IN THE SUPREME COURT OF FLORIDA

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

Plaintiffs-Petitioners,

v.

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

Defendants-Respondents.

CASE NO: SC01-843

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

PLAINTIFFS-PETITIONERS' AMENDED INITIAL BRIEF

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2 STATEMENT OF THE CASE

A woman's decision whether to bear a child is a deeply personal matter, for minors no less than for adults. The right to make that decision free from state imposed interference lies at the heart of the right to privacy guaranteed by the Florida Constitution. In this action, Plaintiffs-Petitioners ("Plaintiffs") challenge the Florida Parental Notice of Abortion Act ("the Act") which interferes with that right by requiring that a pregnant minor's parent or legal guardian be notified before a minor may obtain an abortion, with limited exceptions, or that the minor obtain a judicial waiver of the requirement. § 390.01115, Fla. Stat. (1999).

Plaintiffs filed suit before the Act went into effect, seeking injunctive and declaratory relief. (R. v. I, p. 1-34)[1] After a 2-1/2 day hearing, on July 27, 1999, the Circuit Court issued a temporary injunction, which remained in effect until it was superseded by issuance of a permanent injunction. (R. v. V, p. 966-971, 1058)

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[1] Citations to the record are in the form "R. v. #, p. #;" citations to the trial transcript are in the form "TT pg:line;" citations to the transcript of the temporary injunction hearing are in the form "R. v. #, p. page:line." By Order dated December 7, 2001, this Court granted Plaintiffs' request that the record be supplemented to include transcripts of depositions and videotaped trial testimony introduced into evidence at trial. The transcript pages referenced herein are provided in the Appendix filed November 21, 2001, referenced as "App., Tab #, page:line." A copy of the trial court's final decision, R. v. XIV, p. 2188-2205, is also contained in the Appendix, at Tab A.

The State appealed the temporary injunction decision. (R. v. VI, p. 1038-1054) While that appeal was pending, this case proceeded to trial. After a five day bench trial, the trial court issued a Final Judgment Granting Permanent Injunction on May 12, 2000. (R. v. XIV, p. 2188-2205) Based on the evidentiary record, the trial court found that the Act interferes with minors' fundamental right to privacy, but does not further a compelling state interest in that the State allows minors to obtain medical care of the same or greater risks -- such as pregnancy-related care or treatment of sexually transmitted diseases -- without parental notification. (*Id.*)

By decision dated February 9, 2001, the First District Court of Appeal reversed the trial court's final judgment declaring the Act facially unconstitutional. The court concluded that the requirement of parental notice, like the requirement of parental consent considered by this Court in *In re T.W.*, interferes with minors'

right to privacy under the Florida Constitution. 26 Fla. L. Weekly at D421. However, the First District Court of Appeal decided that the Act does not violate the constitutional right to privacy because it serves a compelling state interest in assisting parents to provide abortion aftercare for their daughters. *Id.* at D422. The district court based its ruling on its own factual determinations, which contradicted or ignored the well-supported findings of the trial court.

Plaintiffs filed timely motions for rehearing, for clarification, and for certification with the district court and a motion requesting stay of issuance of the mandate pending review by this Court. By order dated March 26, 2001, the district court granted Plaintiffs' request for a stay of issuance of mandate pending review by this Court, but denied Plaintiffs' other motions. Plaintiffs filed a timely notice

to invoke the discretionary jurisdiction of this Court. By Order dated October 26, 2001, this Court accepted jurisdiction.

III. STATEMENT OF FACTS

A. The Provision of Abortion Services in Florida

The testimony demonstrated that abortion services are provided to young women in Florida in an appropriate and safe manner. Prior to performance of any abortion procedure, all patients are informed about the nature and risks of the abortion procedure, and the patient's reasons for seeking an abortion and postoperative instructions are discussed. (R. v. VIII, p. 1302:10-1306:14, 1315:18-1316:10; R. v. IX, p. 1381:18-1382:14, 1383:9-18; R. v. I, p. 196 ¶ 17) A physician will not perform an abortion if the patient has not provided informed consent. (TT 664:22-665:2; R. v. IX, p. 1390:17-1391:1, 1412:2-10; R. v. I, p.

195-96 ¶ 16; R. v. II, p. 206 ¶ 16) *See also* § 766.103(3)(a), Fla. Stat. (1999) (physicians must obtain informed consent).

After the abortion has been performed, the patient rests in the recovery room. (R. v. VIII, p. 1308:18-1309:14; R. v. IX, p. 1385:14-1386:3) All patients are questioned regarding their relevant medical histories. (TT 644:4-6; R. v. VIII, p. 1306:9-14; R. v. IX, p. 1381:21-1382:6, 1384:15-21) The trial court found that "[m]ost minors, especially older minors, are perfectly capable of relaying the necessary medical information and history to the physician." (R. v. XIV, p. 2193; *see* TT 644:7-646:14; R. v. VIII, p. 1306:15-1307:8; R. v. IX, p. 1382:18-1383:8; R. v. I, p. 195-96 ¶ 16) Moreover, medical tests are conducted that reveal necessary information about the patient's medical condition and history. (R. v. VIII, p. 1339:2-5, 1339:19-1340:9, 1368:6-1369:2; R. v. IX, p. 1382:2-3; TT

644:14-17 [regarding information obtained from vital signs, blood tests, urine samples])

Before the patient is discharged, clinic personnel provide verbal and written post-operative instructions to the patient and a post-operative visit is scheduled. (R. v. VIII, p. 1309:5-1311:11; R. v. IX, p. 1386:4-11, 1432:9-1433:15; *see also*, *e.g.*, Defs. Exh. 13, 48) Typically, patients are prescribed antibiotics and are instructed how frequently to take them. (R. v. IX, p. 1386:7-17; Defs. Exh. 48) Patients are also advised to refrain from swimming, taking tub baths, douching, using tampons, and having intercourse until the time of their postoperative examination. (R. v. IX, p. 1433:16-24; Defs. Exh. 13, 48)

Although the State's witness Dr. Moorhead testified that minors would have difficulty understanding and complying with written post-operative instructions

without parental involvement, she acknowledged that she had no personal knowledge regarding the circumstances under which post-operative information is given to Plaintiffs' patients. (TT 1133:14-1134:25, 1135:10-1136:4) Dr. Moorhead also acknowledged that she lacked personal knowledge of any clinic practices other than in the Jacksonville area, that she has never worked in a clinic that provides abortions, and that her opinions are based in part on a law student's article regarding abortion counseling practices. (TT 1143:21-1144:3, 1149:8-10, 1151:11-14; App., Tab I, 14:20-16:14)

B. The Safety of Abortion Relative to Other Medical Care Not Requiring Parental Notification

1. The Safety of Abortion

"[F]rom the evidence," the trial court found "that abortion is one of the safer surgical procedures." (R. v. XIV, p. 2192) Although abortion is "surgery" in the

sense that it is an invasive procedure, the most commonly used methods of providing abortions in Florida do not involve making an incision. (R. v. VIII, p. 1297:10-20) The likelihood of a woman developing any post-abortion complication is very low. (R. v. VIII, p. 1296:18-1301:4; TT 455:3-456:5; R. v. I, p. 194 ¶¶ 9-10; *id.*, p. 148 ¶ 14; R. v. X, p. 1626:14-1627:12) Moreover, the risk is lowest for abortions performed during the first trimester, when most Florida minors obtain abortions. (R. v. VIII, p. 1300:3-23, 1370:12-21; TT 383:19-387:2; R. v. I, p. 148 ¶ 15; Pls. Exh. 41, Table 16) The most common complications which can occur after an abortion are infection, hemorrhage, damage to internal organs, failure to terminate the pregnancy, and complications resulting from anesthesia or post-operative medications. (R. v. X, p. 1640:17-24; R. v. VIII, p. 1297:21-1299:9 [study based on 250,000 abortion patients concluded risk of

infection is approximately 5 per 10,000, risk of failure to terminate the pregnancy is approximately 12 per 10,000, risk of perforation of the uterus is approximately 3 per 10,000]; *see also* App., Tab B, 32:6-34:5, 41:18-44:17, 58:3-59:21 & Exh. 2, 3, 4 [State's claim regarding the potential link between breast cancer and abortion is not supported by the best scientific evidence on the issue]) However, the overall risk of being hospitalized for any of these complications is only 8 per 10,000 (R. v. VIII, p. 1297:21-1298:16); that is, most abortion complications are minor and dealt with by out-patient treatment.[2]

Medical abortions, using methotrexate and misoprostol, are performed by Plaintiff Dr. Benjamin up to seven weeks of pregnancy as measured from the first

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[2] The associated risks of mortality are also extremely low. For example, the risk of dying from an abortion performed at 9 to 10 weeks is approximately 0.3 per 100,000, or three per one million abortions. (*See* R. v. VIII, p. 1296:18-1297:9; TT 445:1-5, 455:3-456:5; Pls. Exh. 41, Table 19; R. v. I, p. 148 ¶¶ 14-15)

day of the woman's last menstrual period ("lmp"). (TT 666:22-667:11, 693:14-24; R. v. IV, p. 635 ¶ 23) Studies have shown that these drugs are "extremely safe" when used for abortions and treating ectopic pregnancies, and "there have been no known mortalities and no significant morbidities." (TT 667:12-25.)

Very few young women suffer serious emotional or psychological consequences as a result of abortion. (TT 478:5-480:14; *see also* Pls. Exh. 50 & TT 498:18-509:6; Pls. Exh. 54 & TT 512:1-513:11) Although some women experience negative responses after having an abortion, for the vast majority of those women the responses are mild, decline sharply immediately after the abortion, and then decline gradually over the next few months. (Pls. Exh. 6; TT 489:2-490:13, 502:20-503:5; *see also* Pls. Exh. 52, 61, 65, & TT 477:19-478:4,

480:15-498:8, 513:12-514:23 [describing numerous studies of psychological responses to abortion])

2. The Risks Posed to Minors by Medical Care for Which Parental Notification is Not Required

The trial court found that “in no qualitative sense, are the risks higher, or more unique for abortions than they are for childbirth, or for other surgical procedures for which a minor may now lawfully consent without notifying her parents.” (R. v. XIV, p. 2192; *see, e.g.*, TT 391:9-25; R. v. IV, p. 616 ¶¶ 3-4)

Pregnancy poses numerous health risks for minors. The main risks associated with carrying a pregnancy to term are hemorrhage; infection; worsening pre-existing medical complications, such as a seizure disorder or hypertension; risks associated with a cesarean section; and aggravation of chronic diseases, such as anemia, colitis, and bowel problems. (R. v. VIII, p. 1299:20-1300:2; R. v. IV, p. 618 ¶ 8; *see also* TT 649:5-20, 650:17-651:11; R. v. VIII, p. 1369:3-13; R. v. IV, p. 617-18 ¶ 7; R. v. X, p. 1637:15-1639:14) Other chronic conditions may make

pregnancy more dangerous. (*See*, *e.g.*, TT 635:3-7, 640:24-641:11, 648:8-652:20, 655:13-21; R. v. IV, p. 617-18 ¶ 7 [diabetes, arrhythmia, kidney disease, congenital heart disease]) Minors with hypertension are at increased risk of developing toxemia during pregnancy. (TT 636:13-637:2) Asthma is common in young women and an asthmatic attack during pregnancy can be life-threatening. (TT 645:15-16, 646:15-648:7, 652:8-15) Epilepsy is also a relatively common disease among minors, and drugs commonly used for treatment of epilepsy and treatment of asthma are contraindicated for use during pregnancy. (TT 647:2-22, 649:21-650:16, 652:8-21, 657:16-658:8; *cf. id.* 648:8-653:11, 656:3-657:7 [continued use of medications treating various conditions may put pregnant minor's or fetus's health at risk]) Many of these risks occur long before childbirth and even before the minor's pregnancy "shows."

Young women, especially teens, have a higher risk of developing toxemia in pregnancy than do most adult women, which can result in damage to virtually every organ of the body, seizures, and possibly death, and can make delivery by cesarean section necessary. (TT 634:20-635:2, 636:8-637:2, 662:24-25; R. v. IV, p. 617 ¶ 5; R. v. X, p. 1624:23-1625:6 [State's witness]) Pregnant minors face the risk of miscarrying during their pregnancy. Approximately 15% of pregnancies end in miscarriage, which poses risks of heavy bleeding and infection, and even death, and can necessitate a dilation and currettage ("D&C") or a hysterectomy, which will leave the woman infertile. (TT 634:3-14, 637:16-639:7; *see also* App., Tab D, 53:17-24 [State's witness sees many women in emergency room due to complications from miscarriages]; Pls. Exh. 41, Table 19 [mortality from miscarriages]) From approximately 13 to 26 weeks lmp, late spontaneous

abortions can occur, which pose greater risks than miscarriages, including the risk that the woman might rapidly bleed to death. (TT 634:15-19, 636:8-10, 639:11-640:23; *see also* Pls. Exh. 41, Table 19 [mortality from spontaneous abortions]) Compared to adults, minors are also at heightened risk for preterm labor, which poses risks of hemorrhage and infection and may necessitate medical procedures to forestall delivery. (R. v. X, p. 1625:12-25, 1638:22-1640:10 [State's witness]; TT 634:3-19, 636:8-10; *see also* R. v. IV, p. 617 ¶ 6 [medications to forestall delivery can pose life-threatening risks])

Medical procedures used during pregnancy, including intrauterine fetal diagnostic tests (such as amniocentesis), pose risks to the patient. (R. v. VIII, p. 1301:5-19; R. v. I, p. 194 ¶ 12; R. v. IV, p. 618 ¶ 8) Fetal intrauterine surgery

poses risks comparable to those associated with a cesarean section. (R. v. I, p. 195 ¶ 13; R. v. X, p. 1624:4-12 [State's witness])

Significant risks are associated with delivery. Minors are more likely than adult women to deliver by means of cesarean section. (TT 662:19-663:6) Cesarean section is a major invasive surgical operation and associated risks include injury to surrounding organs, hemorrhage, infection, and death. (TT 635:12-18, 637:3-15, 660:24-662:15; *see also* R. v. IV, p. 618 ¶ 8; R. v. X, p. 1623:22-1624:12 [State's witness]) Vaginal delivery also poses risks to minors, including hemorrhage; infection; lacerations of the cervix; crushing of the urethra; tearing of the muscular and connective tissues of the pelvic floor; and even death. (TT 635:8-12, 659:7-660:19) Even abortions at late gestational ages are safer than childbirth in terms of both morbidity and mortality. (TT 391:9-25; R. v. IV, p. 616

¶¶ 3-4 [rate of death from pregnancy and childbirth in Florida is 9.7 deaths per 100,000 births].) Moreover, teen motherhood adversely affects the economic and educational future of minors: teen mothers are much less likely to finish high school, are more likely to have no job or a low-paying one, and have reduced economic potential. (*See, e.g.*, TT 371:20-373:17, 1416:17-1417:5; App., Tab C, 75:11-80:16, Exh. 6)

Minors may undergo these risks without parental knowledge of their pregnancy. The trial court found that

> [a] pregnant minor will eventually "show" in most cases, but some minors conceal their pregnancy for several months and some even deliver their babies without their parents knowing about it. By the time a minor "shows," it may be too late for a parent to counsel her child as to the abortion decision as it may be too late to safely, or legally, choose abortion. Thus, just as an abortion cannot be undone, neither can the decision to carry to term be revoked after a certain point.

(R. v. XIV, p. 2200; *see also* R. v. III, p. 449 ¶ 29 [minors have given birth without parental knowledge]; Section II.D.2.b, *infra* [regarding limited availability of

abortions beyond 18 or 20 weeks lmp in Florida]) Moreover, although parents may be aware of the pregnancy, they are not necessarily involved in or aware of all of the minor's medical decisions relating to the pregnancy. (R. v. IV, p. 618 ¶ 9)

A minor who fails to obtain pregnancy-related care faces significant health risks. The trial court found that "the earlier prenatal care begins, the better." (R. v. XIV, p. 2200; *see also* TT 1147:25-1148:6; R. v. XI, p. 1723:10-1724:6, 1731:6-12 [State's witnesses]) Prenatal care includes advice about adequate nutrition, which is crucial during the very first weeks of pregnancy, because the developing fetus can deplete the minor's stores of nutrients such as calcium and iron -- which can lead to anemia -- and it may not be possible to correct those early deficiencies later. (TT 316:21-320:19) Early medical care after a positive pregnancy test is also important due to the risk of ectopic pregnancy, which can be life-threatening to the

pregnant minor. (R. v. IV, p. 635 ¶ 22; TT 1043:20-1044:24, 1173:25-1174:16 [State's witness])[3]

Furthermore, as the trial court found, emotional and psychological consequences flow not only from the decision to have an abortion, but also from "the decision to carry a pregnancy to term, to remove life support for your infant child, or to give your child up for adoption." (R. v. XIV, p. 2192; *see, e.g.*, TT 1416:17-1417:10, 1419:5-10 [State's witness Dr. Elkind testified regarding psychological harms result from teenage motherhood]; R. v. X, p. 1639:15-17 & App., Tab H, 66:25-68:8, 167:1-20 [State's witnesses regarding psychological and adjustment complications that result from carrying to term and giving child up for

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[3] Pregnant minors also need to avoid alcohol, nicotine, prescription drugs, and illicit drugs early in their pregnancy, because those substances may pose risks of interfering with organ formation of the early developing fetus. (TT 316:21-317:2, 320:20-321:5, 322:1-17, 323:5-324:14)

adoption]; App., Tab C, 68:16-73:3 & Exh. 6 [study comparing psychological status of minor women who had abortions with those who carried pregnancies to term found that the former had experienced a greater decrease in levels of anxiety after two years than had the latter group])

In addition, as the State's witnesses testified, minors face serious health risks if they contract a sexually transmitted disease ("STD") and fail to obtain treatment or to correctly follow treatment instructions for such diseases. Delay in obtaining treatment for STDs can result in infertility; failure to follow a prescribed treatment regimen can even be fatal. (*See* App., Tab H, 141:12-142:4; *id*., 144:8-145:4; TT 1147:12-24; *see also* R. v. X, p. 1595:14-1597:4, 1615:10-1617:8 & R. v. XI, p. 1664:14-1666:21 [regarding importance of involving parents for treatment of STDs])

C. The Decision-Making Ability of Minors

The trial court found that

> [m]aturity is a relative term, and gradually developed. A person does not magically become mature and able to make informed decisions upon reaching the age of 18 years - or even much older. . . . Some 16 and 17 year olds are more mature than some adults in their 20's, 30s - or older - and these minors are often just as able, or better able, than some adults to make informed decisions and exercise sound judgments, taking into account both immediate and long range consequences of their choices.
>
> * * *
>
> [G]enerally, the younger and less experienced the minor the less her ability to exercise judgment.

(R. v. XIV, p. 2191-2192)

Studies of the decision-making ability or cognitive competency of minors have found that "[b]y middle or later adolescence, minors have the capacity to reason abstractly about hypothetical situations, reason about multiple alternatives and consequences, consider multiple variables, combine variables in more complex ways, and use information systematically in arriving at a decision." (Pls. Exh. 53 at p. 147-48; *see also* TT 530:20-533:23, 1412:8-19, 1426:8-1427:9) Minors, as a

group, can weigh the consequences and understand the risks and benefits of an abortion decision. (TT 518:10-19, 564:9-21; *see also id*. 527:5-530:14 [study found that minors under 15 and those aged 16 to 17 who were seeking abortions were as competent as the 18 to 21 year old women]; Pls. Exh. 55 at 18-19 & Pls. Exh. 63 at p. 86 [few age-related differences found in adolescents' abilities to make decision whether to abort, carry to term, or put child up for adoption]; TT 516:17-518:8, 518:20-524:25, 555:18-556:11, 745:21-746: 21 & Pls. Exh. 51 [supporting conclusion that minors are rational in their decision-making in the abortion context]; TT 525:8-526:21, 576:18-577:22, 772:19-773:15 & Pls. Exh. 58 [studies of adolescents have shown that they do not have a greater sense of invulnerability than do adults]; TT 555:24-556:6, 741:24-743:9, 774:13-21,

777:20-778:3 [explaining why minors' decision-making in abortion and contraceptive use contexts may differ from decision-making in other contexts])

Moreover, the need for minors to make decisions that will have both immediate and long-range consequences arises in other contexts, in which the Legislature has not required parental notification. The trial court found that

> [a] minor is no more mature, or better able to make informed decisions as to carrying a child to term, or determining medical treatment for her child, or giving her child up for adoption.

(R. v. XIV, p. 2199) In fact, data indicate that a minor who has gone through the decision-making process of choosing abortion and who has negotiated the health system in order to effectuate her choice is more likely to be mature than a pregnant minor who continues a pregnancy, who may simply have avoided making a decision. (TT 568:16-570:16, 571:16-24; App., Tab C, 86:10-87:11) Moreover, studies have found that adolescents who are seeking abortions tend to have more future perspective than those who are continuing their pregnancy to term. (TT 596:20-599:4; Pls. Exh. 28, 54)

Under Florida law, the pregnant minor who is continuing her pregnancy may decide on her own what pregnancy-related care she will seek and receive. §

743.065, Fla. Stat. (1999). (*See also* TT 651:12-652:7, 1168:24-1169:5) For example, a minor who is in the advanced stages of toxemia may decide without parental consultation whether to try to continue the pregnancy a little longer in order to give the fetus a better chance of survival or to deliver the fetus immediately in order to save her own life or health. (R. v. IV, p. 617 ¶ 5) Similarly, although the presence of fetal anomalies in the fetus can pose health risks to the pregnant woman if she continues her pregnancy, a minor may choose, without parental involvement, to continue her pregnancy despite those health risks. (TT 663:11-664:21) The decision of whether to undergo a cesarean or vaginal delivery also entails complex choices and requires a minor to weigh increased risk to herself from the cesarean delivery against increased risk to the fetus from

forgoing that option and delivering vaginally. Yet the minor may make this decision alone. (R. v. IV, p. 618 ¶ 8)

As Dr. Elkind, one of the State's witnesses, testified, the Act's distinction between minors choosing abortion and minors choosing to carry to term is psychologically inappropriate. (App., Tab F, 59:17-23) In his view, it is "equally important" to have parents involved in the decision-making process whether the minor wants to choose abortion or birth. (TT 1441:3-22; *see also id*. 1363:23-1364:12, 1414:23-1415:1 [decision-making ability doesn't change if minor decides to carry to term], 1415:2-22; App., Tab H, 124:14-125:8 [State's witness Dr. Greene testified that decisions to abort and to carry to term are equally difficult for a minor]; R. v. XII, p. 1802:16-1803:10 [State's witness Dr. Figley testified regarding importance of parent knowing minor is pregnant so parent can assist

minor in decision-making before it is too late to exercise choice to terminate

pregnancy])

D. The Effect of the Act on Minors Seeking Abortions

1. The Fears and Concerns That Motivate Minors to Avoid Parental Consent Also Motivate Them to Avoid Parental Notice.

In the absence of a parental involvement law, a great many minors -- especially young minors -- inform a parent of their pregnancy and intent to have an abortion. (*See, e.g.*, R. v. VIII, p. 1323:20-22, 1324:12-22, 1359:17-1361:5; R. v. IX, p. 1392:1-11, 1403:6-11; TT 670:13-671:12; R. v. I, p. 195-97 ¶¶ 15, 18-19; R. v. IV, p. 618 ¶ 9; *see also* TT 402:24-406:24, 905:20-906:17 & Pls. Exh. 11 [study of minors seeking abortions in states without parental involvement laws found that in approximately 61% of cases at least one parent knew of minor's intent; only 10% of minors under 15, compared to 49% of 17-year olds, had abortion without knowledge of a parent]; TT 545:2-547:1; App., Tab J, Exh. 6; App., Tab C, 51:10-54:6, Exh. 5) The Act will affect those minors who do not want their parents to know of their pregnancy and/or decision to have an abortion. As the trial court found, "there are some minors who have good reason not to want to have their parents consulted when they see a physician about an abortion." (R. v. XIV, p. 2194) The reasons minors give for not informing their parents -- in Florida and in

states with parental involvement laws in effect -- demonstrate that minors fear parental notification for the same reasons that they fear parental consent.[4]

Some young women who do not tell a parent fear that physical or emotional abuse will result if the parent knows of their pregnancy and intended abortion. (R. v. XIV, p. 2194 [trial court decision]; *see, e.g.*, R. v. VIII, p. 1327:12-25; R. v. IX, p. 1406:6-20; TT 76:7-11, 244:7-10, 253:23-24, 672:20-673:12; R. v. I, p. 197 ¶¶ 20-22; R. v. II, p. 207 ¶¶ 20-22; *id.*, p. 217-19 ¶¶ 17, 19-22; R. v. IV, p. 618 ¶ 9) For example, a minor who sought a judicial bypass in Minnesota testified that her father had physically abused both her and her mother in the past, and that she had witnessed her father break her mother's wrist two weeks prior to the bypass hearing. This minor feared that her father would react with similar violence to

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[4] In Massachusetts, which requires parental consent, minors seek judicial bypasses more due to fear that parents will learn of their pregnancy or their sexual activity than fear that parents will refuse consent. (*See* TT 119:21-120:7)

news of her pregnancy. (TT 254:4-13) Other minors fear parental reactions such as being forced to leave home and the termination of financial support. (TT 76:4-11, 245:7-12; R. v. II, p. 216 ¶ 15) Still other minors who wish to obtain an abortion without parental knowledge fear emotional abuse from a withdrawn, unsupportive parent (TT 254:14-21), or emotional and physical abuse from an alcoholic parent. (TT 245:4-6; *see also* R. v. II, p. 216 ¶¶ 14-15) If a minor in a physically or emotionally abusive home is forced to notify a parent about her intention to obtain an abortion, there is a high likelihood that the minor will suffer further physical abuse and a possibility that emotional abuse will escalate into physical abuse. (TT 734:23-735:11, 788:12-789:8) In two-parent households, notifying only the non-abusive parent is not a solution for a minor because this parent tends to be highly dependent on the abuser and is therefore likely to reveal

the information to the abuser either directly or indirectly. (TT 792:10-793:9; R. v. II, p. 216-17 ¶ 16) Some minors do not want to notify a parent about their intended abortion because they believe the news will harm a parent who has been ill, lost a job, or is under great stress from other sources. (TT 244:10-12; R. v. I, p. 197 ¶ 23; R. v. II, p. 217-18 ¶¶ 18-19)

Where parental notification is forced, minors have suffered a number of negative consequences. (*See, e.g.*, TT 406:25-409:16; R. v. II, p. 216-17 ¶ 16; R. v. IV, p. 638-42; Pls. Exh. 11) Witnesses who testified on behalf of the State acknowledged that some minors will be exposed to negative consequences if they are forced to notify their parents of an abortion. (*See* TT 1306:12-1307:2 [some parents might be abusive]; *cf. id.* 1416:10-21, 1421:17-1424:2) [unsupportive reaction to daughter's pregnancy "not that unusual"]; App., Tab H, 152:22-153:25,

157:3-19 [estimates ten percent of parents he has counseled are not supportive of daughter's decision regarding her pregnancy])

A parental notification requirement can serve to give parents a *de facto* "veto" over minors' ability to obtain an abortion, effectively depriving them of the ability to exercise their choice to terminate their pregnancy. For instance, a minor seeking a bypass in Massachusetts reported that her mother had forced her to carry a previous pregnancy to term against her will; after school personnel informed this minor's mother of the minor's decision to seek a bypass, the minor never appeared for her scheduled court hearing. (TT 112:13-25, 168:8-14; *see also* R. v. I, p. 197 ¶ 22; R. v. II, p. 218-19 ¶ 21; R. v. IV, p. 618-19 ¶ 10) Minors forced to carry to term will face significant medical risks, as well as other adverse effects. (*See* Section II.B.2, *supra*)

The Act will harm even those young women whose fears of parental notification are actually mistaken or exaggerated. The trial court found that

> [e]ven if their fear or concern is irrational, it is very real to them. This fear of disclosure will motivate some minors to go to great lengths to avoid it, including delaying their decision to abort, thus increasing the risks, concealing their pregnancy, going to some other state where notice is not required, or seeking an illegal abortion.

(R. v. XIV, p. 2194; *see* Section II.D.3)

2. Some Minors Will Suffer Harm from Delay in Obtaining Abortions as a Result of the Act.

a. The Act Will Delay Minors' Abortions for Many Reasons.

The Act will result in delay for many reasons. A minor who cannot voluntarily involve her parent in her pregnancy and/or planned abortion is faced with the following alternatives: notifying a parent, having a physician notify a parent, going through a court process, or dealing with her pregnancy in some other way (i.e., carry to term, travel out-of-state, self-abort). (*See* TT 394:13-18, 673:13-674:1; *see also* Pls. Exh. 45 at p. 174 [in survey of abortion patients, 63% of the minors having abortions at 16 or more weeks gestational age cited fear of telling their parent or partner as a reason for their delay in obtaining an abortion]) Having to decide among those alternatives will cause delay, and further delay will result from whatever alternative the minor chooses.

For minors, confidentiality of services is one of the most important factors determining whether they will seek health care, in particular medical care related to sexual matters. (*See* TT 547:21-548:25; App., Tab C, 30:16-31:6, 45:3-46:14 & Exh. 2, 3, & 4; *accord* R. v. XII, p. 1800:24-1803:15; R. v. XI, p. 1695:16-25; App., Tab E, 110:3-111:16 [State's witnesses]) Given this concern, parental involvement laws in general delay minors in obtaining abortions as the minors attempt to find ways to circumvent the parental involvement requirement. (*See* TT 82:1-6; App., Tab C, 30:4-31:1, Exh. 2 & 3)

If a minor decides to have the abortion provider notify her parent, her abortion will probably be delayed for longer than the 48-hour statutory notice period. Many clinics and physicians' offices at which abortions are performed provide those services only on certain days of the week. (*See, e.g.*, R. v. I, p. 198-

99 ¶ 26; R. v. II, p. 208 ¶ 25) Thus, for example, if a physician provides a parent with actual notice on a Saturday, the minor may not be able to return for an abortion until the following Thursday when the physician is back in the office. (*Id*.) Moreover, some minors in Florida must travel great distances in order to obtain an abortion (R. v. I, p. 147 ¶ 11); if required to make two trips to the clinic, the minors may be unable to return within 48 hours due to their own scheduling and transportation difficulties. (*See* R. v. I, p. 151 ¶ 26; R. v. II, p. 208 ¶ 25)

If, on the other hand, a minor decides to seek a judicial bypass, she will experience delay associated with initiating and going through the court process, including difficulties in finding times when she can confidentially be absent from her school, work, or home in order to go to court. In Massachusetts, the delay occasioned by the judicial bypass requirement, as measured from the time that a

minor first contacts an attorney-referral line to the time she receives the procedure, is approximately two weeks. (*See* TT 120:8-16) The same sources of delays from using the bypass exist irrespective of whether parental consent or notice is required: difficulties for the minor in filing a petition, contacting lawyers, and arranging to appear in court. (TT 105:12-106:5)[5] Minors also experience delay due to inability to attend a hearing on the earliest possible court date, conflicts with school, difficulty arranging transportation to court, or difficulty in locating the courthouse in a strange city. (TT 98:1-11, 100:3-16, 104:12-16; R. v. II, p. 219-20 ¶ 25; R. v. IV, p. 647 ¶ 7) In addition, some minors will travel to a court in a

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[5] For instance, minors often encounter difficulties in placing calls to attorneys and attorney-referral lines due to lack of access to a confidential phone. (TT 95:6-96:3; R. v. IV, p. 646-47) Additionally, most minors cannot have an attorney call them back, for fear that parents will intercept the call, and therefore must repeatedly phone the attorney to reach him or her in person, which often takes several days. (TT 90:8-11, 94:15-95:15, 96:17-20; R. v. IV, p. 646-47 ¶ 6)

distant location rather than going to a local courthouse where a relative or neighbor may work. (TT 101:18-24, 102:13-23; R. v. IV, p. 647 ¶ 8)

Studies that have looked at the relationship between implementation of parental involvement laws and the gestational age at which minors have abortions support the conclusion that such laws result in some minors experiencing delay in obtaining an abortion. (TT 395:5-402:18, 445:7-14, 448:1-449:3, 450:12-451:22, 456:6-20, 1298:7-1299:25; Pls. Exh. 10, 42, 43; R. v. III, p. 522-30)

b. Delay in Obtaining an Abortion Will Cause Harm to Minors.

As the trial court found, although abortion is one of the safer surgical procedures, the risks associated with it increase as the pregnancy progresses. (R. v. XIV, p. 2194; *see* R. v. VIII, p. 1370:12-21; R. v. I, p. 148 ¶ 14) After approximately eight weeks lmp, the risk of complications from an abortion increases by about 20 percent for each week of delay in obtaining an abortion; the complication rate is thus greater for second trimester abortions than for first trimester abortions. (TT 383:19-387:2) At thirteen to fifteen weeks gestation, the

risk of mortality from an abortion is nine times as great as at eight weeks or earlier. At sixteen to twenty weeks, the risk of mortality is nineteen times greater than at eight weeks or earlier. (R. v. I, p. 148 ¶ 15)

Delay may even deprive the minor of the ability to exercise her choice to terminate her pregnancy. Abortion providers vary in how late in a pregnancy they offer abortion services, and the number of available providers decreases as pregnancy advances. (*See* TT 668:1-669:15 [some areas of Florida have very few providers who will perform an abortion beyond 18 or 20 weeks lmp; the only providers who will perform abortions up to 24 weeks lmp are located in Orlando, Tampa, and the West Palm Beach area]; R. v. IX, p. 1393:17-1395:6 & R. v. II, p. 213 ¶ 3, 219-20 ¶ 25 [for the Tallahassee area, the nearest places where abortions later than 14 weeks lmp can be obtained are Atlanta, Jacksonville, and possibly Gainesville]) Thus, depending on where she lives, a minor may not be able to

obtain an abortion locally later in her pregnancy, thus making it more likely that delay will prevent her from obtaining an abortion at all because she cannot afford the expense and further delay of travel to a distant location.[6]

Minors tend to obtain abortions later than adult women. This occurs because minors do not recognize their pregnancy as quickly, are hesitant to involve their parents or others, and need time to make arrangements and gather the resources for having an abortion. (TT 388:5-390:19 & Pls. Exh. 45; R. v. II, p. 207-08 ¶¶ 23-24; *id.*, p. 220-21 ¶ 26; R. v. I, p. 198 ¶ 24; Pls. Exh. 41, Table 16) As a result, for

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[6] A minor's ability to obtain an abortion locally or at all also will be reduced by some providers' reluctance or unwillingness to perform abortions on minors, due to the risk of violating the Act. (*See* R. v. VIII, p. 1318:19-1319:24 [regarding difficulties when parental consent law in effect]; *id.*, p. 1359:12-16; R. v. II, p. 204-05 ¶ 10, 209-10 ¶¶ 29-34; R. v. I, p. 200 – R. v. II, p. 201 ¶¶ 31-36 [regarding difficulties of ensuring notification requirements are satisfied]; *see also* R. v. VIII, p. 1329:13-1330:1; TT 671:20-672:12; R. v. IX, p. 1397:15-1398:22 [regarding providers' reluctance to perform abortions for minors if Act is in effect])

minors even short delays pose the risk of pushing the abortion to a stage where the risks are greater or an abortion is not available.[7]

3. The Judicial Bypass is Not a Viable Alternative for All Minors and Minors Will Suffer Harm from Using It.

a. The Judicial Bypass Procedure Poses Problems for All Minors Who Attempt to Use it.

Minors using the judicial bypass procedure may also experience other harms, in addition to delay. (*See* Section II.D.2, *supra*) The trial court found that

> [h]aving to speak to a guardian ad litem and/or attorney, coming up before a judge and other court personnel can be embarrassing and intimidating. The chance of a breach in the confidentiality requirement is a real possibility, especially in small communities.

(R. v. XIV, p. 2201-2202)

The judicial bypass system is emotionally difficult for young women because of the anxiety caused by explaining absences to school personnel, arranging for transportation, and other logistics surrounding the hearing, as well as

[7] For those minors who learn of their pregnancy early and make an early decision to terminate their pregnancy, even short delays may make medical abortions unavailable to them. (*See* TT 666:22-667:11, 710:21-711:3 [medical abortions using methotrexate and misoprostol can be performed effectively only prior to 7 weeks lmp and RU 486 (mifepristone) can be used only up to 9 weeks lmp])

the prospect of discussing intimate details of their life with a judge. (*See* TT 81:13-25; R. v. IX 1395:14-1396:9; R. v. II, p. 208-09 ¶ 26; R. v. I, p. 199 ¶ 27) The bypass hearing itself is particularly stressful for minors. (TT 250:1-2 [hearings are a "nerve-wracking, anxious time" for minors]; R. v. II, p. 209 ¶ 27; TT 116:8-21 [regarding great anxiety, stress, nightmares and insomnia experienced by minors seeking judicial bypass]; *see also* App., Tab G, 39:21-40:7 & TT 1445:22-1446:20 [State's witness Dr. Figley acknowledged minor would find it stressful to tell a judge about her pregnancy and her desire to obtain an abortion])

Regardless of the confidentiality guarantees in the Act, a judicial bypass process by its nature cannot guarantee confidentiality to minors and in a number of ways increases the possibility that minors' confidentiality will be breached. (TT 82:7-11, 258:1-5) Minors must come to the courthouse in order to file the petition

and attend a hearing. These visits expose them to the scrutiny of court personnel and members of the public present in the courthouse, who in some instances may be related to the minor or may know the minor's family. (TT 258:15-259:1; R. v. IV, p. 647 ¶ 8) Minors from small rural areas, in particular, may have family members who work in the court as judges, court reporters, notary publics, or clerks. (R. v. IX, p. 1393:6-16)

Moreover, minors must shoulder the expense and other difficulties of traveling to court for the hearing. (*See* R. v. I, p. 147-48 ¶ 12-13 [travel imposes burdens of expense and time, especially on young women]; R. v. IV, p. ¶ 8; TT 101:18-24, 102:13-23) In addition, because the bypass hearings are likely to be held during the school day, minors will be forced to account to school personnel

and parents for school absences, which can further jeopardize their confidentiality. (TT 108:22-109:2, 111:2-9, 112:13-25, 258: 20-22; R. v. I, p. 199 ¶ 28)

The trial court found that, rather than going through the judicial bypass procedure, some minors, "without doubt, will seek at all cost to avoid telling their parents, including going to other states, having illegal abortions, or self-inducing abortions." (R. v. XIV, p. 2202; *see* TT 410:18-412:10 & Pls. Exh. 12 [minor may self-abort, leave home, or carry pregnancy to term rather than involve a parent in her pregnancy]; TT 381:3-383:15 [some minors will travel out-of-state to obtain an abortion]; Pls. Exh. 10 [same]; Pls. Exh. 68 at 1371 [study found that the odds of a minor traveling out-of-state for an abortion increased by over 50% when Missouri's parental involvement law went into effect]; Defs. Exh. 90A-10 at p. 6-7 [study found that abortions obtained out-of-state increased at least 57% among

minors and 31% among the oldest teens after Mississippi enacted a parental involvement law])

b. Abused Minors Will Experience Additional Problems in Using the Bypass.

Abused minors will find it especially difficult to use the judicial bypass system and may not reveal abuse even if they do. First, because the most likely defense and coping mechanism of an abused minor is avoidance, the minor will be likely to avoid the judicial bypass process, which she will view as extremely stressful. (TT 802:11-803:16, 804:4-17) Second, abused minors will be particularly fearful of turning to the courts because the abuse they have experienced makes them distrustful of those in positions of authority. (TT 798:17-799:11) Third, abused minors may have more problems with the logistics of coming to a courthouse because the abuser generally places great restrictions on the minor's activities. (TT 800:12-19) Of abused minors, those who are sexually abused would have the most difficulty disclosing abuse. (TT 802:11-20)

An abused minor who feels that she cannot use the judicial bypass process or notify her parent will have few options. (TT 807:12-20) Such a minor is most likely to carry the pregnancy to term and thus incur the psychological harm of once

again having no control over her life. (*Id.*) In extreme cases, the abused minor may physically harm herself in an effort to end the pregnancy. (*Id.*)

IV. SUMMARY OF ARGUMENT

The Florida Constitution explicitly and strongly protects privacy as a fundamental right of all persons: minors as well as adults. This right includes the right of reproductive choice. The Act interferes with that fundamental right by requiring that a minor's parent or legal guardian be notified before a minor may obtain an abortion. Thus, those minors who would not voluntarily inform a parent about their pregnancy and intention to have an abortion are no longer able to privately, freely exercise their right of reproductive choice.

The State had the burden of demonstrating that this intrusion on minors' right to privacy furthers a compelling state interest by the least intrusive means.

Pursuant to this Court's rulings in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), and subsequent cases analyzing alleged violations of the right to privacy, the trial court looked for consistent legislative treatment of minors' ability to access medical care related to sexual matters. Based on the extensive factual record, the trial court made findings comparing abortion to other care for which no parental notification is required and found inconsistent legislative treatment: the interests sought to be furthered by the Act are equally applicable to the medical care for which the State does not require parental notification.

The district court ignored most of the trial court's factual findings and instead made its own factual findings, many of them contradictory to those of the trial court. Not only was that improper as a matter of law, but the factual predicates for the district court's opinion are not supported by the record evidence.

Based on its own view of the evidence and despite the fact that this Court has found that the State's interests in protecting minors and preserving family unity are not "compelling" interests in the abortion context, the district court concluded that the Act furthered a "compelling" state interest in facilitating a parent's ability to fulfill his or her duty to provide appropriate medical care to the daughter. However, as the trial court's factual findings and the evidentiary record make clear, that same parental duty is directly implicated when a pregnant minor chooses to carry to term, yet that minor may obtain all of her pregnancy related care without her parent's or guardian's knowledge. Similarly, that duty is directly implicated when a minor tests positive for a sexually transmitted disease, but no parental notification is required in such circumstances.

The district court further erred in concluding that the State demonstrated that the allegedly compelling interest was furthered by the least intrusive means because the Act provides a procedure for judicial waiver of the notice requirement. In so concluding, the district court ignored the trial court's factual findings as to the burdens imposed by the waiver procedure and failed to evaluate whether the goal of ensuring that minors receive post-abortion aftercare can be achieved with less intrusion into minors' privacy rights.

The Act also violates the equal protection rights of minors by: (1) discriminating based on the exercise of a fundamental right; and (2) discriminating on the basis of sex. Under the Florida Constitution's amended equal protection clause, both forms of discrimination must satisfy the stringent strict scrutiny test. The State has failed to satisfy that test.

The Act also violates due process rights of minors, by requiring them to satisfy a vague and/or overly burdensome evidentiary standard of proof in order to obtain a judicial waiver of the notice requirement. The due process rights of physicians performing abortions are violated by the Act because it subjects them to fines and loss of licensure under a strict liability scheme and exposes them to liability for disobeying a vague and standardless term.

V. ARGUMENT

A. The Act Violates the Fundamental Right to Privacy Guaranteed by Florida's Constitution.

1. Standard of Review

Whether the Act violates the state right to privacy involves issues of law and fact. Whether minors have a fundamental right to privacy that includes the right of reproductive choice is purely a question of law. *See*, *e.g.*, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989). Therefore that issue must be reviewed *de novo* by this Court. *See*, *e.g.*, *State v. Glatzmaye*r, 789 So. 2d 297, 301 n.7 (Fla. 2001).

Whether the Act interferes with the right of privacy is a mixed question of law and fact: it involves consideration of the impact of a notice requirement on minors' ability to exercise their right to privacy and a determination of the legal significance of that impact. This Court has decided that "mixed questions of fact and law that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a *de novo* review of the constitutional issue." *Connor v. State*, 26 Fla. L. Weekly S579 (Fla. Sept. 6, 2001) (reviewing issue of whether suspect was in custody); *cf. State Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1212-13 (Fla. 2d DCA 1993) (concluding that constitutionality of statute prohibiting adoption by homosexuals was mixed question of fact and law, requiring factual record for resolution). The appellate

court is to "independently review[] the application of the legal standard *to the facts found by the trial court*." *Connor*, 26 Fla. L. Weekly S579 (emphasis added).

Under the strict scrutiny test, applicable to violations of the right to privacy, the State has the burden of presenting evidence that demonstrates that the challenged statute furthers the asserted state interest and does so by the least intrusive means. *See*, *e.g.*, *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1032-36 (Fla. 1999). In evaluating whether that burden has been met, the appellate court must give deference to the trial court's findings of fact, which are presumptively correct and must stand unless clearly erroneous." *Id.* (relying on trial court's findings to conclude that statute was unconstitutional).

Here, the district court failed to defer to the findings of the trial court and to apply the applicable legal standards to those findings. Instead, the district court

ignored the trial court's findings and made findings of its own, ones which contradict those of the trial court and are not supported by the evidentiary record. *See* Section IV.A.5, *infra*.

2. Minors Have a Fundamental Right to Privacy Under the Florida Constitution, Which Includes the Right of Reproductive Choice.

The Florida Constitution contains an explicit right to individual privacy that has no parallel in the United States Constitution. Article I, section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ." Art. I, § 23, Fla. Const. This "fundamental right to privacy" gives "more protection" to Florida citizens than does the federal constitution. *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985). *Accord*, *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998); *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989).

As part of this fundamental privacy right, women have a legitimate expectation of privacy in making and effectuating a decision to terminate a pregnancy. *In re T.W.*, 551 So. 2d at 1192-93. Minors in Florida have the same

freedom to choose abortion, based on the state constitutional right to privacy, as do adult women. *See id.* at 1193. As this Court has reiterated,

> [i]n *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), the majority of this Court recognized that based upon the unambiguous language of article I, section 23 of the Florida Constitution, "the right to privacy extends to 'every natural person.' Minors are natural persons in the eyes of the law and '[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.'" *Id*. at 1193. [internal citation omitted]

B.B. v. State, 659 So. 2d 256, 258 (Fla. 1995). Minors and adults do not differ in the fundamental nature of their privacy right, but may differ in terms of which state interests can be "compelling." *See In re T.W.*, 551 So. 2d at 1193-94.

3. The Act Interferes With Minors' Right to Privacy.

This Court has found that requiring a minor to obtain parental consent or judicial approval prior to obtaining an abortion intrudes upon minors' right to privacy under the Florida Constitution. *In re T.W.*, 551 So. 2d at 1194. Similarly, as both the trial and the district courts found here, requiring parental notice or court approval before a minor can obtain an abortion also intrudes upon that right.

In the absence of the Act, a minor woman may consent to performance of an abortion procedure without any parental involvement. Under the Act, she may no longer freely exercise her right to choose. Rather, she must either tell a parent about her pregnancy and planned abortion, reveal that information to a judge, or have a physician reveal that information to a parent. As the trial court found, based on the "intended and expected effect of the Act," the notice requirement "is by no means [an] insignificant" intrusion on a minor's right to privacy. (R. v. XIV, p.2201) *See also* 26 Fla. L. Weekly at D421 (finding that "the Act plainly interferes with 'the right to be let alone and free from governmental intrusion into the person's private life.' Art. I, § 23, Fla. Const.").

As the record below establishes, for those minors who do not want their parent to know of their pregnancy and/or decision to have an abortion, the impact

of a parental notification requirement is similar to that of a parental consent law. (*See* Section II.D, *supra*) Under both notice and consent laws, minors fear that telling their parents about an impending abortion will result in abuse, being expelled from the home, disturbing an already dysfunctional or troubled family situation, or a parent exercising a *de facto* veto power over the minor's decision. (*See* Section II.D.1, *supra*) *See also In re T.W.*, 551 So. 2d at 1189 (T.W. alleged she had a "justified fear of physical or emotional abuse if her parents were requested to consent, and . . . her mother was seriously ill and informing her of the pregnancy would be an added burden."); *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (recognizing parental power to block abortion); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1459-60, 1462-63 (8th Cir. 1995) (same); *Planned*

Parenthood of Central New Jersey v. Farmer, 762 A.2d 620, 635 (N.J. 2000) (same).

The Act also interferes with minors' right to privacy by delaying their exercise of that right. (*See* Section II.D.2, *supra*) As the trial court found, the harms that result from delay include "increased [medical] risk to the minor child in having the abortion performed" and that "the termination of the pregnancy will no longer be an option." (R. v. XIV, p. 2201-2202; *see also* Section II.D.2, *supra*) Such minors will face the significant medical risks associated with carrying a pregnancy to term, as well as the economic and educational difficulties associated with teen motherhood. (*See* Section II.B.2, *supra*)

The requirement to go to court to obtain a waiver of the notice requirement also intrudes on minors' privacy rights. The minor must divulge very private

matters to total strangers – a circuit court judge, other court personnel and possibly others whom she may encounter in the courthouse. If the judge denies her petition, the judge has both invaded her privacy and, with the full force of the government, substituted his or her judgment of what she must do, in this most private area of her life. Even if the bypass is granted, the minor's abortion may be delayed and her confidentiality compromised. For some minors, such as abused minors, court might simply not be an option. (*See* Section II.D.3, *supra*) *See also Planned Parenthood v. Farmer*, 762 A.2d at 634-37 (discussing burdens imposed on minors by judicial bypass procedure); *American Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 829 (Cal. 1997) (same); *Wicklund v. Montana*, No. ADV 97-671, slip op. at 7 (Mont. 1st Jud. Dist. Ct. Feb. 4, 1999) (same) (App., Tab K).

4. The State Has the Burden of Establishing That the Act Furthers a Compelling State Interest.

"[T]he Florida constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated." *In re T.W.*, 551 So. 2d at 1195. "[O]nce it is determined that a citizen's privacy interest is implicated, this test shifts the burden to the State to justify the intrusion of privacy." *B.B.*, 659 So. 2d at 259; *accord, e.g., Winfield*, 477 So. 2d at 547 (establishing compelling state interest test as standard of review for intrusions on privacy). This "highly stringent standard," 551 So. 2d at 1192, requires the State to demonstrate, not merely assert, "both that the intrusion is justified by a compelling state interest and that the state has used the least intrusive means in accomplishing its goal." *Shaktman v. State*, 553 So. 2d 148, 151-52 (Fla. 1989). *Accord, e.g.*, *Chiles*, 734 So. 2d at 1034-36; *In re T.W.*, 551 So. 2d at 1193. As the district and trial courts noted, the State's burden of demonstrating that the Act furthers "compelling" state interests is not satisfied by legislative findings asserting that "compelling interests" are served. *See* R. v. XIV, p. 2196; 26 Fla. L. Weekly at 421; *see also Chiles*, 734 So. 2d at 1034.

In the context of intrusions upon the right to privacy, this Court looks for consistent legislative treatment in determining whether an asserted state interest is "compelling." *See, e.g., Jones v. State*, 640 So. 2d 1084, 1085-87 (Fla. 1994); *J.A.S. v. State*, 705 So. 2d 1381, 1385-86 (Fla. 1998); *accord State v. Rife*, 789 So.

2d 288, 294 (Fla. 2001). Thus, in *In re T.W.*, this Court found that the State's inconsistent treatment of abortion compared to other pregnancy and motherhood related matters showed that the State's asserted interests, although "worthy," were not "compelling." 551 So. 2d at 1195. The parental notice requirement fails because of the same lack of consistency.

5. The State Failed to Meet Its Burden of Establishing That the Act Furthers a Compelling State Interest.

The district court concluded that the Act serves a compelling state interest "[b]y facilitating the ability of parents and guardians to fulfill their duty to provide appropriate medical care for their daughters or wards." 26 Fla. L. Weekly at D422. That conclusion was incorrect as a matter of fact and of law.

a. The District Court Improperly Rejected Factual Findings of the Trial Court Regarding the Need for Abortion Aftercare.

The district court reached its conclusion that the Act serves a compelling state interest by ignoring the trial court's factual findings and making its own -- contradictory and unsupported -- factual findings. The district court found that minors need their parents' assistance in order to follow aftercare instructions given to them by an abortion provider, and that parental assistance is necessary because,

as “plaintiffs’ medical experts conceded, the risks [of abortion] are significant in the best of circumstances” and that “[w]hile abortion is less risky than some surgical procedures, abortion complications can result in serious injury, infertility, and even death.” 26 Fla. L. Weekly at D422. In contrast, the trial court found that, although the assistance of a supportive parent could be helpful, “most minors, especially older minors, are perfectly capable of following directions for aftercare treatment,” that “abortion is one of the safer surgical procedures,” and that “the risk of mortality or complications from abortion are very low.” (R. v. XIV, p. 2192-2193)

The trial court’s findings, unlike those of the district court, are well supported by the evidence. Plaintiffs’ experts did not “concede” that the risks of abortion are “significant” even in the “best of circumstances.” Rather, they testified that abortion is one of the safest surgical procedures. In all stages of pregnancy, the risk of complications from an abortion is very low and the risk is particularly low during the first trimester of pregnancy, when most abortions

obtained by minors in Florida are performed. The risk of mortality is extremely low. (*See* Section II.B.1, *supra*)

The record also supports the trial court's finding that minors are capable of following aftercare instructions without parental assistance. Aftercare directions applicable to an abortion require the minor to do simple tasks. (*See* Section II.A)

b. The District Court Improperly Relied on a State Interest Which This Court Has Found is Not "Compelling" in the Abortion Context.

The district court derived the state interest it found "compelling" from the common law obligation of parents to "nurture, support, educate, and protect" their children, *Finn v. Finn*, 312 So. 2d 726, 730 (Fla. 1975), and the fact that parents may be criminally prosecuted for child neglect if they "willfully or by culpable negligence" fail to provide a child with "the care, supervision, and services necessary to maintain the child's physical and mental health." § 827.03(3), Fla. Stat. (1999). *See* 26 Fla. L. Weekly at D422. The court transformed the duty imposed upon parents to protect the health of their children into a compelling interest on the part of the State to make it easier for parents to discharge that duty.

This Court, however, has found that the State's interest in protecting minors is a "worthy," but not a "compelling" state interest in the abortion context, because the State has not treated minors consistently with respect to this interest. *In re T.W.*, 551 So. 2d at 1194-95. *Cf. J.A.S.*, 705 So. 2d at 1385-86 (finding this interest "compelling" in the context of protecting minors from harmful sexual conduct, as demonstrated by the Legislature's longstanding, consistent approach to that issue); *Jones*, 640 So. 2d at 1085-87 (same). An unwed pregnant minor may consent to "the performance of medical or surgical care or services related to her pregnancy" and the performance of such care or services for her child, without any requirement for parental involvement. § 743.065(1), Fla. Stat. (1999). Physicians, health care professionals, and health facilities "may examine and provide treatment for sexually transmissible diseases to any minor" without any parental

involvement. § 384.30(1), Fla. Stat. (2000). In addition, a minor may obtain contraceptives and pregnancy tests from health care providers without any requirement that a parent be notified. §§ 381.0051(5)(a), 743.065, Fla. Stat. (1999). *See also* § 397.601(4)(a), Fla. Stat. (1999) (minor may obtain voluntary substance abuse impairment services without parental involvement); § 394.4784, Fla. Stat. (1999) (minor aged 13 or over may obtain mental health diagnostic and evaluative services and outpatient crisis intervention services without parental involvement); § 63.062, Fla. Stat. (2001) (a minor parent may give her child up for adoption without notifying the minor-parent's parents).

Based on this inconsistent treatment, this Court concluded that:

> In light of this wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned. We fail to see the qualitative difference in terms of impact on the well-being of the minor between allowing the life of an

> existing child to come to an end and terminating a pregnancy, or between undergoing a highly dangerous medical procedure on oneself and undergoing a far less dangerous procedure to end one's pregnancy. If any qualitative difference exists, it certainly is insufficient in terms of state interest. Although the state does have an interest in protecting minors, "the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions."

551 So. 2d at 1195 (quoting *Ivey v. Bacardi Imports Co.*, 541 So. 2d 1129, 1139 (Fla. 1989)).[8] Given that the inconsistency of legislative treatment is "as stark today as it was when [this Court] issued its decision in *T.W.*" (R. v. XIV, p. 2198), the State's interest in protecting minors is still not "compelling" in this context.

c. The Evidence in the Record Demonstrates that the Legislature has not Acted Consistently in Protecting the Interest Articulated by the District Court.

The district court also ignored the trial courts' findings regarding the health risks posed by the treatment that minors may still obtain without parental notification. The district court found that parental assistance is not as important for other medical care that a minor may receive without parental notification. 26 Fla. L. Weekly at D422. However, the trial court found that "in no qualitative sense, are the risks [for abortion] higher . . . than they are for child birth, or for other

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[8] Other states with explicit privacy rights similar to Florida's have found parental notice or consent laws unconstitutional based on this same rationale. *See American Acad. of Pediatrics*, 940 P.2d 797 (finding parental consent law violated state privacy clause); *Wicklund*, slip op. (finding parental notice law violated state privacy clause); *see also Planned Parenthood v. Farmer*, 762 A.2d 620 (finding parental notice law violated state equal protection clause). *Cf. Alaska v. Planned Parenthood*, __ P.3d __, 2001 WL 1448754 (Alaska Nov. 16, 2001) (remanding to trial court for evidentiary hearing to determine if parental consent law furthers compelling state interest by least intrusive means) (App., Tab L).

surgical procedures for which a minor may now lawfully consent without notifying her parents." (R. v. XIV, p. 2192)

In fact, the risks associated with pre-birth pregnancy-related care go far beyond those associated with "general checkups as a matter of course [and] perhaps ultrasound studies or x-rays," as the district court opined, *see* 26 Fla. L. Weekly at D422, and the district court ignored the ample evidence in the record that such risks can be serious and even life-threatening long before "minors' pregnancies are likely to be known to a parent or guardian." *Id.* A minor may need medical treatment for an ectopic pregnancy or a miscarriage long before her pregnancy starts to "show." A pregnant minor is at risk of miscarrying from early in pregnancy up until approximately the middle of pregnancy, which might necessitate a procedure that will leave the minor infertile. (*See* Sections II.B.2, C, *supra*) Compared to most adults, minors are at heightened risk of having preterm

labor, which itself poses serious risks and may require risky, even life-threatening, treatment. (*See id.*) Furthermore, a minor may need fetal intrauterine surgery during her pregnancy, which has risks comparable to those associated with a cesarean section. (*See id.*)

Moreover, as the trial court found, "[s]ome minors face significant health risks if they continue their pregnancy." (R. v. XIV, p. 2199) A pregnancy may aggravate a minor's pre-existing health problems and may make it unsafe for her to continue taking medications or other treatments for such problems. (*See* Sections II.B.2, *supra*)

In addition, the risks associated with cesarean or vaginal delivery, *see* Section II.B.2, *supra*, cannot be dismissed, as the district court did, on the basis that "by then most minors' pregnancies are likely to be known to a parent or

guardian." *See* 26 Fla. L. Weekly at D422. As the trial court found, "some [minors] even deliver their babies without their parents knowing about it." (R. v. XIV, p. 2200) Thus, minors may need surgery at times when their parents are still unaware of the pregnancy or treatment.

The district court also ignored the trial court's finding that it may be too late for a minor to obtain an abortion by the time she "shows" and thus the minor's "decision to carry the pregnancy to term [cannot] be revoked after a certain point," even if that is what a parent would counsel. (R. v. XIV, p. 2200) Minors who keep their pregnancy secret until a time at which an abortion is no longer an option will face the significant medical risks associated with childbirth, as well as the psychological, economic, and educational harms associated with teen motherhood.

(*See* Sections II.B.2, C, *supra*) Yet the State does not require parental notification of a minor's pregnancy or receipt of pregnancy-related care.

The district court also ignored the trial court's findings regarding the significant health risks faced by a pregnant minor who fails to obtain pregnancy-related care, which showed that an interest in protecting the health of a minor is implicated once a minor obtains a positive pregnancy test. The trial court found that it is important to minors' health to obtain prenatal care as early in pregnancy as possible, based on testimony by Plaintiffs' and Defendants' medical experts that minors can harm their health significantly by failing to do so. (*See* R. v. XIV, p. 2200; Section II.B.2, *supra*) During this critical prenatal period, a minor's pregnancy is easily hidden from her parents and no state law requires that parents be informed of the pregnancy. In addition, early medical care is crucial to a

pregnant minor in order for an ectopic pregnancy to be detected and treated. (*See id.*) If, as the district court stated, an unemancipated minor "depends on her parent(s) or guardian, . . ., to arrange for her healthcare," 26 Fla. L. Weekly at D422, then the asserted State interest is implicated when a minor obtains a positive pregnancy test or seeks pregnancy-related care.[9]

The district court also trivialized the significant medical risks faced by minors infected with a sexually transmitted disease by ignoring evidence of the dangers associated with a minor's failure to obtain treatment for STDs or to correctly follow the treatment instructions for such diseases, dangers which include

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[9] The district court justified the differential treatment of abortion as compared to other pregnancy-related surgery on the basis that, with the latter, "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," and give patient-specific advice on complications. 26 Fla. L. Weekly at D425 n.3. In fact, the same occurs with abortion: the physician obtains informed consent from the minor and provides patient-specific advice. (*See* Section II.A, *supra*.)

infertility and even death. (*See* Sections II.B.2, C, *supra*.) Therefore, if the State has a compelling interest in parents being notified when their children need medical care, that interest is clearly implicated when a minor seeks STD or AIDS treatment.

The district court justified the inconsistent approach on the grounds that treatment of STDs and most pre-delivery pregnancy-related care does not involve surgery. 26 Fla. L. Weekly at D422. Of course, a parent's common law duty to provide appropriate medical care to his or her child is not limited to situations in which the child has had surgery. Moreover, as is apparent from the nature of the risks and decisions faced by minors choosing abortion compared to the risks and decisions faced by pregnant minors carrying to term or minors with sexually transmitted diseases, there is no medical justification for distinguishing parents'

duty to protect the health of their child based on whether or not the child is

undergoing surgery.[10]

6. The State Failed to Meet Its Burden of Establishing That the Act Uses the Least Intrusive Means to Further a Compelling State Interest.

Even if the district court was correct that the Act furthers a compelling state interest, the State failed to establish that it furthered that interest in the least intrusive manner possible, as it was required to do. *See, e.g.*, *Shaktman*, 553 So. 2d at 151-52. Contrary to the district court's finding, *see* 26 Fla. L. Weekly at D424, the judicial bypass is not the least intrusive means of furthering the asserted state interest. The district court ignored the difficulties posed to minors in using the bypass and the many harms to minors associated with efforts to do so, including delay and loss of confidentiality. (*See* Section II.D.3, *supra*)

The Act could have been more narrowly drawn so as to address directly the

issues that the State claims should be addressed and to avoid the harms caused by

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[10] The district court further distinguished treatment of STDs on the basis that they are contagious and therefore the State wants to encourage minors to seek treatment by not requiring parental notification. 26 Fla. L. Weekly at D422. That argument supports Plaintiff's position that requiring notice will discourage minors from obtaining necessary medical treatment. It also contradicts the State's assumption, in the abortion context, that the State needs to mandate parental involvement in order to ensure that minors will seek needed medical care.

the bypass. For example, the State might require follow-up steps for minors who receive abortions to help assure that they receive post-abortion care.[11] Other states have dealt with this issue in a less intrusive way. For example, Connecticut requires that a physician or counselor provide specified information and counseling to a minor before performing an abortion, including discussing the possibility of involving parents, guardians or other adult family members in the minor's decision-making. *See* Conn. Gen. Stat. § 19a-601 (2000). Maryland provides that the notice requirement can be waived where the physician, in his or her professional judgment, determines that notice may lead to abuse of the minor, the minor is mature, or notification will not be in the minor's best interest, thereby avoiding the harms of the judicial bypass. *See* Md. Code, Health--Gen. § 20-103

[11] Of course, any such steps would have to be consistent with the need to protect the minor's confidentiality and could not themselves pose an obstacle to care.

(2000). (*See also* R. v. XIV, p. 2203 [trial court noted that Act could have been more narrowly drawn by taking into account general differences in maturity levels of older and younger minors])

B. The Act Violates the Equal Protection Rights of Minors.

Article I, Section 2 of the Florida Constitution provides in pertinent part:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, [and] to pursue happiness . . . .

Art I, § 2, Fla. Const. (as amended 1998). The Act violates this equal protection guarantee because it discriminates between those pregnant minors who decide to terminate their pregnancies and those who decide to carry their pregnancies to term. Thus, the Act impinges upon the exercise of a fundamental right and must satisfy the stringent strict scrutiny test. (*See* Section IV.A, *supra*) For all of the reasons discussed above, the Act fails that test. (*See id.*) *See also Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (striking down

parental notice statute because it violated the state equal protection rights of minors seeking abortions).[12]

The Act also violates the state equal protection clause because it discriminates on the basis of sex. Under the Act, female minors are no longer able to keep all their reproductive health services private: parental notification is mandated for those who become pregnant and decide to have an abortion. In contrast, none of the services relating to sexual activity that might be sought by male minors require parental involvement: male minors can get tested and treated for sexually transmissible diseases without parental involvement and male minors can purchase contraceptive devices without parental involvement. *See* §§

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[12] The issue of whether the Act discriminates on the basis of exercise of a fundamental right is reviewed under the same standard as is the right to privacy claim. (*See* Section IV.A.1, *supra*.) The issue of whether the Act discriminates on the basis of sex is a legal issue subject to *de novo* review. (*See id*.) The issue of whether the State has met its burden of demonstrating that the applicable standard of review has been met is a mixed question of fact and law. (*See id*.)

381.0051(5)(a), 384.30(1), Fla. Stat. (2000). Thus, the State does not impose upon any male minors a parental notification requirement and therefore males are able to keep their receipt of reproductive health services private. Such a requirement *is* imposed upon some female minors: those choosing to obtain an abortion. Accordingly, the Act impermissibly discriminates by treating similarly situated sexually active minors differently on the basis of sex.

Given the 1998 amendment adding the phrase "female and male alike" to the equal protection provision, the Act's sex-based discrimination should be analyzed under strict scrutiny. This Court has recently indicated the significance of the amendment, explaining that "Florida's Constitution now expressly protects the equality of women." *Beal Bank, SSB v. Almand & Associates*, 780 So. 2d 45, 52 n.7 (Fla. 2001) (internal citation omitted). At least two other states have

interpreted their equal rights amendments to provide increased protection against sex-based equal protection violations. *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 851 (N.M. 1998), *cert. denied*, 526 U.S. 1020 (1999); *Darrin v. Gould*, 540 P.2d 882, 889 (Wash. 1975) (*en banc*).

This Court should give full meaning to the amendment of the equal protection clause of the Florida Constitution by applying strict scrutiny to gender-based equal protection challenges. Any other treatment of the amendment would reduce it to surplusage. *See, e.g., Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001). The Act cannot withstand such scrutiny. (*See* Section IV.A, *supra*) Therefore, this Court should hold that the Act violates the equal protection rights of female minors seeking abortions.[13]

[13] The Act also fails to satisfy the "intermediate standard" of review applied to sex discrimination claims before the 1998 amendment of the equal protection clause.

C. The Act Violates Minors' Constitutional Right to Due Process of Law.

To satisfy due process under the Florida Constitution, "the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive." *Rucker v. City of Ocala*, 684 So. 2d 836, 841 (Fla. 1st DCA 1996); *see also Moser v. Barron Chase Sec., Inc.* 783 So. 2d 231, 236 (Fla. 2001). The importance of adequate procedural protections is especially great because if minors are denied a fair opportunity to be heard, their fundamental right to decide whether and when to bear children will be adversely affected.[14]

The Act is vague in that it requires that a minor prove her entitlement to a waiver of the notice requirement by "clear evidence," but does not define that standard of proof. *See* § 390.01115, Fla. Stat. (1999). Instead, minors are left to guess what they will have to prove to obtain a bypass. By failing to define the standard of proof the minor must meet, the Act fails to allow her a fair opportunity

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See Purvis v. State, 377 So. 2d 674, 676 (Fla. 1979) ("[A] law creating a gender-based classification must be substantially related to the achievement of an important governmental objective."). Therefore, even if this Court applies that standard, it should find that the Act violates the equal protection clause.

[14] The issues of whether the act violates the due process rights of physicians or of minors are purely legal issues and therefore subject to *de novo* review. *See, e.g., Glatzmayer*, 789 So. 2d at 301 n.7.

to litigate her request for a waiver of the notice requirement and thus interferes with her exercise of her right to privacy.

The district court acknowledged that the term "clear evidence" is unclear, but found the vagueness constitutionally acceptable on the grounds that it "cannot work to the petitioner's disadvantage" because "clear evidence" cannot "be read to impose a standard more onerous than clear and convincing evidence." 26 Fla. L. Weekly at D423 (citing federal cases upholding statutes that specifically imposed a "clear and convincing" standard for judicial waiver). Of course, under that interpretation, the minor must assume that she has to prove her entitlement by "clear and convincing evidence," because it is unclear how far short of that she can fall and still satisfy the "clear evidence" standard. Thus, the district court cured the vagueness problem by improperly rewriting the statute to require "clear and convincing evidence" -- a resolution that should be rejected as "legislation articulated by the judiciary." *See Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978).[15]

[15] The legislative staff report cited by the district court, *see* 26 Fla. L. Weekly at D423, explicitly states that its analysis "does not reflect the intent or official position of the bill's sponsor or the Florida Senate." *Senate Staff Analysis and Economic Impact Statement*, S.B. 1598, at 10 (Apr. 6, 1999). In fact, the Legislature changed the standard *from* "clear and convincing evidence" *to* "clear evidence." *Compare* Committee Substitute for S.B. 1598, Section 3, at http://www.leg.state.fl.us/cgi-bin/view_page.pl?Tab=session&Submenu=1&FT=D&File=sb1598c1.html&Directory=session/1999/Senate/bills/billtext/html (amended by Senate Judiciary Committee, April 15, 1999) (court must make findings by "clear and convincing evidence") *with* First Engrossed version of S.B. 1598, Section 1, at http://www.leg.state.fl.us/cgi-bin/view_page.pl?Tab=session

Assuming that the Act could be judicially rewritten to require "clear and convincing evidence," it would place an unacceptably high burden of proof upon minor petitioners. Under Florida law, the "clear and convincing evidence" standard requires that "the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *In re Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995). The "clear and convincing" standard of proof generally has been used to preserve fundamental fairness by placing an enhanced burden of proof *on the government* when it seeks to infringe upon an individual's fundamental liberty interest. *See, e.g., Torres v. Van Eepoel*, 98 So. 2d 735, 737 (Fla. 1957) (requiring clear and convincing evidence to sever parental rights); *In re J.L.P.*, 416 So. 2d

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&Submenu=1&FT=D&File=sb1598e1.html&Directory=session/1999/Senate/bills/billtext/html (passed as amended by Senate, April 29, 1999) (court must make findings by "clear evidence").

1250, 1252 (Fla. 4th DCA 1982) (same). Here, the state reverses this normal allocation of the burden of proof by placing the enhanced burden upon the *minor* seeking to exercise her fundamental constitutional rights. Such a high burden violates the minor's due process rights.

The Act also fails to specify that a transcript will be provided to the minor without cost. If this Court finds the Act constitutional in other respects it should find that the Act requires the provision of free, expedited transcripts to minors who appeal the denial of judicial waivers. *See* 26 Fla. L. Weekly at D423. Reading in such a requirement is one of the few permissible instances of judicial rewriting of a statute. *See Smith v. Dep't of Health and Rehab. Svcs.*, 573 So. 2d 320, 323 (Fla. 1991).

D. The Act Violates the Due Process Rights of Abortion Providers.

1. The Act Unconstitutionally Imposes Strict Liability on Physicians.

By subjecting physicians to fines and loss of licensure under a strict liability scheme, the Act violates the Florida Constitution's guarantee of due process of law by imposing substantial penalties on, and doing grave damage to the reputations of, physicians acting without a culpable mental state to provide constitutionally protected services. *See*, *e.g.*, *Chicone v. State*, 684 So. 2d 736, 742-43 (Fla. 1996); *Wyche v. State*, 619 So. 2d 231, 235 (Fla. 1993); *State v. Oxx*, 417 So. 2d 287, 290 (Fla. 5th DCA 1982). The Act does not by its terms contain a scienter requirement. *See* § 390.01115(3)(c), Fla. Stat. (1999). Thus, where physicians attempt in good faith to comply with the Act's requirements but are found to have violated its terms, the Act penalizes them merely for aiding minors in exercising their constitutional rights.

The district court correctly concluded that the Act must contain a scienter requirement in order to be constitutional. *See* 26 Fla. L. Weekly at D424 (citing cases in which federal courts struck down laws because they lacked scienter requirements). The district court erred, however, in reading a scienter requirement into the Act. *See Wyche*, 619 So. 2d at 236 (finding statute affecting constitutionally protected conduct unconstitutional because court could not rewrite it to require intent to engage in prohibited activity). Moreover, the statute must contain a good faith exception, which it lacks. *Compare* 26 Fla. L. Weekly at D424 *with* § 390.01115, Fla. Stat. (1999); *see also Cuda v. State*, 639 So. 2d 22, 24

(Fla. 1994) (distinguishing unconstitutional statute lacking good faith defense from other similar statutes which provided for defense on their face).

2. The Act is Void for Vagueness.

It is "an essential element of due process of law" under Article I, section 9 of the Florida Constitution that statutes "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Aztec Motel, Inc. v. State*, 251 So. 2d 849, 854 (Fla. 1971). When a statute fails to provide such certainty, or where its terms encourage arbitrary and discriminatory enforcement, it is unconstitutionally vague. *See State v. Mark Marks, P.A.*, 698 So. 2d 533, 537-39 (Fla. 1997).

Here, the Act provides that a physician must give 48 hours' notice by certified mail to a minor's parent or legal guardian "[i]f actual notice is not possible after a *reasonable effort* has been made." § 390.01115(3)(a), Fla. Stat.

(1999) (emphasis added). However, the Act does not define the term "reasonable effort," nor does any other statute provide meaning for this term. *See, e.g., Planned Parenthood v. McWherter*, 716 F. Supp. 1064, 1068-69 (M.D. Tenn. 1989) (statute that required parental consent to abortion unless parent could not be reached in a "reasonable time and manner" held void for vagueness due to uncertain meaning of phrase), *vacated as moot*, 945 F.2d 405 (6th Cir. 1991).

In assessing the constitutionality of a statute imposing punishment on attorneys who accepted more than "reasonable charges or fees" in connection with an adoption proceeding, this Court held that the term "reasonable" was vague. *See State v. Buchanan*, 191 So. 2d 33, 37 (Fla. 1966). Moreover, because the term "reasonable" lacks a fixed meaning, the Act provides no objective guidelines or standards by which to judge physicians' conduct. *See Aztec Motel*, 251 So. 2d at

854; *State v. Wershow*, 343 So. 2d 605, 609 (Fla. 1977); *see also Mark Marks*, 698 So. 2d at 539 (concluding that statute penalizing attorneys for providing "incomplete" information regarding client's insurance claims was vague); *Cuda*, 639 So. 2d at 24-25 (striking down as vague statute that used terms "improper or illegal"). Thus, the Act will invite arbitrary and discriminatory enforcement. *See Mark Marks*, 698 So. 2d at 537. The vagueness of the Act's terms is aggravated by the lack of a requirement that a physician act intentionally or with some other *mens rea*. *See* 698 So. 2d at 538.

The fact that, as the district court noted, some other statutes governing physician conduct use the term "reasonable" does not give meaning to the term as used in the Act. *See Cuda*, 639 So. 2d at 23-24 (striking down statute that used terms "improper" or "illegal" despite prior approval of statutes employing similar

language). The "reasonable attempt" as used in § 743.0645(2), Fla. Stat. (1999), is not subject to the same standard of clarity as the Act, because that statute does not impose disciplinary penalties. *See* 639 So. 2d at 24 (imposition of criminal sanctions was "critical difference[]" between unconstitutional statute which included vague terms and other similarly-worded but non-penal statutes). In addition, the term "reasonable skill" used in § 458.331(1)(s), Fla. Stat. (2001), relates directly to the education and training physicians have received regarding how to practice medicine, whereas physicians have no such context for interpreting the "reasonable efforts" required by the Act.

VI. CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the District Court of Appeal for the First District. The Parental Notice of Abortion

Act, § 390.01115, Fla. Stat. (1999), should be declared unconstitutional and permanently enjoined because it violates minors' rights to privacy, equal protection, and due process and physicians' right to due process under the Florida Constitution.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Plaintiffs-Petitioners' Amended Initial Brief has been furnished to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this Plaintiffs-Petitioners' Amended Initial Brief is computer-generated, using Times New Roman 14-point font.

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