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,	:	Class Representation
Plaintiffs-Appellants,	:	
vs.	:	
STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,	:	
Defendant-Appellee.	:	

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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STANDARD OF REVIEW

This Court reviews de novo the questions of law presented by this appeal. *See Tucker v. Resha*, 610 So. 2d 460, 465 (Fla. 1st DCA 1992), *remanded on other grounds*, 648 So. 2d 1187 (Fla. 1994). AHCA argues that the ruling below must be accorded a presumption of correctness. Such a presumption, however, applies to a trial court's factual findings. *See, e.g., Herzog v. Herzog*, 346 So. 2d 56, 58 (Fla. 1977). Because the facts of this case are undisputed and the Circuit Court made no factual findings, its ruling is not entitled to a presumption of correctness.

ARGUMENT

I. THE CHALLENGED REGULATIONS VIOLATE FLORIDA'S RIGHT TO PRIVACY

A. The Regulations Infringe Upon Medicaid-Eligible Women's Right to Autonomy in Choosing Whether to Continue a Pregnancy.

AHCA fundamentally misconstrues Florida's right to privacy. As an initial matter, AHCA erroneously contends that the Florida Constitution only encompasses a woman's right to *choose* an abortion, not a right to *obtain* an abortion. (Def.'s Br. at 6-7.) This argument lacks any merit. If the right to privacy only reached the *making* of certain fundamental, personal *choices*, then the state could impose any restriction whatsoever on individuals' *exercise* of those choices. Florida's right to privacy, however, clearly goes beyond protecting *decision making* itself; it also prevents government interference with the *exercise* of protected decisions. *See, e.g.*, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (minor's fundamental right to privacy encompasses choice whether to terminate pregnancy and authority to exercise choice); *In re Dubreuil*, 629 So. 2d 819 (Fla. 1993) (right to bodily integrity protects decision to refuse medical treatment and ability to carry out that decision free of governmental intrusion). The question presented by this case is whether the challenged regulatory scheme amounts to such impermissible interference with a woman's exercise of her right to terminate a pregnancy.

With respect to that point, AHCA claims that the regulatory scheme does not intrude in any way on the woman's choice. (Def.'s Br. at 7.) This argument ignores the undisputed facts, which demonstrate that Florida's funding ban infringes upon Medicaid-eligible women's constitutionally protected right to choose abortion by steering those women toward childbirth. (Pls.' Br. at 19, 30-35.) As Plaintiffs' opening brief explained, Medicaid-eligible women have such limited means and resources that they often cannot afford to obtain any medical care that is not provided to them through the Medicaid Program. (Pls.' Br. at 13-16, 28-30.) Thus, when Florida offers poor pregnant women health care services for childbirth but not abortion, this is an offer that some women simply cannot

refuse. *See Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 793 (Cal. 1981) ("the state is utilizing its resources to ensure that women . . . will exercise their right of procreative choice only in the manner approved by the state."). This fact is starkly reflected in AHCA's concession that almost one quarter of all Medicaid-eligible women who seek abortions carry their pregnancies to term because of the lack of Medicaid coverage. (Def.'s Br. at 11; *see also* Legislators' Amicus Br. at 13.)

[1] AHCA argues that because three-quarters of Medicaid-eligible women find private funds for their abortions, AHCA's actions do not have a coercive effect. This argument disregards the thousands of Medicaid-eligible women who are so destitute that they are forced to carry medically harmful pregnancies to term despite risks to their health and the great personal and economical impacts of having a child. (Def.'s Br. at 9-10; Legislators' Amicus Br. at 13.)[2]

Further, as Plaintiffs have explained, even if a Medicaid-eligible woman finds private funds to terminate her pregnancy, the State still penalizes her choice through the operation of its Medicaid and other benefits programs. (Pls.' Br. at 29-30.) Under the eligibility standards for both Florida's Medicaid and cash assistance programs, the private funds a woman raises for her abortion are included in her income. *See* Fla. Admin. Code R. 65A-4.209(1).

[3] Depending on the woman's existing income, the additional sums she raised may

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[1] The Brief Amicus Curiae on Behalf of Members of the Florida Legislature in Support of Defendant-Appellee is referred to herein as "Legislators' Amicus Br."

[2] Nor does the fact that private funds are available to some Medicaid-eligible women relieve the state of its responsibility to operate the program in a constitutional manner.

[3] Plaintiffs' opening brief accurately describes the income eligibility level for a single pregnant woman under Florida's Medicaid program. AHCA's contentions to the contrary are incorrect. *Compare* Def.'s Br. at 8-9 *with* Fla. Stat. § 409.903(5) (1995 & Supp. 1999) (pregnant women are eligible if their income is "185%" of federal poverty line), *and* R. vol. V, p. 916 (federal poverty line for single woman is "$150"/week). (*See* Pls.' Br. at 28 (stating that "single pregnant woman is only eligible if she earns less than $278 a week;" note that $150 multiplied by 1.85 equals $277.50).) Plaintiffs also accurately described the benefits given to a single woman and a woman with one child under Florida's temporary cash assistance program. *See* Fla. Stat. § 414.095(11) (Supp. 1999) (single woman receives "$180" a month while a woman with a child receives

cause her to lose her eligibility for both programs. Furthermore, if the woman is on temporary cash assistance, any income she receives must be deducted dollar for dollar from her cash benefits. *See* Fla. Admin. Code R. 65A-4.210(2). This penalization of the Medicaid recipient who chooses abortion is undeniably improper. *See Women's Health Ctr. of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658, 666 (W.Va. 1993) ("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."); *see also* NARAL Amicus Br. at 26-27; *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).[4]

Thus, Florida's use of its Medicaid program to coerce a destitute pregnant woman's choices violates Florida's right to privacy. While the state is not required to fund medical services related to pregnancy, once it does so, it cannot make the funding contingent on how a woman exercises her fundamental right to continue or terminate her pregnancy. This requirement of neutrality has been adopted by the majority of other state courts which have assessed the constitutionality of their state Medicaid abortion funding bans.[5] (*See* Pls.' Br. at 32-33.) To date, courts in fourteen of the nineteen states to have

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"$241"); Pls.' Br. at 28 (stating that single woman receives "maximum of $45 a week to pay for housing and other non-food necessities" and woman with "dependent child and no other source of income receives a maximum of $60 a week"; note that $180 divided by 4 weeks equals $45 per week and $241 divided by 4 weeks equals $60.25 per week). This Court may, of course, take judicial notice of this basic arithmetic. *See* 29 Am. Jur. 2d Evidence § 102 (1998).

[4] AHCA incorrectly contends that this argument rests on "facts" not previously put into evidence. To the contrary, it rests entirely on the statutory framework of Florida's benefit programs.

[5] AHCA wrongly attempts to lessen the import of these cases. First, although some cases were not decided by the highest court in the state, a state's failure to appeal an adverse lower court ruling does not diminish the ruling's importance. Second, while other cases could have rested solely on alternative statutory holdings, two such decisions frankly discussed why the important constitutional issues involved should be decided. *See Doe v. Maher*, 515 A.2d 134, 145-46 (Conn. Super. Ct. 1986); *Jeannette R. v. Ellery*, No. BDV-94-811, slip op. at 14 (Mont. Dist. Ct. May 22, 1995). Tellingly, courts in states whose constitution

considered the constitutionality of such funding bans have struck them down.[6]

The Florida Supreme Court has also embraced this neutrality principle, finding that even when Florida provides a discretionary benefit to its citizens, it must act neutrally towards the exercise of fundamental rights. In *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982), the Court held:

> While a state might choose not to establish any state-supported institutions of higher learning, once it has decided to do so, it may not make the privilege of attending contingent upon the surrender of constitutional rights.

Id. at 462 (footnote omitted). More recently, Justice Barkett emphasized this neutrality principle, stating that:

> While the State may have complete discretion in granting or denying a benefit such as the revenue from filing fees, the State may not condition that benefit in such a way as to induce the waiver of constitutional rights.

State ex rel. Butterworth v. Republican Party of Florida, 604 So. 2d 477, 481 (Fla. 1992) (Barkett, C.J., concurring). This principle of neutrality and the strong privacy right, both guaranteed by the Florida Constitution, distinguish the instant case from the handful of cases relied upon by AHCA and the Legislator amici in which other state courts refused to strike down similar abortion funding bans.

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contains an *explicit* privacy clause have uniformly struck down Medicaid funding bans on abortion. (Pls.' Br. at 33.) Contrary to AHCA's contention, the Kentucky Constitution does not contain an explicit privacy clause, but the Alaska, California, Illinois, and Montana Constitutions do. *See* Alaska Const. art. I, § 22; Cal. Const. art. I, § 1; Ill. Const. art. I, § 6; Mont. Const. art. II, § 10. AHCA's efforts to distinguish the Montana, California and Alaska decisions are also flawed. For example, AHCA's claim that the language of Montana's privacy clause is broader than Florida's is belied by the fact that the words of Florida's clause were chosen to be "as strong as possible." *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985). Despite AHCA's suggestions, there is simply no basis for reading Florida's right to privacy more narrowly than other explicit privacy clauses.

[6] Due to a clerical error, Plaintiffs' opening brief stated this count as thirteen of nineteen state courts. (Pls.' Br. at 32.)

[7]

AHCA claims that the state need not act neutrally toward fundamental rights and points to state funding of public, but not private, schools and state encouragement of marriage as examples of legitimate state bias.[8]

Neither example is persuasive. First, the essence of a "private school" education is an education free from government funding or control. If the State funded private schools, these schools would no longer be private, and the State actually would be interfering with fundamental rights. Second, Plaintiffs do not dispute that the state may undertake efforts to further its preference for childbirth or marriage. But it cannot do so in a manner that deprives citizens of benefits because they have exercised their fundamental rights contrary to the state's preferences. In the context of marriage, for example, a state clearly cannot limit a public university's enrollment to married individuals. *Cf. Lewis*, 416 So. 2d at 461-63 (state cannot require publicly financed universities to advocate abstinence until marriage). Thus, Florida's use of its Medicaid program to coerce poor

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[7] AHCA's reliance on *Hope v. Perales*, 634 N.E.2d 183, 187 (N.Y. 1994), is misplaced because the state of New York *pays* for medically necessary abortions under its standard Medicaid program; the *Hope* court addressed the denial of abortion funding under a supplemental program for pregnant women with incomes too high to be eligible for standard Medicaid. Moreover, the *Hope* court suggested that its holding would be different if the state withheld funding for medically necessary abortions under its standard Medicaid program. *See* 634 N.E.2d at 187. Additionally, in sharp contrast to the detailed and uncontroverted evidence in this case, the plaintiffs in *Hope* did not present any evidence that the denial of state funding coerced a woman's protected choice. *See id.*

[8] The Legislator amici take issue with Plaintiffs' analogy to a program offering free rides to the polls for voters who commit to voting for Democratic candidates. (*See* Legislators' Amicus Br. at 17.) The Legislator amici's criticism, however, rests on a misunderstanding of the right to vote. The fundamentally protected right involved is the right to choose one's candidate and cast one's vote in his or her favor. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (constitution protects "right of qualified voters . . . to cast their votes effectively"). It is not the right to refrain from voting at all. Thus, the analogy is apt --- both the hypothetical ride program and the challenged regulations coerce the exercise of a fundamental right by using the power of the purse to render one protected choice far easier.

women to forgo their right to abortion unconstitutionally infringes on those women's right to autonomy in choosing whether or not to continue their pregnancy.[9]

B. The Regulations Infringe Upon Medicaid-Eligible Women's Right to Bodily Integrity.

Florida's Medicaid scheme also infringes another aspect of a woman's privacy right -- that of maintaining her bodily integrity against unwanted intrusions. *See* Pls.' Br. at 35-36. This right extends to both forced pregnancy and its attendant medical treatments. *See Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387, 404 (Mass. 1981); *Women of State of Minnesota v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982).

AHCA argues that the right to bodily integrity protects only the refusal of life-saving treatment that would merely prolong an inevitable death. This argument is wrong, for this Court has explicitly held that the right to bodily integrity encompasses *all medical choices*, not just the refusal of life-saving treatment:

> Recognizing that one has the inherent right to make choices about medical treatment, we necessarily conclude that this right encompasses all medical choices. . . . The issue involves a patient's right of self-determination and does not involve what is thought to be in the patient's best interests.
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> * * *
>
> [A] competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health.

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[9] AHCA's suggestion that the scope of the state constitutional right to privacy is defined by state tort law, Def.'s Br. at 14, is plainly incorrect. *See Forsberg v. Housing Authority of the City of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984) (distinguishing "privacy as a basis for tort action" from "constitutional right of privacy from unjustified governmental intrusion").

* * *

> We see no reason to qualify that right on the basis of the denomination of a medical procedure as major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise.

In re Browning, 568 So. 2d 4, 10-11 & 11 n.6 (Fla. 1990); *see also Dubreuil*, 629 So. 2d 819 (individual can refuse a blood transfusion after suffering a blood loss -- a life threatening but entirely curable problem); *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989) (same).

C. The Challenged Regulations Are Not Narrowly Tailored to Serve a Compelling State Interest.

As Plaintiffs have explained, the challenged regulations are not even rationally related to a legitimate state interest, let alone narrowly tailored to serve a compelling one. (Pls.' Br. at 36-38.) AHCA contends, however, that the state's interest in "preservation of life" justifies the regulatory scheme's intrusion on women's autonomy and bodily integrity. This argument rests entirely on an unconstitutional elevation of the state's interest in potential life at the expense of women's health. AHCA fails to recognize that prior to viability, the state does not have a compelling interest in the potential life of the fetus. *See In re T.W.*, 551 So. 2d 1186, 1193-94 (Fla. 1989). Further, even under the less protective federal constitution, the State does not have a legitimate interest in forcing women to exchange their own health for the preservation of fetal life before or after viability.[10] *See Stenberg v. Carhart*, No. 99-830, 2000 WL 825889, at *8 (U.S. June 28, 2000) (state cannot subject a woman's health to significant risks by banning a method of abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (even after viability a woman's health must be permitted to take precedence over the state's interest in potential life); *cf.* Fla. Stat. § 390.0111(4) (1997) (statute regulating post-viability abortions contains exception for protection of the woman's health). Thus, if a Medicaid-eligible woman has a medical need for an abortion, the state's overriding interest (at least prior to viability) must be in the woman's life and health, not the potential life of the fetus. *See Krischer v. McIver*,

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[10] If refusing payment for medically necessary abortions serves to protect potential life, that necessarily means that the restrictive funding scheme *causes* women to give birth who would otherwise undergo medically necessary abortions.

697 So. 2d 97, 102 (Fla. 1997) (distinguishing assisted suicide from pre-viability abortion; in the latter case, state does not have a compelling interest justifying intervention).
[11]

II. THE CHALLENGED REGULATIONS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FLORIDA CONSTITUTION.

AHCA addresses Plaintiffs' equal protection claims primarily by asserting that they are governed by a trio of federal funding cases. (*See* Def.'s Br. at 19 and cases cited therein.) As an initial matter, Florida's equal protection clause does not follow the federal language and has independent meaning, especially since its recent amendment. (Pls.' Br. at 43.) "Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992). Moreover, AHCA, like the courts below, has failed to recognize that Plaintiffs' equal protection claims are based on classifications never addressed by the United States Supreme Court in a challenge of this nature. Accordingly, even if federal equal protection law were controlling, there exists no governing law on point. As Plaintiffs' opening brief set forth, the challenged regulations deny equal protection in three distinct ways by discriminating: (1) against exercise of a fundamental right; (2) on the basis of sex; and (3) irrationally amongst medically necessary procedures. (Pls.' Br. at 40-45.)

With respect to Plaintiffs' claims of sex discrimination, AHCA incorrectly argues both that the regulations do not discriminate on the basis of sex and that sex-based classifications are only subject to rational basis review. The challenged regulations discriminate on the basis of sex by: (1) requiring women to meet a more stringent standard than men in order to receive some medically necessary health care; (2) discriminating on the basis of pregnancy; and (3) perpetuating outmoded stereotypes of women as childrearers and childbearers. AHCA ignores the first of those forms of sex discrimination, despite the fact that the New Mexico Supreme Court recently struck down that state's Medicaid funding ban on that basis. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 856 (N.M. 1998) (hereinafter "*NARAL*"); *see also Doe v. Maher*, 515 A.2d 134, 159 (Conn.

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[11] AHCA also seems to argue that because childbirth occurs *after viability*, the state can promote that interest *at any stage of pregnancy*. (Def.'s Br. at 18.) This argument is incorrect, for it would permit banning abortion prior to viability, in violation of the Florida Constitution. *See In re T.W.*, 551 So. 2d 1186.

Super. Ct. 1986). AHCA also ignores the third form of sex discrimination, despite clear precedent from this Court that the state may not base laws on impermissible sex stereotypes. (*See* Pls.' Br. at 42-43 and cases cited therein.)

AHCA's only response to Plaintiffs' claims of sex discrimination is to argue that the State may legitimately classify on the basis of a physical characteristic, such as pregnancy, that is unique to one sex. AHCA correctly states that not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination. (Def.'s Br. at 22.) However, "since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them," *NARAL*, 975 P.2d at 854 (quoting *Maher*, 515 A.2d at 159), and courts must therefore subject "classifications based on the unique ability of women to become pregnant and bear children" to "a searching judicial inquiry." *Id.* at 855.

[12] Thus, where a law's purpose is neither served by nor related to differential treatment on the basis of a physical difference between the sexes, that differential treatment should be recognized as sex discrimination.

[13] *See Maher*, 515 A.2d 134 (Medicaid program cannot justify abortion funding exclusion because of women's ability to become pregnant).

The challenged regulations establish just such discrimination. A woman's capacity to become pregnant has nothing to do with the purposes of Medicaid. Both indigent women and men have medical needs that Florida's Medicaid program attempts to meet. Yet, while Florida provides for all of the medical needs of men who meet the income eligibility requirements, subject only to various limitations based on accepted standards of medical care, it provides for only some of the medical needs of eligible women because of a consideration that has no relationship to standards of medical care. *See NARAL*, 975 P.2d at 855-56; *Maher*, 515 A.2d at 159.

AHCA argues that sex-based classifications are subject only to rational basis review. But even before Florida adopted an equal rights amendment in 1998, this Court applied an intermediate level of review to sex-based classifications. *See, e.g.*, *Kendrick v. Everheart*, 390 So. 2d 53, 56 (Fla. 1980).

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[12] Only one state court has held to the contrary, *see Fischer v. Department of Pub. Welfare*, 502 A.2d 114 (Pa. 1985), but its logic is unpersuasive.

[13] The law review articles cited by AHCA, Def.'s Br. at 22, simply beg the question of whether the challenged regulations' differential treatment of men and women legitimately serves the purposes of the Medicaid program.

Moreover, the new equal rights amendment should be interpreted to provide greater constitutional protection than previously available. (*See* Pls.' Br. at 43-44 and cases cited therein.) Construing the amendment otherwise would violate the presumption that the legislature intended the amendment to accomplish some change.

[14] Accordingly, the challenged regulations' unequal treatment of men and women should be subject to strict scrutiny, which they cannot satisfy. (Pls.' Br. at 44.)

Furthermore, the challenged regulations' classifications cannot even survive the lowest level of constitutional review. Neither the regulations' differential treatment of medically necessary abortions and all other medically necessary health care, nor their differential treatment of life-saving and health-preserving abortions is rational in light of the goals of the Medicaid program. (*See* Pls.' Br. 44-45.) AHCA's promotion of potential life at the expense of Medicaid recipients' health simply ignores Medicaid's aim of providing necessary health care for indigent citizens of Florida.

III. THE SEPARATION OF POWERS DOCTRINE DOES NOT PREVENT THIS COURT FROM GRANTING PLAINTIFFS THE RELIEF THEY SEEK.

AHCA asserts that even if the challenged regulations are unconstitutional, this Court cannot order AHCA to pay for medically necessary abortions, because doing so would violate the principle that only the legislature, not the courts, can "appropriate" funds.

[15] This argument rests on two fundamental errors.

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[14] AHCA's contention that the equal rights amendment created no change in the standard of review is refuted by the holdings of the New Mexico and Washington Supreme Courts. (*See* Pls.' Br. at 43 and cases cited therein.) AHCA's attempt to distinguish the New Mexico and Florida equal rights amendments is flawed. (Def.'s Br. at 22-23.) New Mexico's guarantee of equal protection to "any person," *NARAL*, 975 P.2d at 851, already applied to both men and women, just as, as AHCA notes, Florida's protection of "all natural persons" already applied to both men and women. (*See* Def.'s Br. at 22.) In both cases, amending the provision to explicitly address equal treatment of the sexes must be read to increase the constitutional protection against sex discrimination. *See NARAL*, 975 P.2d at 851.

[15] AHCA cannot argue it would spend more on Medicaid then it does now as a result of such an order. Because childbirth costs far outweigh the costs of abortion, paying for medically necessary abortions will reduce overall Medicaid

First, although the Legislature can appropriate funds for specific purposes, it must do so in a constitutional manner. The appropriations clause "secures to the Legislature *(except where the Constitution controls to the contrary)* the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government." *State ex rel. Kurz v. Lee*, 163 So. 859, 868 (Fla. 1935) (emphasis added). Thus, the judiciary has the power to review appropriations bills to determine whether they comport with the constitution. *See Murray v. Lewis*, 576 So. 2d 264 (Fla. 1990); *Lewis*, 416 So. 2d 455; *see also Cotten v. County Comm'rs*, 6 Fla. 610, 613 (Fla. 1856); Fla. Stat. § 20.02(1) (1997). If the enactments violate the Constitution, courts can grant relief even if doing so means that state funds will be spent in a manner not explicitly approved by the Legislature. *See Lewis*, 416 So. 2d at 458, 463 (ordering state to finance universities improperly excluded from public funding). *See also Planned Parenthood v. Perdue*, No. 3AN 98-7004 CI, slip op. at 16-18 (Alaska Super. Ct. Mar. 16, 1999); *Moe*, 417 N.E.2d at 395; *NARAL*, 975 P.2d at 857-59; *Maher*, 515 A.2d at 144-45; *Roe v. Harris*, No. 96977, slip op. at 9-10 (Idaho Dist. Ct. Feb. 1, 1994); *Doe v. Celani*, No. S81-84CnC, slip op. at 14-17 (Vt. Super. Ct. May 26,

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costs. (Pls.' Br. at 21.) Nor must AHCA fund all abortions sought by Medicaid-eligible women. Florida must fund abortions only to the extent it funds other services under its definition of medical necessity. Medical necessity, as defined by Florida's Medicaid program, differs in many respects from the definition of health found in the United States Supreme Court's jurisprudence upon which the Legislator-amici incorrectly rely. *Compare* Fla. Admin. Code R. 59G-1.010(166)(a) *with Doe v. Bolton*, 410 U.S. 179, 192 (1973).

The studies cited by the Legislator-amici are not to the contrary. First, those amici misquote the percent of abortions performed *primarily* for health reasons, which can be as high as 15% in certain age groups. *See* Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169, 170 (July/August 1988). The percentage of abortions motivated in part, instead of primarily, by health reasons must be presumed to be higher. Second, amici improperly rely on raw data from states that fund abortions through Medicaid. This data does not reveal what standard of medical necessity the programs use, what types of medical problems motivated the abortions, or how many of the overall number of abortions in the state were sought by Medicaid-eligible women. Without this data, amici's assertion that these states pay for all abortions for Medicaid-eligible women is pure guesswork.

1986). To hold otherwise would mean that the State could immunize its actions by failing to appropriate the funds necessary to carry out a program in a constitutional manner.

Second, the Florida Legislature has already appropriated funds for the state Medicaid program without statutory limitations. The Legislature does not earmark funds for specific types of care provided under Medicaid. Rather, the Legislature allocates funds to the state Medicaid program for general purposes such as all physician services or personnel expenses such as salaries. *See, e.g.,* Fla. General Appropriations Act of 1999-2000, S.B. 2500, § 3 (Fla. 1999). As Plaintiffs have already demonstrated, medically necessary abortions would be covered by the state's Medicaid program but for the challenged regulations. Moreover, a state does not receive federal money as an advance against future spending. Rather, it expends its own funds to pay for services and then applies to the federal government for *reimbursement* for the portion that the federal government has promised to cover. Reimbursement is not sought for services outside the federal plan. *See generally* 45 C.F.R. Part 95.
[16]

IV. THE CIRCUIT COURT IMPROPERLY STRUCK PLAINTIFFS' CLAIM FOR SPECIFIC RELIEF ON SOVEREIGN IMMUNITY GROUNDS.

The doctrine of sovereign immunity generally bars claims against a state for compensatory damages. But courts do not hesitate to order states to provide

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[16] Nor can AHCA argue that the Hyde Amendment prevents Florida from spending its Medicaid monies for abortions, for it is clear that "[a] participating state is free, if it so chooses, to include *in its Medicaid plan* those medically necessary abortions for which federal reimbursement is unavailable." *Harris*, 448 U.S. at 311 n.16 (emphasis added). Tellingly, by regulation, Florida's Medicaid program, like the programs of the majority of states, covers more abortions than the Hyde Amendment currently permits. *See* Pls.' Br. at 5 n.4. Thus, AHCA's argument is belied by its own regulations. Likewise, the Florida statute stating that Medicaid providers shall be reimbursed "in accordance with state and federal law," Fla. Stat. § 409.908, (1995 & Supp. 1999) does not preclude the relief Plaintiffs seek. *Harris* establishes that federal law does not bar states from covering medically necessary abortions, and the Florida Constitution, of course, is the preeminent state law. The Florida statutes are silent on the scope of Medicaid funding for abortions.

wrongfully withheld benefits, even though such an order may require disbursement of funds.

[17] (Pls.' Br. at 46-48.) Under AHCA's sovereign immunity argument, it could deny reimbursement for all Medicaid services obtained by African-Americans, or all services obtained by women, and be forever immunized in these unconstitutional actions. This argument confuses damages with equitable relief.

[18] This confusion led the circuit court to improperly strike the Plaintiff class's claim for reimbursement for medically necessary abortions they obtained.

CONCLUSION

For the foregoing reasons, the circuit court's decision should be reversed and Plaintiffs should be granted the relief requested in their opening brief.

Dated: July 17, 2000

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[17] Contrary to AHCA's assertion, the propriety of the lower court's opinion does not turn on whether the particular plaintiff seeking reimbursement is a Medicaid recipient or a Medicaid provider. AHCA argues that it may make payments only to eligible Medicaid providers. (Def.'s Br. at 27.) While this statement is generally true, AHCA does have the authority to directly reimburse Medicaid recipients. *See* Fla. Admin. Code R. 59G-5.110. Nor can AHCA avoid responsibility for its unconstitutional actions towards the individual *recipients* for that "would make constitutional law subservient to the State's will." *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994).

[18] Plaintiffs' desire to ameliorate a harm done to them does not turn their claim into one for compensatory damages. *See Gribben v. Kirk*, 466 S.E.2d 147 (W. Va. 1995) (ordering restitution after state refused to pay them the full amount of their salary); *Kuhnlein*, 646 So. 2d 717 (ordering refund of improper tax).

Attorneys for Plaintiffs-Appellants

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: July 17, 2000

Respectfully Submitted,

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