rapporteur on Violence Against Women on a Human Rights-Based Approach to Mistreatment and Violence Against Women in Reproductive Health Services with a Focus on Childbirth and Obstetric Violence,* U.N. Doc. A/74/137 (July 11, 2019)[hereinafter *Obstetric Violence Report*].
[47] *Id.* at ¶ 6.
[48] *Id.* at ¶ 8.

The SRVAW's report affirmed that obstetric violence occurs within health care settings against a backdrop of "structural inequality, discrimination and patriarchy," and is rooted in "lack of respect for women's equal status and human rights."[49] Of particular concern were the overuse of cesarean sections, and instances where fetal interests are treated as though they "override the rights of the pregnant woman," leading to failures of informed consent. In such instances, while cesarean sections can be lifesaving, if they are performed without consent, they "may amount to gender-based violence against women and even torture."[50]

While the report was the first to focus exclusively on obstetric violence, it built upon concerns expressed by other U.N. experts and bodies. In 2014, the W.H.O. issued a statement identifying disrespect and abuse in childbirth as a public health and human rights concern. [51] The U.N. Special Rapporteur on torture raised concerns about the long-term consequences of abuse in health care settings in a 2013 report, observing that "international and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and

[49] *Id.* at ¶ 9.
[50] *Id.* at ¶ 24. *See also* Eur. Parl. Ass. Comm. on Equality & Nondiscrimination, *Report: Obstetrical and Gynecological Violence*, Doc. No. 14965, 7 (2019)(obstetric violence "may include medically justified acts carried out without prior information and/or without the patient's consent.").
[51] World Health Org., *supra* note 10 at 1.

emotional suffering, inflicted on the basis of gender."[52] And 2015, the U.N. Working Group on discrimination against women (WGDAW) issued a report in which it noted that pregnant individuals face "disproportionate risk of being subjected to humiliating and degrading treatment in health-care facilities."[53]

Similar to other forms of gender-based violence in society, obstetric violence is exacerbated by a lack of repercussions for wrongdoers.[54] Thus, the availability of mechanisms for redress is critical to ensuring that harms are not repeated.

D. New York Law Provides Ms. Dray the Right to Seek Redress for This Human Rights Violation.

New York's City and State Human Rights laws were created with the purpose of ensuring that people who have experienced violations of their rights have the opportunity for vindication. They play an integral role in ensuring that international human rights obligations are carried out.[55] Designed to remedy discriminatory mistreatment by private parties, they are consistent with the U.S.'s obligation to provide avenues for redress of serious violations like obstetric violence. Non-state actors have "a responsibility to respect women's sexual and reproductive rights," and should exercise due diligence to avoid interfering with

[52] Méndez, *supra* note 15, at ¶45.
[53] Eleonora Zielinska et al, *Report of the Working Group on the Issue of Discrimination Against Women in Law and Practice*, U.N. Doc. A/HRC/32/22, ¶ 17 (April 8, 2016).
[54] Jewkes & Penn-Kekana, *supra* note 42, at 1.
[55] U.N. Technical Guidance, *supra* note 23, at ¶ 23.

fundamental rights.[56] According to the U.N. Office of the High Commissioner for Human Rights, accountability – ensuring that harms are prevented, rectified, and not repeated – is "not an afterthought"[57] and is "central to every stage of a human rights-based approach."[58] Enforcement is an especially important part of the equation, as "[r]emedies are essential to give effect to rights."[59]

The W.H.O. and WGDAW urge states to affirm women's human rights by creating "mechanisms for redress following violations,"[60] and ensuring that penalties are incurred for obstetric violence.[61] The SRVAW's obstetric violence lays out specific actions, including: ensuring redress (including financial compensation, formal acknowledgement and apology, and guarantee of non-repetition),[62] professional sanctions,[63] investigation of complaints,[64] and increased awareness of human rights in childbirth among the legal community "to ensure effective use of remedies."[65] This call has spurred international and regional human rights bodies to action. Earlier this year, the CEDAW Committee ruled that Spain failed to uphold its human rights obligations by denying legal remedy to a

[56] U.N. Technical Guidance, *supra* note 23 at ¶ 75 (d).
[57] U.N. Technical Guidance, *supra* note 23, at ¶ 18.
[58] *Id.* at ¶ 77.
[59] *Id.* at ¶ 76.
[60] World Health Org., *supra* note 10, at 2.
[61] Zielinska et al., *supra* note 53, at ¶106(h).
[62] Obstetric Violence Report, *supra* note 46, at ¶ 81(i).
[63] *Id.* at ¶ 81(j).
[64] *Id.* at ¶ 81(k).
[65] *Id.* at ¶ 81(n).

birthing woman who experienced unconsented medical procedures.[66] It reiterated the obligation to abolish discriminatory policies and practices, and warned that adjudicative bodies "should exercise particular caution in order not to reproduce stereotypes" in assessing liability.[67] The Council of Europe has also called for member states to create mechanisms to examine complaints related to obstetric violence, and apply sanctions when against health care providers who violate their patient's rights.[68]

The guidance from human rights doctrine is clear: forced surgery upon pregnant patients is gender-based violence that demands a remedy. New York provides its citizens the means for redress through its human rights laws, and the court below erred by reading in a pregnancy exception to these laws. This Court should reinstate the complaint and give Ms. Dray access to the process by which she can hold the appropriate parties accountable.

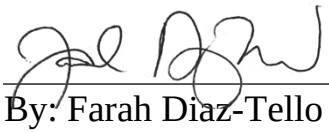
Conclusion

The lower court erred in dismissing Ms. Dray's civil and human rights-based causes of action. This Court is empowered to take into consideration U.S. and international precedent establishing that elevating concern for a fetus over the

[66] CEDAW Comm., *Decision Concerning Communication No. 138/2018,* U.N. Doc. CEDAW/C/75/D/138/2018 (Feb. 20, 2020).
[67] *Id.* at ¶ 7.5
[68] Eur. Parl. Ass., *supra* note 38, at ¶ 8(11).

rights of a pregnant patient constitutes sex-based discrimination. By reinstating Ms. Dray's Second Amended Complaint, this Court upholds New York law and fulfills the human rights obligation to provide a process for remedy of violations of the civil and human rights of pregnant patients.

Dated: New York, NY
December 4, 2020



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Printing Specifications Statement

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NOTICE OF APPEAL AND ORDER APPEALED FROM

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
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(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

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

Michael M. Bast, P.C.
Attorney for Plaintiff
by:_____
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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.

PRESENT:

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,

[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

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.

ENTER,

J. S. C.

HON. GENINE D. EDWARDS

2019 OCT -4 AM 8:21

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

Rinat Dray,

Plaintiff

- against -

Staten Island University Hospital, Leonid Gorelik, Metropolitan OB-Gyn Associates PC and James J. Ducey,
Defendants

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ Action Commenced under CPLR 214-g
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: Kings
Dated: 10/30/2019	Entered: October 4,2019
Judge (name in full): Genine D. Edwards	Index No.:500510/2014
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☐ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

In this personal injury action plaintiff moved to amend her complaint to add addititional causes of action. The court granted the motion. Defendants moved to reargue, and upon reargument, the court vacated its previous order and denied the motion to amend the complaint. This is an appeal from the second order.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Plaintiff contends the lower court impermissibly decided issues of fact, and held the plaintiff's complaint to a higher standard of proof than is necessary on a motion to amend the complaint. Plaintiff appeals from each and every part of the order from which she is aggrieved.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Rinat Dray	Plaintiff	Appellant
2	Staten Island University Hospital	Defendant	Respondent
3	Leonid Gorelik	Defendant	Respondent
4	Metropolitan OB-Gyn Associates PC	Defendant	Respondent
5	James J. Ducey	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Michael M. Bast, PC			
Address:26 Court Street Suite 1811			
City:Brooklyn	State:NY	Zip:11242	Telephone No:718-852-2902
E-mail Address:michael@michaelbastlaw.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):1			
Attorney/Firm Name: Gerspach Sikoscow LLP			
Address:40 Fulton Street			
City:New York	State:NY	Zip:10038	Telephone No:212-422-0700
E-mail Address:sikoscow@gerspachlaw.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):2 and 5			
Attorney/Firm Name: Belair & Evans LLP			
Address: 90 Broad Street 14th floor			
City:New York	State:NY	Zip:10004	Telephone No: 212-344-3900
E-mail Address:escheffiein@belairevans.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 3 and 4			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

AFFIDAVIT OF SERVICE BY E-FILE and MAIL

State of New York }
}ss:
County of Kings }

Frances B. Bast, being duly sworn, deposes and says: I am over the age of 18 years, reside at Brooklyn, NY and am not a party to this action; that on October 31, 2019 deponent served within **Notice of Appeal** upon:

Gerspach & Sikoscow LLP
Attorneys for Staten Island University Hospital and James J. Ducey
40 Fulton Street
New York, NY 10038
(212) 422-0700

Belair & Evans LLP
Attorneys for Leonid Gorelik and
Metropolitan OB-GYN Associates, PC
90 Broad Street 14th floor
New York, NY 10004
(212) 344-3900

The address designed by said attorney(s) for that purpose by depositing a true copy of same enclosed in E-File and a post-paid, properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the E-Filing and the United States Postal Service with the State of New York.

Frances B Bast
Frances B. Bast

Sworn to before me this
October 31, 2019

Notary Public

MICHAEL M. BAST
NOTARY PUBLIC, STATE OF NEW YORK
No. 02BA4780186
Qualified in Kings County
Commission Expires 5.31.23

Index #: 500510/14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

RINAT DRAY

Plaintiff,

-against-

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

Defendants

NOTICE OF APPEAL

MICHAEL M. BAST, P.C.
Attorney at Law
26 Court Street – Suite 1811
Brooklyn, New York 11242
(718) 852-2902

By: _____
Michael M. Bast, P.C.

Service of a copy of the within
is hereby admitted.

Dated: Brooklyn, New York