IN THE SUPREME COURT OF FLORIDA

Case No. SC00-989

RENEE B.; BARBARA S. HUNTER; TAHARA D. WILSON; PRESIDENTIAL WOMEN'S CENTER, INC.; FLORIDA WOMEN'S MEDICAL CLINIC, INC., d/b/a/ Women's Clinic; AWARE WOMAN MEDICAL CENTER d/b/a/ Manhattan Magnolia Corporation; AWARE WOMAN HEALTH CENTER d/b/a Magnolia Management and Marketing Group, Inc.; AWARE WOMAN CENTER FOR CHOICE, INC.; FEMINIST WOMEN'S HEALTH CENTER IN TALLAHASSEE, INC.; CENTRAL FLORIDA WOMEN'S ORGANIZATION, INC.; RANDALL BROOKS WHITNEY, M.D.; MICHAEL BENJAMIN, M.D.; EMERGENCY MEDICAL ASSISTANCE, INC, Plaintiffs-Appellants,	:	Class Representation
vs.	:	
STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, Defendant-Appellee.	:	

On Appeal from the District Court of Appeal,
First District, State of Florida

BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF THE CASE

A woman's decision whether to bear a child is a deeply personal matter that fundamentally affects her life and health. The right to make that decision free from state interference lies at the heart of the guarantees of liberty, privacy, bodily integrity, and equality protected by the Florida Constitution. In this action, Plaintiffs-Appellants ["Plaintiffs"]challenge Florida's interference with this right through its Medicaid program, which funds virtually all medically necessary health care *except* for abortions that are necessary to preserve a pregnant woman's health.

Plaintiffs are three individual Medicaid-eligible women who sought medically necessary abortions and who sue on behalf of themselves and a class of similarly situated women, seven reproductive health clinics that provide abortions, two physicians, and a non-profit organization that provides financial assistance to women who cannot afford abortions. R. vol. III, pp. 468-475. Defendant-Appellee, Agency for Health Care Administration ("AHCA"), is the state agency responsible for administering Florida's Medicaid program. R. vol. III, p. 475.

In March 1993, Plaintiffs filed a complaint in the Fifteenth Judicial Circuit Court of Palm Beach County challenging the state regulations that deny Medicaid funding for medically necessary abortions except in the most limited of circumstances.[1] Those regulations currently prohibit the use of Medicaid funds for abortions except in cases where the pregnancy endangers a woman's life or was caused by rape or incest. Fla. Admin. Code R. 59G-4.150(4)(a)(12); 59G-4.160(4)(a)(5), (b)(3); & 59G-4.230(2). The complaint seeks (1) a declaration that these regulations are unconstitutional and that the state Medicaid program must cover medically necessary abortions; (2) a permanent injunction prohibiting enforcement of the regulations; and (3) reimbursement to the Medicaid-eligible Plaintiffs of wrongfully-withheld Medicaid funds for medically necessary abortions performed during the pendency of this lawsuit. R. vol. III, pp. 491-495.

The Honorable Ronald V. Alvarez heard Plaintiffs' motions for a temporary

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[1] Plaintiffs filed several amended complaints, partly as a result of changes in Florida's Medicaid program, including revisions to the challenged regulations and the state agency responsible for administering the program. For example, when the lawsuit was originally filed, Florida's Medicaid program paid for abortions only in instances where the woman's life was endangered. Subsequently, the program extended coverage to instances where the pregnancies were the result of rape or incest.

The most recent complaint is found at R. vol. III, pp. 466-496. Defendant-Appellant's answer is found at R. vol. V, pp. 788-795. After the most recent complaint was filed, one of the named defendants – the Department of Health and Rehabilitative Services – was dismissed by stipulation, R. vol. V, pp. 826-831, and one of the challenged regulations – Rule 10M-6.142 of the Florida Administrative Code – was repealed.

injunction and oversaw discovery.[2] On September 2, 1994, the Honorable Edward H. Fine certified the plaintiff class as:

> all women in the State of Florida who (1) are, have been, or will be during the pendency of the litigation pregnant and Medicaid-eligible; (2) have decided or will decide, in consultation with their physicians, to have abortions; and (3) are, have been, or will be denied Medicaid coverage for abortions and related procedures.

R. vol. III, pp. 426-33. The Honorable Richard Wennet transferred the case to the Second Judicial Circuit Court of Leon County. R. vol. IV, pp. 686-689.

On October 9, 1998, the Honorable Terry P. Lewis denied Plaintiffs' motion for summary judgment, holding that the challenged regulations did not violate the Florida Constitution. R. vol. VII, pp. 1290-1295. On March 16, 1999, Judge Lewis granted AHCA's motion for summary judgment on the basis of his earlier ruling. R. vol. VII, pp. 1296-1297. Plaintiffs filed a timely notice of appeal on April 1, 1999, R. vol. VII, pp. 1298-1302, and, on April 7, 1999, filed a suggestion with the District Court of Appeal, First District, that this case be heard immediately by this Court. On April 29, 1999, the First District Court of Appeal certified the case to this Court as one of great public importance requiring immediate resolution. On June 29, 1999, this Court declined jurisdiction over the appeal and remanded it to the District Court of Appeal. The District Court of Appeal issued an opinion on April 20, 2000, affirming the trial court's judgment in favor of Defendants. The opinion of the First District Court of Appeal ["Ct. App. Op."] is reproduced at Tab N of Plaintiffs-Appellants' Appendix.

The circuit court had jurisdiction over this matter pursuant to Article V, Section 5(b) of the Florida Constitution and Sections 26.012(2)(a) and 86.011 of the Florida Statutes. The District Court of Appeal had jurisdiction over the appeal pursuant to Article V, Section 4(b)(1) of the Florida Constitution, and this Court has jurisdiction over this appeal pursuant to Article V, Section 3(b)(5) of the Florida Constitution.

STANDARD OF REVIEW

An appellate court reviews de novo the grant of summary judgment. *See Tucker v. Resha*, 610 So. 2d 460, 465 (Fla. 1st DCA 1992), *remanded on other grounds*, 648 So. 2d 1187 (Fla. 1994). Summary judgment is appropriate where "there is no genuine issue as to any material fact" and the moving party is "entitled

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[2] The lower court held two hearings on Plaintiffs' motions for a temporary injunction, first on April 15, 1993, and again on June 17, 1993. The lower court denied the first motion because the woman seeking relief obtained an abortion from a physician who volunteered his services, and he denied the second because he concluded that the women seeking relief were not named plaintiffs, did not demonstrate they were unable to find other, non-Medicaid sources of funding for the abortion, and did not demonstrate the medical necessity of the procedure. R. vol. I, pp. 66-68, 147-151.

to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). *See also Anderson v. Maddox*, 65 So. 2d 299, 300 (Fla. 1953). Where solely legal issues are at stake, summary judgment is proper. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *Aloff v. Neff-Harmon, Inc.*, 463 So. 2d 291, 294 (Fla. 1st DCA 1984).

Here, Plaintiffs seek review of the Circuit Court's grant of summary judgment to AHCA, which was affirmed by the First District Court of Appeal. There are no disputed material facts because AHCA did not submit any evidence rebutting the evidence submitted by the Plaintiffs. Since only legal issues remain, resolution of the case by summary judgment is appropriate. The courts below erred, however, in granting judgment to AHCA, rather than to Plaintiffs.

STATEMENT OF FACTS

I. THE CHALLENGED FUNDING BAN.

Medicaid is a joint federal-state program designed to provide medical care to the poor. 42 U.S.C. § 1396 *et seq*. While the states develop individual plans for implementing the Medicaid program, the federal government requires the states to provide certain mandatory categories of services and permits the states to provide additional optional services. 42 U.S.C. §§ 1396a(a)(10), 1396d(a). After the states have paid for medical services under their plans, the federal government reimburses them for a portion of those costs. 42 U.S.C. § 1396b. The federal government generally provides reimbursement for all medical services that are provided to eligible individuals and medically necessary. 42 U.S.C. § 1396b(a)(1).

The federal government's reimbursement to the states for Medicaid programs is sharply limited by the Hyde Amendment.[3] Under the current version of the Hyde Amendment, *federal funds* may only be used to pay for abortions if the pregnancy is the result of rape or incest or if the procedure is necessary to save a woman's life and her life is endangered by a physical disorder, physical injury, or physical illness. Pub. L. No. 105-277, Title V, §§ 508-509 (1998). The Hyde Amendment does not limit the use of *state funds*. *Harris v. McRae*, 448 U.S. 297, 311 n.16 (1980). Thus, the federal Medicaid program allows a state to fund abortions that are not federally reimbursable. Currently, the majority of the states, including Florida itself, permit varying degrees of abortion funding beyond the circumstances of the Hyde Amendment.[4]

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[3] The "Hyde Amendment" is the name given to language that, since fiscal year 1977, has been inserted annually into federal appropriations bills to limit the circumstances in which federal funding may be used for abortions. The exact language of the Hyde Amendment varies from year to year.

[4] Three states voluntarily fund all medically necessary abortions for Medicaid recipients. Haw. Admin. Code r. 17-1727-49(c)(7); N.Y. Soc. Serv. Law § 365-a(2), (5)(b), N.Y. Comp. Codes R. & Regs. tit. 18, § 505.2(e); Wash. Rev. Code §§ 9.02.100(4), 9.02.160. Several other states voluntarily provide state

Florida's Medicaid program provides its indigent citizens with virtually all non-experimental, medically necessary health care. §§ 409.902, 409.905, 409.906, Fla. Stat. (1995 & Supp. 1999). "Medically necessary" services are those that are:

> 1. . . . necessary to protect life, to prevent sickness or significant disability, or to alleviate severe pain;
>
> 2. . . . individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
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> 3. . . . consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
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> 4. . . . reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide; and
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> 5. . . . furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the

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Medicaid funding beyond that required by the Hyde Amendment. Maryland voluntarily funds abortions where the fetus is affected by a genetic defect or serious abnormality, or where the continuation of pregnancy could have a serious and adverse affect on the woman's mental or physical health. Md. Regs. Code tit. 10, § 10.09.02.04(G). Virginia funds abortions if the fetus will be born with an incapacitating mental deficiency or physical deformity, Va. Code Ann. § 32.1-92.2, while Iowa funds abortions if the fetus is "physically deformed, mentally deficient, or afflicted with a congenital illness," Iowa Admin. Code r. 441-78.1(17). Wisconsin voluntarily funds abortions that are necessary to prevent grave, long-lasting physical health damage due to an existing medical condition. Wis. Stat. § 20.927.

As a result of litigation such as this, fourteen additional states currently provide Medicaid coverage for all medically necessary abortions. *See infra* pp.32-33. A number of other states, including Florida, fund all abortions that are necessary to preserve the life of the woman. For example, by regulation, Florida allows reimbursement for all abortions that are necessary "to save the life of the mother." Fla. Admin. Code R. 59G-4.150(4)(a)(12). By contrast, the current Hyde Amendment permits federal funds to be used only in the narrower instances when a woman's life is endangered by a physical disorder, injury, or illness. Pub. L. No. 105-277, Title V, §§ 508-509 (1998). Florida's regulations contain no such explicit limitation to physical, as opposed to mental or psychological, life endangerment.

provider.
Fla. Admin. Code R. 59G-1.010(166)(a).[5]

By statute, Florida's Medicaid program explicitly includes medically necessary care related to pregnancy. § 409.901(8), Fla. Stat. (1995). Accordingly, all in-patient, out-patient and physician services relating to prenatal care and childbirth are covered upon certification by a physician that the services are medically necessary. §§ 409.903(5), 409.905(5), (6), (9), Fla. Stat. (1995 & Supp. 1999).

By regulation, however, AHCA has carved out a special exception to the state's Medicaid program in the case of abortion services. Pursuant to Rules 59G-4.150; 59G-4.160; and 59G-4.230 of the Florida Administration Code, a Medicaid-eligible woman is denied state funding for a medically necessary abortion unless her pregnancy endangers her life or is the result of rape or incest. *See* Fla. Admin. Code R. 59G-4.150 (4)(a)(12) (restricting funding for abortions provided in hospital settings), -4.160 (4)(a)(5), (b)(3) (restricting funding for abortions provided in out-patient hospital facilities), -4.230 (2) (incorporating by reference Florida Medicaid Physician Coverage and Limitations Handbook which restricts funding for abortions provided in physician offices or clinics). For no other medical service does Florida require that the patient's condition be life-threatening or caused by a crime in order to be funded by Medicaid.

II. FOR MANY WOMEN, AN ABORTION IS MEDICALLY NECESSARY.

Pregnancy can cause numerous health problems without being life-threatening. It can cause serious medical conditions, exacerbate pre-existing conditions, and prevent women from obtaining treatment for pre-existing conditions. *See generally* R. vol. V, pp. 879-889, 932-946. For women who are young or have substance abuse problems, these risks are heightened. R. vol. V, pp. 939-940, 944.

In Florida, more than 7,000 pregnant, Medicaid-eligible women a year, like the individual women Plaintiffs, have pregnancy related complications or medical conditions that, combined with pregnancy, pose significant risks to their health. R. vol. V, p. 914. For these women, abortion is a vital and necessary treatment option that their physicians should be able to discuss with them and provide where appropriate. R. vol. V, pp. 944-945.

The individual women who provided testimony in this case all suffer from

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[5] *See also Orlando Gen. Hosp. v. Department of Health & Rehabilitative Servs.*, 567 So. 2d 962 (Fla. 5th DCA 1990) (medically necessary in-patient hospital services are those "reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent deterioration of condition threatening life, causing pain or suffering, or resulting in illness or infirmity"); Fla. Admin. Code R. 59G-4.160(1)(c) (out-patient hospital services are covered when they are "preventative, diagnostic, therapeutic, rehabilitative, or palliative").

conditions that significantly increase the risks that pregnancy poses to their health. Each of the women was Medicaid-eligible at the time she sought an abortion that was necessary to preserve her health. Despite the medical risks the women were facing, the Florida Medicaid program would not cover those abortions. The circumstances of these Plaintiffs is as follows:

Barbara S. Hunter (who originally appeared in this action under the pseudonym Anne Moe) has Grave's Disease and was addicted to illegal substances when she became pregnant. Hunter's illness required immediate radio-iodine treatment. Since the treatment would harm her fetus, Hunter had to stop her treatments for the duration of her pregnancy. R. vol. V, pp. 959-960.

Renee B. began hemorrhaging during her pregnancy. She admitted herself to the emergency room several times. At the emergency room, she underwent a very painful treatment in order to get the bleeding under control. The pregnancy also caused her to have high blood sugar. Diabetes runs in her family. She was advised to confine herself to her home, keep off her feet, and change her diet during her pregnancy. R. vol. VI, pp. 1019-1022.

Jane and Mary Youth became pregnant at such young ages, 13 and 14 respectively, that their pregnancies presented risks to their health. R. vol. VI, pp. 1039, 1055. Young adolescents have high-risk pregnancies and often suffer from physical, social, and economic problems. R. vol. V, pp. 939-940.

As the provider Plaintiffs have demonstrated, the experiences of these four women are not unique. Dr. Randall Brooks Whitney sees numerous patients who are Medicaid-eligible. His patients seek abortions for many different reasons, including physical and mental health conditions and fetal abnormalities. Often, his patients have several reasons for terminating their pregnancies. R. vol. VI, p. 1012.

Approximately 15% of the patients at Aware Woman Center for Choice are Medicaid-eligible. Some of those patients seek medically necessary abortions. For example, the clinic worked with one woman who was 33 years old, was the mother of several children, and was in very fragile health. She was HIV positive, schizophrenic, and had a history of heart attacks. Because of the patient's numerous health complications and because of the weakened condition of her uterus due to past pregnancies, Aware Woman Center for Choice was unable to perform the procedure in its facilities. Despite that patient's desperate medical need for an abortion, Florida's Medicaid program would not cover an abortion for her. R. vol. V, pp. 962-963.

The Presidential Women's Center in West Palm Beach also has many Medicaid-eligible patients for whom carrying a pregnancy to term would be highly risky. For example, the clinic often receives referrals from physicians who have determined that a patient's high blood pressure prevents her from safely carrying a pregnancy to term. Some of the Center's other patients suffer from cancer, lupus, or debilitating orthopedic problems which make an abortion medically indicated. Because these conditions, which pose great health risks, are not life-threatening, these patients receive no Medicaid funding to terminate their pregnancies. R. vol. V, p. 954.

Palm Beach County's high incidence of HIV and AIDS infection is also reflected in Presidential Women's Center's patient population. An HIV positive woman may jeopardize her already compromised immune system by carrying a pregnancy to term. She cannot receive Medicaid funding for a medically necessary abortion to spare her fragile health, however, because the pregnancy itself is not life-threatening. R. vol. V, p. 954.

In addition to the specific cases just described, various other medical conditions also pose significant health risks during pregnancy. For example, pregnancy can actually cause some health conditions, such as diabetes, that require medical attention. Pregnancy-induced diabetes occurs in approximately 1-3% of pregnancies. Diabetes has a number of adverse effects on the pregnant woman: it causes a fourfold increase in the likelihood of hypertensive disease; it increases the incidence and severity of infection; it increases the incidence of injury to the birth canal during vaginal delivery; it necessitates delivery by cesarean sections more frequently; and it makes hemorrhage after delivery more common. R. vol. V, pp. 936-937.

For other women, pregnancy worsens existing serious conditions. For example, women already suffering from diabetes are at greater risk during pregnancy. Their pregnancies may cause the rapid degeneration associated with nephropathy or proliferative retinopathy which can result in permanent visual abnormalities or blindness. Such women are also at greater risk of leg edema, pre-eclampsia, infection, and having a fetus with congenital abnormalities. R. vol. V, pp. 936-937.

Women with renal disease associated with diabetes or lupus may experience an exacerbation of that condition if they become pregnant, especially if pre-pregnancy renal function is substantially impaired. For those patients who have undergone a renal transplant, the stress on the transplanted organ caused by pregnancy may lead to diminished functioning. The risk of fetal mortality is also increased. R. vol. V, pp. 937-938.

For women with sickle cell anemia, pregnancy frequently accelerates the clinical course of the condition. Pregnant women with sickle cell anemia experience more frequent and more severe crises (especially in the bones), infections such as pneumonia and urinary tract infections, increasingly severe anemia, congestive heart failure, and pulmonary complications such as embolus. In addition, pre-eclampsia is seen in as many as one-third of pregnant women with sickle cell disease. R. vol. V, p. 938.

Women with acquired or congenital heart disease are also at greater risk during pregnancy. During pregnancy, a woman normally undergoes increased cardiac output, tachycardia, and fluid retention. These characteristics of pregnancy frequently cause deterioration in the condition of women with cardiac lesions. One percent of all pregnant woman suffer from heart disease, and it is the most common non-obstetrical cause of maternal mortality. R. vol. V, pp. 935-936.

In addition to exacerbating pre-existing medical conditions, pregnancy can also interfere with treatments for some medical problems. The anti-coagulants frequently taken by women with prosthetic heart valves may cause abnormal fetal

development and birth defects. R. vol. V, p. 936. Various other conditions, such as asthma, liver disease, epilepsy, and malignant breast tumors, are prone to aggravation during pregnancy with results including hemorrhaging, frequent seizures, blood clotting, and the rapid spread of cancer. While forgoing treatment for these conditions could be deadly to the woman, some treatments are harmful to the fetus. R. vol. V, pp. 938-939.

Similarly, as occurred with plaintiff Barbara S. Hunter, pregnancy can interfere with treatment of Grave's Disease. Grave's Disease is a disease of the thyroid which causes thyroid goiter, dermopathy, excessive fluid retention in the tissues around the eyes which causes the eyes to protrude, and possible thyrotoxicosis, with associated degeneration of skeletal muscle, enlargement of the heart and fatty infiltration of diffuse fibrosis of the liver. R. vol. V, pp. 935, 959. Grave's Disease is often treated with radio-iodine. Because this treatment poses possible harm to the fetus, pregnant women with Grave's Disease cannot receive the radio-iodine treatments that they need. R. vol. V, p. 959. As a result, some women with Grave's Disease, such as Hunter, require immediate abortions to assist in their medical care if they become pregnant. R. vol. V, p. 960.

Women who seek abortions because they are carrying fetuses with severe or even fatal anomalies are also denied funding under the challenged restrictions. A wide range of fetal anomalies inevitably results in the death of a newborn, severely compromise the newborn's quality of life, or seriously endanger a woman's health and future fertility. R. vol. V, pp. 940-942. Nonetheless, Florida women cannot receive Medicaid funding if they decide to undergo an abortion in these tragic circumstances.

In addition to creating risks for a pregnant woman's physical health, an unwanted pregnancy can also cause or exacerbate mental disturbance. For women with pre-existing psychopathology, the danger of breakdown is greater. An unwanted pregnancy can cause the patient to regress or to enter a psychotic episode. R. vol. V, p. 886. Characteristic signs of mental disturbance brought on by an unwanted pregnancy include depression, anxiety, emotional withdrawal, feelings of self-hatred, self-destructive behavior, suicidal ideation and dangerous attempts to self-induce an abortion. R. vol. V, pp. 880-881, 884. The psychiatric symptoms related to an unwanted pregnancy are proportional to the stress the pregnancy causes and are relieved as soon as the stress (pregnancy) is terminated. R. vol. V, p. 881.

Pregnancy can also cause very serious psychological problems in some women. For example, Dr. Judith Belsky, a psychiatrist, had an eighteen year old patient who had a family history of psychiatric illnesses and had twice previously attempted suicide by the time she became pregnant. Dr. Belsky determined that this patient was likely to attempt suicide again if her pregnancy was not terminated. R. vol. V, pp. 899-900. Another patient of Dr. Belsky's was a young woman who had also previously attempted suicide on several occasions including once during her first pregnancy. The patient was schizophrenic and was becoming increasingly depressed, disorganized, and agitated as a result of her current pregnancy. Dr. Belsky recommended an immediate abortion to preserve her

mental health. R. vol. V, pp. 901-02. Another of Dr. Belsky's patients suffered from schizophrenia and had auditory hallucinations, as well as suicidal thoughts. Her functioning had markedly deteriorated upon the birth of her first child. Dr. Belsky concluded that her second pregnancy would cause further deterioration and would place her in danger of hurting herself and others. R. vol. V, pp. 985-96.

Denying abortion funding to indigent women for any of the myriad health reasons described above thus clearly deprives those women of access to a medically necessary treatment option. R. vol. V, p. 944.

III. THE COST OF ABORTION IS BEYOND THE MEANS OF MANY LOW-INCOME WOMEN.

The providers in this case charge from $275 to $1200 for abortion procedures. R. vol. V, pp. 953, 962; vol. VI, p.1013. The cost of the abortion procedure depends on the type of facility in which the abortion is performed and the duration of the pregnancy. High-risk patients who need hospital supervision pay the highest prices for abortions. R. vol. V, pp. 915-916.

Under the 1997 poverty guidelines, a family of four at the poverty line has less than $310.00 per week in income, and a single woman without children has approximately $150.00 or less per week in income. R. vol. V, p. 916. Pregnant women in Florida are eligible for Medicaid if their family income is at or below 185% of the most current federal poverty level. *See* § 409.903(5), Fla. Stat. (1995 & Supp. 1999). For 1997, that means a single pregnant women would have to make less than $278 a week in order to be eligible for Medicaid. R. vol. V, p. 916. Thus, even a very early abortion will generally cost more than the women's entire weekly income.

Because Medicaid-eligible women have such limited income, the costs of an abortion are often beyond their means. This is poignantly illustrated by the experiences of the plaintiff providers. The Aware Woman Center for Choice works with many patients who are destitute. One patient was homeless and living in a shelter. Her only possession was a guitar. Another patient had recently lost her husband, and she and her six children were facing eviction. These patients were unable to come up with any funds for the procedure. R. vol. V, p. 964. Another patient borrowed $10 from every relative she knew to pay for her procedure. R. vol. V, p. 964. Other women use their rent or grocery money to pay for an abortion and are then dependent on charity to feed their children. R. vol. V, pp. 955, 964-965; vol. VI, p. 1015. Some women become so desperate they prostitute themselves to raise money for an abortion. R. vol. VI, p. 1015. When women delay an abortion in order to gather funds to pay for the procedure, the amount of money they need to raise often increases, because the cost of the abortion itself increases with each week of gestation. R. vol. V, pp. 915, 953, 962; vol. VI, pp. 1013-1015.

In January 1988, the Aware Woman Center received a patient referral from Project Response, a social service organization that works with people who are infected with HIV. The patient was HIV positive, in very fragile health, and with no means to pay for an abortion that was necessary to prevent further health

problems. Although this woman was only eight weeks pregnant, the clinic did not feel it could perform her abortion at the clinic because of her poor health. Therefore, Aware Woman Center attempted to refer the patient to a doctor in a different setting. But that doctor refused to treat the patient because she had no funds to pay for the procedure and Medicaid would not provide reimbursement. The patient was then referred to a provider in Daytona Beach. Since Daytona Beach is an hour and a half away and the patient had no means of transportation, the clinic is not sure whether the patient ever obtained the procedure. R. vol. V, p. 963.

The Presidential Women's Center in Palm Beach County has seen Medicaid patients with full-blown AIDS who have had to pay for medically necessary abortions that Medicaid would not cover. For example, a woman from Fort Pierce – an hour and a half from the clinic – was brought to Presidential Women's Center by a hospital nurse for an abortion. The patient had been admitted to the hospital for two weeks due to complications from AIDS and needed to get an abortion because continuing her pregnancy would have exacerbated her complications and further jeopardized her immune system. She was 21 weeks pregnant, on Medicaid, and had absolutely no money to pay for the procedure. She was unable to obtain resources from her family or any other source. Presidential Women's Center was not able to provide her the procedure for free. The patient planned to go to a public hospital in the hope that she could obtain the abortion there without charge. This very ill woman, with a medical need for an abortion, was barred by the challenged regulations from receiving Medicaid assistance for that procedure. R. vol. V, pp. 954-955.

The Presidential Women's Center recently counseled a 23 year-old patient on Medicaid who was referred to them by a high-risk obstetrical facility. She had a four year-old child, and was 14 weeks pregnant. Unfortunately, this young woman had cancer. She could not be treated for her cancer unless she terminated the pregnancy, because chemotherapy would have endangered the fetus. Because the pregnancy endangered this patient's health, but did not itself threaten her life, Medicaid would not pay for the abortion. Ultimately, a charitable organization donated part of the abortion costs and Presidential Women's Center donated the rest of the fee. R. vol. V, p. 954.

As the above cases demonstrate, the provider Plaintiffs attempt to help low-income women obtain abortions by providing discounted services or by performing some abortion procedures for free. R. vol. V, pp. 953, 963-964; vol. VI, p. 1013. Charitable organizations also provide some money to low-income women seeking abortions. R. vol. V, pp. 909-911, 963-964. Abortion providers and charitable organizations simply cannot afford, however, to pay the entire cost of all medically necessary abortions for the many Medicaid-eligible women who seek the procedure. R. vol. V, pp. 910-911, 963.

An additional financial burden suffered by many low-income women seeking abortions is the cost of traveling to one of the few parts of the state with an abortion provider. Low-income women are often unable to travel great distances in order to seek out an affordable abortion provider.

[6] R. vol. V, p. 918. Yet, as of 1992, 46, or over two-thirds, of the counties in Florida had no abortion providers. Approximately 512,000 women ages 13-44 live in these 46 counties without available abortion services. Based on the abortion rate in Florida, and the fact that women outside of metropolitan areas have lower abortion rates, approximately 8,000 women in the 46 Florida counties without an abortion provider seek abortions each year. Those women are forced to travel hours outside of their counties or states to obtain abortions because no provider works in their county. R. vol. V, p.915; vol. VI, p. 1013. Women who must travel outside of their counties to obtain abortions face additional financial burdens beyond the cost of the abortion procedure due to added travel time and expenses. R. vol. VI, p. 1013.

IV. THE LACK OF FUNDING FOR MEDICALLY NECESSARY ABORTIONS CAUSES SOME LOW-INCOME WOMEN TO DELAY THEIR ABORTIONS, THUS INCREASING THE RISKS TO THEIR LIVES AND HEALTH.

Florida's abortion funding ban irreparably harms poor women by causing them to delay medically necessary abortions due to their lack of funds. In states like Florida where Medicaid funding is unavailable for most abortions, Medicaid eligible women are forced to delay their abortion procedure an average of approximately eleven days while they try to gather money to pay for it. R. vol. V, p. 916.

Sometimes this delay forces women to undergo second, rather than first, trimester abortions. Studies conducted in another state that denies Medicaid funding for most medically necessary abortions demonstrates that approximately 22% of Medicaid-eligible women who obtained second trimester abortions would have had earlier (and safer) first trimester abortions if public funding had been available. R. vol. V, p. 916.

The experiences of the plaintiff providers also illustrate that for many women, the necessity of raising money for the abortion procedure causes delay. For example, Medicaid patients seeking abortions from Presidential Women's Center are often forced to delay an abortion for several weeks in order to raise money. As each week goes by, the cost of the abortion procedure increases, and the likelihood that the patient can raise enough money decreases. R. vol. V, pp. 955-956. Similarly, Aware Woman Center, which performs abortions up to 14 weeks, must refer some Medicaid patients elsewhere for later procedures because they have been unable to raise enough money for the procedure before passing the fourteenth week of pregnancy. R. vol. V, pp. 964-965.

In plaintiff Dr. Whitney's experience, the primary cause of delay in obtaining an abortion is lack of money. R. vol. VI, p. 1014. Some of Dr. Whitney's patients delay making an appointment while they raise sufficient money for a first trimester

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[6] The Medicaid program covers transportation for prenatal services. If abortion patients were treated equally, their transportation costs to medical facilities for this necessary procedure would be covered as well. R. vol. V, p. 915.

procedure. On the day of their appointment, Dr. Whitney performs an ultrasound which sometimes shows that a woman is now in her second trimester and will need a more expensive procedure. Women who have already delayed their procedure while they struggled to pay for a first trimester abortion sometimes become visibly upset at this new obstacle. R. vol. VI, p. 1014. Other women make three or four appointments for their abortion procedure, rescheduling each one while they attempt, sometimes unsuccessfully, to raise the necessary funds. R. vol. VI, p. 1014.

The delays described above increase health risks. Abortion is an exceedingly safe procedure and poses far fewer health risks than childbirth. R. vol. V, pp. 917-918, 934. Nevertheless, each week of delay exacerbates the risks to the life and health of the pregnant woman. For example, the mortality risk of abortion increases 20% with each week after the eighth week of pregnancy. Between 1981 and 1985, the 9% of all abortions performed in the second trimester of pregnancy accounted for 53% of all abortion-related deaths in the United States. R. vol. V, pp. 917, 933-934.

Delay of a desired abortion procedure also causes psychological trauma. Many low-income women who must postpone their abortions in order to raise funds suffer acute distress as a result, with exacerbated psychological and physical symptoms of stress. R. vol. V, p. 887. This can lead to attempts to self-induce an abortion through such harmful methods as ingesting dangerous substances and inserting foreign bodies and irritating solutions into the uterus and vagina. R. vol. V, p. 884. One woman called Aware Woman Center after taking eight birth control pills to try unsuccessfully to induce a miscarriage. Another woman called because she had begun to hemorrhage after taking herbs to cause a miscarriage. R. vol. V, p. 964.

V. THE LACK OF FUNDING FOR MEDICALLY NECESSARY ABORTIONS CAUSES SOME LOW-INCOME WOMEN TO CARRY UNWANTED PREGNANCIES TO TERM, INCREASING THE RISKS TO THEIR LIVES AND HEALTH.

Studies indicate that, in states like Florida 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. R. vol. V, p. 918. By providing fully funded medical care to Medicaid-eligible women who choose to carry to term, but not to those who choose to terminate their pregnancies, the Medicaid program steers pregnant women toward childbirth even though that alternative may not be the medically appropriate one for the particular woman. By directing women in this manner, the program interferes with the woman's ability to follow her physician's medical advice, as surely as if the state bribed her to forgo needed medical care. R. vol. V, pp. 934-935.

The Aware Woman Center, Presidential Women's Center, and Dr. Whitney have all had Medicaid patients who were unable to raise enough money for an abortion, and therefore carried their pregnancies to term. R. vol. V, pp. 955, 964; vol. VI, pp. 1015-1016. In June 1997, for example, a Medicaid patient at Aware

Woman Center cancelled her abortion appointment and carried her pregnancy to term because she lacked the funds to pay for an abortion. R. vol. V, p. 964. In September 1996, a patient of Dr. Whitney also carried to term once she learned that Medicaid would not cover the abortion. R. vol. VI, p. 1016.

Thus, the exclusion of medically necessary abortions from Medicaid funding will cause some low-income women who cannot raise the funds to obtain abortions to choose between compulsory motherhood and the dangers of self-induced or illegal abortion. R. vol. V, p. 888.

[7]

VI. THE ABORTION FUNDING BAN IMPOSES PARTICULAR HARDSHIPS ON BATTERED WOMEN.

The ban on Medicaid funding disproportionately affects battered women. *See generally* R. vol. VI, pp. 967-976. Batterers often forcibly impregnate their partners and compel them to carry to term as one form of psychological and physical abuse. R. vol. VI, p. 971. Battering increases in frequency and severity when women are pregnant. R. vol. VI, pp. 971-972. Often the only way a battered woman can obtain an abortion at all, or obtain one without risking her life and health, is by concealing her pregnancy from her abuser. R. vol. VI, p. 971.

For battered women who are Medicaid-eligible, the lack of financial resources available for abortion is devastating. R. vol. VI, p. 971. Battered women often have only limited access to their own money, and their activities are usually closely monitored by the abusive partner. Because batterers often prevent battered women from communicating with family and friends in order to weaken the women's support systems, a battered woman may not have anyone from whom to borrow money. R. vol. VI, pp. 970-971.

The delay that occurs while the woman seeks funds to pay for an abortion places a battered woman's life and health in jeopardy. Because a woman faces an increased risk of battering during pregnancy, by forcing women to carry a pregnancy to term, the funding ban places low-income women's lives at risk. R. vol. VI, pp. 971-972. Moreover, by forcing battered women to bear more children, the funding ban diminishes these women's ability to leave an abusive relationship and to protect themselves and their children from violence. The reasons women remain in battering relationships range from the psychological state of "learned helplessness" to the fear of being killed or more seriously hurt if they try to leave. Women fear, correctly, that with a child or an additional child, they will be less able to leave and provide for and protect themselves and their children. R. vol. VI, p. 972.

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[7] A study of deaths resulting from illegal abortion in the United States between 1975 and 1979 revealed that one third of the women who sought illegal abortions did so because legal abortions were either too expensive or not readily accessible in their areas. R. vol. VI, pp. 971-972.

VII. THE FUNDING BAN DOES NOT CONSERVE STATE RESOURCES.

The medical costs associated with childbirth and pediatric care greatly exceed the costs associated with abortion. In 1985, the average Medicaid cost of maternity care in Florida (including physician fees for prenatal, delivery, and postpartum services, and hospital charges for the mother and healthy newborn) was $2,750, and the cost of infant care for the first two years of life was approximately $1,520. The additional cost of providing the family with Aid to Families with Dependent Children was $1,240. R. vol. V, p. 914.

By contrast, if, in 1985, 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. R. vol. V, p. 914. As of January 1, 1992, Florida expanded its Medicaid program to include pregnant women earning up to 185% of the current federal poverty level. As a result, the number of pregnant women eligible for Medicaid has increased since 1985. Therefore, absent the challenged regulations, more than 7,000 Medicaid-eligible women would receive funding for abortion in Florida annually. R. vol. V, pp. 914-915.

Thus, the state itself pays many times the cost of an abortion every time a Medicaid-eligible woman is compelled to carry to term. This is true even despite the fact that the federal government provides reimbursement for part of the cost of childbirth but not abortions. R. vol. V, p. 914.

For all of the above reasons, the funding ban severely jeopardizes the lives and health of low-income women in Florida and conflicts with the purpose of the Medicaid program – to ensure access to necessary medical care for state residents who are financially unable to obtain such care on their own.

SUMMARY OF ARGUMENT

Plaintiffs do not claim that they have a "right" to public assistance or to government funded health care. Nor do they assert any right to funding for abortion "on demand." Rather, they claim that once the state has chosen to fund necessary medical care for its indigent citizens, the Florida Constitution requires it to do so in a manner neutral with respect to the exercise of fundamental rights. Because Florida's current regulatory scheme for Medicaid is not neutral with respect to reproductive choice, it cannot withstand constitutional scrutiny.

The state Medicaid regulations provide funds for medically necessary health services in virtually all instances except when the service needed is a medically indicated abortion. This differential treatment violates two provisions of the Florida Constitution by impermissibly coercing a woman's exercise of her fundamental rights and by creating unconstitutional classifications for the receipt of government benefits.

The Florida Constitution explicitly guarantees its citizens a fundamental right to privacy. This Court has held that this right encompasses both an individual's autonomy in reproductive decision-making and an individual's right to bodily integrity. By 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. Accordingly, the state's Medicaid scheme violates the Florida right to privacy.

The Florida Constitution also guarantees its citizens equal protection of the laws. By denying funds for medically necessary abortions, the state violates this right in three ways. First, the challenged regulatory scheme impinges on the exercise of a fundamental right without furthering a compelling state interest. Second, the scheme discriminates on the basis of sex by funding the health care costs of childbirth and virtually all medically necessary health care for men while denying funding for medically necessary abortions, and by perpetuating outmoded stereotypes of women as childbearers. Finally, the regulations create an irrational and oppressive distinction between life-saving and health-preserving abortions.

ARGUMENT

I. FLORIDA'S CONSTITUTION AFFORDS GREATER PROTECTION TO THE INDIVIDUAL'S RIGHT TO PRIVACY THAN DOES THE FEDERAL CONSTITUTION.

The Florida Constitution contains an explicit right to individual privacy that has no parallel in the United States Constitution. It is contained in article I, section 23 of the Florida Constitution and ensures that every "natural person has the right to be let alone and free from governmental intrusion into his [or her] private life." This provision "is an independent, freestanding constitutional provision which declares the *fundamental* right to privacy." *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (emphasis added).

This fundamental right to privacy under the Florida Constitution gives "more protection" to Florida citizens than the federal constitution. *Id.* In evaluating its scope, this Court concluded:

> Article I, section 23, was intentionally phrased in strong terms. The drafter of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy rights *as strong as possible*. Since the people of this State exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is *much* broader in scope than that of the Federal Constitution.

Id. (emphases added). *See also Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998) ("The state constitutional right to privacy is *much* broader in scope, embraces *more* privacy interests, and extends *more* protection to those interests than its federal counterpart.") (emphases added).

Accordingly, where the federal constitution has proven inadequate to protect individual privacy, the Florida courts have not hesitated to rely on the state constitution to ensure the privacy rights of Floridians. For example, in 1989, this

Court invalidated a statute that placed restrictions on a minor's ability to access abortions even though such restrictions had previously been upheld under the federal constitution. *Compare In re T.W.*, 551 So. 2d 1186, 1194-96 (Fla. 1989) (striking parental consent requirement even though it contained judicial bypass), *with Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-94 (1983) (upholding parental consent statute with judicial bypass).

Similarly, just last year, the Fourth District Court of Appeal found that there was a substantial likelihood that a statute requiring physicians to provide certain mandatory information to women prior to performing abortions was unconstitutional. *State v. Presidential Women's Center*, 707 So. 2d 1145, 1149 , 1151, (Fla. 4th DCA 1998), *as corrected by* 23 Fla. L. Weekly D953 (Fla. 4th DCA Apr. 15, 1998) (affirming temporary injunction). Recognizing that the United States Supreme Court had previously upheld a similar mandatory "counseling" requirement, *see Planned Parenthood v. Casey*, 505 U.S. 833, 884-85 (1992), the court held that "the Florida right to privacy embraces more privacy interests, and extends more protection in those interests, than the Federal constitution." *Presidential Women's Center*, 707 So. 2d at 1148.

This case likewise presents a situation in which the federal constitution has failed to protect the privacy rights of Floridians adequately. In *Harris v. McRae*, 448 U.S. 297 (1980) (5-4 decision), a closely divided United States Supreme Court held that the denial of Medicaid funding for medically necessary abortions "d[id] not impinge on the due process liberty recognized in [*Roe v.*] *Wade*." *McRae*, 448 U.S. at 318. The Court viewed the funding of childbirth but not abortion as a constitutionally insignificant burden on the right to privacy because no new obstacles were placed "in the path of a woman's exercise of her freedom of choice." *Id.* at 316.

It is widely believed among scholars and commentators that the majority opinion in *McRae* was wrong. *See, e.g.*, Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330 (1985); Leslie F. Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 Hastings Const. L.Q. 313 (1981); Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 Stan. L. Rev. 1113 (1980). Moreover, the dissenting justices provided a persuasive demonstration of the errors in the majority's reasoning:

> what the [majority] fails to appreciate is that it is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth. . . . The fundamental flaw in the [majority's] due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.

McRae, 448 U.S. at 333 (Brennan, J., dissenting). As a result, numerous states have rejected the strained *McRae* approach in interpreting their own constitutions. *See infra* pp. 32-33.

In light of the limited protection given by the federal constitution in this context, this Court must now examine Florida's Medicaid funding scheme to determine whether it comports with the strong privacy guarantees of the Florida Constitution. Such an exercise is sanctioned by the United States Supreme Court which "has made it clear that the states, not the federal government, are the final guarantors of personal privacy." *In re T.W.*, 551 So. 2d at 1191; *see also McRae*, 448 U.S. at 311 n.16 (states are free to provide funding beyond Hyde Amendment).

II. FLORIDA'S REGULATORY SCHEME FOR MEDICAID FUNDING VIOLATES THE RIGHT TO PRIVACY GUARANTEED BY THE FLORIDA CONSTITUTION.

Although the Circuit Court recognized the fundamental nature of Florida's right to privacy, it incorrectly found that the challenged regulatory scheme did not infringe upon that right. The trial court based this finding entirely on its conclusion that, by denying funding for medically necessary abortions, the state was not "doing something affirmatively to prohibit, restrict, or interfere" with the right to privacy. R. vol. VII, p. 1294. The First District Court of Appeal affirmed this holding, stating that the

> decision to fund prenatal care and childbirth expenses, but not abortion, does not coerce indigent women to carry a pregnancy to term, nor does it penalize them if they choose to have an abortion; to the extent the Medicaid restriction influences the decision whether to have an abortion, such influence is not unconstitutional.

Ct. App. Op. at 8 (Pls.-Appellants' App. Tab N at 8).

Contrary to those opinions, the state has interfered with a woman's right to privacy by affirmatively creating a wide-ranging health care program for the poor that denies funds for medically necessary abortions while funding virtually all other medically necessary care. Banning Medicaid funding for a procedure that is both constitutionally protected and vital to preserving the health of many women infringes on their right to privacy in two ways. It intrudes upon the Medicaid-eligible woman's right to autonomy in choosing whether or not to carry a pregnancy to term, and it interferes with her bodily integrity.

A. Florida's Medicaid Funding Scheme Violates the Right to Autonomy in Choosing Whether to Continue a Pregnancy.

This Court has affirmed that the explicit right to privacy in the Florida Constitution encompasses the right to decide whether to carry a pregnancy to term or to have an abortion. The "'woman's right to make [her] choice freely is fundamental,'" for the "Florida Constitution embodies the principle that '[f]ew decisions are more personal and intimate, more properly private, or more basic to

individual dignity and autonomy than a woman's decision . . . to end her pregnancy.'" *In re T.W.*, 551 So. 2d at 1193 (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986)); *see also Presidential Women's Center*, 707 So. 2d at 1148.

Pursuant to these principles, this Court held in *T.W.* that a parental consent requirement for minors seeking abortions constituted a substantial invasion of a minor's privacy and was not necessary for the preservation of maternal health or potential life. *In re T.W.*, 551 So. 2d at 1194. This Court found that even the "worthy" state interests of "protecting the immature minor" and preserving the family unit were not sufficiently compelling to justify the invasion on the minor's privacy imposed by the consent requirement. *Id.* at 1194-95.

[8] Similarly, the restrictions here substantially invade the pregnant woman's decision-making process.

1. The Challenged Regulations Infringe Upon the Right to Privacy by Hindering Some Women, and Preventing Others, From Obtaining Desired Abortions.

To understand why the denial of Medicaid funds for medically necessary abortions unduly influences poor women to delay or forgo termination of unwanted pregnancies, it is necessary to examine the economic situation facing Medicaid-eligible women and the structure of the state's poverty programs.

Women who are eligible for Medicaid have very limited means and a tightly restricted monthly budget. A single pregnant woman is only eligible if she earns less than $278 a week. *See* § 409.903(5), Fla. Stat. (1995 & Supp. 1999); R. vol. V, p. 916. Many Medicaid-eligible women, like the individual Plaintiffs in this case, have significantly less income than that or no income at all and are, therefore, likely to be eligible for Florida's cash assistance program. See § 414.085(1), Fla. Stat. (Supp. 1999). A single woman in this program receives a maximum of $45 a week to pay for housing and other non-food necessities. *See* § 414.095(11), Fla. Stat. (Supp. 1999). (She receives a limited amount of Food Stamps for some of her food needs. *See* 7 U.S.C. §§ 2012(h), 2014(c).) A woman with a dependent child and no other source of income receives a maximum of $60 a week to care for herself and her child. *See* § 414.095(11), Fla. Stat. (Supp. 1999).

Generally, any recipient of cash assistance or Food Stamps is eligible for Florida's Medicaid program. *Compare* § 414.085(1), Fla. Stat. (Supp. 1999) & 7 U.S.C. § 2014(c) *with* §§ 409.903, 409.904, Fla. Stat. (1995 & Supp. 1999). Since Medicaid provides for virtually all the health care needs of Florida's poor citizens free of charge, neither the state's cash assistance program nor the federal government's Food Stamp program contemplate that recipients will use the

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[8] The court also found the judicial bypass procedure to be defective in that it contained no provision for counsel for the minor or for a record hearing. *In re T.W.*, 551 So. 2d at 1195-96.

benefits from these programs to pay for medically necessary health care. *See, e.g.,* 7 U.S.C. § 2013(a) (Food Stamps can only be used to purchase food items); § 414.095(11), Fla. Stat. (Supp. 1999) (setting very limited monthly benefits under the cash assistance program). As the amounts paid under Florida's non-Medicaid poverty programs make clear, these programs are not designed to provide adequate income to pay for the costs of health care.

Thus, when the state refuses to fund medically necessary abortions, it forces a woman to struggle to pay for an abortion out of her limited income or her other state benefits, either of which, by design, are not adequate to pay health care costs. For example, the cost of an abortion at the plaintiff clinics and from the plaintiff doctors ranges from $275 to $1200. *See supra* p. 13. Since even the least expensive procedure far exceeds the *monthly* income of a woman who is dependent on the state for both her medical and financial needs, the cost of the procedure is simply prohibitive for many Medicaid-eligible women, including the individual Plaintiffs in this case.

Moreover, if a woman does obtain money to pay for an abortion, the state, through the operation of its poverty programs, penalizes her. Eligibility for the Medicaid and the temporary cash assistance programs is based on an individual's monthly income. Money from any source, including money donated by charity, given by friends or family, or otherwise obtained to pay for medically necessary care, is considered income for eligibility purposes. *See* Fla. Admin. Code R. 65A-4.209(1). A woman receiving such additional income is under an obligation to report the sum to the state. *See* § 414.095(10)(e), Fla. Stat. (Supp. 1999). Therefore, the sums raised for the abortion procedure will affect a woman's eligibility for both her other medical needs and for any financial assistance she receives from the state. *See Women's Health Ctr. of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658, 664-66 (W.Va. 1993) (reaching same conclusion).

In the case of Medicaid, a woman who has raised $275 to pay for her abortion procedure is at risk of losing her Medicaid eligibility, for she cannot have income of $278 or more a week and still remain eligible. If the woman has no source of income or a very limited source of income and is, thus, receiving cash benefits from the state, the result is even more punitive. These cash benefits are determined by taking the maximum monthly benefit and subtracting any monthly income a woman receives. *See* Fla. Admin. Code R. 65A-4.210(2). Therefore, if a woman *does* receive money for an abortion, her monthly benefit level will be reduced by the same amount. In other words, if a woman on cash assistance needs to raise the funds for a medically necessary abortion procedure, she is likely to lose some or all of her benefits during the months that she is gathering those funds.

The challenged regulations thus force many Medicaid-eligible women to delay a wanted abortion or carry their pregnancies to term despite the risks to their health and despite their desire to terminate their pregnancies.

2. The Challenged Regulations Violate the Right to Privacy by Using the Power of the State's Purse to Coerce the Exercise of Constitutional Rights.

For a poor woman, the state's subsidy of prenatal care and childbirth, but not medically necessary abortions, necessarily influences and coerces the woman's protected choice. *See supra* pp. 13-21, 28-30. If the state funds the medical needs of women who carry their pregnancies to term, but denies such funding to women who wish to terminate their pregnancies, it effectively bribes the women of the state not to exercise their fundamental right to choose an abortion.[9] This lack of governmental neutrality towards a woman's right to choose threatens to render that right meaningless "through the selective bestowal of governmental favors." *McRae*, 448 U.S. at 334 (Brennan, J., dissenting).

Although the state is not constitutionally required to provide funding for pregnancy-related services, if it does so, it cannot make such funding contingent upon the manner in which a pregnant woman exercises her fundamental right to continue, or not continue, her pregnancy. *See State ex rel. Butterworth v. Republican Party of Florida*, 604 So. 2d 477, 481 (Fla. 1992) (Barkett, C.J., concurring) (even where the state has some measure of discretion to grant or deny a benefit, the United States and Florida Constitutions prohibit the state from conditioning that benefit in a manner that induces a waiver of fundamental rights).

The constitutional infirmities of biased governmental funding of fundamental rights appear even more clearly when considered outside the contentious context of abortion. Consider, for example, a hypothetical state policy of increasing voter turnout in order to involve more citizens in civic life. Such a policy would undoubtedly be legitimate, and the state could, without running afoul of its constitutional obligations, effectuate that policy by offering all voters free transportation to the polls. The state would, however, clearly infringe on the fundamental right to vote if it offered such transportation only to citizens who committed their votes to the Democratic Party. By enhancing the availability of, and thereby rewarding, only one of the voters' multiple options, the government tilts the even playing field previously existent between the voters' choices, thus intruding upon the individual's fundamental right to vote even though voters who refuse to pledge their votes to the preferred party are no worse off as a result of the government's action. *See McRae*, 448 U.S. at 314-17.

The constitutional infirmity of such biased funding is equally apparent if one imagines a state policy with the opposite aims of the one at issue here. Florida might, for example, decide to adopt a policy of reducing population growth in the state. It might be able to promote that policy by educating its citizens about birth

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[9] As explained in the previous section, the funding restriction will cause some poor women for whom abortions are medically necessary to carry their pregnancies to term and will cause others to delay medically necessary abortions at the expense of their health and well-being. *See supra* pp. 13-21.

control and the benefits of having small families. It certainly could not, however, effectuate the policy by offering free college tuition to any pregnant woman who underwent an abortion – or by providing Medicaid coverage *only* for abortions, but *not* for prenatal care and childbirth. As these examples illustrate, where the state chooses to bestow a financial benefit that impacts upon the exercise of fundamental rights, it may neither favor nor penalize the exercise of one fundamental right over another.

This requirement of neutrality in the funding of constitutional rights has been widely adopted by the other state courts to have considered similar Medicaid funding bans under their state constitutions. In fact, thirteen out of the eighteen state courts that have considered the issue have recognized this principle and struck down such funding bans.[10] *See Planned Parenthood v. Perdue*, No. 3AN 98-7004 CI, slip op. (Alaska Super. Ct. Mar. 16, 1999); *Simat Corp. v. Arizona Health Care Cost Containment System Admin.*, No. CV1999014614, slip op. (Ariz. Super. Ct. May 23, 2000); *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *Roe v. Harris*, No. 96977, slip op. (Idaho Dist. Ct. Feb. 1, 1994); *Doe v. Wright*, No. 91 Ch. 1958, slip op. (Ill. Cir. Ct. Dec. 2, 1994), *leave to file late appeal denied*, No. 78512 (Ill. Feb. 28, 1995*)*; *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Women of Minnesota v. Gomez*, 542 N.W. 2d 17 (Minn. 1995); *Jeannette R. v. Ellery*, No. BDV-94-811, slip op. (Mont. Dist. Ct. May 22, 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Planned Parenthood Ass'n v. Department of Human Resources*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984); *Doe v. Celani*, No. S81-84CnC, slip op. (Vt. Super. Ct. May 26, 1986); *Panepinto*, 446 S.E.2d 658.[11] Courts in states, like Florida, whose constitutions explicitly protect privacy have uniformly struck down these funding bans. *See Perdue*, No. 3AN 98-7004 CI; *Myers*, 625 P.2d 779; *Wright*, No. 91 CH 1959; *Jeannette R.*, No. BDV-94-811.

Underlying these decisions is the recognition that state governments must act neutrally when they fund constitutionally protected decisions:

> As an initial matter, the Legislature need not subsidize any of the costs associated with childbearing or with health care generally. However, once it chooses to enter the constitutionally protected area

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[10] All of the following cases are filed herewith as a separate Appendix of Out-of-State Authorities.

[11] *Contra Doe v. Childers*, No. 94CI02183, slip op. (Ky. Cir. Ct. Aug. 3, 1995); *Doe v. Department of Social Servs.*, 487 N.W.2d 166 (Mich. 1992); *Rosie J. v. North Carolina Dep't of Human Resources*, 491 S.E.2d 535 (N.C. 1997); *Fischer v. Dep't of Public Welfare*, 502 A.2d 114 (Pa. 1985); *Low-Income Women of Texas v. Raiford*, No. 93-02823, slip. op. (Tx. Dist. Ct. Mar. 23, 1998), *appeal docketed*, No. 03-98-00209 CV (Tex. Ct. App. Argued Feb 10, 1999).

> of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds.

Moe, 417 N.E.2d at 402. Thus, "once government enters the zone of privacy surrounding a pregnant woman's right to choose, it must act impartially. In that constitutionally protected zone, the state may be an umpire, but not a contestant." *Right to Choose*, 450 A.2d at 935 n.5. In other words, "even though the poverty of the plaintiff women was not of the state's making and there may have been no constitutional obligation to pay for the medical treatment of the poor, once the state has chosen to do so it must preserve neutrality." *Maher*, 515 A.2d at 152 (footnote omitted).

By using government resources to pay for the pregnant woman's health needs only if she chooses to carry to term, the state pressures recipients to forgo the choice the state disfavors. As the California Supreme Court aptly observed:

> [F]rom a realistic perspective, we cannot characterize the statutory scheme as merely providing a public benefit which the individual recipient is free to accept or refuse without any impairment of her constitutional rights. On the contrary, the state is utilizing its resources to ensure that women who are too poor obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.

Myers, 625 P.2d at 793. The court concluded that, having undertaken to provide medical care to the poor, the state was required as a matter of due process to "fund[] impartially the expenses of childbirth and abortion." *Id.* at 797. In addition, as the West Virginia Supreme Court held:

> The potential denial of [government assistance] benefits upon borrowing, earning or receiving funds to pay for an abortion is yet another illustration of how indigent women are coerced by the State to have children which they might otherwise choose not to bear.

Panepinto, 446 S.E.2d at 666. Like the California and West Virginia constitutions, the Florida Constitution forbids such severe impairments and purposeful chilling of constitutional rights.

This Court has emphasized that the privacy amendment to Florida's Constitution contains no modification of its prohibition on governmental interference with privacy, and that its drafter explicitly rejected inclusion of the terms "unwarranted" or "unreasonable." *Winfield*, 477 So. 2d at 548. Since Florida's right to privacy is "as strong as possible," *id.*, it is at least as strong as the explicit privacy protection found in the Alaska, California, Illinois, Montana, and other state constitutions under which Medicaid funding bans have been invalidated.

B. Florida's Regulatory Scheme for Medicaid Funding Violates the Right to Bodily Integrity.

The challenged Medicaid regulations also violate a woman's right to privacy by infringing upon her ability to avoid an unwarranted intrusion upon her body. Florida courts have repeatedly recognized that an individual has the right to refuse or to choose medical treatment as part of her fundamental right to self determination. *See In re Dubreuil*, 629 So. 2d 819 (Fla. 1993) (constitutional right to choose or refuse medical treatment extends to all relevant decisions regarding one's health); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (surrogate must make medical choice that patient, if competent, would have made, not one that surrogate might make for herself or think is in patient's best interests); *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989) (state cannot override an individual's decision to refuse a blood transfusion); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. 2d DCA 1986) (adult in permanent vegetative state has constitutional right to removal of nasogastric feeding tube); *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. 2d DCA 1984) (upholding infant's right, through petition of parents, to removal of life support); *see also Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980) (competent adult has right to refuse, or to order discontinued, extraordinary medical treatments, such as a respirator, even prior to enactment of state constitutional privacy amendment). This "right extends to all relevant decisions concerning one's health." *Browning*, 568 So. 2d at 11.

As the facts have shown, the challenged discriminatory funding scheme forces some low income women to carry unwanted pregnancies to term. *See supra* pp. 13-21, 28-30. This result constitutes a significant intrusion upon the body of the unwilling pregnant woman. As the Massachusetts Supreme Judicial Court held in striking down a similar funding ban:

> [T]here can be no question that the magnitude of this invasion far exceeds that of the compelled medical treatments . . .; the nine months of enforced pregnancy inherent in effectuating these regulations are only a prelude to the ultimate burden the State seeks to impose.

Moe, 417 N.E.2d at 404; *see also Right to Choose*, 450 A.2d at 934. The Florida funding ban, which imposes this "ultimate burden" on a woman's right to bodily integrity, is wholly inconsistent with the privacy protections of the Florida Constitution. Forced pregnancy, childbirth, and motherhood are at least as invasive of a woman's right to bodily integrity as the forced medical treatments struck down in *Dubreuil*, *Browning, Wons, Corbett*, *Barry*, and *Satz*. Accordingly, the abortion funding ban should be invalidated.

C. The Medicaid Regulatory Scheme is Not Narrowly Tailored to Serve a Compelling State Interest.

The state may not infringe upon a woman's right to privacy unless the state can prove that its actions survive strict constitutional scrutiny. *In re T.W.*, 551 So. 2d at 1192. As enunciated by this Court, under this test, the state bears the burden

of demonstrating that its intrusion on the right to privacy will serve a compelling state interest and is the least intrusive means of accomplishing the state's goal. *Id; Winfield*, 477 So. 2d at 547; *Presidential Women's Center*, 707 So. 2d at 1149. This difficult test "imposes a heavy burden of justification upon the state" and "is almost always fatal in its application." *In re Estate of Greenberg*, 390 So. 2d 40, 42-43 (Fla. 1980); *see also In re T.W.*, 551 So. 2d at 1192 ("no government intrusion in the personal decision making cases . . . has survived"); *Presidential Women's Center*, 707 So. 2d at 1148 ("strict scrutiny test is extremely difficult for a statute to pass").

In the abortion context, this Court has recognized only two compelling state interests: the promotion of maternal health and the potentiality of life in a viable fetus.[12] *In re T.W.*, 551 So. 2d at 1193. Denial of Medicaid funding for medically necessary abortions does not serve either compelling state interest, and indeed undermines women's health.

The explicit objective of the Medicaid program is to provide needed health care to poor people. *See* 42 U.S.C. § 1396; *see also* § 409.902, Fla. Stat. (1995). Nonetheless, in direct contravention of this objective, the challenged provisions delay or prevent women from obtaining medically necessary health care. Thus, rather than *furthering* an interest in women's health, the ban poses a direct *threat* to women's health. *See supra* pp. 7-21. *See also Myers*, 625 P.2d at 790; *Celani*, No. S81-84CnC, slip op. at 10-11. Nor can the funding scheme be justified by the state's interest in protecting potential life, for that interest cannot override a woman's right to an abortion prior to viability. *In re T.W.*, 551 So. 2d at 1193-94. The funding scheme, however, is not limited to post-viability procedures but applies throughout a woman's pregnancy.[13] Aside from failing to serve a compelling state interest, the funding ban does not even serve lesser state interests such as limiting public expenditures. The decision to fund only prenatal care and childbirth but not medically necessary abortions costs the state more money than a decision to fund all medically necessary procedures including abortion. *See supra* pp. 21-22; *see also Perdue*, No. 3AN 98-7004 CI, slip op. at 13-14; *Myers*, 625 P.2d at 794; *Moe*, 417 N.E.2d at 403 n.20; *New Mexico Right to Choose/NARAL*, 975 P.2d at 856-57.

The challenged regulations also fail constitutional scrutiny because the differential funding scheme is clearly not the least restrictive means available to

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[12] Even after viability, the state's interest in fetal life must yield in cases where the pregnancy "endanger[s] the woman's . . . health." *Casey*, 505 U.S. at 846; *see also In re T.W.*, 551 So. 2d at 1194 ("Following viability, the state may protect its interest in the potentiality of life by regulating abortion, provided that the mother's health is not jeopardized.")

[13] Moreover, the funding ban applies to pregnancies in which the fetus has a lethal anomaly, and the state's interest in potential life is clearly not present in those cases.

the state to promote its interests. For example, the state can promote its interests in both maternal health and potential life by undertaking efforts to prevent unwanted pregnancy. Last year, for example, the state extended limited Medicaid eligibility to certain women who have just given birth. Those women can receive contraceptives and other family planning services for two years.[14] One of the stated purposes of this change in the Medicaid eligibility requirements is the promotion of family planning and the prevention of abortions. *See* Curtis Krueger, *State Asks Moms to Wait*, ST. PETERSBURG TIMES (May 3, 1999). Furthermore, the state can encourage childbirth by funding prenatal care and childbirth for those women who choose to carry to term *without* denying funding to those women who wish to terminate their pregnancies. Accordingly, the state cannot meet its heavy burden of establishing that no other, less intrusive means would serve its interests. Thus, the state's discriminatory funding scheme violates Plaintiffs' fundamental right to privacy and should be invalidated.

III. FLORIDA'S REGULATORY SCHEME FOR MEDICAID FUNDING VIOLATES PLAINTIFFS' RIGHT TO EQUAL PROTECTION UNDER THE FLORIDA CONSTITUTION.

Plaintiffs also challenge Florida's abortion funding ban on equal protection grounds. The Florida Constitution's guarantee of equal protection is contained in article I, section 2, which provides: "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 . . . ."

The trial court rejected Plaintiffs' equal protection claims after incorrectly determining that the only classification at issue was one based on indigency. Finding that the United States Supreme Court had rejected such an indigency-based equal protection challenge under the federal constitution, the trial court determined that Florida's ban also survived review under Florida's equal protection clause. R. vol. VII, pp. 1292-1293. The First District Court of Appeal affirmed the trial court ruling without ever addressing Plaintiffs' equal protection claims. *See* Ct. App Op. (Plaintiffs-Appellants' App. at Tab N).

Contrary to the trial court's conclusion, Florida's funding ban discriminates on several impermissible grounds unrelated to indigency. 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

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[14] Pregnant women are eligible for Medicaid if their income is equal to or less than 185% of the federal poverty level. *See* § 409.903(5), Fla. Stat. (1995 & Supp. 1999). This program extends the pregnant woman's eligibility for Medicaid for two years after birth. *See* § 409.904(5), Fla. Stat. (1995 & Supp. 1999).

women and by penalizing those women who do not conform to traditional assumptions about women's role in society. Florida's regulatory scheme also 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.

A. The Challenged Regulations Violate Equal Protection by Creating a Classification That Interferes With the Fundamental Right to Choose Abortion.

Strict scrutiny analysis must be applied to Plaintiffs' equal protection challenge because Florida's Medicaid scheme infringes on the fundamental right to privacy. *See supra* pp. 26-38. When a regulatory classification infringes upon a fundamental right, the regulation must be narrowly tailored to serve a compelling state interest. *Winfield*, 477 So. 2d at 547; *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989). As already demonstrated, the challenged regulations cannot survive this test. *See supra* pp. 36-38. Accordingly, the challenged regulations violate Plaintiffs' right to equal protection.

B. Florida's Medicaid Program Discriminates on the Basis of Sex.

Florida's current regulatory scheme also violates the state equal protection clause by discriminating on the basis of sex without adequate justification. First, the state's refusal to fund medically necessary abortions clearly constitutes sex discrimination. Florida's Medicaid program provides health care for both indigent men and women but requires women to meet a more stringent standard than men in order to receive some health care. Specifically, Florida's Medicaid program provides a full range of health services, including reproductive health services, to eligible men as long as the services are medically necessary. Yet the program denies women medically necessary abortions unless their pregnancy is life-threatening or was caused by a criminal attack. Thus, eligible men receive funding for essentially all their medically necessary health services while women do not. As a result, Florida's Medicaid program provides strikingly different benefits to men and women.

Two other state courts addressing Medicaid abortion funding bans have found this differential treatment to be unconstitutional sex discrimination under their state constitutions. Most recently, the New Mexico Supreme Court struck down a similar ban as unconstitutional because "there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men." *New Mexico Right to Choose/NARAL*, 975 P. 2d at 856. Thus, the New Mexico ban "undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women." *Id.* Similarly, a state court in Connecticut held that the state's abortion funding ban discriminated on the basis of sex because "all the male's medical expenses associated with their reproductive

health, for family planning and for conditions unique to his sex are paid." *Maher*, 515 A.2d at 159.

In addition, as both the Connecticut and New Mexico courts found, the ban on Medicaid funding for medically necessary abortions also discriminates on the basis of pregnancy, which is a form of sex discrimination.[15] *See New Mexico Right to Choose/NARAL*, 975 P.2d at 855 ("classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment"); *Maher* 515 A.2d at 159 ("Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid for by the state for both men and women is sex-oriented discrimination."). In other contexts, many courts have held that because only women can get pregnant, and because the ability to become pregnant is a basic and distinguishing characteristic of women, disparate treatment on the basis of pregnancy is sex discrimination. *See, e.g., Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination*, 375 N.E.2d 1192, 1198 (Mass. 1978); *Minnesota Mining & Mfg. Co. v. State*, 289 N.W.2d 396, 399-400 (Minn. 1979).

Finally, the state's policy of funding childbirth but not abortions also discriminates against women by perpetuating an outmoded stereotype of women as childbearers and childrearers. By encouraging and supporting childbirth over abortion, the challenged regulations reinforce the stereotype that women's proper role is reproduction. But the state may not define the "normal" role for women as that of childbearers and then enact legislation to keep women in, or steer women towards, this role. *See In re Dubreuil*, 629 So. 2d at 828 (reversing district court opinion that ordered a mother to undergo a necessary blood transfusion against her wishes on grounds that her refusal of treatment on religious grounds amounted to abandonment of her children; stating that order "perpetuate[d] the damaging stereotype that a mother's role is one of caregiver"); *Alachua County*, 418 So. 2d at 266 (statute that excused only mothers, and not fathers, from jury service unconstitutional because it was based on impermissible sex stereotypes of women as caretakers). Accordingly, "[t]he validity of any classification must be 'determined through reasoned analysis rather than through mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.'" *Brown v. Dykes*, 601 So. 2d 568, 569 (Fla. 2d DCA 1992) (statute that gave only mothers, not fathers, attorney's fees in paternity actions unconstitutional

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[15] That the funding ban does not affect all women, but only *pregnant* women, does not change the fact that pregnancy discrimination is sex discrimination. Recognizing this principle, this Court has held that discrimination against fathers constitutes sex discrimination even though the classification does not include all men. *Alachua County Cty. Exec. v. Anthony*, 418 So. 2d 264 (Fla. 1982) (automatic exemption from jury service for mothers with small children but not for similarly-situated fathers was sex discrimination).

since women are no longer regarded as the only parent equipped to initiate such suits) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (heightened scrutiny serves to eliminate "fixed notion concerning the roles and abilities of males and females")); *see also United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (any differential treatment based on sex must have an "exceedingly persuasive" justification which "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) ("[n]o longer is the female destined solely for the home and the rearing of the family").

Because the challenged regulations discriminate on the basis of sex, they are subject to heightened review under the Florida Constitution. Prior to November 1998, this Court applied an intermediate level of review to gender-based classifications, requiring that such classifications be substantially related to an important government objective to pass muster. *Kendrick v. Everheart*, 390 So. 2d 53, 56 (Fla. 1980); *Purvis v. State*, 377 So. 2d 674, 676 (Fla. 1979). In November 1998, however, the citizens of this state amended their Constitution to augment its protection against sex discrimination by voting to add the phrase "female and male alike" to the state's guarantee of equal treatment under the laws to all natural persons. Art. I, § 2, Fla. Const. (as amended 1998). The November 1998 "equal rights amendment" was adopted despite the fact that Florida's equal protection clause had already been construed as requiring heightened "quasi-suspect" review. *See Kendrick*, 390 So. 2d at 56; *Purvis*, 377 So. 2d at 676. In these circumstances, the new "equal rights amendment" should be interpreted to provide greater protection of sex discrimination than that which existed previously, and, thus, to subject sex-based classifications to strict constitutional scrutiny. *See, e.g., New Mexico Right to Choose/NARAL*, 975 P. 2d at 851 (construing the intent of the state's equal rights amendment "as providing something beyond that already afforded by the general language of the Equal Protection Clause"); *Darrin v. Gould*, 540 P.2d 882, 889 (Wash. 1975) (*en banc*) (construing equal rights amendment as not providing greater protection "would mean the people intended to accomplish no change in the existing constitutional law governing sex discriminations" when they enacted the amendment); Ellen Catsman Freidin & Ann C. McGinley, *Protecting Basic Rights of Citizens*, Fla. Bar. J. 48 (Oct. 1998) (interpreting Florida's new "equal rights amendment" to subject gender-based classifications to strict scrutiny is "more consistent with the intent of the [Constitutional Review Commission].") Accordingly, this court should subject the challenged regulations, which discriminate on the basis of sex, to strict scrutiny.

The challenged regulations cannot survive strict scrutiny for the reasons already explained. Moreover, the regulations also collapse under the less stringent intermediate review used prior to adoption of the State's "equal rights amendment." There simply exists no constitutionally justifiable basis for depriving women, but not men, of medically necessary health care in a program intended to provide such care. As discussed above, the regulations neither advance women's health nor preserve state resources, and, in fact, produce the opposite effects. *See supra* pp. 36-38. The challenged regulations therefore

discriminate on the basis of sex without adequate justification, denying women equal protection of the laws.

C. Florida's Regulatory Scheme for Medicaid Funding Creates an Irrational Classification Between Abortions Necessary to Save Women's Lives and Those Necessary to Preserve Women's Health.

The challenged provisions violate Florida's equal protection guarantee even under the lowest level of scrutiny because they establish irrational, arbitrary, and oppressive distinctions between those abortions covered by Medicaid and those which are not. "[W]ithout exception, all statutory classifications that treat one person or group differently than others must appear to be based at a minimum on a rational distinction . . . ." *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 69 (Fla. 1990). Such classifications must not be "discriminatory, arbitrary or oppressive." *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997).

An indigent woman who seeks a medically necessary abortion to protect her health requires the state's assistance in just the same way as a woman whose continued pregnancy threatens her life. Numerous women have health conditions which are aggravated by pregnancy, and continuing a pregnancy puts those women in serious, but not necessarily life-threatening danger. *See supra* pp. 7-13. Although the health of many of these women will worsen if they are forced to continue a pregnancy, their condition does not fall within the narrow "life" exception found in the challenged regulations. *Id.*

The overall objective of the Medicaid program is to provide necessary health care for indigent citizens of Florida. *See* 42 U.S.C. § 1396; *see also* § 409.902, Fla. Stat. (1995). The challenged regulations, however, only provide funding for abortions necessary "to save the life of the mother or, when the pregnancy is the result of rape . . . or incest . . . ." Fla. Admin. Code R. 59G-4.150(4)(a)(12). Differentiating between abortions necessary to prevent death and those necessary to preserve physical and mental well-being is both irrational in the context of the medical program and dangerous to women's health. *See Right to Choose*, 450 A.2d at 934 ("By granting funds when life is at risk, but withholding them when health is endangered, the [provision] denies equal protection to those women entitled to necessary medical services under Medicaid."); *see also Hodgson v. Board of County Comm'rs*, 614 F.2d 601, 608 & nn.12-15 (8th Cir. 1980) (invalidating Medicaid funding scheme that subsidized "health-sustaining measures generally, including pregnancy-related services, but subsidize[d] abortions only if they are life-sustaining" as arbitrary and "not in accordance with a uniform standard of medical need").

Accordingly, the challenged regulations deny Plaintiffs equal protection of the laws even under the lowest level of scrutiny and should be stricken.

IV. THE COURTS BELOW IMPROPERLY STRUCK PLAINTIFFS' CLAIM FOR SPECIFIC RELIEF ON SOVEREIGN IMMUNITY GROUNDS.

AHCA moved to dismiss the complaint on the grounds that the trial court could not grant Plaintiffs the relief sought. Specifically, AHCA argued that, even if the court found the challenged regulations unconstitutional, the court still could not require AHCA to pay for medically necessary abortions in the future. On October 9, 1998, Judge Lewis denied AHCA's motion to dismiss. AHCA did not appeal this ruling. All courts to have considered the issue are in accord. Once a court finds unconstitutional a state's refusal to cover medically necessary abortions, the court has the authority to order the state Medicaid program to pay for such procedures with state funds. *See, e.g., Perdue*, No. 3AN 98-7004 CI, slip op. at 16-18; *Maher*, 515 A.2d at 144-45; *Harris*, No. 96977, slip op. at 9-10; *Moe*, 417 N.E.2d at 395; *New Mexico Right to Choose/NARAL*, 975 P.2d at 857-58; *Celani*, No. S81-84CnC, slip op. at 13-17.

Judge Lewis did, however, grant AHCA some of the relief that it sought. Construing a portion of AHCA's motion to dismiss as a motion to strike pursuant to Rule 1.140 of the Florida Rules of Civil Procedure, Judge Lewis struck Plaintiffs' claim for reimbursement of funds that they had spent on medically necessary abortions since the date of the complaint's filing. Incorrectly characterizing the claim as one for monetary damages, Judge Lewis found that sovereign immunity barred Plaintiffs' claim. The First District Court of Appeal affirmed the trial court's ruling without ever addressing Plaintiffs' contention that the relief they seek is not precluded by sovereign immunity.

While sovereign immunity precludes courts from entering awards of past money damages against the state, Plaintiffs do not seek such damages. Rather, they seek specific equitable relief. But for the challenged funding ban, medically necessary abortions obtained by the plaintiff class would have been paid for out of Medicaid funds. Accordingly, if the ban is found unconstitutional, Plaintiffs seek to have the Medicaid funds that should have been expended for their abortions provided to them as (partial)
[16] reimbursement of the expenses they improperly incurred because of the ban. Thus, Plaintiffs seek restitution of wrongfully-denied funds, not damages.

The United States Supreme Court has recognized this distinction between restitution – which attempts to give plaintiffs the very thing to which they were entitled – and compensatory damages, which would be barred by sovereign immunity. *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (sovereign immunity does not bar reimbursement for state Medicaid expenditures wrongfully withheld by federal agency). As the Court held:

> Our cases have long recognized the distinction between an action at

[16] The record does not demonstrate whether the amount that Medicaid pays to physicians for reimbursable abortions is equal to the amounts that were expended by the plaintiff class in order to obtain their abortions.

> law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief – which may include an order providing . . . for the recovery of specific property or monies . . .

Id. at 893 (quotation omitted). The rationale for this distinction is that "'[d]amages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* (quoting *Maryland Dep't of Human Resources v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)) (internal quotation omitted).

Many state courts have adopted *Bowen*'s reasoning, awarding equitable relief even where a state constitution specifically provides immunity from claims against the state for money damages. *See AIU Ins. Co. v. Superior Court of Santa Clara County*, 799 P.2d 1253, 1273-74 (Cal. 1990) (recognizing distinction between action for damages and equitable action for specific relief including recovery of specific monies); *Mitchell v. Steffen*, 487 N.W.2d 896, 905-07 (Minn. Ct. App. 1992) (allowing reimbursement of withheld Medicaid funds), *aff'd*, 504 N.W.2d 198 (Minn. 1993); *Ohio Hospital Ass'n v. Ohio Dep't of Human Servs.*, 579 N.E.2d 695, 700 (Ohio 1991) ("The order to reimburse Medicaid providers for the amounts unlawfully withheld is not an award of money damages, but equitable relief."); *Gribeen v. Kirk*, 466 S.E.2d 147, 155 n.13 (W. Va. 1995) (sovereign immunity clause in constitution does not preclude award of back pay wrongfully withheld during pendency of lawsuit).

Florida too permits monetary awards against the state under the instant circumstances. In a suit against the state Department of Revenue, this Court declared a particular auto tax unconstitutional and found that "[t]he only clear and certain remedy is a full refund to all who have paid this illegal tax." *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 726 (Fla. 1994). Rejecting the defendant's sovereign immunity argument, the court stated:

> Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supercede a provision of the federal or state constitutions.

Id. at 721; *see also Division of Alcoholic Beverages & Tobacco v. McKesson*, 524 So. 2d 1000 (Fla. 1988), *rev'd in part*, 496 U.S. 18 (1990) (permitting suit but denying refund because of equitable concerns, reversed by United States Supreme Court which ordered the refund to be made); *State v. Atkinson*, 188 So. 834, 839 (Fla. 1938); *Public Medical Assistance Trust Fund v. Hameroff*, 689 So. 2d 358 (Fla. 1st DCA 1997), *remanded on other grounds*, 24 Fla. L. Weekly S173 (Fla. Apr. 8, 1999); 48 Fla. Jur. 2d § 228.

Because the doctrine of sovereign immunity does not preclude the equitable relief Plaintiffs seek, the claim should not have been stricken from the complaint.

Pentecostal Holiness Church v. Mauney, 270 So. 2d 762, 769 (Fla. 4th DCA 1972) (motion to strike "should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision"), *cert. denied*, 276 So. 2d 51 (Fla. 1973).

CONCLUSION

For all of the foregoing reasons, the decision of the First District Court of Appeal should be reversed. Rules 59G-4.150(4)(a)(12); 59G-4.160(4)(a)(5), (b)(3); and 59G-4.230(2) of the Florida Administration Code should be declared unconstitutional and permanently enjoined because they violate a woman's right to privacy and equal protection under the Florida Constitution. A declaration should issue requiring Medicaid funds be made available to all eligible women seeking medically necessary abortions and ordering reimbursement, when appropriate, to the plaintiff class of funds for medically necessary abortions that were wrongfully withheld after this case was filed.

CERTIFICATE OF COMPLIANCE

Pursuant to the Administrative Order of the Supreme Court of Florida dated July 13, 1998, In Re: Briefs Filed in the Supreme Court of Florida, I certify that the foregoing brief is reproduced in 14 point, proportionately spaced Times New Roman font.

Dated: June 1, 2000

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