IN THE SUPREME COURT OF FLORIDA

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

CASE NO.: SC 01-843

Plaintiffs/Petitioners,

v.

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

Defendants/Respondents.
_____/

On Petition for Discretionary Review
From the First District Court of Appeal,
Nos. 1D00-1983, 1D00-2106

RESPONDENTS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

JURISDICTIONAL STATEMENT 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL. 3

II. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT REVIEW OF THE DISTRICT COURT'S DECISION AND DETERMINE THE CONSTITUTIONALITY OF THE PARENTAL NOTICE OF ABORTION ACT. 4

A. The Court Has Generally Recognized the Finality of District Court Decisions Upholding the Constitutionality of State Statutes Absent Express Conflict or a Certification of a Question of Great Public Importance and Declined to Review Such Decisions. 4

B. The Legal Issues Resolved by the District Court Do Not Warrant the Court's Exercise of its Discretion. 6

CONCLUSION 10

CERTIFICATE OF SERVICE 11

STATEMENT CERTIFYING TYPE SIZE AND STYLE 11

TABLE OF AUTHORITIES

CASES **Page(s)**

Acton v. Fort Lauderdale Hosp.,
440 So. 2d 1282 (Fla. 1983) 7

Albertson's, Inc. v. Department of Professional Regulation,
681 So. 2d 708 (Fla. 1996) 7, 8

Ansin v. Thurstin,
101 So. 2d 808 (Fla. 1958) 8

Avatar Development Corp. v. State,
723 So. 2d 199 (Fla. 1998) 7

Board of County Comm'rs, Hernando County v. Florida Dept. of Community Affairs,
626 So. 2d 1330 (Fla. 1993) 7, 8

Bouters v. State,
659 So. 2d 235 (Fla. 1995) 7

Bunnell v. State,
453 So. 2d 808 (Fla. 1984) 7, 8

Cantor v. Davis,
489 So. 2d 18 (Fla. 1986) 7

Chrysler Corp. v. Pitsirelos,
721 So. 2d 710 (Fla. 1998) 7

Cox v. Florida Dept. of Health and Rehabilitative Services,
656 So. 2d 902 (Fla. 1995) 7, 8

Coy v. Florida Birth-Related Neurological Injury Compensation Plan,
595 So. 2d 943 (Fla. 1992) 7, 8

Cuda v. State,
639 So. 2d 22 (Fla. 1994) 7

Gilbreath v. State,
650 So. 2d 10 (Fla. 1995) 7

Glendening v. State,
536 So. 2d 212 (Fla. 1988) 7, 8

Page(s)

Ilkanic v. City of Fort Lauderdale,
705 So. 2d 1371 (Fla. 1998) 7

In re T.W.,
551 So. 2d 1186 (Fla. 1989) 2-5, 10

Jenkins v. State,
385 So. 2d 1356 (Fla. 1980) 9

Jennings v. State,
682 So. 2d 144 (Fla. 1996) 7

Lewis v. State,
556 So. 2d 1103 (Fla. 1990) 7

Libertarian Party of Florida v. Smith,
687 So. 2d 1292 (Fla. 1996) 7, 8

Palmieri v. State,
572 So. 2d 1378 (Fla. 1991) 7, 8

Perez v. State,
536 So. 2d 206 (Fla. 1988) 7, 8

Raffield v. State,
565 So. 2d 704 (Fla. 1990) 7

Reese v. State,
453 So. 2d 810 (Fla. 1984) 7, 8

Ross v. State,
601 So. 2d 1190 (Fla. 1992) 7

Sanchez v. Wimpey,
409 So. 2d 20 (Fla. 1982) 9

Schmitt v. State,
590 So. 2d 404 (Fla. 1991) 7

Shriners Hospitals for Crippled Children v. Zrillic,
563 So. 2d 64 (Fla. 1990) 7

Sieniarecki v. State,
756 So. 2d 68 (Fla. 2000) 7

Page(s)

Stewart v. Price,
762 So. 2d 475 (Fla. 2000) 7

Tal-Mason v. State,
515 So. 2d 738 (Fla. 1987) 7

Warren v. State,
572 So. 2d 1376 (Fla. 1991) 7, 8

Watts v. State,
463 So. 2d 205 (Fla. 1985) 7

Zile v. State,
748 So. 2d 1012 (Fla. 1999) 7

OTHER AUTHORITIES

The Parental Notice of Abortion Act
Fla. Stat. § 390.01115 . . . . . 1-5, 9, 10

PRELIMINARY STATEMENT

The issue before the Court is not whether the Court has discretionary jurisdiction to review the decision of the First District Court of Appeal, but whether the Court should exercise that discretion. Respondents respectfully submit that the Court should decline discretionary review.

STATEMENT OF THE CASE AND FACTS

Respondents generally accept Petitioners' Statement of the Case. However, certain factual representations in the Statement and in the Introduction are not supported by the opinion below nor by the record.

Petitioners state in their Introduction (Brief at 2) that the provisions of section 390.01115, Florida Statutes, the Parental Notice of Abortion Act (the Act), will "significantly diminish[] minors' ability to obtain abortions in Florida." The provisions of the Act do no such thing.

Under the terms of the Act, all young girls who wish to have an abortion may have this surgical procedure done, just as under present law, without the consent of anyone. Moreover, there was no finding below that the availability of abortion providers would be affected by the Act in any manner.

The litany of "harms" which Petitioners claim (Brief at 4, n.3) will occur if abortion providers must take the minimal notification requirements of the Act into account were rejected

by the trial court and the district court of appeal. Even more distressing is Petitioners' total failure to mention that young girls are directly and actually harmed by complications from surgical abortions and that these complications would likely be alleviated if a parent or guardian were aware of the surgery taking place (Opinion at 15-20). Petitioners ignore the district court's holding that limiting such real harms is an obvious and compelling state interest.

JURISDICTIONAL STATEMENT

Respondents accept Petitioners' Jurisdictional Statement with the observation that because the district court's opinion expressly declared the Act valid against a constitutional challenge it necessarily construed a portion of the Florida Constitution.

SUMMARY OF THE ARGUMENT

Respondents concede that the Court possesses discretionary jurisdiction to review the district court's opinion upholding the Act. In light of the well reasoned opinion of the lower court, however, the Court should decline to exercise that discretion.

The district court's opinion took full account of this Court's privacy and abortion rights jurisprudence enunciated in In re T.W., 551 So. 2d 1186 (Fla. 1989), and its progeny. In an exhaustive and thorough analysis the lower court addressed all of this Court's concerns with the more intrusive parental consent

statute at issue in In re T.W. and resolved those issues in favor of the Act's constitutionality. Moreover, as is even recognized by Petitioners, the district court's opinion validating the Act is not in conflict with In re T.W. or any other opinion of this Court or of another district court of appeal.

In addition, for the Court to decline to exercise its discretion to review the district court's opinion would be fully compatible with the Court's long established precedent and institutional history which generally recognizes the decisions of district courts upholding the constitutionality of statutes as final in the absence of conflict or a certified question. In light of the fact that this facial attack on the Act was initiated by an action for declaratory relief which was filed before the Act was ever enforced, it is even more apparent that the Court should decline to reach out unnecessarily to review the decision of the district court.

ARGUMENT

I. THE COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL.

Respondents concede that the Court has discretionary jurisdiction to review the decision below because it expressly construes Article I, Sections 2, 9 and 23 of the Florida Constitution, as well as the Due Process Clauses of the Federal Constitution, and declares valid Section 390.01115 under those constitutional provisions.

II. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT REVIEW OF THE DISTRICT COURT'S DECISION AND DETERMINE THE CONSTITUTIONALITY OF THE PARENTAL NOTICE OF ABORTION ACT.

A. The District Court's Decision Is Correct.

Petitioners' argument that the Court should decide to review the lower court's decision is based upon the implied premise that the district court improperly found that the state had established a "compelling interest" in facilitating parents' rights, duties, and obligations to provide appropriate medical care for their daughters when no such interest was allegedly recognized in In re T.W.

Petitioners' assertions could not be more incorrect. The district court clearly, exhaustively, and correctly premised its decision upon this Court's In re T.W. opinion. Indeed, one is hard pressed to read the Opinion and see how the district court could have crafted its constitutional analysis with more deference to In re T.W.

In this vein, the district court did not opine that parents' obviously compelling interests in their children's well being was "in contrast" to the In re T.W. opinion. The district court, with the benefit of a fully developed record which was absent in In re T.W., simply was able to reconcile the minimal impact of the Act upon a young girl's surgical abortion decision with the superficially apparent difference in the legislative treatment of parental notification in full term pregnancies.

Moreover, in deciding whether the Act was sufficiently narrowly tailored to meet constitutional strictures, the district court went over the Act in a point-by-point analysis. Here, too, the district court plainly realized that the deficiencies in the parental consent statute identified by In re T.W. would have to be remedied for the Act to be valid.

The district court's opinion is just as unassailable on the other grounds raised by Petitioners. As Petitioners have asserted is appropriate under this Court's privacy rights jurisprudence, the district court assumed that strict scrutiny applied (Opinion at 19-21) in its equal protection analysis of the Act. Likewise, the district court's due process analysis (Opinion at 29-31) of the Act protects Petitioners from any reasonable concerns that the Act's provisions will reach any further than is constitutionally permissible.

Thus Petitioners' contention that this Court's review is warranted because the district court's opinion misconstrues In re T.W., is wrong and illogical. In fact, if Petitioners really thought that the district court had modified the holding of In re T.W., then they would surely have sought review under this Court's conflict jurisdiction. Tellingly and correctly, they did not do so.

B. **The Court Has Generally Recognized the Finality of District Court Decisions Upholding the Constitutionality of State Statutes Absent Express Conflict or a Certification of a Question of Great Public Importance and Has Declined to Review Such Decisions.**

When the Florida Constitution was amended in 1980 to substantially modify the Court's jurisdiction, one of the most significant changes was to remove the appeal of right from a decision of a district court of appeal which initially and directly passed upon the validity of a state statute or construed a provision of the state or federal constitution. As a result, the Court's jurisdiction to review such decisions of the district courts, as set out in the provisions of Article V, Section 3(b)(3), Fla. Const., became discretionary. Thus, as was recognized in 1980, "[t]he district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended article V." (Committee notes to FRAP 9.030.)

Since 1980, the Court's jurisprudential history has borne out the Committee's prediction. The Court has apparently exercised its discretion to reach out and review a decision on only 30 reported occasions out of some 600 filings, as reported by the Court's Public Information Office, when the sole basis for its jurisdiction was that the district court had expressly

declared a statute valid.[1] An even closer review shows that 10 of these cases were either directly or indirectly tied to some other jurisdictional basis, involved multiple presentations of the same issue, or were ultimately determined to have been improvidently accepted by the Court.[2]

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[1]Stewart v. Price, 762 So. 2d 475 (Fla. 2000); Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000); Zile v. State, 748 So. 2d 1012 (Fla. 1999); Avatar Development Corp. v. State, 723 So. 2d 199 (Fla. 1998); Chrysler Corp. v. Pitsirelos, 721 So. 2d 710(Fla. 1998); Ilkanic v. City of Fort Lauderdale, 705 So. 2d 1371 (Fla. 1998); Libertarian Party of Florida v. Smith, 687 So. 2d 1292 (Fla. 1996); Jennings v. State, 682 So. 2d 144 (Fla. 1996); Albertson's, Inc. v. Department of Professional Regulation, 681 So. 2d 708 (Fla. 1996); Bouters v. State, 659 So. 2d 235 (Fla. 1995); Cox v. Florida Dept. of Health and Rehabilitative Services, 656 So. 2d 902 (Fla. 1995); Gilbreath v. State, 650 So. 2d 10 (Fla. 1995); Cuda v. State, 639 So. 2d 22 (Fla. 1994); Board of County Comm'rss, Hernando County v. Florida Dept. of Community Affairs, 626 So. 2d 1330 (Fla. 1993); Ross v. State, 601 So. 2d 1190 (Fla. 1992); Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943 (Fla. 1992); Schmitt v. State, 590 So. 2d 404 (Fla. 1991); Palmieri v. State, 572 So. 2d 1378 (Fla. 1991); Warren v. State, 572 So. 2d 1376 (Fla. 1991); Raffield v. State, 565 So. 2d 704 (Fla. 1990); Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990); Lewis v. State, 556 So. 2d 1103 (Fla. 1990); Perez v. State, 536 So. 2d 206 (Fla. 1988); Glendening v. State, 536 So. 2d 212 (Fla. 1988); Tal-Mason v. State, 515 So. 2d 738 (Fla. 1987); Cantor v. Davis, 489 So. 2d 18 (Fla. 1986); Watts v. State, 463 So. 2d 205 (Fla. 1985); Bunnell v. State, 453 So. 2d 808 (Fla. 1984); Reese v. State, 453 So. 2d 810 (Fla. 1984); Acton v. Fort Lauderdale Hosp., 440 So. 2d 1282 (Fla. 1983).

[2]Stewart v. Price, (resolved by companion case which was before the Court on a certified question); Zile v. State, (discharged as improvidently granted); Palmieri v. State and Warren v. State, (cases where the same issue was presented in separate district court decisions); Shriners Hospitals for Crippled Children v. Zrillic, (companion case before Court on conflict with a decision of the Court and of a district court); Lewis v. State, (Court had already accepted similar case on a

Even more rare are the number of occasions when the Court has exercised its discretion to review a decision upholding the validity of a statute when the case began as a request for prospective declaratory and injunctive relief. Respondents have found only five occasions where the Court has granted review when the district court's decision did not actually and directly affect the litigant's life, liberty, or property.[3]

Thus, the Court's history shows that it has largely adhered to its precept that the district courts were never intended to be intermediate courts. The Court's admonition in Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958), still holds true today:

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. Diamond Berk Insurance Agency, Inc. v. Goldstein, Fla., 100 So.2d 420; Sinnamon v. Fowlkes, Fla., 101 So.2d 375. It was never intended that the district

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certified question); Perez v. State and Glendening v. State, (cases from different district courts presenting same issue to the Court); Bunnell v. State and Reese v. State, (same circumstances as Palmieri and Warren, infra).

[3]Libertarian Party of Florida v. Smith, (facial attack on statute restricting minor parties from receiving rebates from candidate's filing fees); Albertson's, Inc. v. Department of Professional Regulation, (facial challenge to law restricting pharmacies' rights to do business with state purchasing alliances); Cox v. Florida Dept. of Health and Rehabilitative Services, (facial attack on statute prohibiting gay adoption); Board of County Comm'rss, Hernando County v. Florida Dept. of Community Affairs, (challenge to administrative enforcement action); Coy v. Florida Birth-Related Neurological Injury Compensation Plan, (challenge to Birth-Related Neurological Injury Compensation Plan as invalid taxation).

> courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.
>
> To fail to recognize that [the district courts of appeal] are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Id. at 810, (quoted with approval in Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), and Sanchez v. Wimpey, 409 So. 2d 20, 21 (Fla. 1982)).

When these principles are applied to the instant case it is apparent that the Court should decline Petitioners' invitation to review the district court's decision. It is plain that the legal issues were correctly resolved under Florida law by the district court in upholding the facial validity of the Act. Accordingly, the resources of this Court need not be expended in review of a decision correctly applying this Court's controlling precedents.

The Act does not prohibit any young girl, whatever her age, from being the sole arbiter as to whether she will or will not

have an abortion. Additionally, as Petitioners recognize, because this case is a declaratory judgment action, there is no real person before the Court to whom any requirement of the Act has been applied, including the requirement that the medical professional performing the abortion take minimal steps to inform the young girl's parents or guardian about the pendency of the surgical procedure.[4]

CONCLUSION

For the reasons set forth herein the Court should decline Petitioners' invitation to review the decision of the First District Court of Appeal.

Respectfully Submitted,

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[4]This is in stark contrast to In re T.W. where a real minor's interest in obtaining an abortion without gaining the consent of her parents was the basis for instituting the action.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail this 23rd day of May, 2001, to the following:

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STATEMENT CERTIFYING TYPE SIZE AND STYLE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that Respondents' Jurisdictional Brief is computer-generated, using Courier New 12-point font.

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