IN THE SUPREME COURT OF FLORIDA

RENEE B., *et al.*	)	Supreme Court No. SC00-989
	)	
Plaintiffs-Appellants,	)	On Appeal from
	)	the District Court of Appeal,
	)	First District, State of Florida
vs.	)	Case No. 1D99-1238
	)	
	)	There Heard on Appeal from
	)	the Second Judicial Circuit
STATE OF FLORIDA,	)	in and for Leon County
AGENCY FOR HEALTH CARE	)	
ADMINISTRATION,	)	the Honorable Terry Lewis,
	)	Judge Presiding.
Defendant-Appellee.	)	Case No. CV-97-3983 CM

BRIEF *AMICUS CURIAE*
ON BEHALF OF MEMBERS OF THE FLORIDA LEGISLATURE
IN SUPPORT OF DEFENDANT-APPELLEE

Thomas A. Horkan, Jr., Esq.
Florida Bar No. 037227
313 South Calhoun Street
Tallahassee, Florida 32301
(850) 222-3803

Paul Benjamin Linton, Esq.
Illinois Bar No. 1670158
921 Keystone Avenue
Northbrook, Illinois 60062
(847) 291-3848

Counsel for the *Amici*

Table of Contents

Table of Authorities

Cases:

Statutes:

Other Authorities:

List of *Amici*

Sen. Charles W. Clary, III (Rep.) . . . . . 7th District
Sen. John Grant (Rep.) . . . . . 13th District
Sen. Charlie Bronson (Rep.) . . . . . 18th District
Sen. Roberto Casas (Rep.) . . . . . 39th District

Speaker John Thrasher (Rep.) . . . . . 19th District
Rep. Jerry G. Melvin (Rep.) . . . . . 4th District
Rep. Stephen R. Wise (Rep.) . . . . . 13th District
Rep. George Albright (Rep.) . . . . . 24th District
Rep. Randy Ball (Rep.) . . . . . 29th District
Rep. Tom Feeney (Rep.) . . . . . 33rd District
Rep. Bob Brooks (Rep.) . . . . . 35th District
Rep. Allen Trovillion (Rep.) . . . . . 36th District
Rep. Everett A. Kelly (Rep.) . . . . . 42nd District
Rep. Mike Fasano (Rep.) . . . . . 45th District
Rep. Sandra L. Murman (Rep.) . . . . . 56th District
Rep. Johnnie B. Byrd, Jr. (Rep.) . . . . . 62nd District
Rep. Paula Bono Dockery (Rep.) . . . . . 64th District
Rep. Mark G. Flanagan (Rep.) . . . . . 68th District

Statement of the Interest of the *Amici*

Amici curiae are duly-elected Members of the Florida Legislature. As legislators, *amici* have a vital and continuing interest in the outcome of this litigation, which directly challenges their constitutional authority to establish public policy for the State of Florida and to allocate scarce tax resources in accord with that policy. Public funding of abortion is a sensitive issue which, like most other such issues in our society, should be decided by the popularly elected branches of government, where the voice of the people may be heard and where compromise and accommodation of divergent views is possible.

Having failed to persuade the legislature to fund abortions, abortion advocates have turned to the courts in an effort to subvert the democratic will. That effort should be resisted. "Judicial power is most forcefully asserted when a court refrains from arrogating to itself decisions properly entrusted to the other branches of government or to the people." *Doe v. Dep't of Social Services*, 487 N.W.2d 166, 186 (Mich. 1992) (Levin, J., concurring).

Plaintiffs have provided this Court with no principled basis on which it could conclude that the decision to pay for childbirth, but not abortion, is unconstitutional. Accordingly, the judgment of the District Court of Appeal, First District, should be affirmed.

Statement of the Case

Plaintiffs brought an action against defendant, the Agency for Health Care Administration, seeking declaratory and injunctive relief against enforcement of the administrative regulations prohibiting the use of public funds to pay for abortion except to save the life of the mother or when the pregnancy is the result of rape or incest. *See* FLA. ADMIN. CODE r. 59G-4.230(2) (1998) (physician services); r. 59G-4.150(4)(a)12 (1996) (in-patient hospital services); r. 59G-4.160(4)(a)5 (1996) & 4.160(4)(b)3 (1996) (out-patient hospital services). These regulations implement FLA. STAT. ANN. § 409.902 (West Supp. 2000), which provides that payments made by the Agency for medical assistance and related services "shall be made . . . only for services included in the program." The "program" to which § 409.902 refers is the "program authorized under Title XIX of the federal Social Security Act." FLA. STAT. ANN. § 409.901(15) (West Supp. 2000). Thus, § 409.902, which plaintiffs have *not* challenged, forbids the expenditure of any state funds for any services not included in Title XIX. As a result of the Hyde Amendment, § 409.902 effectively restricts the use of *state* funds to the same categories of abortion for which *federal* matching funds are available. On March 16, 1999, the circuit court granted defendant's motion for summary judgment. On April 20, 2000, the District Court of Appeal affirmed.

Summary of Argument

This Brief is filed on behalf of Members of the Florida Legislature, as *amici curiae*, in support of defendant. *Amici* submit that nothing in either the privacy (art. I, § 23) or equal protection (art. I, § 2) guaranty of the Florida Constitution, properly understood, requires the State of Florida to pay for abortions of indigent women, even though this Court has held that a right to abortion is protected by the privacy guarantee of the state constitution. *See In re T.W.*, 551 So.2d 1186 (Fla. 1989). A right to engage in certain conduct does not entail a right to public funding of that conduct.

Amici submit further that the relief requested by plaintiffs is barred by the separation of powers (art. II, § 3) and appropriations (art. VII, § 1(c)) provisions of the Constitution because the relief, if granted, would require the State of Florida to expend public funds in direct contravention of state law, which no court in Florida has the authority to order. Finally, *amici* submit that the relief requested by plaintiffs, if granted, would compel the State of Florida to pay for virtually all abortions of indigent women, regardless of the reasons for which they were being sought, as it has in other States whose courts have granted similar relief. For all of these reasons, the judgment of the District Court of Appeal, First District, should be affirmed.

I.

NOTHING IN THE PRIVACY PROVISION OF THE FLORIDA CONSTITUTION (ART. I, § 23) REQUIRES THE STATE OF FLORIDA TO PAY ANY PART OF THE COST OF ABORTIONS FOR INDIGENT PREGNANT WOMEN.

In their brief, plaintiffs argue that Florida's "regulatory scheme for Medicaid funding violates the right to privacy guaranteed by [art. I, § 23 of] the Florida Constitution." Plaintiffs' Br. at 26. Art. I, § 23, provides, in pertinent part, that "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ." FLA. CONST. art. I, § 23 (West Supp. 2000). Plaintiffs contend that Florida's restrictions on public funding of abortion violate "the right to autonomy in choosing whether to continue a pregnancy," Brief at 27, and "the right to bodily integrity," *id*. at 35, secured by the privacy guarantee, by "coerc[ing] a pregnant woman's exercise of her fundamental rights," *id* at 22, and by "penaliz[ing] the exercise of [a] fundamental right." *Id*. at 32.

Amici respond that the existence of a constitutional right to engage in certain conduct does not carry with it an entitlement to sufficient state funds to enable one to exercise that right. Thus, recognition of a right to choose abortion under art. I, § 23, of the Florida Constitution by this Court in *In re T.W.*, 551 So.2d

1186 (Fla. 1989), imposes no obligation on the State of Florida to pay for those abortions sought by indigent women. Florida's public policy decision to pay for childbirth, but not abortion (except in limited circumstances), does not "coerce" indigent pregnant women into carrying their children to term, nor does it "penalize" them if they choose abortion. Moreover, to the extent that Florida's restrictions on abortion funding may influence a pregnant woman's decision whether or not to obtain an abortion, that influence is not unconstitutional. Florida may favor childbirth over abortion in its allocation of public funds. *Amici* begin their analysis of plaintiffs' argument with a brief review of other provisions of the Florida Declaration of Rights.

Under art. I, § 2, of the Florida Constitution, FLA. CONST. art. I, § 2 (West Supp. 2000), a person has an inalienable "right to work, earn a living and acquire and possess property, ..." *Lee v. Delmar*, 66 So.2d 252, 255 (Fla. 1953). Nevertheless, nothing in art. I, § 2, obligates the State to furnish anyone with a job, provide for his basic needs or bestow property upon him. Although, under the free exercise guarantee of the Florida Constitution, *see* FLA. CONST. art. I, § 3 (West 1991), any person may sell or distribute religious literature without having to pay a license fee, *see State ex rel Singleton v. Woodruff,* 153 Fla. 84, 13 So.2d 704 (1943), it is obvious that the State need not provide such literature for sale or

distribution. The right of free speech, *see* FLA. CONST. art. I, § 4 (West Supp. 2000) may include a right to beg for alms, *see C.C.B. v. State*, 458 So.2d 47, 50 (Fla. 1st DCA 1984), but neither the State nor any of its agents is obliged to respond favorably to such pleas. Finally, although the Florida Constitution secures the right of the people "to keep and bear arms in defense of themselves," FLA. CONST. art. I, § 8(a) (West 1991), *see Davis v. State*, 146 So.2d 892, 893-94 (Fla. 1962), it would be absurd to suggest that the State must equip the citizenry with firearms suitable for such purposes, even though plausible claims could be made that arming the adult populace would deter or frustrate many criminal acts.

Focusing on the right of privacy, this Court has held that art. I, § 23, of the Florida Constitution guarantees that "a competent person has the constitutional right to choose or refuse medical treatment." *In re Guardianship of Browning*, 568 So.2d 4, 11 (Fla. 1990). But the right to choose medical treatment does not carry with it an entitlement to state funding of treatment, even though the treatment chosen may be necessary to sustain life or health. *See Dade County v. American Hospital of Miami, Inc.,* 502 So.2d 1230, 1231 (Fla. 1987) ("it must be understood that no fundamental constitutional right or established common law right requires any governmental entity to provide indigent medical care"). For the same reason, there is no corresponding right to publicly funded abortions. *See*

Rosie J. v. Dep't of Human Resources, 491 S.E.2d 535, 537 (N.C. 1997) ("No person has the constitutional right to have the State pay for medical care") (upholding restrictions on abortion funding).

Amici have not been able to identify any circumstances where the existence of a *substantive* right under any provision of the Florida Declaration of Rights, including the right of privacy, has been construed to include a right to a state subsidy of that right. Indeed, careful review of the applicable case law discloses that it is only where the State attempts to use the machinery of the criminal justice system to deprive someone of his life or liberty that certain *procedural* rights accorded by art. I, § 16(a), FLA. CONST. art. I, § 16(a) (West Supp. 2000), must be provided to a defendant, regardless of his ability to pay for them. *See Graham v. State*, 372 So.2d 1363, 1365 (Fla. 1979) (right to counsel); *Floyd v. State*, 90 So.2d 105, 106 (Fla. 1956) (right to jury trial): *Buckman v. Alexander*, 24 Fla. 46, 50, 3 So. 817, 818 (1888) (right to compulsory process).[1]

What Justice Stewart, writing for the Supreme Court in *Harris v. McRae*,

---

[1] A right to appointed counsel also has been recognized, on state due process grounds, in juvenile proceedings where the State seeks to terminate parental custody permanently, *see In the Interest of D.B.*, 385 So.2d 83, 90-91 (Fla. 1980), and in judicial bypass proceedings, where "a minor can be wholly deprived of authority to exercise her fundamental right to privacy," *In re T.W.*, 551 So.2d 1186, 1196 (Fla. 1989) (plurality opinion).

448 U.S. 297 (1980), said in reference to the Due Process Clause of the Fourteenth Amendment, applies with equal force to the privacy provision of the Florida Constitution:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions [*e.g.*, marriage; procreation; contraception; abortion; family relationships; and child rearing and education], it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives [citation omitted], or prevent parents from sending their child to a private school [citation omitted], government, therefore, has an affirmative obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.

448 U.S. at 317-18. *See also Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 120 (Pa. 1985) ("merely because all have the right to do a thing does not require that the Commonwealth is obliged to provide the means to all") (upholding

restrictions on abortion funding).[2] So, too, whether the freedom of choice that is protected by art. I, § 23, "warrants [state] subsidization is a question for [the State of Florida] to answer, not a matter of constitutional entitlement." *Harris v. McRae,* 448 U.S. at 318.

Even where the Florida Constitution imposes a funding obligation upon the State, state courts have been reluctant to determine whether that obligation has been met. Prior to its amendment in 1998, article IX, § 1, of the Florida Constitution provided, in part, "Adequate provision shall be made by law for a uniform system of free public schools . . . ." FLA. CONST. art. IX, § 1 (West 1991).[3] Notwithstanding this unambiguous directive to the Legislature, this Court rejected a challenge to the adequacy of school funding by the State, explaining that it would violate the separation of powers doctrine, *see* FLA. CONST. art. II, § 3

---

[2] *See also Doe v. Dep't of Social Services*, 487 N.W.2d 166, 184 (Mich. 1992) (Levin, J., concurring) ("the Due Process Clause . . . does not oblige government to relieve the burdens of poverty. While one may have a fundamental right to shelter, food and medical service free of unreasonable governmental restrictions, one does not have the right to demand that government provide free shelter, free food, or free medical services") (upholding abortion funding ban).

[3] Pursuant to an amendment ratified on Nov. 3, 1998, art. IX, § 1, now declares the education of children "a fundamental value of the people of the State of Florida" and sets forth specific criteria ("efficient, safe, secure, and high quality") for determining whether "adequate provision" has been made for a "system of free public schools." FLA. CONST. art. IX, § 1 (West Supp. 2000).

(West 1991), and usurp the exclusive authority of the legislature to appropriate funds, *see* FLA. CONST. art. VII, § 1(c) (West 1995), for the court to attempt to determine whether particular levels of funding are "adequate." *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 405-08 (Fla. 1996). If this Court has hesitated to determine whether the legislature has fulfilled an express, constitutionally mandated requirement to fund a specific right (*i.e.*, free public education), then it should shrink from the far more daunting task of deciding whether (and under what circumstances), the legislature must subsidize the exercise of a much more general right (*i.e.*, privacy, in all of its various permutations) for which funding is *not* expressly mandated by the constitution.

Confronted with a lack of authority to support their position and having failed to articulate a reasoned argument mandating taxpayer-funded abortions, plaintiffs concede that "they [do not] have a 'right' to public assistance or to government funded health care" or, for that matter, to "funding for abortion 'on demand.'" Plaintiffs Br. at 22. *See Hope v. Perales*, 634 N.E.2d 183, 187 (N.Y. 1994) ("Plaintiffs recognize that the fundamental right of reproductive choice [under the New York Constitution] does not carry with it an entitlement to sufficient public funds to exercise that right, and that the State is not required to

remove burdens, such as indigence, not of its creation") (upholding program which funded prenatal care, but not abortion, for women near the poverty line). Rather, plaintiffs argue that "[b]y funding the health care costs of childbirth and prenatal care, but denying funding for medically necessary abortions, the state coerces a pregnant woman's exercise of her fundamental rights and violates her bodily integrity without serving any compelling state interest." Brief at 22.

Plaintiffs' "coercion" argument is fatally undermined by their concession that there is no freestanding right to government funding of abortion. Plaintiffs argue, in effect, that an indigent woman who would have chosen an abortion (and paid for it through private resources) if the State funded neither abortion nor childbirth, will choose to carry her child to term for no reason other than to obtain the benefits of subsidized childbirth, despite some risk to her health in so doing. Plaintiffs' Br. at 28-34.[4] This argument is clearly counterintuitive, as Presiding Justice Murphy of the New York Supreme Court, Appellate Division, recognized:

> The very great difficulty with this argument is that funding for pregnancy related services cannot reasonably be viewed as an inducement to pregnancy or its continuation. The decision to have a child is one laden with tremendous personal and economic

[4] The alleged "coercion" obviously would not affect the decision of an indigent woman who would choose to give birth with or without a state subsidy of childbirth; nor would it affect the decision of a woman who would choose to terminate her pregnancy with or without a state subsidy of abortion.

> consequence. It would not be rational to suppose that a woman not otherwise disposed to do so, would undertake to bear the considerable risks and discomforts of pregnancy and the enormous ensuing responsibilities of parenthood simply because the government had offered to pay for some of the medical costs occasioned by the pregnancy. This is particularly true of the women for whom the entitlement to a government funded abortion is here at issue, for these women have, by hypothesis, been advised that an abortion is medically necessary. Obviously, the government's offer to fund the continuation of pregnancy cannot, under such circumstances[,] be regarded as an "inducement". One does not embrace serious and in some cases life threatening[5] health risks simply to obtain a subsidy, particularly where, as here, the need for the subsidy can be eliminated along with the risk by following medical advice. There may, of course, be compelling reasons for a woman to choose to continue a pregnancy her doctor has advised her to terminate, but these will undoubtedly be rooted in deep personal, religious, or ethical considerations; they will not conceivably stem from an offer of an economic benefit such as the one here challenged, so utterly insignificant as a decisional determinant when viewed in the context of the enormous risk and obligation its receipt entails.

Hope v. Perales, 595 N.Y.S.2d 948, 956-57 (N.Y. App. Div. 1993) (Murphy, P.J., dissenting), *rev'd*, 634 N.E.2d 183 (N.Y. 1994).[6] Justice Murphy's sense that the public policy choice of the State to subsidize childbirth, but not abortion, seldom enters into the calculus of a woman's decision to obtain an abortion (at least one

---

[5] Florida pays for abortions necessary to save the life of the mother, and also in those cases where pregnancy has resulted from an act or rape or incest.

[6] In reversing the Appellate Division, the Court of Appeals noted that there was no evidence that eligible women were "coerced, pressured, steered or induced" by the prenatal care assistance program to carry their pregnancies to term. *Hope v. Perales*, 634 N.E.2d 183, 187 (N.Y. 1994).

which is "medically necessary") is confirmed by evidence, cited by plaintiffs, that "where Medicaid does not provide coverage for abortion, the lack of abortion funding forces approximately 18-23% of Medicaid eligible women who seek abortions to carry their pregnancies to term." Plaintiffs' Br. at 19, citing Affidavit of Stanley K. Henshaw at ¶ 14. In other words, about four out of five indigent pregnant women who would have obtained abortions had they been publicly funded still get them, even though they must pay for them with private resources.[7] This is weak evidence of "coercion."

Amici acknowledge that this Court has recognized a right to abortion under the state constitution. *See In re T.W.*, 551 So.2d 1186, 1192-93 (Fla. 1989). Nevertheless, Florida's decision to subsidize childbirth, but not abortion (except in limited circumstances), violates no right of those women who choose *not* to carry their children to term. Again, Justice Stewart's opinion for the Supreme Court in *Harris v. McRae* is illuminating:

> [I]t simply does not follow that a woman's freedom of choice [with respect to abortion] carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected

---

[7] Justice Levin's perceptive comments in the Michigan funding case leave little doubt that private resources are more than adequate to pay for the cost of those few abortions which are sought and performed for medical, as opposed to social or economic, reasons. *See Doe v. Dep't of Social Services*, 487 N.W.2d 166, 180-81 (Mich. 1992) (Levin, J., concurring).

> choices. . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls into the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in [*Roe v.*] *Wade.*

448 U.S. at 316-17. "[A] decision by the Legislature not to fund the exercise of a right is distinct from a legislative action that impinges upon that right." *Doe v. Dep't of Social Services*, 487 N.W.2d at 178.

Even assuming, however, that the State of Florida's decision to fund childbirth over abortion has some indeterminate impact on the choice of indigent women whether or not to carry their children to term, that effect is entirely legitimate, as the Michigan Supreme Court recognized in its funding decision:

> [W]e do not find that an offer to fund childbirth impermissibly influences the procreative decisions of an indigent woman. The state's election to subsidize childbirth does not coerce a woman into forfeiting her right to choose an abortion any more than the state's election to subsidize public schools coerces parents into forfeiting their right to send their children to private schools. [Citation omitted]. As with the decision to fund public schools, the state may have made

> childbirth a more attractive option by paying for it, but it has imposed no restriction on obtaining an abortion that was not already there.

Doe, 487 N.W.2d at 178. "[A] decision to offer funds only for childbirth [does not] take[] away any of the choices that would be available to an indigent woman if the state did not offer funds for childbirth." *Id.* Moreover, "there is no constitutional obligation on the state to remain neutral regarding abortion any more than there is an obligation on the state to remain neutral regarding the exercise of other fundamental rights." *Id.* at 179.

> The state has a legitimate interest in protecting potential life, and it has a legitimate interest in promoting childbirth. Equally important, the Legislature has a legitimate interest in allocating state benefits in a way that reflects its determination of the public policy of the state. Our constitution does not require that we have a government without values; it requires only that, in the pursuit of certain values, our government will not improperly interfere with the exercise of fundamental rights. Because no medical procedure besides abortion involves the deliberate termination of fetal life, and because of the high cost of childbirth and the relatively lower cost of abortion, it is rational for the state to pursue its legitimate interests by paying for childbirth, but not abortion.

Id. In his concurring opinion, Justice Levin observed that "the entire concept of government neutrality on the abortion/childbirth issue is fallacious." *Id.* at 185 (Levin, J., concurring). He explained:

> The government must embrace one position or the other. It is at least fair argument to say that the government would promote abortion by providing funding even for a medically indicated abortion. Such

> funding would offend those who oppose abortion as much as the contrary result offends those who favor choice. In short, there is no middle ground. The decision to promote "choice" is as much an expression of values at the decision to promote childbirth.

Id.

Plaintiffs' broadly stated "neutrality" principle ignores the examples of education and marriage. Parents have an unquestioned right to send their children to private or parochial schools. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Yet, it is clear that Florida may pay for public education without violating the right of parents to choose private educational facilities. *See Norwood v. Harrison,* 413 U.S. 455, 462 (1973) ("It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid"). So, too, the "right to choose not to marry" is "equally fundamental as the right to marry." *Doe v. Dep't of Social Services*, 487 N.W.2d at 185 (Levin, J., concurring). Nevertheless, "no one can truthfully contend that the state unconstitutionally burdens the right not to marry by promoting the competing value, marriage," by enacting "laws and programs designed to aid the institution of marriage." *Id.*

Given these (and other) examples, plaintiffs are wrong then they make the blanket statement that "state governments must act neutrally when they fund

constitutionally protected decisions." Plaintiffs' Br. at 33.[8] They need not. Neither plaintiffs nor the authorities on which they rely (Plaintiffs' Br. at 32-33) even attempt to explain how their "neutrality" principle can be reconciled with the indisputable right of the State to favor public education and marriage.[9] The State

---

[8] Plaintiffs' analogy of Florida's decision to fund childbirth, but not abortion, to a hypothetical decision of the government to provide free transportation to the polls to Democratic, but not Republican, voters (Plaintiffs' Br. at 32) is imaginative, but inapt. Plaintiffs have confused the *manner* in which a choice is exercised (for which party is the citizen going to cast a vote) with the *choice* itself (the decision to vote). Although there may be a right *not* to vote in an election (because voting is not mandatory), that "right" does not preclude the State for assisting those who choose to exercise the franchise, as plaintiffs themselves admit. *See* Plaintiffs' Br. at 31.

Plaintiffs' reliance on *State by Butterworth v. Republican Party of Florida*, 604 So.2d 477 (Fla. 1992), is misplaced. In *Butterworth*, the State improperly attempted to assess fees on contributions to political parties and redistribute the collected fees to all candidates for statewide political office who agreed to abide by certain campaign spending limits. Relying exclusively on the First Amendment, this Court invalidated this scheme. It was in this context that former Chief Justice Barkett stated that "the State may not condition [a] benefit in such a way as to induce the waiver of constitutional rights." 604 So.2d at 481 (Barkett, C.J., concurring). Florida has not "condition[ed]" an indigent woman's entitlement to benefits upon a "waiver" of her constitutional rights. The State simply has chosen not to subsidize the exercise of a right.

[9] Plaintiffs' citation of fourteen contrary decisions (Plaintiffs' Br. at 32-33) is misleading. Five of the cases they cite (from Connecticut, Idaho, Illinois, Montana and Vermont) were unappealed or unreviewed trial court decisions. Moreover, the state constitutional law discussion in three of those decisions (Connecticut, Montana and Vermont) was mere *dicta*, because the judgments were based on administrative law grounds, *i.e.*, that the regulations restricting funding were not authorized by statute. *See Doe v. Maher*, 515 A.2d 134, 145-46 (Conn.

also has the unquestioned right to encourage childbirth and discourage abortion by making public funds available for the former, but not the latter. *See Doe v. Dep't of Social Services*, 487 N.W.2d 166, 179 (Mich. 1992); *Rosie J. v. Dep't of Human Resources*, 491 S.E.2d 535, 537 (N.C. 1997); *Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 122-23 (Pa. 1985).

In the *Fischer* case, the Pennsylvania Supreme Court characterized the right it was being asked to recognize as "the purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights." 502 A.2d at 121. The court refused to recognize the claimed right, explaining that "[s]uch a right is to

---

Super. Ct. 1986); *Jeanette R. v. Ellery*, No. BDV-94-811, First Judicial District Court (Lewis & Clark County, Montana), May 19, 1997, slip op. at 14; *Doe v. Celani*, No. S81-84CnC, Chittenden Superior Court (Chittenden, Vermont), May 26, 1986, slip op. at 13-19. Furthermore, in subsequent appeals involving collateral matters, the Connecticut Supreme Court strongly intimated that it disagreed with the lower court's judgment on the merits, which was not appealed. *See Doe v. Heintz*, 526 A.2d 1318, 1320 n.3 (Conn. 1987) (citing federal authorities); *Doe v. State*, 579 A.2d 37, 39 n.4 (Conn. 1990) (*same*). The Illinois decision–a one-page judgment order–was not accompanied by a written opinion explaining the court's cryptic order declaring the abortion funding statutes unconstitutional. Two other cases–from Alaska and Arizona–are on appeal. And in a eighth case, the court of appeals' judgment was affirmed by the state supreme court on administrative law grounds only. *See Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources of the State of Oregon,* 687 P.2d 785 (Or. 1984), *aff'g* 663 P.2d 1247 (Or. Ct. App. 1983). The supreme court held that the ruling on the constitutionality of the funding limitation and the constitutional challenge were "premature." *Id*. at 787.

be found nowhere in our state Constitution, and . . . cannot be considered fundamental." *Id*. Nor can such a right be found in the Florida Constitution.

Finally, in not funding abortion, Florida is not trying to "penalize the exercise of one fundamental right [*i.e*., to choose abortion] over another [*i.e*., to choose childbirth]." Plaintiffs' Br. at 32. Florida has *not* sought to deny general welfare benefits to all women who obtain abortions and who are otherwise entitled to those benefits. Florida merely has chosen not to pay for abortions for indigent women, except in limited circumstances. *See Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 124 (Pa. 1985) ("the Commonwealth here has not otherwise penalized [Medicaid-eligible pregnant women] for exercising their right to choose, but has merely decided not to fund that choice in favor of an alternative social policy"); *Hope v. Perales*, 634 N.E.2d 183, 188 (N.Y. 1994) ("PCAP [the Prenatal Care Assistance Program] does not penalize the exercise of the right of choice, as it does not deny eligibility for any benefit to which participants choosing to abort would otherwise be entitled"); *Doe v. Dep't of Social Services*, 487 N.W.2d 166, 178 (Mich. 1992) ("an indigent woman who desires an abortion is not excluded from the Medicaid program").[10]

[10] *See also* Justice Levin's detailed critique of plaintiffs' argument and the authorities on which they rely. *Doe v. Dep't of Social Services*, 487 N.W.2d at 181 n.8, 182-84 & nn. 11-18 (Levin, J., concurring).

The United States Supreme Court has recognized the same distinction in rejecting challenges to abortion funding. *See Maher v. Roe*, 432 U.S. 464, 474-75 n.8 (1977) (rejecting claim that "the State 'penalizes' the woman's decision to have an abortion by refusing to pay for it," but noting that if a State "denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, . . . strict scrutiny might be appropriate under . . . the penalty analysis"); *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (noting that a "substantial constitutional question" would have arisen "if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion").

Perhaps the clearest refutation of plaintiffs' "penalty" theory comes from one of their own authorities, *Planned Parenthood Ass'n v. Dep't of Human Resources*, 663 P.2d 1247 (Or. Ct. App. 1993), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984):

> [Petitioners] do not contend that the right to choose termination of a pregnancy is a basic constitutional right that requires the state to provide an abortion to the indigent as it is required to provide counsel in criminal cases. Neither do they contend that the state must fund all abortions if it funds medical expenses for childbirth.
>
> Notwithstanding those concessions, some of the propositions petitioners assert would necessarily lead to one or the other of those

> conclusions. For example, petitioners contend that "the state may not condition receipt of benefits upon the wavier of a fundamental right * * * ." If we understand the contention correctly, it falls with in the accepted principle that unconstitutional conditions may not be imposed on the granting of a right. [Citation omitted]. Petitioners contend that the rule requires an indigent pregnant woman to carry her pregnancy to term, which she has a right not to do, in order to receive pregnancy-related medical benefits. However, by definition, a woman who chooses to terminate her pregnancy is not seeking childbirth benefits, and at no time does the state say to a pregnant woman that it will provide childbirth benefits only if she waives her right to choose; those benefits simply follow as a matter of course if the pregnancy is not terminated.
>
> It is true that the effect of the rule is to provide unwanted childbirth expenses for women who are not entitled to a funded abortion under its terms and are unable to obtain an abortion from other sources. In that sense, the rule undoubtedly would have an effect on the woman's choice. On the other hand, if the state provided no funding for either childbirth or abortion, the probable effect would be to encourage early abortions, because, as petitioners contend, they are less expensive and might be affordable. If petitioners' waiver contention is correct, then if must follow that the state is mandated by its constitution to fund all abortions, nontherapeutic as well as medically necessary, if it funds childbirth. As indicated, they disclaim that proposition.

Id. at 1256-57.[11]

The public policy decision of the State of Florida not to pay for abortions

---

[11] Later in its opinion, the court of appeals held that an administrative regulation restricting public funding of abortion violated the privileges and immunities provision of the state constitution, a holding expressly disavowed by the state supreme court, which affirmed the judgment of the court of appeals on administrative law grounds only. *See Planned Parenthood Ass'n v. Dep't of Human Resources*, 687 P.2d 785, 787 (Or. 1984).

except to save the mother's life or in cases where pregnancy results from an act of rape or incest does not infringe upon "the right to autonomy in choosing whether to continue a pregnancy." Plaintiffs' Br. at 27. Nor does that policy decision, which places no obstacles in the path of an indigent woman seeking an abortion, compromise the woman's "right to bodily integrity." *Id.* at 35. Accordingly, that policy does not violate the privacy provision (art. I, § 23) of the Florida Constitution.

II.

NOTHING IN THE EQUAL PROTECTION GUARANTEE OF THE FLORIDA CONSTITUTION (ART. I, § 2) FORBIDS THE STATE OF FLORIDA FROM PAYING FOR THE COST OF CHILDBIRTH, BUT NOT ABORTION, OF INDIGENT WOMEN.

Plaintiffs next argue that "Florida's regulatory scheme for Medicaid funding violates plaintiffs' right to equal protection under the Florida Constitution." Plaintiffs' Br. at 38. Art. I, § 2, of the Florida Constitution provides, in part, "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty [and] to pursue happiness . . . ." FLA. CONST. art. I, § 2 (West Supp. 2000).

Plaintiffs contend that Florida's restrictions on public funding of abortion violate the guarantee of equal protection in three respects: "First, by providing

funding for women who choose to carry their pregnancies to term but denying funding to women who choose to have an abortion, Florida's regulatory scheme impermissibly discriminates against a Medicaid-eligible woman's fundamental right to choose abortion[;]" second, "the regulatory scheme discriminates on the basis of sex by prohibiting funding for a medically necessary procedure sought only by women and by penalizing those women who do not conform to traditional assumptions about women's role in society[;]" and third, "Florida's regulatory scheme . . . fails to meet even the minimum level of scrutiny under the equal protection clause because it establishes arbitrary, oppressive, and irrational distinctions between abortions necessary to save women's lives and those necessary to preserve their health." *Id*. at 39.

None of these contentions withstands scrutiny. Plaintiffs' first argument, that the funding restrictions "impermissibly discriminate[] against a Medicaid-eligible woman's fundamental right to choose abortion," is only a restatement of their privacy argument, as plaintiffs acknowledge (Plaintiffs' Br. at 40), which *amici* have addressed. There is no interference with an indigent woman's right to make choices regarding reproduction (and thus no impermissible discrimination against the exercise of a fundamental constitutional right) in funding childbirth, but not abortion. *Amici* have identified only one situation in

which a Florida court has held that a state constitutional right must be afforded to indigents on state equal protection grounds.

In *Traylor v. State*, 596 So.2d 957 (Fla. 1992), this Court held that a right to appointed counsel arises when art. I, § 16, of the Declaration of Rights is read in conjunction with the equal protection guarantee of art. I, § 2, of the state constitution. 596 So.2d at 969.

> The Equal Protection Clause of our state Constitution was framed to address all forms of invidious discrimination under the law, including any persistent disparity in the treatment of rich and poor. We conclude that our clause means just what it says: Each Florida citizen--regardless of financial means--stands on equal footing with all others in every court of law throughout our state. [Citation omitted.] Nowhere is the right to equality in treatment more important than in the context of a criminal trial, for only here can a defendant be deprived by the state of life and liberty.

Id.

Noting "the widely-recognized and oftentimes decisive role the lawyer plays in the judicial process," the Court concluded that "our state Constitution requires that the Section 16 right to counsel be made available to impoverished defendants. No Florida citizen can be deprived of life or liberty in a criminal proceeding simply because he or she is too poor to establish his or her innocence." *Id*. at 969. *See also Green v. State*, 620 So.2d 188 (Fla. 1993).

Notwithstanding the sweep and tone of the opinion in *Traylor*, the

Florida courts have held that the State need *not* provide counsel and expenses to indigent prisoners not under sentence of death to prepare motions for post-conviction relief solely because the State provides the same to indigent prisoners who *are* under sentence of death. *See Elam v. State*, 689 So.2d 1232 (Fla. 5th DCA 1997), *rev. denied*, 698 So.2d 839 (1997), *cert. denied*, 118 S.Ct. 584 (1997). Moreover, this Court has held that there is no state equal protection violation in providing counsel at no initial cost to the petitioner, but not the respondent, in a paternity suit. *See Dep't of Health & Rehabilitative Services v. Heffler*, 382 So.2d 301 (Fla. 1980).

The equal protection guarantee of the Florida Constitution mandates state funding of certain *procedural* constitutional rights, specifically, the right to counsel, and then only in limited circumstances (criminal and quasi-criminal proceedings). *See Collie v. State*, 710 So.2d 1000, 1012-13 (Fla. 2d DCA 1998) (no right to appointed counsel in sexual predator hearing).[12] It does not mandate the public funding of *substantive* constitutional rights.

Plaintiffs' second argument, that the funding restrictions constitute impermissible gender discrimination, ignores the fact that the restrictions are "directed at abortion as a medical procedure, not women as a class." *Moe v.*

---

[12] *But see* n. 1, *supra*.

Secretary of Admin. & Finance, 417 N.E.2d 387, 407 (Mass. 1981) (Hennessey, C.J., dissenting); *see also Right to Choose v. Byrne*, 450 A.2d 925, 950 (N.J. 1982) ("[t]he subject of the legislation is not the person of the recipient but the nature of the claimed medical service") (O'Hern, J., dissenting).[13] In *Fischer v. Dep't of Public Welfare*, 502 A.2d 114 (Pa. 1985), the Pennsylvania Supreme Court described as "simplistic" the argument that a law restricting abortion funding necessarily discriminated on the basis of gender because only women can become pregnant:

> . . . we cannot accept [the] rather simplistic argument that because only a woman can have an abortion then the statute [restricting public funding of abortion] necessarily utilizes "sex as a basis for distinction, ..." [Citation omitted]. To the contrary, the basis for the distinction here is not sex, but abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women [whether to carry the child to term or have an abortion].

Id. at 125. Prior to the New Mexico Supreme Court's decision striking down abortion funding restrictions on the authority of the state equal rights amendment, *see New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998), *Fischer* was the *only* state reviewing court to have decided

---

[13] Both *Moe* and *Right to Choose* were decided on other grounds. The dissenting justices were addressing alternative grounds raised by the plaintiffs, but not reached by the majority opinions.

whether pregnancy-based classifications transgress state constitutional norms (as opposed to whether such classifications violate state civil rights statutes).[14]

In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the United States Supreme Court rejected an equal protection challenge to a California statute excluding pregnancy from the list of conditions that qualified for disability benefits. *Apropos* of the issue discussed herein, the Court stated:

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is [an impermissible] sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, law makers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this [disability

---

[14] *Amici* note that the two pregnancy discrimination cases cited by plaintiffs in their brief (Br. at 42), were decided on the basis of state *civil rights statutes*, not state *constitutions*, and are entitled to no weight in evaluating state constitutional claims. A civil rights statute may prohibit conduct that, in itself, is not unconstitutional. *Compare Geduldig v. Aiello*, 417 U.S. 484 (1974) (excluding pregnancy coverage under state disability insurance plan did not violate the Equal Protection Clause of the Fourteenth Amendment) *with Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983) (Pregnancy Discrimination Act of 1978 prohibited sex discrimination on the basis of pregnancy). Constitutional standards of discrimination are not coterminous with statutory ones. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 153-55 & n.6 (1976) (Brennan, J., dissenting). *See also Bd. of Trustees of Bastrop Indep. School District v. Toungate*, 958 S.W.2d 365, 368 (Tex. 1997) (state civil rights statute prohibiting discrimination on account of sex "is distinct from the ERA and must be applied accordingly").

> benefits] on any reasonable basis, just as with respect to any other physical condition.

417 U.S. at 496-97 n.20.

Prior to November 1998, when the equal protection guarantee of the Florida Constitution was amended to include the phrase "female and male alike," sex was treated as a "quasi-suspect" class under Florida law. *See Purvis v. State*, 377 So.2d 674, 676 (Fla. 1979). This Court has not yet considered whether the amendment to art. I, § 2, has made sex a suspect basis for classification. But even in States with equal rights amendments where sex-based classifications are subject to a more exacting standard of review, the courts, with the exception of New Mexico, have uniformly held that laws that differentiate between the sexes are permissible and do not violate the state guarantee of gender equality if they are based upon the unique physical characteristics of a particular sex.[15] In the words of the Pennsylvania Supreme

---

[15] *See People v. Salinas*, 551 P.2d 703, 705-06 (Colo. 1976) (statutory rape statute); *State v. Bell*, 377 So.2d 303 (La. 1979) (*same*); *State v. Miller*, 663 So.2d 107, 109 (La. Ct. App. 1995) (*same*); *State v. Vining*, 609 So.2d 984 (La. Ct. App. 1992) (*same*), *writ denied*, 613 So.2d 991 (La. 1993); *State v. Rivera*, 612 P.2d 526, 530-31 (Hawaii 1980) (rape statute); *State v. Fletcher*, 341 So.2d 340, 348 (La. 1976) (*same*); *Brooks v. State*, 330 A.2d 670, 672-73 (Md. App. 1975) (*same*), *cert. denied*, 275 Md. 746 (1975); *State v. Craig*, 545 P.2d 649, 652-53 (Mont. 1976) (*same*); *Finley v. State*, 527 S.W.2d 553, 555-56 (Tex. Crim. App. 1975) (*same*); *People v. Boyer*, 349 N.E.2d 50 (Ill. 1976) (aggravated incest), *cert. denied*, 429 U.S. 1063 (1977); *Singer v. Hara*, 522 P.2d 1187, 1189-95 (Wash.

Court:

> The mere fact that only women are affected by this statute [restricting public funding of abortion] does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex. Although we have not previously addressed this situation, other ERA jurisdictions have; and the prevailing view amongst our sister state jurisdictions is that the ERA "does not prohibit differential treatment [between] the sexes when, as here, that treatment is reasonably and genuinely based on physical characteristics unique to one sex." [Citations omitted].

Fischer v. Dep't of Public Welfare, 502 A.2d 114, 125 (Pa. 1985). For example, the Texas Court of Civil Appeals has stated, "Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive

---

App. 1974) (laws banning same sex marriages); *People v. Morrison*, 584 N.E.2d 509 (Ill. App. Ct. 1991) (means of establishing maternity and paternity) (classification "based merely upon the biological reality" of childbearing), *appeal denied*, 591 N.E.2d 28 (Ill. 1992); *Commonwealth v. MacKenzie*, 334 N.E.2d 613, 616 (Mass. 1975) (*same*) (cited with approval in *Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 293 (Mass. 1979) and *Lowell v. Kowalski*, 405 N.E.2d 135, 140 (Mass. 1980)); *A v. X, Y & Z*, 641 P.2d 1222, 1224-25 (Wyo. 1982) (*same*), *cert. denied*, 459 U.S. 1021 (1982); *City of Seattle v. Buchanan*, 584 P.2d 918, 919-21 (Wash. 1978) (public exposure of female breasts) (cited with approval in *Guardo v. Jackson*, 940 P.2d 642, 644 (Wash. 1997) (ERA "not violated "[w]hen differential treatment of the sexes is based upon actual differences between the sexes")); *Dydyn v. Dep't of Liquor Control*, 531 A.2d 170, 175 (Conn. App. 1987) (female nudity in bars), *certification denied*, 532 A.2d 586 (Conn. 1987), *cert. denied*, 485 U.S. 977 (1988); *Messina v. State*, 904 S.W.2d 178, 181 (Tex. Civ. App. 1995, *no writ*) (*same*).

differences between the sexes." *Mercer v. Board of Trustees, North Forrest Independent School District*, 538 S.W.2d 201, 206 (Tex. Civ. App. 1976, *writ ref'd n.r.e.*). And the Maryland Court of Appeals has noted that "[d]isparate treatment on account of physical characteristics unique to one sex is generally regarded as beyond the reach of equal rights amendments." *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817, 822 n. 3 (Md. 1985).

The seminal law review article in support of the proposed federal Equal Rights Amendment, which would have established strict scrutiny as the standard of review for sex-based discrimination, appeared to place its *imprimatur* on statutes discriminating between men and women where the discrimination is directly related to physical characteristics unique to one sex: "The fundamental legal principle underlying the Equal Rights Amendment, . . . that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex," "does not preclude legislation . . . which . . . takes into account . . . a physical characteristic unique to one sex." Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman, "*The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*," 80 YALE L. J. 871, 893 (April 1971). The authors concluded, "So long as the law deals only with a characteristic found in

all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principle of the Equal Rights Amendment." *Id* (emphasis in original).[16]

Obviously, the ability to conceive and bear children is one which only some women and no men possess. In a subsequent article urging Connecticut to ratify the E.R.A., Professor Emerson, the lead author of the Yale article, stated unequivocally that the ERA "has nothing to do with the power of the states to stop or regulate abortions, or the right of women to demand abortions. The state's power over abortions depends upon wholly different constitutional considerations, primarily the right of privacy, and would not be affected one way or the other by passage of the ERA." Thomas I. Emerson and Barbara G. Lifton, "*Should The ERA Be Ratified?*," 55 CONN. B. J. 227, 232 (June 1981).

The decision of the New Mexico Supreme Court striking down the State's abortion funding restrictions on the basis of the state equal rights amendment takes issue with the foregoing analysis and concludes that classifying on the basis of "a physical condition unique to one sex" does not

---

[16] Given the reliance which abortion advocates have placed on the reasoning set forth in this article, it is curious that its authors no where suggest that laws against abortion would violate the proposed Equal Rights Amendment.

immunize the classification from constitutional attack. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 854-55 (N.M. 1998). Contrary to the implications of the court's opinion, however, limiting the use of public funds to pay for abortions of indigent women does not use "the unique ability of women to become pregnant and bear children," 975 P.2d at 855, as a pretext to discriminate against women in *other* respects, *e.g.*, "imposing restrictions on women's ability to work and participate in public life." *Id*. at 854.[17] As the Pennsylvania Supreme Court stated, "[T]he basis for the distinction here [*i.e*., abortion funding restrictions] is not sex, but abortion, ..." *Fischer*, 502 A.2d at 125.

The decision of the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL v. Johnson* is at odds with the decisions of courts in thirteen other States that a classification based upon the unique physical characteristics of one sex does not constitute unlawful discrimination under a state equal rights amendment. The decision also ignores the views of Professor Emerson, lead author of the seminal law review on the proposed federal Equal Rights Amendment cited by the court in its opinion (975 P.2d at 854), that the Equal

[17] As, for example, the automatic exemption from jury service for mothers with small children struck down in *Alachua County Court Executive. v. Anthony*, 418 So.2d 264 (Fla. 1982), cited by plaintiffs. *See* Plaintiffs' Br. at 41 n.15.

Rights Amendment "has nothing to do with the power of states to stop or regulate abortions, or the right of women to demand abortions." Thomas I. Emerson and Barbara G. Lifton, "*Should the ERA Be Ratified?*," 55 CONN. B.J. at 232.

Plaintiffs' second equal protection argument is invalid precisely because the regulation of abortion can directly affect only *some* women (those who become pregnant and want an abortion) and *no* men. For that reason, "the constitutional test applicable to government abortion funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination [citing *Craig v. Boren*, 429 U.S. 190 (1976)], but the ordinary rationality standard." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993), citing *Maher v. Roe*, 432 U.S. 464, 470-71, 478 (1977), and *Harris v. McRae*, 448 U.S. 297, 322-24 (1980). This leads directly to plaintiffs' third equal protection argument, *i.e.*, the rationality of the challenged regulations.

Contrary to plaintiffs' final equal protection argument, Florida's "regulatory scheme" does not "establish[] arbitrary, oppressive, and irrational distinctions between abortions necessary to save women's lives and those necessary to preserve their health." Plaintiffs' Br. at 39. In rejecting a challenge to state abortion funding restrictions, the Michigan Supreme Court

held that the State has legitimate interests in protecting unborn human life, in promoting childbirth and in allocating state benefits in a way that reflects the legislature's determination of the public policy of the State. *See Doe v. Dep't of Social Services*, 487 N.W.2d 166, 179 (Mich. 1992). The court held further that "[b]ecause no medical procedure besides abortion involves the deliberate termination of fetal life, and because of the high cost of childbirth and the relatively lower cost of abortion, it is rational for the state to pursue its legitimate interests by paying for childbirth, but not abortion." *Id.* *See also Rosie J. v. Dep't of Human Resources*, 491 S.E.2d 535, 537-38 (N.C. 1997) (action of General Assembly "in placing severe restrictions on the funding of medically necessary abortions for indigent women" is "rationally related" to the "legitimate governmental objective" of "encourag[ing] childbirth"); *Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 122-23 (Pa. 1985) (Commonwealth's decision "to encourage the birth of a child in all situations except where another life would have to be sacrificed" is "specifically related to the ends sought ["the preservation of life"], in that it accomplishes the preservation of the maximum amount of lives: i.e., those unaborted new babies, and those mothers who will survive though their fetus be aborted").

The public policy of the State of Florida to pay for abortions only where

continuation of the pregnancy would endanger the mother's life or where the pregnancy has resulted from rape or incest is rationally related to the legitimate governmental purpose of promoting unborn human life. That is sufficient to sustain its constitutionality under the equal protection guarantee of the Florida Constitution. *See generally Sasso v. Ram Property Management*, 431 So.2d 204, 211-17 (Fla. 1st DCA 1983), *approved* 452 So.2d 932 (Fla. 1984), *appeal dismissed*, 469 U.S. 1030 (1984).[18]

In addition to the foregoing analysis, *amici* note that the framers and adopters of the Florida Constitution "intended that the Florida equal protection clause operate in a manner similar to the fourteenth amendment." *Sasso*, 431 So.2d at 212. There is no denial of equal protection in the choice of the State to pay for childbirth, but not abortion. *See Williams v. Zbaraz*, 448 U.S. 358 (1980) (rejecting federal equal protection challenge to Illinois statutes prohibiting public funding of abortion except to save the life of the mother) (relying upon *Harris v. McRae*, 448 U.S. 297 (1980). Hence, there is no denial

[18] Whether that policy makes sense from a strictly economic point of view (because subsidizing childbirth is more expensive than subsidizing abortion) is, contrary to plaintiffs' argument (*see* Plaintiffs' Br. at 21), simply not relevant to the constitutional calculus. As the North Carolina Supreme Court observed, "It is not necessary that State action be rationally related to all State objectives. It is enough that it is related to some legitimate State objective." *Rosie J, v. Dep't of Human Resources*, 491 S.E.2d at 537-38.

of equal protection under art. I, § 2, of the Florida Constitution, either.

III

THE RELIEF SOUGHT BY THE PLAINTIFFS IS BARRED BY THE FLORIDA CONSTITUTION.

Entirely apart from the lack of merit in plaintiffs' substantive claims, the relief they seek, funding of abortions for which state funds have not been appropriated, is barred by the Florida Constitution. Section 409.902 provides, in part, that payments made by the Agency for Health Care Administration for medical assistance and related services under Title XIX "shall be made . . . *only* for services included in the program, ..." FLA. STAT. ANN. § 409.902 (West Supp. 2000) (emphasis supplied). The "program" to which § 409.902 refers is the "program authorized under Title XIX of the federal Social Security Act." FLA. STAT. ANN. § 409.901(15) (West Supp. 2000). Section 409.902, which plaintiffs have *not* challenged, thus forbids the expenditure of *any* state funds for any services *not* included in Title XIX. Under the current version of the Hyde Amendment, Title XIX does not pay for abortions except to save the life of the mother and where the pregnancy has resulted from rape or incest. *See* H.R. 3434, §§ 508, 509, incorporated into "Consolidated Appropriations Act 2000," P.L. 106-113, 113 Stat. 1501, 1537-269. As a result of that limitation, § 409.902 effectively restricts the use of *state* funds to the same categories of

abortion for which *federal* matching funds are available.[19] To grant the relief requested by plaintiffs would require this Court to order the expenditure of state funds for a purpose expressly forbidden by state law. This it has no power to do.

Article II, § 3, of the Florida Constitution provides, in pertinent part, "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." FLA. CONST. art. II, § 3 (West 1991). Article VII, § 1(c), provides, "No money shall be drawn from the treasury except in pursuance of appropriation made by law." FLA. CONST. art. VII, § 1(c) (West 1995). The "separation of powers" clause "embodies one of the fundamental principles of our federal and state constitutions and prohibits the unlawful encroachment by one branch upon the powers of another branch." *Simms v. State of Florida, Dep't of Health & Rehabilitative Services,*

---

[19] Plaintiffs' failure to challenge the language in § 409.902 restricting payments made by the Agency for Health Care Administration to those "services included in the [federal Medicaid] program" should moot their challenge to the implementing regulations. Even without those regulations, the Agency is barred by statute from paying for any services for which federal reimbursement is not available. Thus, contrary to plaintiffs' representation (Plaintiffs' Br. at 5 n.4), Florida law (specifically § 409.902) *does* restrict public funding of abortions to those specific circumstances for which federal funding is available as defined under the current version of the Hyde Amendment.

641 So.2d 957, 960 (Fla. 3d DCA 1994), *review denied*, 649 So.2d 870 (Fla. 1994).

In *Dade County Classroom Teachers Ass'n, Inc. v. The Legislature of the State of Florida*, 269 So.2d 684 (Fla. 1972), this Court held that "the judiciary cannot compel the Legislature to exercise a purely legislative prerogative." 269 S.W.2d at 686. Moreover, "the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes." *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260, 265 (Fla. 1991). Art. VII, § 1(c), "gives to the Legislature 'the exclusive power of deciding how, when and for what purpose the public funds shall be applied in carrying on the government.'" *Republican Party of Florida v. Smith*, 638 So.2d 26, 28 (Fla. 1994), *quoting State ex rel. Kurz v. Lee*, 121 Fla. 360, 384, 163 So. 859, 868 (1935). The object of such a provision is "to prevent the expenditure of the public funds already in the Treasury, or potentially therein, from the sources provided to raise it, without the consent of the public given by their representatives in formal legislative Acts." *Kurz*, 121 Fla. at 384, 163 So. at 868. In *Chiles*, this Court stated:

> The constitution specifically provides for the legislature alone to have the power to appropriate state funds. More importantly, only the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal projects of the State of Florida. The legislature must carry out its constitutional duty to establish fiscal priorities in light of the financial resources it has provided.

Chiles, 589 So.2d at 267. *See also Undereducated Foster Children of Florida v. Florida Senate,* 700 So.2d 66, 67 (Fla. 1st DCA 1997) (plaintiffs' requests that the Legislature be ordered to provide educational assistance to foster children and to restructure foster care program stated claims "seek[ing] relief that is outside the province of this court").

In enacting § 409.902, the Florida Legislature has done precisely that. The administrative regulations challenged by plaintiffs implement the statutory mandate that payments made for medical assistance and related services under Title XIX "shall be made . . . *only* for services included in the [Medicaid] program, ..." Emphasis supplied. Under current federal law, that program does not fund "medically necessary" abortions; therefore, neither does the State of Florida. Plaintiffs ask this Court to usurp a legislative prerogative and mandate the expenditure of state funds for purposes forbidden by the legislature. Under the Florida Constitution, this Court has no power to grant that relief.

IV.

THE RELIEF REQUESTED BY THE PLAINTIFFS WOULD REQUIRE FLORIDA TO PAY FOR VIRTUALLY ALL ABORTIONS OF INDIGENT WOMEN.

Plaintiffs seek a judgment from this Court ordering Florida to pay for all "medically necessary" abortions of Medicaid-eligible women. Although the concept of "medical necessity" may appear to have a defined and determinant meaning,[20] in the context of abortion, it does not. The judgment demanded by plaintiffs, if entered, would effectively require the State of Florida to pay for virtually every abortion sought by a Medicaid-eligible woman in Florida, as it has in other States whose courts have ordered the payment of "medically necessary" abortions. Plaintiffs essentially concede as much when they state, using fifteen-year old statistics, that "if, in 1985, [Florida] Medicaid had funded abortions without the ban challenged in this suit, approximately 6,620 to 7,720 Medicaid funded abortions would have been performed in Florida at a public expenditure of $292 per abortion." Plaintiffs' Br. at 21.[21]

---

[20] *See* Plaintiffs' Br. at 6 (citing what is now FLA. ADMIN. CODE r. 59G-1.010(167)(a) (1995)).

[21] This would have represented approximately 10% of *all* abortions performed in Florida in 1985. *See* Stanley K. Henshaw, Jacqueline Darroch Forrest and Jennifer Van Vort, "*Abortion Services in the United States, 1984 and 1985,*" 19 Family Planning Perspectives 63, 65 Table 3 (March/April 1987).

An examination of the relevant case law yields two conclusions: First, the term "medically necessary" is extremely elastic and may include virtually any reason a woman may seek an abortion, especially when the open-ended language of *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), is applied; second, the physician's determination of when an abortion is "medically necessary" under such an imprecise standard is unreviewable.

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court summarily held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. The Court's holding was significantly influenced by its perception of "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether . . . ." *Id*. The Court explained:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.

Id. The Court concluded, "All these are factors the woman and her responsible

physician necessarily will consider in consultation." *Id*. In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court stated that the determination whether "'an abortion is necessary' is a professional judgment" which "may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient." 410 U.S. at 192. "All these factors," the Court found, "may relate to health." *Id*.

Before the constitutionality of the Hyde Amendment was resolved in *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court's understanding of what constitutes a "therapeutic" or "medically necessary" abortion, for purposes of public funding, basically mirrored the Court's open-ended language in *Doe v. Bolton*. In *Beal v. Doe*, 432 U.S. 438 (1977), the Court held that the Medicaid Act (Title XIX) did not require Pennsylvania to pay for "unnecessary . . . medical services." 432 U.S. at 445. But at oral argument, counsel for the Commonwealth informed the Court that the definition of "medical necessity" under the applicable state regulations, was "broad enough to encompass the factors specified in [*Doe v.*] *Bolton*." *Beal v. Doe,* 432 U.S. at 441-42 n.3.[22]

---

[22] Specifically, counsel stated that "'a physician, in examining a patient, may take psychological, physical, emotional, familial considerations into mind and in the light of those considerations, may determine if those factors affect the health of the mother to such an extent as he would deem an abortion necessary.'" *Beal v. Doe*, 432 U.S. at 451 n.* (Brennan, J., dissenting).

Significantly, "[t]he decision whether to fund the costs of the abortion . . . depends *solely* on the physician's determination of medical necessity." *Id*. at 445 n.9 (emphasis supplied). Thus, as a practical matter, the physician could take into account any of the *Bolton* factors in determining whether an abortion was "necessary" and his judgment that the abortion was "necessary" was final.

Prior to the adoption of the Hyde Amendment, the federal government was paying for between 250,000 and 300,000 abortions annually. *McRae v. Califano*, 491 F.Supp. 630, 639 (E.D.N.Y. 1980), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980). These abortions accounted for a *minimum* of 20-25% of *all* abortions performed in the United States in each of those years.[23] The notion that all, most or even many of these abortions were "medically necessary" in any genuine sense strains credulity. These statistics leave little

---

[23] Based on summary information furnished by state health departments, the federal Centers for Disease Control reported 615,831 legal abortions in 1973, 763,476 in 1974, 854,853 in 1975, 988,267 in 1976, 1,079,430 in 1977, 1,157,776 in 1978, 1,251,921 in 1979, and 1,297,606 in 1980. *See* "*Abortion Surveillance, 1982-83*," *Morbidity and Mortality Weekly Report (CDC)*, Vol. 36/No. 1SS (Feb. 1987) at 12SS (Table 1). The private Alan Guttmacher Institute, which gathers information from abortion providers, reported 744,600 abortions in 1973, 898,600 in 1974, 1,034,200 in 1975, 1,179,300 in 1976, 1,316,700 in 1977, 1,409,600 in 1978, 1,497,700 in 1979, and 1,553,900 in 1980. *See* Stanley K. Henshaw, Jacqueline Darroch Forrest and Jennifer Van Vort, "*Abortion Services in the United States, 1984 and 1985,*" 19 Family Planning Perspectives 63, 64 (March/April 1987).

doubt that the United States was paying for virtually every abortion sought by an indigent pregnant woman, regardless of reason.[24]

In their fourth amended complaint, plaintiffs alleged that "Medicaid eligible women seek abortions for a variety of psychological, emotional, medical, social, familial, economic, and personal reasons." *Plaintiffs' Fourth Amended Complaint* at 24 ¶ 63. Plaintiffs claimed that abortion may be necessary for women "to preserve their mental or physical health," *id*. at ¶ 65, and they did not deny that they have sought state funding for abortions "when[ever] a physician and her or his patient agree that an abortion is medically necessary," *id*. at ¶ 66. Plaintiffs assert that Florida's abortion funding policy "operates to delay and, in some situations, to prevent low-income women from obtaining safe, timely abortions, thereby endangering their mental and physical health." "Memorandum of Law in Support of Plaintiffs' Renewed Motion for Summary Judgment" at 5. Plaintiffs claim that "[d]enying abortion funding to indigent women for any of the myriad health reasons described above clearly deprives those women of access to a medically

---

[24] This conclusion is supported by evidence that fully 90% of abortions are performed principally for socio-economic reasons, and only three percent mainly for reasons relating to a woman's health. *See* Aida Torres and Jacqueline Darroch Forrest, "*Why Do Women Have Abortions?*", 20 Family Planning Perspectives 169, 170 (Table 1) (July/August 1988).

necessary treatment option." *Id*. at 13.

The experience in those States whose courts have mandated public funding of abortion services for indigent women confirms the conclusion that a "medically necessary" abortion is any abortion desired by an indigent woman. In *Right to Choose v. Bryne*, 450 A.2d 925 (N.J. 1982), the New Jersey Supreme Court declared unconstitutional the State's restrictions on abortion funding. Although the court declined to extend its ruling to include "nontherapeutic abortions," 450 A.2d at 935 n.5, and held that "the State may pursue its interest in potential life by excluding those [elective, nontherapeutic] abortions from the Medicaid program," *id*. at 937, the court's conclusion that the State must fund "medically necessary abortions," *id*., has meant, in practice, that New Jersey pays for all abortions of indigent women. *See* N.J. ADMIN. CODE 10: 54-5.43(b)(4) (1997) (physician services); N.J. ADMIN. CODE 10:52-2.14(b) (1997) (hospital services manual).

In 1987, New Jersey paid for 10,422 abortions of indigent women. *See* Rachel Benson Gold and Sandra Guardado, "*Public Funding of Family Planning, Sterilization and Abortion Services, 1987*," Family Planning Perspectives 20(5): 228, 232 (Table 3) (September/October 1988) (hereinafter, Gold and Guardado, "*Public Funding of Abortion Services*, 1987"). This

accounted for almost one-sixth of *all* abortions performed in New Jersey in 1987 (63,570). *See* Stanley K. Henshaw and Jennifer Van Vort, "*Abortion Services in the United States, 1987 and 1988*," Family Planning Perspectives 22(3): 102, 104 (Table 2) (May/June 1990) (hereinafter, Henshaw and Van Vort, "*Abortion Services: 1987 and 1988*"). This meant that New Jersey paid for virtually any abortion sought by a Medicaid-eligible indigent woman, regardless of reason.

In 1992, although the total number of abortions performed in New Jersey actually had dropped more than 13% from 1987, to 55,320, *see* Stanley K. Henshaw and Jennifer Van Vort, "*Abortion Services in the United States, 1991 and 1992*," Family Planning Perspectives 26(3): 100, 102 (Table 2) (May/June 1994) (hereinafter, Henshaw and Van Vort, "*Abortion Services: 1991 and 1992*"), the number of state-paid abortions *rose* more than 25% from 1987, to a total of 13,034, or almost one-fourth (23.56%) of all abortions performed in New Jersey in 1992. *See* Daniel Daley and Rachel Benson Gold, "*Public Funding for Contraceptive Sterilization and Abortion Services, Fiscal Year 1992*," Family Planning Perspectives 25(6): 244, 251 (Table 3) (November/ December 1993) (hereinafter Daley and Gold, "*Public Funding for Abortion, Fiscal Year 1992*"). These statistics leave little doubt that New Jersey's "medical necessity"

standard has no fixed boundaries.

The same experience has occurred in other States whose courts have struck down funding limitations. In *Moe v. Secretary of Admin. & Finance*, 417 N.E.2d 387 (Mass. 1981), the Supreme Judicial Court of Massachusetts declared unconstitutional limitations on abortion funding. Although the court was particular to emphasize that it was ordering the payment only of "medically necessary" services and not "elective" or "nontherapeutic" services, 417 N.E.2d at 394 n.12, the statistics of abortion funding in Massachusetts tell a different story. In 1987, a total of 41,490 abortions were performed in Massachusetts. *See* Henshaw and Van Vort, "*Abortion Services: 1987 and 1988,*" Family Planning Perspectives 22(3): 102, 104 (Table 2) (May/June 1990). Of these, Massachusetts paid for 5,800, or roughly 14% (13.97%) of the total. *See* Gold and Guardado, "*Public Funding of Abortion Services, 1987*," Family Planning Perspectives 20(5): 228, 232 (Table 3) (September/October 1988).

In 1986, Connecticut was ordered to pay for "medically necessary" abortions under an unappealed trial court decision. *See Doe v. Maher*, 513 A.2d 134 (Conn. Super. Ct. 1986). The court defined "medically necessary" abortions as those abortions "necessary to ameliorate a condition that is

deleterious to a woman's physical and or psychological health." 513 A.2d at 135 n.4. In 1987, Connecticut paid for 13.17% of all abortions performed in the State in that year (2,948 out of 22,380). *See* Henshaw and Van Vort, "*Abortion Services: 1987 and 1988*," Family Planning Perspectives 22(3): 102, 104 (Table 2) (May/June 1990); Gold and Guardado, "*Public Funding of Abortion Services, 1987,*" Family Planning Perspectives 20(5): 228, 232 (Table 3) (September/October 1988). By 1992, however, Connecticut was paying for 6,501 out of 19,720 abortions performed in the State, or almost one-third (32.96%) of all abortions. *See* Henshaw and Van Vort, "*Abortion Services: 1991 and 1992,*" Family Planning Perspectives 26(3): 100, 102 (Table 2) (May/June 1994); Daley and Gold, "*Public Funding for Abortion Services, Fiscal Year 1992,*" Family Planning Perspectives 25(6): 244, 251 (Table 3) (November/December 1993). These figures again demonstrate the elasticity of the concept of "medical necessity."

In 1981, the California Supreme Court declared unconstitutional state restrictions on the public funding of abortion. *See Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981). Although nothing in the *Myers* opinion indicated that the court intended to require the State to pay for elective, as opposed to therapeutic, abortions, the reality is that California

pays for virtually all abortions of indigent women, regardless of reason. In 1987, California paid for more than one fourth of the abortions (25.59%) performed in the State in that year (77,000 out of 300,830 abortions). *See* Henshaw and Van Vort, "*Abortion Services: 1987 and 1988*," Family Planning Perspectives 22(3): 102, 104 (Table 2) (May/June 1990); Gold and Guardado, "*Public Funding of Abortion Services, 1987*," Family Planning Perspectives 20(5): 228, 232 (Table 3) (September/October 1988). By 1991, California was paying for more than one out of every three abortions (34.64%) performed in the State (111,196 out of 320,960). *See* Henshaw and Van Vort, "*Abortion Services: 1991 and 1992,*" Family Planning Perspectives 26(3): 100, 102 (Table 2) (May/June 1994); Daley and Gold, "*Public Funding for Abortion Services, Fiscal Year 1992*," Family Planning Perspectives 25(6): 244, 251 (Table 3) (November/December 1993).[25]

The experience of States whose courts have ordered the payment of all "medically necessary" abortions for indigent women compels one to conclude that the concept of "medical necessity" has no ascertainable boundaries and includes virtually any reason a woman may seek an abortion. This also reflects the experience of the United States before the Hyde Amendment became

[25] The figures for California in this report refer to 1991, not 1992.

effective. In sum, the concept of "medical necessity" is completely elastic and, if adopted, would require the State of Florida to pay for virtually all abortions sought by Medicaid-eligible women in Florida. *Amici* urge this Court to reject that request and uphold the present funding restrictions under Florida law.

Conclusion

For the foregoing reasons, and because "the making of social policy is a matter within the purview of the legislature–not this Court," *State v. Ashley*, 701 So.2d 338, 343 (Fla. 1997), *amici curiae*, Members of the Florida Legislature, respectfully request this Honorable Court to affirm the judgment of the District Court of Appeal, First District, affirming the circuit court's order granting defendant's motion for summary judgment.

Respectfully submitted,

Thomas A. Horkan, Jr., Esq.
Florida Bar No. 037227
313 South Calhoun Street
Tallahassee, Florida 32301
(850) 222-3803

Paul Benjamin Linton, Esq.
Illinois Bar No. 1670158
921 Keystone Avenue
Northbrook, Illinois 60062
(847) 291-3848

Counsel for the *Amici*

Certificate of Compliance

This is to certify that under Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, as modified by this Court's Administrative Order of July 13, 1998, this Brief has been reproduced in 14 point CG Times, a proportionately spaced font.

This is to certify further that, pursuant to this Court's Administrative Order of February 5, 1999, the Brief is being submitted in both paper copies and on 3.5" computer diskette formatted for DOS. The document filed on diskette is contained within a single file (marked "brief") in WordPerfect 9.0 format.

_____

Paul Benjamin Linton, Esq.
Counsel for the *Amici*

Certificate of Service

I, Thomas A. Horkan, Jr., a member of the Florida Bar, Florida Bar No. 037227, hereby certify that on June , 2000, I caused to be served on the Clerk of the Supreme Court of Florida, an original and seven copies of the Brief *Amicus Curiae* on Behalf of Members of the Florida Legislature in Support of the Defendant, and one 3.5" computer diskette containing the brief in one file, an original of a Motion for Leave to file Brief *Amicus Curiae* on Behalf of Members of the Florida Legislature in Support of the Defendant, and an original of a Motion by Foreign Attorney to be Admitted *Pro Hac Vice*, by depositing the same in the United States mail, in Tallahassee, Florida, first class postage prepaid.

I certify further that on June , 2000, I caused to be served on each of the following counsel of record, one copy of the Brief Amicus Curiae on Behalf of Members of the Florida Legislature in Support of the Defendant, one copy of a Motion for Leave to file Brief *Amicus Curiae* on Behalf of Members of the Florida Legislature in Support of the Defendant, and one copy of a Motion by Foreign Attorney to be Admitted *Pro Hac Vice*, by depositing the same in the United States mail, in Tallahassee, Florida, first class postage prepaid:

Bonnie Scott Jones
Center for Reproductive Law
& Policy
120 Wall Street
18th Floor
New York, New York 10005

Larry Helm Spalding
ACLU Foundation of Florida
314 West Jefferson Street
Tallahassee, Florida 32301

William Roberts
Office of the General Counsel
Agency for Health Care Administration
2727 Mahan Drive
Fort Knox Building, # 3
Tallahassee, Florida 32308-5403

_____
Thomas A. Horkan, Jr.