IN THE SUPREME COURT OF FLORIDA

NORTH FLORIDA WOMEN'S HEALTH
AND COUNSELING SERVICES, INC.;
et al.,

Petitioners,

v. Case No.: SC01-843

STATE OF FLORIDA; FLORIDA
DEPARTMENT OF HEALTH; et al.,

Respondents.

On Appeal from The District Court of Appeal,
First District, State of Florida
(Case Numbers 1D00-1983, 1DO0-2106)

AMICUS CURIAE BRIEF BY THE FLORIDA CATHOLIC CONFERENCE

STEPHEN C. EMMANUEL
Florida Bar No. 0379646
JOHN BERANEK
Florida Bar No. 0005419
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
850/224-9115

AND

THOMAS A. HORKAN, JR.
Florida Bar No. 0037227
VICTORIA H. ERQUIAGA
Florida Bar No. 0656232
313 South Calhoun Street
Tallahassee, Florida 32301

Attorneys for Amicus Curiae
FLORIDA CATHOLIC CONFERENCE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

PREFACE

Pursuant to Florida Rule of Appellate Procedure 9.370, the Florida Catholic Conference submits this brief as amicus curiae in support of the Defendants/Respondents. In this brief, the following abbreviations will be used:

The Parental Notice of Abortion Act, Section 390.01115, Florida Statutes (1999), will be referred to as the "Act."

Petitioners, North Florida Women's Health and Counseling Services, Inc., et al., will be referred to as "Petitioners."

Respondents, State of Florida, Department of Health, Robert Brooks, M.D., in his official capacity as Secretary of the Florida Department of Health, the Agency for Health Care Administration, and Ruben J. King-Shaw, Jr., in his official capacity as the Director of the Agency for Health Care Administration, will be jointly referred to as the "State."

Amici curiae American Civil Liberties Union, American Civil Liberties Union of Florida, and Women's Law Project shall be jointly referred to as "ACLU."

The Florida Catholic Conference will be referred to as the "Conference."

INTEREST OF THE AMICUS

The Florida Catholic Conference, a Florida corporation not for profit, is comprised of all the active Roman Catholic Bishops in the State of Florida. The Conference is the vehicle through which the Bishops speak, cooperatively and collegially, in the field of public affairs. Roman Catholicism is one of the largest religious denominations in the State of Florida. Its members, numbering over 2 million in the State of Florida, share a faith that recognizes: 1) the need to defend the family as the basic unit of society; and 2) the sanctity and dignity of each and every human life.

STATEMENT OF THE CASE AND FACTS

The Conference adopts the Statement of the Case and Facts set forth in the Answer Brief filed by the State.

STANDARD OF REVIEW

The Conference adopts the Standard of Review set forth in the Answer Brief filed by the State.

SUMMARY OF THE ARGUMENT

This case presents two basic constitutional considerations, the right to privacy and separation of powers.

Florida Right Of Privacy; Article I Section 23

In their Initial Brief, Petitioners argue that In re T.W., 551 So. 2d 1186 (Fla. 1989), stands for the proposition that a female child has an absolute and uncontrollable right to obtain an abortion at her own whim and without the knowledge or advice of her parents. In arguing that the Act is unconstitutional, Petitioners only consider the privacy rights of minor girls and fail to recognize and address the state and federal constitutional rights of their parents.

This Court has recognized that Florida's constitutional privacy provision protects parental rights. Indeed, this Court has ruled that a parent's right to raise and care for his or her child is specifically protected by Article I, Section 23. Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998). The constitutional right of parents to raise and care for their minor children "is at its zenith when the decision as to which parental involvement is urged is one – like the abortion decision - with profound and enduring consequences not merely for the physical well-being of the child, but for the child's spiritual, moral, and emotional development." Planned Parenthood of Blue Ridge v. Camblos, 155 F.3d 362, 368 (4th Cir. 1998). Therefore, in reviewing the constitutionality of the Act, this Court must consider not only the privacy rights of minor girls, but also the privacy rights of their parents. At a bare minimum, the rights of pregnant girls and the rights of their

parents must be balanced. When a balancing of these constitutional rights is applied, the Act must be upheld. This is the correct ruling because the Act does not restrict a minor girl's freedom to make the ultimate decision, but merely ensures that in making that decision she receives the benefits of her parents' counsel, advice and support, and the parents have the opportunity to provide this counsel, advice and support.

The Implicit Federal Right Of Privacy

The United States Supreme Court has long recognized that parents possess federally protected privacy rights which include the right to independence in child-rearing and education. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Indeed, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57 (2000).

The expanded rights of minors in the Florida Constitution cannot overpower their parents' federal constitutional rights. The federal constitutional rights of parents cannot be abrogated even by a state constitutional amendment creating a broader and stronger right of privacy in their children. If the Florida Constitution can be interpreted to expand a child's right of privacy to the extent that this expansion totally abrogates an existing federal right of privacy in the child's parents, then the Florida constitutional interpretation must fall.

Separation Of Powers

In Krischer v. McIver, 697 So.2d 97, 104 (Fla. 1997), this Court stated that "[b]y broadly construing the privacy amendment to include the right to assisted suicide, we would run the risk of arrogating to ourselves those powers to make social policy that as a constitutional matter belong only to the legislature." The situation presented by this case is no different than that presented in Krischer. Whether or not parental notification should be required before a female child receives an abortion is a social policy issue fraught with competing interests and profound ramifications. Whatever this Court's power to act here, this is a social policy issue more appropriately left to the Legislature, which has the ability to hold public hearings and debates, to examine the issue, and to draft appropriate legislation addressing the rights and balancing the interests of the various parties involved – which is precisely what the Legislature did in this case.

T.W. Is Not Controlling

In re T.W., 551 So. 2d 1186 (Fla. 1989), is not controlling because: (1) T.W. is not a precedential "opinion" under the Florida Constitution; (2) even if precedential, T.W. is distinguishable because it involved a parental consent rather than notice statute; and (3) T.W. is inherently flawed and should not be followed.

ARGUMENT

I. THE CONSTITUTIONAL RIGHTS OF PARENTS GUARANTEED BY ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION REQUIRE AFFIRMANCE OF THE DISTRICT COURT'S DECISION.

In a well-reasoned opinion, the First District Court of Appeal upheld the Act, finding that the Act served a compelling state interest because it facilitated the ability of parents to provide appropriate medical care for their minor daughters. State of Florida v. North Florida Women's Health and Counseling Services, Inc., 26 Fla.L.Weekly D419, D420 (Fla. 1st DCA Feb. 9, 2001). The fundamental right and obligation of parents to provide for the care and upbringing of their children is one of our most basic rights. In Foster v. Sharpe, 114 So. 2d 373, 376 (Fla. 3d DCA 1959), the Third District described this right:

> The right of the parents to the custody, care and upbringing of their children is one of the most basic rights of our civilization. The emphasis upon the importance of the home unit in which children are brought up by their natural parents is one of the great humanizations of western civilization as contrasted with the ideologies of some nations where family life is not accorded primary consideration.

The right of parents to care for their children is not just a worthy state interest, it is also an interest protected by our State Constitution. In 1980, the fundamental right of parents to determine the care and upbringing of their children became specifically protected by Article I, Section 23 of the Florida Constitution. Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996). In

Beagle, this Court stated:

> The fundamental liberty interest in parenting is protected by both the Florida and federal constitutions. In Florida, it is specifically protected by our privacy provision.

678 So. 2d at 1275 (emphasis added) (footnote omitted). As a result, "parenting is not just a statutory responsibility – it is a constitutional right." Matter of Dubreuil, 629 So. 2d 819, 829 n.11 (Fla. 1993).

Our state recognizes, indeed mandates, parental involvement in the lives of their minor children. Parents have a legal duty to supervise, support, and protect their minor children. By both statute and common law, parents are obligated to provide food, clothing and shelter for their children until they attain majority. See Section 827.03, Florida Statutes (2001); Finn v. Finn, 312 So. 2d 726 (Fla. 1975).

Included within the duty of supporting a child until he or she reaches the age of majority is the parental obligation to provide "medical services that a prudent person would consider essential for the well-being of the child." Section 827.03(3)(a)1., Florida Statutes (2001) (defining neglect as including the failure to provide necessary medicine and medical services); see also Variety Children's Hospital v. Vigliotti, 385 So. 2d 1052 (Fla. 3d DCA 1980) (parents have a duty to provide reasonable and necessary medical attention for their minor children).

As the First District noted in its decision below, "before a minor can obtain medical treatment – unless an emergency renders obtaining consent impractical – her parent or guardian must consent to the treatment." 26 Fla.L.Weekly at D422. See also O'Keefe v. Oren, 731 So. 2d 680, 686 (Fla. 1st DCA 1968) ("Implicit in the parent's right to consent to proposed medical treatment for his minor or otherwise incompetent child, is the right to be fully informed concerning the child's condition and prognosis").

In addition to providing for their children's physical and medical needs, parents, rather than society or the state, are the principal persons charged with the duty of educating their children. "Raising children provides a person with the opportunity to secure the continuation of his or her values, and thereby, to influence the future of society." M.F.G. v. Dept. of Children & Families, 723 So. 2d 290, 292 (Fla. 3d DCA 1998).

While this Court's decision in T.W. ruled unconstitutional a state statute that required a female child to obtain the consent of one of her parents before she could obtain an abortion, that opinion did not eliminate a parent's right and obligation to provide for a minor child's physical, medical, and emotional needs when that child is pregnant and considering whether or not to have an abortion. While a parent of a pregnant minor in Florida does not have to give consent to the child's decision to undergo an abortion, a parent retains the constitutional, statutory, and common law right and obligation to care for her daughter's physical

and emotional needs.

The Act contains a detailed summary of the Legislature's purposes in enacting Section 390.01115. Among those purposes was the Legislature's desire to protect the constitutional right of parents to rear their children, and to strengthen the ability of parents to provide appropriate medical care for their children. The preamble to the Act provides in part:

> WHEREAS, the Legislature's purpose in enacting parental notice legislation is to further the important and compelling state interests of protecting minors against their own immaturity, fostering family unity and preserving the family as a viable social unit, protecting the constitutional rights of parents to rear children who are members of their household, and reducing teenage pregnancy and unnecessary abortion, and
>
> WHEREAS, further legislative purposes are to ensure that parents are able to meet their high duty to seek out and follow medical advice pertaining to their children, stay apprised of the medical needs and physical condition of their children, and recognize complications that might arise following medical procedures or services. . . .

(Emphasis added).

In adopting the Act, the Florida Legislature acknowledged that previous legislation requiring parental consent before a physician could perform an abortion on a minor had been ruled unconstitutional by this Court in In re T.W. However, the fact that minors may enjoy a State constitutional right to privacy does not mean that the constitutional rights of their parents evaporate. Rather, the unique role of the family within our society mandates

that the constitutional rights and obligations of parents also be considered and these rights can most certainly be recognized by the Florida Legislature.

Since parental rights are protected by Article I, Section 23 of the Florida Constitution, this Court has ruled that the State must satisfy a compelling state interest standard before it can infringe upon those rights. More specifically, in Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996), this Court adopted the following standard in ruling a grandparent visitation statute unconstitutional:

> Based upon the privacy provision in the Florida Constitution, we hold that the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.

Id. at 1276 (emphasis added).

In Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998), this Court expressly held that this standard applied not only to legislative interferences with parental rights but also to judicial interferences. The Court stated: "Neither the legislature nor the courts may properly intervene in parental decisionmaking absent significant harm to the child threatened by or resulting from those decisions." Id. at 514 (emphasis added); see also Kazmierazak v. Query, 736 So. 2d 106, 109 (Fla. 4th DCA 1999) ("Von Eiff stands for the proposition that the state cannot intervene into a parent's fundamental or constitutionally protected right of privacy, either via the judicial system or legislation, absent a showing of

demonstrable harm to the child.").

Voiding the Act would clearly constitute a judicial interference with the parental rights described above. Under this Court's own decisions, this Court is prohibited from interfering with these parental rights absent a showing that significant harm would occur in the absence of such interference. No such showing is demonstrated by the record in this case; and absent that showing, this Court does not have the authority to interfere with parental rights by declaring the Act unconstitutional.

While it is often noted that the right of privacy guaranteed by the Florida Constitution is stronger than the right of privacy under federal constitutional law, Florida's constitutional right of privacy protects parental rights as well as children's rights. Indeed, Florida's Constitution affords parental rights greater protection than does the federal constitution, and the Act is, without question, constitutional under the federal constitution. [1]

At a bare minimum, this Court should balance the constitutional rights of pregnant girls with the constitutional rights of their parents. When a balancing of the constitutional rights analysis is applied, the Act must be upheld because the Act does not restrict a girl's freedom to make the ultimate decision, but merely ensures that in making that decision she receives the benefits of her parents' counsel, advice and support.

[2] Without this Act, parents will be deprived of their right to provide their counsel, advice and

[1] See e.g., H.L. v. Matheson, 450 U.S. 398 (1981); Planned Parenthood Ass'n v. Miller, 934 F.2d 1462 (11th Cir. 1991).

[2] Since there is a presumption that fit parents will act in the best interests of their children, Troxel v. Granville, 530 U.S. 57, 68 (2000), the Conference does not view the constitutional rights of (continued...)

support.

II. THE CONSTITUTIONAL RIGHTS OF PARENTS RECOGNIZED BY THE FEDERAL COURTS AS INHERENT IN THE FEDERAL CONSTITUTION REQUIRE AFFIRMANCE OF THE DISTRICT COURT'S DECISION.

For the reasons stated in Point I above, overturning the Act would violate the privacy rights of parents which are specifically protected by Article I, Section 23 of the Florida Constitution. If this Court affirms the lower court's decision based upon the Florida constitutional arguments in Point I above, then the following arguments based upon the federal constitutional rights of parents need not be reached. However, if Article I, Section 23 is given the construction argued by the Petitioners, then the constitutional provision itself would effectively violate parental rights protected by the United States Constitution.

A. Parents Have A Federally Protected Liberty Interest In Raising Their Minor Children Which Includes Involvement In Major Decisions.

As acknowledged by this Court in Beagle at p. 1275: "The fundamental liberty interest in parenting is protected by both the Florida and federal constitutions." The United States Supreme Court has repeatedly recognized the rights of parents as a fundamental liberty interest in the "care, custody and management" of their children. Santosky v. Kramer, 455 U.S. 745, 754 (1982). Parents have federally protected constitutional rights which includes the liberty "to direct the upbringing and education of

---

(...continued)
parents and their minor children as being competing. In many cases, there may be feasible and relevant alternatives -- such as arranging for an adoption or assuming the responsibilities of motherhood with the assured support of the minor's parents –- that the minor may not have adequately considered. Parental notification will help to ensure that the minor is knowledgeable about the alternatives to abortion and that her decision is an informed one.

children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). Privacy rights have been specifically recognized as inherent in the federal constitution, and they are a "private realm of family life which the state can not enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Parental autonomy is not delegated by the state, but rather resides in the very nature of parenthood. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Our legal heritage recognizes that the family has its "origins entirely apart from the power of the State." Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977). Based on this heritage, the United States Supreme Court stated in Prince: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166.

In Troxel v. Granville, 530 U.S. 57 (2000), the United States Supreme Court once again recognized the constitutional right of parents to make decisions concerning the care, custody, and control of their children. In Troxel, the United States Supreme Court noted that the liberty interest of parents "is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65. After summarizing its numerous decisions in this area, the United States Supreme Court stated: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right

of parents to make decisions concerning the care, custody, and control of their children." Id. at 66.

The constitutional right of parents to be involved in decisions made by their minor children "is at its zenith when the decision as to which parental involvement is urged is one – like the abortion decision – with profound and enduring consequences not merely for the physical well-being of the child, but for the child's spiritual, moral, and emotional development." Planned Parenthood of Blue Ridge v. Camblos, 155 F.3d 362, 368 (4th Cir. 1998). Overturning the Act would violate parental rights guaranteed by the United States Constitution because it would constitute "nothing less than an abrogation of the parental role by judicial fiat, a wresting from parents and rendering unto the courts of the privileges and responsibilities that are parenthood itself." Id. at 372.

B. A State Cannot Lessen Parental Rights By Increasing Children's Rights.

While Florida is free to grant its citizens more rights than those granted them by the federal constitution, a state is not free to limit or restrict rights granted a person by the United States Constitution even if that limitation is attempted in the Florida Constitution. The Florida Constitution can not be amended to increase certain rights at the expense of others. Any attempt by a state to limit a person's federal constitutional rights is void under the Supremacy Clause of the United States Constitution.

State ex rel. Woman's Ben. Ass'n v. Port of Palm Beach Dist., 164 So. 851, 857 (Fla. 1935) ("State Constitutions and amendments thereto are subject to applicable prohibitions and limitations of [the] Federal Constitution.").

In his concurring opinion in T.W., Justice Ehrlich noted that Florida's privacy provision was added in 1980, well after Roe v. Wade, 410 U.S. 113 (1973), and concluded "It can therefore be presumed that the public was aware that the right to an abortion was included under the federal constitutional right of privacy and would therefore certainly be covered by the Florida privacy amendment." However, the United States Supreme Court decision in Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II), also preceded the adoption of Article I, Section 23. In Bellotti II, the United States Supreme Court recognized the importance of parental rights, stating: "The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." 443 U.S. at 634.

Obviously, federal rights cannot be abridged by Florida even through the vehicle of a Florida constitutional amendment. If Article I, Section 23 expanded the privacy rights of young girls by diminishing the privacy rights of their parents, that diminishment must be viewed as prohibited. Since parental rights are protected by the United States Constitution, a state court does not have the authority to abridge those rights – indeed, Florida voters also

could not have done so when they enacted Article I, Section 23. It is no answer to suggest that Florida's right to privacy is broader than the similar federal right if the Florida right is used as a basis for abrogating the federal constitutional right of parents to raise and care for their minor children. Thus this case presents a compelling federal constitutional question.

C. The ACLU's Brief Misstates The Federal Issue.

The ACLU has filed an amicus curiae brief which attacks the Conference's argument that overturning the Act would violate parental rights protected by the United States Constitution.

[3] Significantly, the ACLU's brief begins by attempting to re-cast the federal issue. Specifically, on page 2 of its brief, the ACLU attempts to change the issue from the constitutionality of the Act to the constitutional implications of a state not enacting a parental notification requirement. While perhaps an interesting issue for a law review article, it is simply not the issue before the Court.

The ACLU's brief does, however, make some statements which require a response. First, the ACLU states "a parental right claim under the federal constitution depends on a showing that the government requires or prohibits some activity at odds with important parental prerogatives," and that no such prohibition is present in the instant case. To the contrary, if this Court were to agree with the Petitioners and find the Act unconstitutional, then the government (specifically this Court) would be overturning the constitutional and common law rights and responsibility of parents to provide assistance and care for their children. A decision that this notice Act is void would constitute an absolute prohibition against abortion providers and pediatricians ever advising parents

[3] The ACLU's brief does not attempt to refute the Conference's primary argument that overturning the Act would violate parental rights guaranteed by the Florida Constitution.

about an abortion and the medical condition and needs of their minor daughters following an abortion unless the child consents. Make no mistake, a decision by this Court overturning the Act would unequivocally "prohibit some activity at odds with important parental prerogatives."

Second, on page 11 of its brief, the ACLU cites to several United States Supreme Court and lower federal cases where the courts "enjoin[ed] parental involvement laws that fail to satisfy federal standards, leaving no parental involvement laws in effect." The ACLU then makes the outlandish claim that the "Conference would have this Court conclude that the injunctions in all of those cases, including the United States Supreme Court cases, violated parental rights." Of course, the Conference never made such a claim, nor would it.

The distinction between the federal cases and the instant case is that in the federal cases the courts were balancing the privacy rights of minors with the privacy rights of their parents. And in those cases where federal courts have enjoined a parental involvement law that failed to satisfy federal standards, temporarily leaving no parental involvement law in effect, parental rights did not evaporate and the states were free to enact a new statute that met the federal standards. In this case, on the other hand, Petitioners do not contend that the Act does not meet federal standards. However, they are asking this Court to interpret our State's privacy provision as completely abrogating ALL parental rights in the area of abortion. The Conference respectfully submits that such a decision would infringe upon parents' federally protected privacy rights.

If, as Petitioners and the ACLU apparently contend, parents have no federally protected right to be involved in their child's decision to have an abortion, then the United States Supreme Court would have never upheld any parental notice or consent statutes. Clearly, parents do have some federally protected rights in this area, and interpreting our State Constitution as abolishing those federally protected rights would violate the Supremacy Clause of the United States Constitution.

Third, the ACLU brief cites to several out-of-state cases which are: (a) not controlling; and (b) distinguishable. For example, the cases involving a minor's access to birth control do not involve a medically intrusive procedure being performed on a minor. The California Supreme

Court's decision in American Academy of Pediatrics v. Lungren, 16 Cal. 4th 307, 940 P.2d 797, 66 Cal. Rptr. 2d 210 (Cal. 1997), is distinguishable because it involved a parental consent rather than notice statute. Further, as noted by Justice Baxter in his dissent in Lungren, that decision did not resolve the issue of parental rights under the federal Constitution. On that issue, Justice Baxter stated:

> Of course, nothing said in these opinions has any impact on parents' rights under the federal Constitution. Whether the California Constitution, as construed by the majority to condition a parent's involvement in a minor daughter's decision to under an abortion on the child's willingness to seek the parent's advice and counsel, impermissibly intrudes on the parent's rights may yet be decided in another forum.

940 P.2d at 869-70.

For the above reasons, this case presents a compelling federal constitutional question. However, this compelling federal question only arises if Article I, Section 23 is interpreted in the manner suggested by the Petitioners and ACLU (i.e., as totally abrogating the right of parents to be involved in their minor child's decision to undergo an abortion). If Article I, Section 23 is construed in the manner urged by the Conference in Point I above, the federal constitutional issue does not arise.

SEPARATION OF POWERS SUPPORTS AFFIRMANCE OF THE DISTRICT COURT'S DECISION.

Article II, Section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Using the right of privacy to strike down the Act would violate the separation of powers required by the Florida Constitution.

This Court has previously recognized that where, as here, an issue is laden with significant and controversial social and public policy concerns, it is inappropriate for a court to use its judicial

powers to solve a problem best handled by the Legislature. For example, in Krischer v. McIver, 697 So.2d 97 (Fla. 1997), which held that the right to privacy did not provide a constitutional right to assisted suicide, this Court stated that "[b]y broadly construing the privacy amendment to include the right to assisted suicide, we would run the risk of arrogating to ourselves those powers to make social policy that as a constitutional matter belong only to the legislature." 697 So.2d at 104. In Krischer, this Court cited to Shands Teaching Hospital & Clinics, Inc. v. Smith, 497 So.2d 644, 646 (Fla. 1986), for the proposition that "of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus." 697 So.2d at 104 n.5.

The situation presented by this case is no different than that presented in Krischer. Whether or not parental notification should be required before a female child receives an abortion is a social policy issue fraught with competing interests and profound ramifications. It is no exaggeration to say that the issue presented in this case goes to the very core of our nation's social unit, the family. Large numbers of persons and organizations have strongly held and widely varying opinions on the issue before the Court. Whatever this Court's power to act here, this is a social policy issue more appropriately left to the Legislature, which has the ability to hold public hearings and debates, to examine the issue, and to draft appropriate legislation addressing the rights and balancing the interests of the various parties involved – which is precisely what the Legislature did in this case.

Strict adherence to the doctrine of separation of powers is not only constitutionally required, it is also the best way to safeguard the independence of the judiciary. Contrasting an activist court with one which strictly adheres to the separation of powers, Judge Barfield in his concurring opinion in Shands Teaching Hospital and Clinics, Inc. v. Smith, 480 So.2d 1366, 1369-70 (Fla. 1st DCA 1985), stated:

> Judicial activism . . . is both elitist and dangerous. It is result oriented without considering the appropriateness of the means employed. When the judiciary becomes the avant-garde for what it perceives as forthcoming trends in societal conduct without the legislative machinery to test those trends, it not only departs from its

> constitutional role in government, but also subjects itself to the risk of reactionary political attacks that can so weaken it as to preclude its effective functioning as a safeguard for human rights. In order to avoid such reactionary political influences, the court must maintain consistency and adherence to a methodology based upon separation of powers.

In this case, the Legislature has enacted a statute which balances the state and federal privacy rights of both the parents and their minor daughters. In the Act, the Legislature reached a perfectly reasonable result. It is to be remembered that the legislative process is a continuing one which seeks over time to achieve a perfect result. Should the Legislature wish to change its present position and decides to repeal or amend the Act because it is unwieldy, impractical, or unpopular, it may do so. However, if this Court strikes down the Act and declares it unconstitutional, it deprives the Legislature and the people of the state of Florida of the opportunity to use the flexibility, sensitivity and fact-finding prerogative of the Legislature in this policy decision. Thus, the democratic process would become largely irrelevant.

For the above reasons, the doctrine of separation of powers supports affirmance of the decision of the district court.

THE LEGISLATURE HAS CONSISTENTLY PROTECTED THE INTERESTS ADVANCED BY THE ACT.

In their Initial Brief, Petitioners argue that the Legislature has not consistently protected the interests advanced by the Act. To the contrary, the Act is consistent with our State's historic treatment of children differently from adults.

A. The Act Is Consistent With Our State's Firmly Established Public Policy of Extending Special Protections To Minors.

Our State has historically treated children differently from adults, extending special protections to children that are not enjoyed by adults. Many of these protections entail limitations on what a minor can do on her own. The Legislature, for example, has

enacted numerous statutes which restrict a minor's freedom to make certain decisions. Some of these statutes impact rights which are considered fundamental under both the State and federal constitutions. For example, the State prohibits minors from marrying without parental consent, from entering into contracts, and from running away from home. Section 741.0405 (marriage); Chapter 743 (contracts); Sections 985.501 - 985.507 (Interstate Compact on Juveniles). By statute, the State of Florida also requires a minor to obtain a parent's consent before getting a tattoo, going to certain movies, and receiving most types of medical care other than that authorized under Section 743.065.

[4] The State's interest in protecting minors from harm justify these statutes even though comparable restraints on adults would clearly be unconstitutional.

This Court has also extended special protections to minors. For example, in Brennan v. State, 754 So. 2d 1 (Fla. 1999), this Court ruled that the death penalty constituted cruel and unusual punishment if imposed on a minor under the age of 17. In that decision, this Court stated: "Nothing in the Constitution prohibits any court from taking notice of the peculiar condition and historical treatment of the very young. The law itself for centuries has recognized that children are not as responsible for their acts as are adults. . . ." Id. at 6.

In his concurring opinion in Brennan, Justice Anstead elaborated on our society's consistent treatment of minors differently than adults. Justice Anstead stated:

---

[4] The trial court found it difficult to reconcile these statutes with T.W.'s holding. Footnote 4 of the trial court's Order provides in part:

> But what about the fact that parental consent is required for almost every thing else a minor does, from admittance to movies, to getting a tattoo, to receiving an aspirin at the school clinic? To say that you have to have a parent's consent to get an aspirin, but not an abortion, seems ludicrous.

> I believe the question to be less complicated and far more logically framed in terms of how our society has traditionally valued and defined its children and assessed their maturity for purposes of prescribing their rights and responsibilities in society. Using that framework of analysis, I would conclude that based upon the enormous value we place on our children, and **our historically consistent treatment of children differently from adults for virtually all legal purposes**, but especially for purposes of assessing responsibility and meting out punishment for criminal acts, that the constitutional line should be drawn at age seventeen. . . .
>
> It is no coincidence, for example, that we use the age of eighteen as the cutoff for child dependency and for the legal requirement of parents to take care of their children, as well as a dividing line for a countless number of other legal distinctions based upon a firmly established public policy of placing limitations upon and extending special protections to the young and immature.

Id. at 12-13 (emphasis added).

Our State, through numerous legislative enactments and judicial decisions, has consistently extended special protections to minors. The Act is fully consistent with these statutes and decisions and our State's well-established public policy of providing special protections and safeguards for our young.

B. There Are Fundamental Differences Between the Act and Section 743.065.

In their Initial Brief, Petitioners argue the Legislature has not acted consistently because Section 743.065 allows a pregnant minor to consent to medical treatment related to her pregnancy without parental involvement. There are, however, several very fundamental differences between the Act and Section 743.065. First, there is a fundamental difference between a pregnant minor seeking prenatal care for herself and her unborn child and a minor seeking an abortion. In the first case, the minor is seeking traditional medical assistance, and in the second the minor is not.

This same distinction was made by this Court in Krischer v. McIver, 697 So. 2d 97 (Fla. 1997), where this Court ruled that a statute prohibiting assisted suicide did not violate Florida's constitutional right to privacy. In Krischer, this Court stated:

> We cannot agree that there is no distinction between the right to refuse medical treatment and the right to commit physician-assisted suicide through self-administration of a lethal dose of medication. The assistance sought here is not treatment in the traditional sense of that term. It is an affirmative act designed to cause death – no matter how well-grounded the reasoning behind it. Each of our earlier decisions involved the decision to refuse medical treatment and thus allow the natural course of events to occur. (Emphasis added.)

Similarly, in this case there is a fundamental difference between a minor seeking medical care for her unborn child and a minor seeking to "terminate" her pregnancy.

Second, as noted by the United States Supreme Court in H.L. v. Matheson, 450 U.S. 398 (1981), the decision to abort a fetus is much more likely to involve grave emotional and psychological components than a decision over the proper course of treatment for a fetus or child in need of medical assistance. In H.L., the Supreme Court noted:

> Appellant also contends that the constitutionality of the statute is undermined because Utah allows a pregnant minor to consent to other medical procedures without formal notice to her parents if she carries the child to term. But a state's interests in full-term pregnancies are sufficiently

> different to justify the line drawn by the statutes. If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few -- perhaps none -- of the potentially grave emotional and psychological consequences of the decision to abort.

450 U.S. at 412-13 (emphasis added) (citations omitted). In other words, the most significant consequences of an abortion decision are often not medical in character but emotional and psychological.

Third, a minor faced with a medical decision that she is authorized to make pursuant to Section 743.065 will not face that question alone, but will have the counsel and advice of the physician who is treating her fetus or child. Such counsel and advice is not generally present in an abortion decision. On this point, the First District Court of Appeal stated:

> In circumstances where non-abortive surgery is necessary, moreover, the patient is more likely to have a substantial relationship with her treating physician. Absent emergency circumstances – circumstances which would eliminate the requirement to notify a parent or guardian anyway – the surgeon is supposed to advise the minor fully of the nature of the procedure and attendant risks and receive informed consent before performing pregnancy-related surgery. This provides an opportunity to give advice specific to the patient about possible post-surgical complications, how to avoid them or minimize the risk of their occurrence, or what to do if they arise.
>
> On the other hand, evidence at trial showed, the physician-patient relationship is often attenuated in the abortion context, almost to the point of non-existence.

State v. North Fla. Women's Health and Counseling Ser., 26

Fla.L.Weekly at D425 n. 3.

This same distinction was made by Justices Stewart and Powell in their concurring opinion in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), where they stated:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

428 U.S. at 91 (emphasis added).

Fourth, our State, as a matter of public policy, has enacted numerous statutes which seek to encourage and assist all pregnant females, whether they are an adult or a minor, to obtain prenatal care.

[5] These statutes are based on the widely acknowledged fact that prenatal care can significantly reduce the risks associated with pregnancy and greatly improve the likelihood of a healthy outcome for both the mother and her baby. When viewed in the context of these statutes and their underlying public policy, it is readily apparent the Legislature was acting consistently when it enacted Section

---

[5] See, e.g., § 383.013, Fla. Stat. (2001) (requiring the Department of Health to establish a statewide prenatal care program); § 383.011, Fla. Stat. (2001) (designating the Department of Health as the administering agency for maternal, prenatal and child health services); § 383.216, Fla. Stat. (2001) (providing for a cooperative effort between the Department of Health and local entities for the establishment of prenatal and infant health care coalitions); § 381.0045, Fla. Stat. (2001) (establishing a targeted outreach program to ensure access to prenatal care services for pregnant women).

743.065. Otherwise stated, when it enacted Section 743.065 the Legislature reasonably determined, as a matter of public policy, that the public health benefits of prenatal care are so overwhelming that they justified allowing a pregnant minor to obtain prenatal care regardless of parental approval.

For the reasons stated above, there are significant differences between the Act and Section 743.065 which justify the Legislature's decision not to require parental involvement before a pregnant minor can obtain prenatal care.

IN RE T.W. IS NOT CONTROLLING.

A. T.W. Is Not A Precedential Opinion.

T.W. was a highly fractured opinion in which a majority of justices agreed on very little. In T.W., only two justices joined in the plurality opinion by Justice Shaw. Three justices dissented, either in whole or in part, from the plurality opinion. The fourth "swing" vote was by Justice Ehrlich who wrote a separate concurring opinion.

One of the justices who joined Justice Shaw in the plurality opinion in T.W. was Justice Kogan. In his concurring opinion in Jones v. State, 640 So. 2d 1084, 1091 (Fla. 1994), Justice Kogan expressed "surprise at the rather widespread practice in Florida of referring to a 'majority opinion' in T.W." Justice Kogan noted that the justices in T.W. were divided into five separate opinions, "none of which garnered the four votes necessary to constitute a precedential 'opinion' under the Florida Constitution." Id.

In Jones, Justice Kogan stated there were only three general holdings on which a majority had agreed in T.W. The three general holdings were: (a) adult women have the right to terminate a

pregnancy; (b) at least six justices agreed that Florida's parental consent statute "read in its literal sense was unconstitutional, though two of the six felt that the deficiencies properly could be corrected through a judicial narrowing construction;" and (c) "at least four Justices – and possibly all seven – agreed that minors do not share the same degree of privacy rights adults possess." Id. None of these general holdings support the legal conclusion that the Act is unconstitutional under T.W. Indeed, the last general holding supports the constitutionality of the Act.

Under Florida's Constitution, a binding opinion is created only "to the extent that at least four members of the Court have joined in an opinion and decision." Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). Since four justices did not join in the plurality opinion, it does not constitute a precedential opinion.

B. T.W. Is Distinguishable.

Even if this Court was to disagree with Justice Kogan and find T.W. to be a precedential opinion, T.W. is clearly distinguishable because the statute at issue in T.W. required parental consent before a minor could obtain an abortion, while the Act now before this Court requires parental notice. As noted by Justice Kennedy in Hodgson v. Minnesota, 497 U.S. 417 (1990), there are substantial differences between notice and consent statutes:

> The difference between notice and consent was apparent to us before and is apparent now. Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an

> abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental," and as one "substantially modify[ing] the federal constitutional challenge." (Emphasis added.)

497 U.S. at 496, quoting Bellotti v. Baird, 428 U.S. 132, 145, 148 (1976) (Bellotti I). Because of these differences, T.W. is not controlling.

In his concurring opinion in T.W., Justice Ehrlich noted that "regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives." 551 So. 2d at 1197. The notice statute established by the Act not only satisfies these requirements, it also meets the compelling state interest/least intrusive means standard. In the preamble to the Act, the Legislature stated that it had found that parents ordinarily possess "information essential to a physician's exercise of his or her best medical judgment concerning the child" and that passage of the Act would serve "to ensure that parents are able to meet their high duty to seek out and follow medical advice pertaining to their children." Clearly, the legislative goal of ensuring that minors receive the best possible medical care constitutes a compelling state interest.

A notice statute also serves the compelling state interest of fostering family unity and protecting the constitutional rights of parents. In upholding the constitutionality of a notice statute, the federal Fourth Circuit Court of Appeals stated in Planned Parenthood of Blue Ridge v. Camblos:

> [A] notice statute serves the compelling state interest in securing inviolate the right of a mother and a father to rear their child as they see fit, and to participate fully in that child's life, as free from governmental interference as constitutionally permissible. It is a fundamental premise of our society that "[t]he child is not the mere creature of the State" and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for," the challenges and decisions of life.

155 F.3d 352, 367 (4th Cir. 1998) quoting Bellotti II, 443 U.S. at 637 (emphasis added).

The notification requirement is also the least intrusive means of meeting the Act's goals. Parental notice statutes have "neither 'the purpose [n]or effect of placing a substantial obstacle in the path of a woman seeking an abortion,' and therefore cannot reasonably be said to unduly burden the minor's abortion right." Camblos, 155 F.3d at 367, quoting Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992). As the Fourth Circuit further reasoned in Camblos:

> [T]he incremental weight added to the young woman's abortion decision through the encouraged parental involvement is an incidental and inescapable consequence of the state's pursuit of its legitimate interests not only in the minor's informed consent and health, but also in preservation of the cardinal right of responsible parents to shape, as they deem appropriate, their children's lives, their beliefs, their values, their morals, their character.

155 F.3d at 372.

Based on the above, T.W. is distinguishable, and does not control the result in this case.

C. T.W. Is Flawed And Should Not Be Followed.

In T.W., this Court acknowledged that the United States Supreme Court had found three reasons justifying the conclusion that states can impose more restrictions on the right of minors to obtain abortions than they can impose on the right of adults: "[T]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." 551 So. 2d at 1194 quoting Bellotti II, 443 U.S. at 634. However, a plurality of the Court found that those reasons were not "sufficiently compelling" in light of what they perceived to be an inconsistency between Section 743.065, which provides that a minor may consent to any medical procedure involving her pregnancy or her existing child, and the consent statute under review in T.W..

T.W. is flawed because the Court failed to recognize that there are, as discussed in Section IV.B. above, fundamental differences between abortion and prenatal care which justify the Legislature treating those two subjects differently. Additionally, the T.W. Court failed to recognize that the parental consent statute was consistent with our State's historic treatment of children differently than adults. For these reasons, T.W. is flawed and should not be followed.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court of Appeal.

Respectfully submitted this _____ day of January, 2002.

STEPHEN C. EMMANUEL
Florida Bar No. 0379646
JOHN R. BERANEK
Florida Bar No. 0005419
Ausley & McMullen
227 S. Calhoun Street (32301)
P.O. Box 391
Tallahassee, FL 32302

AND

THOMAS A. HORKAN, JR.
Florida Bar No. 0037227
VICTORIA H. PFLUG
Florida Bar No. 0656232
313 South Calhoun Street
Tallahassee, FL 32301

Counsel for Amicus Curiae,
FLORIDA CATHOLIC CONFERENCE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has been forwarded as indicated below this day of January, 2002, to the following counsel of record:

Bebe J. Anderson — By U. S. Mail
Julie Rinkelman
The Center for Reproductive Law & Policy
120 Wall Street, 18th Floor
New York, NY 10005

Dara Klassel — By U.S. Mail
Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, NY 10019

John J. Rimes — By U.S. Mail
Office of the Attorney General
Administrative Law Section
PL-01, The Capitol
Tallahassee, FL 32399-1050

Randall C. Marshall — By U.S. Mail
American Civil Liberties
Union Foundation of Florida
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227

Julie Sternberg — By U.S. Mail
Louise Melling
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York NY 10004

Jody Ratner — By U.S. Mail
Center for Reproductive Law and Policy
120 Wall Street, 14th Floor
New York, New York 10005

Richard E. Johnson — By Hand Delivery
314 West Jefferson Street
Tallahassee, FL 32301-1608

Carol Banta
Heather Jones
Wilmer Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

By U.S. Mail

Teresa C. Collett
South Texas College of Law
1303 San Jacinto
Houston, TX 77002

By U.S. Mail

William W. Large
General Counsel
Department of Health
4052 Bald Cypress Way A02
Tallahassee, FL 32399-1703

By U.S. Mail

CERTIFICATE OF COMPLIANCE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

_____

ATTORNEY

\\ausley_law_2\vol1\data\sce\pld\fcc brief supreme ct.doc