IN THE SUPREME COURT OF FLORIDA

NORTH FLORIDA WOMEN'S HEALTH
AND COUNSELING SERVICES, INC.,
ET AL.,

Plaintiffs/Petitioners,

v.

CASE NO.: SC01-843
DCA CASE No: 1D00-1983,
1D00-2106

STATE OF FLORIDA; FLORIDA
DEPARTMENT OF HEALTH; ET AL.,

Defendants/Respondents.
_____/

RESPONDENTS' ANSWER BRIEF

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PRELIMINARY STATEMENT

References to Plaintiffs/Petitioners shall be to "Plaintiffs" and references to the Defendants/Respondents shall be to "State."

The Record on appeal consists of 24 volumes, 14 volumes of lower court materials, including 5 volumes of transcripts of the temporary injunction hearing (volumes VIII-XII), and 10 volumes of trial transcripts which were not given roman numerals by the Clerk of the Circuit Court. Therefore, the State will cite to those 10 volumes as though they followed at the end of the 14 volumes of lower court materials (XV-XXIV). Citations to the record shall appear as (R-vol. no. at page no.). The record also included two packages of exhibits. Citations to the exhibits shall appear as Plaintiffs' exhibits (P Ex. #) and the State's exhibits as (D Ex. #).

Exhibits cited in the State's brief shall be attached Exhibit B of the Appendix, except for Defendants' Exhibit 4, National Abortion Federation 1999 Conference Syllabus, Abortion Care for the 21st Century, Approaches to Difficult Cases, which is under seal. Additionally, to the extent that the State cites to depositions, those portions shall be attached as Exhibit C of the Appendix. The depositions cited here are those which were supplemented into the Record pursuant to Plaintiffs' Unopposed Motion and this Court's Order granting that motion.

INTRODUCTION

"Our cases have made it abundantly clear that the State can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to a child." Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996).

As the First District held, the Parental Notice of Abortion Act (the "Act") is an effort by the Legislature to alleviate the demonstrable harms that can occur when parents' unawareness of a daughter's abortion renders them unable to properly help or respond to completely predictable complications that may arise from the procedure, State v. North Fla. Women's Health And Counseling Ser., _ So. 2d _, 26 Fla. L. Weekly D419 (Fla. 1st DCA 2001). Because it alleviates these harms, the Act directly furthers parents' rights to raise their minor children and, as the First District held, aids them in their corresponding duty to protect their children's health and welfare. Moreover, as the District Court also found, the Act advances these compelling interests in the least intrusive manner while respecting the due process and equal protection rights of minors and medical care providers. Most importantly, as the Legislature intended and as the District Court determined, the Act is fully consistent with this Court's decision in In re T.W., 551 So. 2d 1186 (Fla. 1989).

This Court should concur with the well-reasoned opinion of the District Court and uphold the Act.

STATEMENT OF THE CASE AND FACTS

I. COURSE OF PROCEEDINGS BELOW

Several physicians and clinics that perform abortions and provide abortion services ("Plaintiffs") initiated this litigation to challenge the Legislature's adoption of the Act, which is codified at section 390.01115, Florida Statutes (1999). The Act requires physicians to give 48 hours' notice to a minor's parent before terminating the minor's pregnancy, unless notice is excused pursuant to the statute. Plaintiffs contended that the Act violates minors' constitutional rights to privacy, equal protection and due process, as well as physicians' rights to due process.

The circuit court entered a temporary injunction and then, following a trial, permanently enjoined enforcement of the Act. In its final order the court rejected Plaintiffs' equal protection and due process arguments. However, based on minors' right to privacy under Florida law, the court held the Act unconstitutional (R-v. XIV at 2204).

On appeal, the First District reversed. The court held that real harms to the child could occur if parents were unaware of their child's abortion decision, that the State has a compelling interest in assisting parents in their duty to provide care and medical treatment for their minor children, that the State consistently protected this interest, and that the Act furthered this interest through the least intrusive means. After affirming the trial court's rejection of Plaintiffs' due process and equal protection arguments, the court upheld the Act.

II. THE ACT REFLECTS THE LEGISLATURE'S CONTINUING CONCERN FOR THE WELL BEING OF MINORS WHO WISH TO UNDERGO ABORTIONS

Throughout Florida's history, the disability of nonage has rendered minors incapable of consenting to medical treatment for themselves. Absent parental consent or affirmative permission by law, no physician can treat a minor without exposure to criminal and civil charges of battery. See, e.g., § 743.064(2), Fla. Stat., (exception for emergencies).

In 1979, the Legislature enacted a statute specifically requiring written parental consent, subject to a good cause exception, before physicians could perform abortions on minors. § 390.001(4)(a), Fla. Stat. (1979). This Court declared that statute to be unconstitutional, see In re T.W.

In 1999, aware that many minors were undergoing abortions without any parental involvement, the Legislature enacted the Parental Notice of Abortion Act. Unlike parental consent statutes invalidated in In re T.W., the Act preserves the ultimate right of the minor to decide whether to have an abortion.

In coming to its conclusion that the Act was necessary, the Legislature decided that informing parents of a minor's pending abortion would serve several compelling state interests. These interests are spelled out in the preamble to the Act and include: (1) ensuring that parents are able to meet their "high duty" to seek out and follow medical advice pertaining to their children, stay appraised of children's medical needs and physical condition, and recognize complications that might arise following medical procedures; (2) protecting minors from their own

immaturity; (3) preventing, detecting, and prosecuting batteries, rapes, and other crimes committed upon minors; and (4) protecting parents' constitutional rights to rear their children. Ch. 99-322, Laws of Fla. (copy attached as Exhibit A in the Appendix to this Brief). The Act's preamble concluded with a direct reference to In re T.W. and the Legislature's expressed intent to enact a statute respectful of all persons' constitutional rights.

Plaintiffs' Initial Brief presents an incomplete and argumentative view of the trial below, ignoring the trial court's ultimate finding of fact that the Legislature's supportive findings were so unarguable and sensible as to be "self evident" (R-v. XIV at 2191). The State, therefore, must lay out the relevant facts, largely either undisputed or drawn from Plaintiffs' own witnesses and documents, which clearly show that the legislative findings upon which the Act was based and which are laid out above were borne out by the evidence. As both the trial court and the district court found, parents, if they know about an abortion, can prove to be the best resource to help their child come safely through the procedure.

III. THE FACTS SUPPORT THE LEGISLATIVE FINDINGS UNDERPINNING THE ACT

A. Parent's Knowledge of Their Minor Child's Abortion Aids in the Minor's Care and Recovery.

By letting parents know that their child is going to have an abortion, the Act protects children from harm by ensuring that parents can carry out their "high duty" to preserve their children's health and welfare.

1. Many Minors Undergo Abortions Without Parental Involvement

No party disputes that minors frequently have abortions and that a significant number of those minors are very young. Plaintiffs' demographic expert Dr. Henshaw testified that approximately 7000-8000 minors terminate their pregnancies in Florida each year and that some 2000 of those minors are age 15 or younger. (R-v. XXI at 904-05.) Plaintiffs' medical experts testified that they had performed abortions on minors who had become pregnant as young as 11. R-v. XXI at 912; Watson Depo. at 139-140; Hill Depo. at 9, 23-24.)

There is also no dispute that many minors routinely do not inform either parent when they have an abortion. While others thought that the figure might be higher, Dr. Henshaw testified that 55 percent of minors do not inform either parent of the procedure. (R-v. XVII at 406; R-v. XX at 895.) Dr. Adler, Plaintiffs' expert on the social psychology of minors' abortion decision making, placed that figure at approximately 50 percent. (R-v. XVIII at 546.)

2. A Minor's Decision to Have an Abortion Necessarily Involves Receiving, Attempting to Comprehend, and Acting upon Complex Information

There is no dispute regarding the complexity of information minors receive, must comprehend and then act upon during the process of having an abortion and recovering from it. In all material ways, abortion clinics treat minors no differently than adult women. (R-v. VIII at 1509-1510; D. Ex. 45.) Minors are thus required

to complete and sign numerous forms, some of legal consequence and all of which provide or request information relevant to the abortion and its aftermath.

3. Post-Abortion Care Requires Monitoring and Follow-up

The evidence abundantly supported the fact that all patients who undergo abortions should be monitored to be sure that appropriate medical attention is paid to their condition. (D. Ex. 45 at 39.) Indeed, Plaintiffs' forms state that from the point a patient is sedated or anesthetized, she must be accompanied by someone who will remain with her for the following 24 hours (D. Ex.5H). Thereafter, the patient begins a multiple-week period in which numerous medical conditions, including adverse complications, may manifest. Forms through which Plaintiffs inform their patients make clear that significant, but wholly expected, post-operative conditions include abnormal or unusual bleeding, pelvic cramps, nausea, breast tenderness, breast swelling, and breast discharge. (See, e.g., D Exs. 5F, 13A, 30, 48.)

Moreover, according to Plaintiffs, (1) "common risks and complications" include retained tissue, continued pregnancies; and medicinal reactions; (2) "rare" but not unprecedented complications include hysterectomy, cardiac arrest, hemorrhage, hospitalization, ovarian pain, and injury to the cervix, uterus, intestines or bladder; and (3) reactions to the sedative or anesthesia include respiratory depression, circulatory depression, stroke, brain damage, heart attack, and death, as well as infection, bleeding, drug reactions, blood clots, dizziness, blurred vision, hypertension, hypotension, nausea, vomiting, headache and profuse perspiration.

[D. Ex. 5G, 5H]. Because of the possibility of these complications medical follow-up is advised for all patients. (See, e.g., D Ex. 13).

4. Compared to Adults, Minors Do Not Follow Directions

The State presented the testimony of Dr. Rebecca Moorhead, a Florida obstetrician/gynecologist, who explained that minors typically do not follow post-surgery instructions, including taking prescribed medications and keeping a follow-up appointment with the provider. (R-v. X at 1603-04.) Instead, minors go to the nearest hospital emergency room when complications arise. (R-v. X at 1600.) Dr. Moorhead testified that she was on call three nights a week at a Jacksonville hospital emergency room and that, each week, she saw patients with complications from abortions. Id.

Another witness with extensive experience in clinics providing abortion services, Eric Harrah, reaffirmed that minors returned for follow-up visits far less than adults, adding that minors tended not to take post-operative instruction sheets home out of fear that parents would discover the materials. (R-v. X at 1518-19, 1521.) Harrah also explained that a minor will often ignore such instructions because compliance may allow others to learn of the procedure. (R-v. X at 1524-25.)

5. Parental Knowledge That Their Child Has Had an Abortion Improves the Likelihood That Minors Will Follow Medical Directions

Harrah, Dr. Moorhead, and Dr. Aultman, an Orange Park obstetrician/ gynecologist and a former medical director for Planned Parenthood, testified that

parental involvement improves minors' medical care because parents can ensure that minors follow the prescribed care protocol. (R-v. X at 1523, 1603-04; v. XI at 1666-67.) Minors accompanied by parents consistently held up better through the abortion, made fewer follow-up calls regarding problems, and returned for follow-up visits more often than minors without parents, and whereas minors often did not know enough about their own bodies to ask pertinent questions, parents who accompanied their minor children typically asked more detailed questions and thereby learned valuable information to assist the minors through the process. (R-v. X at 1524-25, 1541-42, 1567-68.) Clinic workers may be short with minors in order to hurry them through the process, but not when a parent is present. (R-v. X at 1542-43.)

Furthermore, the evidence showed that parents' lack of information regarding the procedure directly compromises their ability to provide adequate and necessary medical care for their children. Dr. Moorhead described a 16-year old Jacksonville patient who appeared at an emergency room with complications but did not inform the hospital that she had recently had an abortion. According to Dr. Moorhead the severed uterine artery may have been reparable and the minor's uterus may have been saved had her parents known about the abortion and been able to direct her medical care. (R-v. X at 1600-02.)

A parent's ignorance of a daughter's abortion could lead the parent to unknowingly harm the child. Eric Harrah explained that parents, aware of a minor's discomfort but unaware of its source, have given minors aspirin, a blood

thinner that should not be taken following an abortion. (R-v. X at 1529.) Dr. Aultman testified that her largest concern with minors having abortions is that parents are not aware of the source of post-operative problems. (R-v. XI at 1659.)

A Plaintiff physician, Dr. Ralph Bundy, acknowledged that, from a medical treatment standpoint, it is better to have parents involved and that minors are better served where their parents can assist with medications. (R-v. VIII at 1327-28, 1355.).[1] Ultimately, the trial court not surprisingly found that "having a supportive parent involved is certainly preferable." (R-v. XIV at 2193.)

6. Prior to the Abortion, Parental Involvement Will Help the Child Obtain the Best Abortion Services as Well as Help to Assure That Needed Medical Information Is Imparted to the Provider

The evidence also demonstrated that parental involvement prior to a daughter obtaining an abortion is important. Abortions can occur in hospitals, physicians' offices, and clinics, and, as Dr. Moorhead testified, some centers are often staffed by residents and physicians who have comparably less training than others in providing abortion services. (R-v. X at 1605.) Parents may therefore help ensure the safety of their children by assisting in the selection of a provider. (R-v. X at 1605, v. XXII at 1103-04.) As they would with any medical treatment, parents can

[1]Contrary to all of the other testimony, Plaintiff Dr. Edward Watson implausibly testified that parental involvement would not assist minors in complying with post-operative instructions and that minors are more capable of complying with those instructions and follow-up care requirements than are adults. (Watson Depo. at 147-52.)

be expected to want their daughters to obtain the best abortion services possible. (R-v. XI at 1670-71; v. XXIV at 1401.)

In addition to aiding in the selection and compensation of competent physicians, parents may also assist their minor children in selecting providers who do not limit patients' legal rights in the event complications arise. Eric Harrah testified that clinics where he worked required patients, including minors, to execute multi-paged arbitration agreements. (R-v. VIII at 1509.)

Similarly, the "Important Information" form that Plaintiffs, Dr. Watson and A Choice for Women, require patients to execute includes the following waiver:

> Unless the physician or the clinic commits gross negligence, the patient will be fully responsible for the costs, including other physician and all hospital charges, [of] any complications which occur as a result of the pregnancy termination procedure.

[D. Ex. 5E] (emphasis added). Plaintiff, A Choice for Women, also requires patients to execute a form acknowledging that the clinic's doctors, including Plaintiff, Dr. Watson, do not carry medical malpractice insurance. [D. Ex. 5D]. The form reads as a letter from the doctors to the patient and includes the following: "Due to the malpractice insurance crisis, the price of malpractice insurance has become unaffordable and I have been forced to give up my insurance coverage at the present time." Id. The patient is required to acknowledge both her understanding of this situation and her consent nonetheless to treatment with the uninsured doctors. Id.

Parents may also be a valuable resource to a physician's preparation for performing an abortion. Dr. Moorhead explained that minors are often unaware of pertinent medical history – such as childhood conditions and whether any relatives have had reactions to anesthesia – and that parents are often very useful in providing such information. (R-v. XXI at 1027-29.) Examining one clinic's medical history form, Dr. Moorhead testified that many adults would find it confusing and may not know the meaning of many terms. Id. She gave an example of a pregnant minor who did not know that, as a child, she suffered from a thalamic glioma – a highly dangerous and not uncommon intracranial lesion that had implications for the pregnancy. Id. Dr. Moorhead also testified that certain familial syndromes produce life-threatening reactions to anesthesia, and while obtaining knowledge of such conditions is critical before anesthesia is given, only rarely do minors have such knowledge. Id.

Finally, and no less significant, parents' greater financial resources may also allow minors to obtain medications that are medically indicated but not absolutely necessary. For example, a patient with Rh negative blood may purchase a drug, Rhogam, that will prevent the development of antibodies in the patient if fetal blood enters her bloodstream. (D. Ex. 22A.) As Plaintiffs' documents show, approximately one in eight women has Rh negative blood, and fetal blood enters a patient's bloodstream in approximately five percent of abortions. Id. If fetal blood enters an Rh negative patient's bloodstream and Rhogam is not taken, there are no short-term consequences, but the resulting antibodies will make future pregnancies

difficult if not impossible. Id. Despite the very serious long-term consequences of not purchasing Rhogam (which costs about $35), short-sighted financial concerns may cause minors not to do so. (R-v. XXI at 1054-57.)

7. Notifying Parents about Their Child's Desire to Have an Abortion Does Not Result in Harm to the Child

Notwithstanding Plaintiffs' argument that abortions do not pose material risks to the health of minors, Plaintiffs' Initial Brief posits that minors will be harmed by the Act because it will supposedly delay the procedures and thereby increase minors' risk of health complications. There is, however, no evidence that notice requirements in other states have had any adverse health consequences for minors. Plaintiffs' recitation of the record evidence omits several pertinent pieces of information.

While Plaintiffs recite outdated statistics about the effect of eight-week delays, (In. Br. at 21), Plaintiffs ignore Dr. Moorhead's unrebutted testimony that, in today's practice of medicine, delays of up to 10 days (the longest delays), do not materially increase the chances of any complications to an abortion. (R-v. X at 1644.)[2] Plaintiffs also ignore a study concluding that enactment of a parental

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[2]The maximum delay that the Act contemplates in most cases is 48 hours (§ 390.01115(3), Fla. Stat). In the circumstances where a judicial by-pass is sought the trial court must act within 48 hours of the request (§ 390.01115(4), Fla. Stat.,) or the petition is deemed granted. Even when the trial court denies a petition and an appeal is taken, the Rules of Appellate Procedure require a final determination within 10 days of the filing of the appeal (Rule 9.110(l), Fla. R. App. P.). Plaintiffs' Expert Dr. Henshaw's study shows that in Mississippi, a state with few abortion providers and where minors must comply with a two-parent consent

involvement law in Minnesota did not cause more minors to terminate their pregnancies late, as the number of late term procedures for persons aged 15-17 dropped after the law went into effect. (R-v. XXIII at 1318.) Likewise, Plaintiffs ignore testimony from their own witnesses that abortion visits are often scheduled in advance – thus a "delay" is inherent in the system even absent a notification requirement – and that the 48-hour parental notice could be given when the visit is scheduled. (R-v. VIII at 1364-65; v. IX at 1384.)

Finally, Plaintiffs ignore the State's unrebutted evidence that parental involvement laws do not lead to an increase in birth rates. Rather, studies show that parental involvement laws correlated with a decrease in the pregnancy rate, thus lowering both the birth rate and the abortion rate. (R-v. XXII at 1217-19.)

B. Because Minors Are Not Mature, Parent's Knowledge That Their Child Wants to Have an Abortion Can Help the Minor to Fully Understand the Ramifications of That Decision

The State presented numerous witnesses who testified that, as the Legislature and the trial court found, the capacity for mature judgment and the capacity to become pregnant are not necessarily related. (R-v. XXII at 1106, v. XXIV at 1363-66, 1372-78, 1387-90; R-v. X at 1593-1604; v. XI at 1666-67; v. XII at 1774-75.) Not surprisingly, several of Plaintiffs' witnesses agreed. (R-v. XVI at 294; XVIII at 544, 580; XIX at 704, XX at 876-83.)

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statute, delays of only three (3) days were average. (D Ex. 90A-11 at 121; P. Ex. 10.)

The State also presented numerous witnesses who testified that negative, potentially long-term psychological effects of an abortion may be significant and that minors tend not to understand that fact, in part due to a false sense of invulnerability. (R-v. XXI at 1059-61; R-v. XXIV at 1379, 1382-84.) As explained by an expert in developmental and clinical psychology, sixty percent of adult women have shown some degree of post-traumatic stress from an abortion two years after it occurred, and young adolescents have more such problems than older women. (R-v. XXIV at 1382-84.) Plaintiffs' training documentation for clinic workers also confirmed that extreme negative emotional feelings – including guilt, anger, disappointment, and regret – often follow abortions. (D. Exs. 4 (under seal), 7; R-v. XXI at 1059, 1059-60; v. XXII at 1098-99.)

Finally, the State demonstrated that parents are in the best position to relate to their minor children and therefore that consultation with parents is generally in minors' best interests. (R-v. IX at 1447-55, 1465-67; v. X 1594-1599; v. XXIV at 1401-03, 1437.) Indeed, one of Plaintiffs' expert witnesses agreed that parental involvement in the decision-making process can benefit minors, (R-v. XVII at 430), and the State presented expert testimony regarding the positive social benefits of notifying parents of a minor's abortion and the negative consequences to a family's integrity that flow from the failure to notify parents. (R-v. XII at 1763-70; v. XXII at 1225-26.)

C. Requiring Parental Notification Can Aid in Identifying Those Who Sexually Prey upon Minors and in Deterring Illegal Conduct

This fact is also self-evident. At trial, Plaintiffs' witnesses acknowledged that parents have an interest in determining whether a minor child was unlawfully impregnated and that parents who are notified of a minor's pregnancy may learn who fathered the child. (R-v. XVIII at 562-63, 702.) Parents are presumed to act in their children's best interests and can reasonably be expected to take appropriate steps to alert the appropriate authorities to the identity of anyone who has committed a crime upon their minor children. Plaintiffs acknowledged that one of the chief problems with sexual abuse is the secrecy of the activity; secrecy that is maintained as a result of the minor's paramour surreptitiously sending her to have an abortion. (R-v. XVIII at 561-62; v. XX at 853-54.)

In addition, the evidence suggested that one of the effects of parental involvement laws is to heighten the public's (including minors') awareness of the criminal prohibitions against such illegal sexual activity and, as a result, to deter that conduct in advance.

STANDARD OF REVIEW

The First District's rejection of Plaintiffs' myriad challenges to the Act is subject to de novo review by this Court. State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The Act enjoys a presumption of constitutionality and, whenever reasonably possible, this Court must construe the Act to be constitutional. Capital

City Country Club v. Tucker, 613 So. 2d 448, 452 (Fla. 1993); In re Caldwell's Estate, 247 So. 2d 1, 3 (Fla. 1971).

Furthermore, in enacting a statute, the Legislature is presumed to have intended a constitutional result. Sandlin v. Criminal Justice Standards Comm'n, 531 So. 2d 1344, 1346 (Fla. 1983). The Legislature has the last word on declarations of public policy and its factual and policy findings are presumed correct unless shown to be clearly erroneous. Univ. of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993); Am. Lib. Ins. Co. v. West and Conyers, 491 So. 2d 573, 575 (Fla. 2d DCA 1986). Here, the trial court specifically found the legislative findings underlying the Act to be "fairly self-evident" and supported by the record. By sustaining the Act the District Court concurred.

SUMMARY OF THE ARGUMENT

The First District properly concluded that the Act furthers the State's compelling interest in assisting parents in their duty to provide care and medical treatment for their minor children and that the Act does so by the least intrusive means. Although not reached by the First District (because it did not need to), the State's compelling interests (1) in protecting minors from their own immaturity, (2) in preventing and detecting sexual abuse to minors, and (3) in preserving the integrity of the family also justify the Act.

Plaintiffs' privacy-based challenge to the Act rests on a fundamental misunderstanding of this Court's decision in In re T.W. First, Plaintiffs ignore the fundamental distinction between a consent statute, which deprives the minor of

control over the abortion decision, and a notice statute (like the Act) that preserves a minor's right to choose. The Court in In re T.W. invalidated a consent statute, not a notice statute.

Second, the Court in In re T.W. did not purport to comprehensively define the nature of the State's interests in the "abortion context" generally. In re T.W. and other decisions of this Court, e.g., Krischer v. McIver, 697 So. 2d 97 (Fla 1997), make it abundantly clear that the definition of what constitutes a compelling interest is context-specific. The Court must undertake a careful inquiry of the State's asserted interests in relation to the precise nature of the intrusion effected by the statute under review. A state interest can be deemed compelling in one circumstance but not compelling in a related (indeed, factually similar) circumstance. See Krischer.

Finally, the rigid and formulaic conception of the consistency inquiry advocated by Plaintiffs has never been employed by this Court. Properly understood, the consistency analysis set forth in In re T.W. and other decisions of this Court tests whether the State has offered a reasonable basis for the legislative distinctions that are inherent in the difficult task of setting public policy. As the District Court concluded, any asserted inconsistencies between the Act and similar legislation are either justified or nonexistent.

The Act furthers the State's compelling interests through the least intrusive means. The parental notice requirement embodied in the Act recognizes that, left to their own devices, minors habitually fail to avail themselves of follow-up

treatment; that parents are the most interested and effective counselors of their children; and that judges are in a better position than doctors to oversee the Act's bypass procedures. None of the alternative statutory approaches suggested by Plaintiffs would effectively accomplish the Act's purposes.

The First District also correctly rejected Plaintiffs' equal protection and due process claims. With regard to the former, even assuming arguendo that Plaintiffs have identified disparate treatment of similarly-situated individuals and that such treatment triggers the highest level of judicial scrutiny, the compelling state interests underlying the Act justify that treatment. With regard to the latter: (1) the clear evidence standard is wholly appropriate for an uncontested, ex parte proceeding and by no means vague; (2) a constitutionally necessary scienter standard can properly be inferred from the Act; and (3) the reasonableness standard set forth in the Act is consistent with other disciplinary standards governing physicians and is thus sufficiently clear in the context of notification.

The Act should be upheld in its entirety.

ARGUMENT

I. PLAINTIFFS IGNORE THE CONTEXT-SPECIFIC NATURE OF FLORIDA'S PRIVACY RIGHT ANALYSIS AND MISCONSTRUE THIS COURT'S CONSISTENCY INQUIRY.

Plaintiffs' main contention is that the Act violates minors' right to privacy under Florida law. The right to privacy expressed in Article I, section 23, of the Florida Constitution affords each Florida citizen a general expectation of being let alone, but it by no means offers blanket immunity from governmental intrusion

into one's personal life. See City of N. Miami v. Kurtz, 653 So. 2d 1025, 1027-28 (Fla. 1995). A legislative enactment may legitimately impinge upon a privacy interest if the statute furthers a compelling state interest through the least intrusive means. E.g., J.A.S. v. State, 705 So. 2d 1381 (Fla. 1998)(statute prohibiting sexual contact with minor implicates privacy right but serves compelling interest through least intrusive means).

This Court has recognized that there are State interests which are sufficiently compelling to justify statutory requirements and other forms of government action that impinge upon the right to privacy. In some cases, those legitimate intrusions have required the disclosure of personal information that one might otherwise wish to keep from others, see, e.g., Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983)(required disclosure of medical and psychological history necessary to determine fitness to practice law). In other cases, the Court has upheld intrusions that directly affect the right to make decisions central to an individual's autonomy, see Krischer v. McIver, 697 So. 2d 97 (Fla 1997)(State has compelling interests sufficient to overcome individual's wish for assistance in committing suicide); see also Jones v. State, 640 So. 2d 1084(Fla. 1994)(need to protect minors from harm justifies criminalizing consensual sexual relations between a minor under 16 and an adult).

The Court's prior decisions construing the right to privacy make it abundantly clear that the strength of the State's interest must be evaluated in the context of the nature of the intrusion involved. In In re T.W., for example, the

Court noted that it had more often found a compelling interest in the "disclosural" context than in cases directly involving "personal decisionmaking." Also illustrative of this point is the Court's analysis in Krischer v. McIver.

In Krischer, the Court found the State's interests in the preservation of life, in the prevention of suicide, and in the integrity of the medical profession to be compelling grounds for the State's prohibition of assisted suicide, see id. at 103-04. Also in Krischer, however, the Court recognized that its decisions had deemed these very same interests not compelling when proffered to justify the State's efforts to foreclose a person from refusing life-sustaining medical treatment, see id. at 102, Kogan, J. dissenting at 109-11. Clearly, both the choice to seek assistance in committing suicide and the choice to refuse life-sustaining medical treatment implicate personal decisionmaking in its most profound sense. In fact, the trial court in Krischer had concluded that there was no meaningful difference between those two choices. Nonetheless, based on its careful evaluation of the precise nature of the state intrusion at issue (i.e., the difference between precluding a person from enlisting others' help in committing suicide and forcing a person to accept treatment), the Court deemed the State's interests compelling in one instance, but not the other.

The Court spoke directly to the inherently context-based nature of privacy rights analysis in J.A.S. v. State, supra, 705 So. 2d at 1387:

> [While] it would simplify [the] privacy analysis if we could fashion a precise equation by which all could easily determine which interest should prevail in whatever context a privacy right is asserted .... the

> human experience is not so easily categorized or quantified and no single formula can be crafted for deciding issues which implicate the most personal and intimate forms of conduct and privacy, especially where children are involved. If we blinded ourselves to the unique facts of each case, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general.

The Court's analysis in Krischer demonstrates the error of Plaintiffs' sweeping claim that In re T. W. forecloses State action to protect minors' well being "in the abortion context" generally. The Court in In re T. W. addressed a specific intrusion–a parental consent requirement that deprived minors of ultimate control over the decision whether to have an abortion–and concluded that the State does not have a compelling interest to justify that intrusion. In no way did the Court purport to evaluate whether the state's interest in preventing demonstrable harm to minors justifies the parental notice requirement embodied in the Act. The interests that the State claims justify the Act must be examined independently and in the specific context of the need for parental notification. To the extent that Plaintiffs use In re T. W. as a template to craft a "precise equation" invalidating all efforts of the State to address real harms to children in the "abortion context," their effort must fail.

Courts nationwide have recognized the self-evident point that a parental notice statute is fundamentally less intrusive than a parental consent statute, see, e.g., Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 511 (1990) ("notice statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision"); Planned Parenthood of

Blue Ridge v. Camblos**,** 155 F.3d 352, 363-64 (4th Cir. 1998). Predicated on the notion that a minor is too immature to make the decision to have an abortion, a consent statute deprives a minor of control over the abortion decision. By contrast, a notice statute preserves the minor's right to make the abortion decision, but assists parents in meeting their duty to ensure that the minor's health and well-being are not unnecessarily harmed. Both the concerns addressed by the State and the scope of the intrusion on the minor's privacy right are profoundly different in each instance.

Recognizing the unassailability of the District Court's conclusion that the Act really does address and alleviate demonstrable harms to minors, Plaintiffs resort to the claim that the Act is invalid because it is assertedly inconsistent with other provisions of law. This challenge will be addressed in concert with the discussion of the state interests underlying the Act. Nonetheless, it must be noted at the outset that Plaintiffs misunderstand the role of legislative consistency in this Court's privacy rights analysis.

This Court has never employed its consistency inquiry to require superficially consistent treatment across society wherever a statute touches upon the right to privacy. Clearly the Court recognizes that it is the Legislature's constitutional duty to determine social policy and that the Legislature must have sufficient latitude to draw reasonable distinctions in furtherance of that duty. See Art. II, § 3, Fla. Const. (establishing three separate branches of government); Krischer v. McIver, supra, 697 So. 2d at 104 (holding it is uniquely the

Legislature's role to create social policy and enact laws that further that policy); State v. Ashley, 701 So. 2d 338, 342-43 (Fla. 1997) ("[O]f 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.") (quoting Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So. 2d 644, 646 (Fla. 1986)). A court's consistency inquiry must not be applied in a manner that would undermine the constitutionally-mandated separation of powers.

Recognizing the need to respect the reasonable exercise of legislative discretion, the judiciary's inquiry into legislative consistency is not a formulaic exercise. As explained by the United States Supreme Court:

> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955). See also Mariani v. United States, 212 F.3d 761, 773-75 (3d Cir. 2000); In re Gainer, 466 So. 2d 1055, 1059 (Fla. 1985); United Yacht Brokers, Inc. v. Gillespie, 377 So. 2d 668, 671 (Fla. 1979); see also Austin v. Mich. Chamber of Comm., 494 U.S. 652, 677 (1990) (Brennan, J. concurring) ("One purpose of the underinclusiveness inquiry is to ensure that the proffered state interest actually underlies the law.").

Challenges based on asserted legislative "inconsistencies" only succeed where no sensible basis supports the Legislature's determination to treat apparently similar circumstances differently. This Court's citation in In re T.W. to its earlier

decision in Ivey v. Bacardi Imports Co., 541 So. 2d 1129 (Fla. 1989), makes this plain. The law at issue in Ivey blatantly treated similar parties differently. But that inconsistency alone did not doom the statute. Rather, the Court conducted its own inquiry and determined that the law's inconsistencies were irrational and that the State's asserted interests were largely contradicted by the facts adduced in the record.

In the instant case, the District Court evaluated the "inconsistencies" asserted by Plaintiffs and found them to be either justified or nonexistent. This Court should come to the same conclusion.

II. THE ACT DOES NOT VIOLATE A MINOR'S RIGHT TO PRIVACY.

A. As the First District held, the Act Furthers the State's Compelling Interest in Assisting Parents in Their Duty to Provide Care and Medical Treatment for their Minor Children.

The First District correctly acknowledged the State's compelling interest in "facilitating the ability of parents... to fulfill their duty to provide appropriate medical care for their daughters," North Florida, 26 Fla. L. Weekly at 422. Within the most basic unit of our society – the family – parents hold the legal responsibility for recognizing their minor children's medical needs and securing appropriate medical attention. Failure in these respects may constitute neglect and provide the State with justification to intervene in, and in some cases sever, the parent-child relationship. See § 827.03(3)(a)1., Fla. Stat. (defining neglect to include failure to provide necessary medicine and medicinal services); see also, e.g., Simms v. State, Dep't of Health & Rehab. Servs., 641 So. 2d 957, 959-60 (Fla. 3d DCA 1994) (parental rights terminated based largely on inadequate medical attention).

The United States Supreme Court has long recognized parents' duty to provide appropriate medical care to their minor children, as well as minors' concomitant right to call upon their parents for the discharge of that duty:

> [O]ur constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."

> Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice.

Parham v. J.R., 442 U.S. 584, 602 (1979) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)). Likewise, this Court and other Florida courts have historically acknowledged these respective parent-child rights and duties. E.g., Finn v. Finn, 312 So. 2d 726, 730 (1975) ("It is recognized that a parent has the obligation to nurture, support, educate, and protect his minor children and the child has the right to call on him for the discharge of this duty."); State v. Bollinger, 88 Fla. 123, 126, 101 So. 282, 283 (1924) (same); see also O'Keefe v. Orea, 731 So. 2d 680, 686 (Fla. 1st DCA 1998) ("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."); Variety Children's Hosp. v. Vigliotti, 385 So. 2d 1052, 1054 (Fla. 3d DCA 1980) ("[E]ither or both of the parents of a minor child have a duty to provide reasonable and necessary medical attention for that child.").

The evidence in this case confirms that the Act materially aids parents in complying with their duty to provide appropriate medical care for their children because abortions, however comparatively safe as a surgical procedure, do have attendant risks. At the very least, even in the absence of any complications, having an abortion requires short-term monitoring and medication, as well as temporary limitations on a minor's normal lifestyle, such as no driving and no strenuous activity. (D Ex. 5H, 48.) But even more compelling is the fact that, as the District

Court found and the evidence conclusively indicates, the normal cramping, nausea, tenderness, swelling and bleeding which are the after-effects of an abortion can worsen and turn into complications that Plaintiffs themselves describe as "common." (See, e.g., D Exs. 5F, 13A, 30, 48.)

Plaintiffs contend that the First District's observations regarding the risks attendant to abortions are contrary to the trial court's findings and the record below. As is evident from the trial court's final judgment, the court accepted the legislative findings and did not make any contrary findings of fact. Aside from the fact that the informed consent documents that are given to patients in Plaintiffs' clinics belie this assertion, the District Court did not overstate the health risks that are possible after an abortion. The District Court recognized that abortion is "less risky than other surgical procedures," North Florida, 26 Fla. L. Weekly at 422, but could not ignore the fact that, as with all surgery, complications can occur which have the most severe consequences. To affirm the District Court, this Court need not reject or ignore any of the trial court's findings of fact.

The State's evidence eliminated any uncertainty about the potential severity of post-operative complications and demonstrated that parents can be vital in intervening to alleviate them. Dr. Moorhead provided a real example from her own practice when she testified about her 16-year old Jacksonville patient who lied to her parents about having had an abortion. Had the minor's parents known of the procedure, the delay in medical care that resulted in the minor requiring a hysterectomy may never have occurred. (R-v. X at 1600-02.)

As the First District recognized, a parent unaware that a daughter will undergo an abortion will be unable to help her child cope with its aftermath.

Proceeding with his or her routine decision-making process, a parent may grossly underestimate the significance of a minor's post-operative health concerns and fail to take necessary action that, were the true situation known, would otherwise be taken. Conversely, a parent may take well-intended but nonetheless harmful action based on a misapprehension of the minor's actual condition. In all cases, a parent who is unaware that her daughter has undergone surgery obviously cannot meaningfully assist the child in making a full and complete recovery .

Plaintiffs nonetheless contend that the Act cannot stand because parental notice is not required when a minor decides to carry to term and, as a result, seeks and receives medical care. As an initial matter, by isolating a few asserted inconsistencies in legislative policy, Plaintiffs ignore the fact that Florida has long recognized the disability of minors. At common law, unemancipated minors were prohibited from entering into most non-emergency contractual relationships. Moreover the Florida Legislature has in numerous areas prohibited or restricted a minor's ability to make choices implicating privacy, including marriage without parental consent (§ 741.04(1)); donating body parts (§ 381.0041); consenting to sexual intercourse with an adult (§ 800.04); receiving a permanent tattoo (§ 877.04); obtaining a driver's license (§ 322.09); using a tanning facility (§ 381.89(7); entering into contracts (Chapter 743); or remaining in public places during certain hours (§ 877.22)). The fact that parents need to be involved in their children's decision making thus has a lengthy and respected provenance.

In addition, as discussed previously, the constitution does not require absolute consistency in legislative policy wherever privacy rights are implicated. Rather, the Legislature may permissibly draw reasonable, sensible distinctions in determining public policy. As the First District held, there are sensible, indeed self-evident, reasons for treating pregnancies carried to term differently from abortions. Thus, the exception for treating pregnancies does not undermine the State's compelling interest in assisting parents in their duty to provide minors who have abortions with care and medical treatment.

There is no evidence that minors carrying a pregnancy to term do not normally tell their parents, and the State need not legislate parental knowledge of a minor's condition when it will occur naturally, as it does when a minor carries to term. In fact, Plaintiffs' own expert found that even minors who initially decide to carry to term and then change their mind and seek an abortion are more likely to have told their parents about the pregnancy while they still intended to give birth. (P Ex.11 at 201-02.) However, as Plaintiffs' expert stated, approximately 55 percent of the 7000-8000 minors who abort their pregnancies each year in Florida do not inform their parents of the procedure.

Plaintiffs further maintain that the risks involved in various medical procedures that may be undergone during a full term pregnancy are much more rife with potential complications than having an abortion. The State cannot dispute that carrying to term and giving birth may involve more risks than having an abortion. However, in a normal pregnancy, most of those procedures which are invasive and for which parental aid would be materially useful occur at or near the term's end,

when, as the District Court noted, the pregnancy would be obvious to any parent reasonably involved in the minor's life. Ultimately conclusive for purposes of addressing the reasonableness of the scope of the Act's notification requirement, nothing in the record shows that the pregnancy treatment exception has ever resulted, let alone frequently resulted, in minors not informing their parents before undergoing the sort of medical procedure that – like abortion – would compromise parents' ability to care for the minors if left unaware of the event.[3]

Plaintiffs' attempt to show that the Act is constitutionally flawed due to the fact that parental notice is not mandated when a minor seeks treatment for a sexually treated disease (STD) is similarly unavailing. While parents might be able to better care for their children who are being treated for STDs if they knew of the fact, this possible good, as the District Court held, North Florida, 26 Fla. L. Weekly at 422, pales before the State's undeniably compelling interest in protecting society from the real and present danger of a broader epidemic than sexually transmitted diseases now present. Enabling confidentiality in treating STDs by abrogating the common law parental consent requirement well serves that interest, and, as a result, the State's interest in preventing the spread of those diseases wholly justifies that legislative policy decision.

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[3]Indeed, the trial court's statement (R-v. XIV at 2200.) that minors may carry to term but conceal that fact from their parents was based on pure speculation, as the court acknowledged at the conclusion of the temporary injunction hearing. (R-v. XII at 1802-03.)

B. The Act Furthers Three Additional Compelling State Interests.

The District Court, having found that the Act furthered the compelling state interest discussed above, properly went no further, see Buckley v. Valeo, 424 U.S. 1, 26 (1976) (once the court determines that at least one asserted governmental interest is compelling it is unnecessary to examine additional reasons offered to justify the law under challenge). The Act, however, serves at least three additional compelling interests which will be discussed below.

1. The Act Furthers the State's Compelling Interest in Protecting Minors' Health From Their Own Immaturity

The Act serves the State's compelling interest in protecting minors' health from their own immaturity. By informing parents of a minor's intended abortion, the Act serves this interest in three significant ways.

First, the Act permits parents to participate in the selection of a competent physician, a process which includes navigating through the pitfalls of a complicated decision-making process. Courts have acknowledged parents' superior ability to aid in this regard. For example, in Bellotti v. Baird, 443 U.S. 622 (1970), the United States Supreme Court explained that even 17-year old minors "are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals." Id. at 641 n.22. The Supreme Court added that "[m]any minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent from those that are incompetent or unethical." Id.; see also Camblos, 155 F.3d at 370 ("the

parental notice statute also enables the parents to advise their daughter on her choice of a competent and compassionate physician.").

Second, the Act permits parents to aid the selected physician by ensuring the availability of an accurate medical history. "[P]arents can provide medical and psychological data, refer the physician to other sources of medical history, ... and authorize family physicians to give relevant data." Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 519 (1990) (quoting H.L. v. Matheson, 450 U.S. 398, 411 (1981)). See also Camblos, 155 F.3d at 370 ("parental notice statutes serve the important state interest of ensuring that the physician advising the minor on her abortion decision has access to the child's full medical and, where relevant, psychological history").

The State's presentation of evidence at trial confirmed the necessity of providing accurate medical histories. In addition to the admissions of numerous witnesses regarding the advisability of parental input on a minor's medical history, the State presented the testimony of a mother whose daughter underwent an abortion without parental knowledge. The minor did not inform the physician of her tendency to faint at the sight of blood and opted to take only a sedative for the procedure, during which she fainted. Severe psychological as well as physical complications followed, complications that may have been avoided had a parent been involved to recommend general anesthesia. (R-v. IX 1445-54.)

Third, the Act permits parents the opportunity to counsel and provide emotional support to their daughters contemplating abortion – both before and after it takes place. As the State's evidence showed, and many of Plaintiffs' witnesses

agreed, minors often have not yet developed the ability to inform themselves fully before making important decisions, particularly decisions with long-term consequences. Parents' greater life experience as well as intimate knowledge of their minor children's needs, beliefs, and personalities may provide aid not only in the decision-making process but in minors' efforts to cope during and after the procedure.

This Court has recognized minors' general immaturity and need for protection from inadequately informed decisions. In determining that minors' privacy rights were not violated by a statute that removes from minors under 17, without exception, all capacity to consent to sexual contact, the Court held that Florida has a compelling interest in protecting children from "sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe and healthy for them." Jones v. State, 640 So. 2d 1084, 1087 (Fla. 1994). Subsequently, this Court reaffirmed the State's interest in protecting twelve-year olds "from older teenagers and their own immaturity" by forbidding the former from participating in sexual contact. J.A.S. v. State, 705 So. 2d 1381, 1385-86 (Fla. 1998) (emphasis added).

The fact that parental notification is not required in other contexts does not undermine the Act. While parental involvement would be helpful in aiding a child seeking treatment for STDs or carrying a pregnancy to term, there is no question that the minor's decision to seek such treatment is the only reasonable decision. In comparison, the evidence at trial plainly showed that abortions are nearly always elective and are not medically indicated (unlike treatment for STDs and medical

complications of a pregnancy) and therefore should be made by the minor with the benefit of the best information available. Parents' interest in being aware of their daughter's abortion decision-making process is thus substantial and the differing treatment afforded parental notice of abortion is sensible.

2. The Act Furthers the State's Compelling Interest in Detecting and Preventing Sexual Abuse to Minors

Another compelling interest furthered by the Act is the State's interest in detecting and preventing sexual abuse to minors. The Legislature has made it a crime for any person to engage in sexual activity with a minor under age 16. § 800.04, Fla. Stat. (1999). The Legislature has also made it a crime for any person over age 23 to engage in sexual activity with minors aged 16 and 17. § 794.05, Fla. Stat. (1999). Nonconsensual sexual activity is always a crime. § 794.011, Fla. Stat. (1999).

The Court has previously held that the State has a "very compelling interest" in preventing the sexual exploitation of minors. State v. Schmitt, 597 So. 2d 404, 410 (Fla. 1991). In Jones, as quoted above, the Court also held that the Legislature has both an obligation and a compelling interest in protecting minors from sexual activity and exploitation before their minds and bodies have sufficiently matured. 640 So. 2d at 1087. Certainly, the State has a compelling interest in detecting and preventing sexual abuse of minors.

The Act advances this compelling interest in at least two ways. Parents can find out things from their children that no one else can. Because of this a parent can uniquely aid in the identification of the person that abused their child.

Second, the notice requirement may, actually deter adults from having sex with minors.

The supposed inconsistencies asserted by Plaintiffs – the Legislature's decision not to require parental notification before minors may receive treatment for STDs and during pregnancies – are, once again, sensible decisions on matters of public policy. As explained above, the Legislature has a compelling interest in removing any impediment whatsoever to treatment for sexually transmitted diseases. Furthermore, where a minor elects to carry a pregnancy to term, any parent close enough to the minor to uncover any underlying abuse will learn of the pregnancy absent State involvement. There is no need to require notification.

In sum, the State could hardly advance a more compelling interest for the Act than the detection and prevention of sexual abuse toward minors. The Act plainly furthers that interest.

3. The Act Furthers the State's Compelling Interests in Preserving the Integrity of the Family, Including Parents' Constitutional Liberty Interest in Rearing Their Minor Children

A final compelling interest furthered by the Act is that it preserves the integrity of the family by advancing parents' interests in rearing their children.

It is a long-settled matter of federal law that parents hold a fundamental liberty interest, and thus a constitutional right, in rearing their minor children. E.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925). The United States Supreme Court has deemed it a "cardinal" principle 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." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Thus, in Parham v. J.R., the Supreme Court held that parents have a constitutional right to commit their minor children for psychiatric treatment, even over the minors' objection, subject to oversights for abuse. 442 U.S. 584 (1979). Most recently, the Supreme Court concluded that "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, 66 (2000) (citing cases). Florida constitutional law is in accord. Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 570 (Fla. 1991) (recognizing parents' "longstanding and fundamental interest ... in determining the care and upbringing of their children free from the heavy hand of government paternalism"); see also Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996) (concluding that "[t]he fundamental liberty interest in parenting is protected by both the Florida and federal constitutions."

Absent any good cause exception in particular circumstances, parents' fundamental liberty interest in rearing their children affords them a constitutional prerogative, at a minimum, (1) to be aware of a minor's decision to have an abortion and (2) to be a knowing participant in the minor's care during and following that procedure. See, e.g., Parham, 442 U.S. at 604-05 (balancing minors' right not to be confined in psychiatric hospital with parent's right to rear their children and concluding that parents "retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional

presumption that the parents act in the best interests of their child should apply"); see also Arnold v. Board of Educ., 880 F.2d 305, 318 (11th Cir. 1989) (holding parents stated cause of action under § 1983 for deprivation of their constitutional parenting rights where public school employees acted to prevent parents from learning of a minor's pregnancy).

The Act stands as a legislative compromise to the interests and rights of both parents and minors. A minor may make her own decision, but her parents' constitutional right to rear their child is respected and advanced by ensuring them the opportunity to be involved in both the pre-abortion process as well as the care that must be afforded the child after the abortion has occurred. If this Court were to construe minors' right to privacy under Florida law as precluding a notification requirement that ensures the potential for parental involvement in both of these aspects of a minor's decision to abort, then parents' fundamental liberty interest in rearing their children will be unconstitutionally compromised by the state right to privacy. Constitutionally proscribed interference with parental rights may stem from not only legislative action but judicial action as well. Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998).

Yet, to uphold the Act, this Court need not reach the issue of whether there is a conflict between Plaintiffs asserted reading of the Florida privacy right and parents' rights under the federal constitution. Rather, this Court need only acknowledge the unremarkable proposition that the Act furthers a compelling state interest in preserving the integrity of the family, and advancing parents' constitutional right to rear their children, by ensuring parents' awareness of a

minor child's decision to abort and thus to be meaningfully involved in the minor's care during and after the procedure.

The en banc Fourth Circuit Court of Appeals had no trouble reaching this conclusion when that court examined Virginia's parental notification statute:

> Such 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.

Planned Parenthood of the Blue Ridge v. Camblos, 155 F.3d 352, 367-68 (4th Cir. 1998)(quoting Bellotti v. Baird, 443 U.S. 622, 637 (1979))(emphasis added). The Fourth Circuit also recognized that this state interest is strongest in situations such as the abortion context. Id. (citing Bellotti); see also id. at 384.

The soundness of the Fourth Circuit's conclusions is obvious. The Act furthers the State's compelling interest in preserving the integrity of the family, including parents' fundamental right to rear their minor children.

C. The Act Furthers the State's Compelling Interests Through the Least Intrusive Means

As the Legislature determined, providing notice to a minor's parents shortly before an abortion is the least intrusive means of furthering all of the compelling state interests that underlie the Act. Plaintiffs argue otherwise. They contend that the State should instead: (1) require follow-up steps for post-surgical care, (2) require counseling by physicians or their staffs, and (3) waive notice wherever the

physician believes it to be in the minor's best interests. But under scrutiny none of these asserted alternatives gets at the problems that the Act addresses.

The undisputed reality is that physicians already require all patients to return for follow-up, but minors simply do not do so. (R-v. X 1518-19, 1521, 1524-25, 1600, 1603-04.) Legislation requiring minors to return to the clinic under penalty of law is hardly less intrusive than enlisting parents in the promotion of better aftercare and would likely be of little, if any, effect. In the same vein, clinics already claim that they "counsel" all of their patients, but nothing suggests that providers' physicians or their staffs could "counsel" minors as effectively as would parents.[4] Finally, allowing physicians to waive notification would hardly be less intrusive than providing an independent judicial bypass. Moreover, such a scheme would likely place physicians in conflict with their own patients' wishes. It is a physician's duty to provide quality medical care, not to judge whether good cause exists to waive notice to a minor's parents of an abortion.

Simply put, Plaintiffs' suggested "less intrusive" means of effectuating the Act's purposes would not effectively further any of the compelling state interests that underlie the Act, much less all four.

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[4]Moreover, and in stark contradiction to their expressed belief that additional "counseling" could obviate the need for the Act, many of these very same Plaintiffs have challenged on privacy grounds an effort on the part of the Legislature to require more comprehensive counseling before a woman has an abortion, see State v. Presidential Women's Center, 707 So. 2d 1145(Fla. 4th DCA 1998)(challenging the Women's Right to Know Act, s. 390.0111(3), Fla. Stat.).

III. THE ACT DOES NOT VIOLATE MINORS' EQUAL PROTECTION RIGHTS OR THE DUE PROCESS RIGHTS OF MINORS OR PHYSICIANS

A. The Act Does Not Violate Minors' Equal Protection Rights

Both the trial court and the First District rejected Plaintiffs' claims that the Act violates minors' equal protection rights. Before this Court, Plaintiffs simply incorporate their privacy rights argument and assert that the Act improperly discriminates between minors who choose to abort and those who choose to carry their pregnancies to term. Plaintiffs also argue that the Act impermissibly discriminates between male and female minors. Plaintiffs claim that while male minors may "get tested and treated for sexually transmitted diseases without parental involvement and male minors can purchase contraceptive devices without parental involvement," pregnant female minors who choose to abort must do so with parental involvement. In. Br. at 43.[5]

As both courts below held, Plaintiffs are incorrect. Equal protection analysis inquires as to whether the law properly or improperly discriminates among two sets of similarly situated persons. See Ocala Breeders Sales Co., Inc. v. Fla. Gaming Ctrs., Inc., 793 So. 2d 899, 901 (Fla. 2001). The State does not agree that minors who choose to carry to term and those who choose to abort are similarly situated.

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[5]Plaintiffs ignore that female minors may also be treated for STDs and purchase contraceptive devices without parental involvement, and thus no differential treatment is shown in this regard. Plaintiffs also ignore that only pregnant females have the right to decide whether to have an abortion and only a female may undergo such a procedure, and, thus, males and females are not similarly situated.

However, even assuming that they are, and assuming further that such a classification is subject to the strictest scrutiny, it necessarily follows, as the District Court held, North Florida, 26 Fla. L. Weekly at 422, that for the same reasons that the Act passes scrutiny under a privacy rights analysis it also passes scrutiny under an equal protection analysis.[6]

B. The Act Does Not Violate Minors' Due Process Rights

Plaintiffs next contend that the Act deprives minors of due process. First, Plaintiffs claim the Act is unconstitutionally vague in requiring that minors demonstrate by "clear evidence" an entitlement to waiver of the parental notice requirement. The legislative standard is by no means vague. As the First District held, the Act requires a minor to demonstrate evidence "the sum total of [which] must be of sufficient weight to convince the trier of fact without hesitancy." North Florida, 26 Fla. L. Weekly at 423 (quoting In re Davey, 645 So. 2d 398, 404 (Fla. 1994)).

Plaintiffs contend that the First District's adoption of the aforementioned standard, borrowed from this Court's definition of "clear and convincing evidence" set forth in Davey, amounts to prohibited judicial legislation. On the contrary, this Court has held that constitutionally appropriate deference to the Legislature

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[6]The State does not agree with Plaintiffs' interpretation of the effect of the 1998 amendment to Article I, section 2, of the Florida Constitution and draws the Court's attention to Frandsen v. County of Brevard, 800 So. 2d 757, (Fla. 5th DCA 2001) (effect of 1998 amendment is not to heighten scrutiny of gender-based classifications). Nevertheless, as explained above, Plaintiffs' argument fails regardless of that argument's validity. Therefore, there is no need for the Court to resolve that argument in this case.

requires courts to adopt statutory interpretations that avoid constitutional infirmities, if at all possible. E.g., Capital City Country Club v. Tucker, 613 So. 2d 448, 452 (Fla. 1993). Here, the First District did not invent a standard where none was provided; rather, the court simply interpreted the standard that the Legislature did provide. That standard is by no means vague, and its adoption was wholly proper.

Plaintiffs next assert that the aforementioned standard is too high. To the contrary, the reasonableness of this standard is manifest. Given the fact that the minor proceeds without opposition from any party, a "preponderance of the evidence" standard would be difficult, if not impossible, to apply (as the trial court held (R-v.XIV at 2204)); a "competent evidence" standard would likely be meaningless; and a "beyond reasonable doubt" standard would be far more burdensome. The selection of a clear evidence standard cannot be said to be so high as to violate due process. See Lambert v. Wickund, 520 U.S. 292, 294 (1997); Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 515-16 (1990).

Plaintiffs also contend that the Act should be read to require transcripts to be expeditiously provided to minors without cost. The State has already agreed with that construction, and the First District held that interpretation to be supported by the Act.

C. The Act Does Not Violate Physicians' Due Process Rights

Finally, Plaintiffs' attack on the Act concludes with two challenges based on physicians' right to due process. First, Plaintiffs argue that the Act requires proof of scienter to avoid punishing physicians absent a culpable mental state. The fact

that the First District agreed and held such a requirement to be implied in the Act fails to satisfy Plaintiffs, who cite Wyche v. State, 619 So. 2d 231 (Fla. 1993), to argue that the First District's decision amounted to improper judicial legislation.

Wyche is not authority for Plaintiffs' proposition. There, the Court faced a municipal ordinance riddled with constitutional deficiencies, including substantial overbreadth and a complete lack of specificity with regard to the exact conduct intended to be prohibited by the ordinance. Merely inferring an element of scienter would not have cured those deficiencies, and the Court declined to suppose the drafters' intent and engage in a full rewrite of the provision. Id. at 235-37.

The First District's decision to infer an element of scienter is wholly consistent with, if not required by, this Court's command to interpret statutes, whenever possible, in a manner that avoids constitutional infirmities. E.g., Capital City Country Club, 613 So. 2d at 452. That decision should be affirmed.

Lastly, Plaintiffs argue that the Act is unconstitutionally vague in requiring physicians to make a "reasonable effort" to give actual notice to a minor's parent. The district court rejected Plaintiffs' argument, concluding that regulations governing physicians were commonly couched in reasonableness standards and that "reasonable effort" was sufficiently clear. That decision should also be affirmed.

As the First District pointed out, various regulations governing physicians are commonly framed in terms of objective reasonableness. For instance, section 458.331(1)(s), Fla. Stat., prohibits physicians from being unable to practice medicine with reasonable skill and safety to patients by reason of illness or use of

various substances. In the same statute physicians are prohibited from committing "[g]ross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." § 458.331(1)(t). Most directly comparable to the Act, section 743.0645(2) permits physicians to obtain substitute consent for medical treatment on a minor from various persons when, "after a reasonable attempt," the person who has power to consent cannot be contacted. Objectively defined reasonableness is thus a common and sufficiently clear standard in this context to avoid a constitutional vagueness problem.

Plaintiffs contend that the substituted consent provision of section 743.0645 is inapposite because that statute does not impose disciplinary penalties. However, Plaintiffs ignore that Florida law prohibits treatment of any person without appropriate consent, and where a physician fails to make reasonable efforts as required under section 743.0645, the substitute consent permitted by that statute will not be effective. The physician may then be held civilly and criminally liable for his or her conduct and may be disciplined by his licensing board, see § 458.331(1)(p) (physician may be disciplined for performing services without due authorization).

Furthermore, unlike here, the cases Plaintiffs rely upon involved terms that either were plainly insufficient to inform a reasonable person of what constituted prohibited conduct or were ambiguous in the context of the particular person regulated. In this case, by comparison, requiring a "reasonable effort" to give

parents actual notice is consistent with other regulations governing physicians, including a statute that requires using "reasonable efforts" to contact a person and obtain consent to treatment before a physician may obtain substitute consent.

In sum, the Act's notice requirement is reasonably clear. The decisions of the lower courts rejecting Plaintiffs' due process challenges should be affirmed.

CONCLUSION

The Legislature crafted the Act to foster parental involvement where it is clearly lacking, and the Legislature did so in a manner that avoids the substantive and procedural deficiencies observed in In re T.W. The Act is constitutional and should be upheld in full.

Respectfully Submitted,

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I CERTIFY that this brief complies with the type-volume limitation set forth in Florida Rule of Appellate Procedure 9.210(a)(2). It is typed using the Font Times Roman, 14 point.

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