IN THE SUPREME COURT OF FLORIDA

JEFFREY WOODARD and
CAROL GOAD,

Appellants,
vs.

JUPITER CHRISTIAN SCHOOL, INC.
and TODD BELLHORN,

Appellees.

CASE NO.: SC05-1986
DCA CASE NO.: 4D04-3531

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

AMENDED BRIEF OF *AMICUS CURIAE* FLORIDA'S CHILDREN FIRST, INC., IN SUPPORT OF APPELLANTS

FILED BY CONSENT OF APPELLANTS ONLY

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C.N. et al. *v. Wolf,* et al., Case No. SACV 05-868 (C.D. Cal., Nov. 28, 2005)...... 19
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 9
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Gracey v. Eaker, 837 So. 2d 348 (2002). 6
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Kos v. State, 15 S.W.3d 633 (Tex. App. 2000)........ 6
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Nussbaumer v. State, 882 So. 2d 1067 (Fla. 2d DCA 2004). 5
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)........ 9
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) 9
Planned Parenthood of Southeastern Pa v. Casey, 505 U.S. 833 (1992)........ 9
Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213 (Miss. 2005 6
Rowell v. Holt, 850 So. 2d 474 (Fla. 2003)........ 8
S.C. v. Guardian Ad Litem, 845 So. 2d 953 (Fla. 4th DCA 2003)........ 11
Tanner v. Hartog, 696 So. 2d 705 (Fla. 1997) 8
Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906 (1980) 6, 7
Waters v. O'Connor, 103 P.3d 292 (Ariz. App. Div. 1 2004) 6
Woodard v. Jupiter Christian School, __ So.2d ___, 2005 WL 2508733 (Fla. 4th DCA 2005) 3, 4, 8

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Fla. Stat. § 390.0116 (2005) 12
Fla. Stat. § 394.4784 (2005) 12
Fla. Stat. § 743.065 (2005)........ 12
Fla. Stat. § 90.505(1)(a) (2005) 5
Fla. Stat. § 90.505(1)(b) (2005) 5
Fla. Stat. §397.501(7)(e) 12
Fla. Stat. §397.601(4)(a)(2005) 12

Other Authorities

A. Peters, *Isolation or Inclusion: Creating Safe Spaces for Lesbian and Gay Youth*,

84 SCHOOL SOCIAL WORK 332 (2003) 17
Abigail English et al., Center for Adolescent Health & the Law, *State Minor Consent Statutes: A Summary* (2d ed. 2001) 10
Administration for Children & Families, U.S. Dept. of Health and Human Svces., *Child Maltreatment 2003: Reports from the States to the National Child Abuse and Neglect Data Systems* 21 (2005).. 14
American Association of Pastoral Counselors, Code of Ethics, 1994, section IV . 16
American Counseling Association, Code of Ethics, 2005, Section B.................. 16
American Medical Association, Code of Medical Ethics, *Professionalism: Confidential Care for Minors*.. 17
American School Counselor Association, *Position Statement: The Professional School Counselor and Confidentiality* (1999).. 16
Andrew J. Weaver et al., *Collaboration Between Clergy and Mental Health Professionals: A Review of Professional Health Care Journals from 1980 Through 1999*, 47 COUNSELING AND VALUES 162 (2003) 3
Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249 (1996).. 20
Carol A. Ford, *et al.*, *Forgone Health Care Among Adolescents*, 282 J. AM. MED. ASS'N (1999).. 15
Carol A. Ford, *et al.*, *Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care.*, 278 J. AM. MED. ASS'N 1029, 1033 (1997)... 16
Confidentiality in Adolescent Health Care, American Academy of Pediatrics News, 2005 17
Council on Ethical and Judicial Affairs, American Medical Association, *Confidential Care for Minors* (1992) 15
Elizabeth Ozer, *et al.*, National Adolescent Health Information Center, *America's Adolescents: Are They Healthy?* 21 (2003) 13
Florida Bar Commission on the Legal Needs of Children Final Report, Confidentiality Subcommittee Report (June 2002) 13
Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege 73 N.Y.U. L. REV. 225 (1998).. 5
Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools* (2001) 19
Janet H. Fontaine & Nancy L. Hammond, *Counseling Issues with Gay and Lesbian Adolescents*, 31 ADOLESCENCE 817 (1996) 17, 19
Jeannie S. Thrall, *Confidentiality and Adolescents' Use of Providers for Health Information and for Pelvic Examinations*, 154 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 885 (2000).. 15

Marks, *et al.*, *Assessment of Health Needs and Willingness to Utilize Health Care Resources in a Suburban Population*, 102 J. PEDIATRICS 456 (1983)................... 16
MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005) 10
Massachusetts Dept. of Educ., 1999, Massachusetts Youth Risk Behavior Survey (2000). 18
Michael Bahr, *et al.*, Addressing Sexual Orientation and Professional Ethics in the Training of School Psychologists in School and University Settings, 29 SCHOOL PSYCHOL. REV. 222 (2000).. 19
National Board for Certified Counselors Code of Ethics, 1997 17
National Mental Health Association, Bullying in Schools: Harassment Puts Gay Youth At Risk, http://nmha.org.pbedu/backtoschool/bullying GayYouth.pdf....... 18
P. Gibson, Substance Abuse & Mental Health Services Administration, U.S. Dept. of Health and Human Svces., *Report of the Secretary's Task Force on Youth Suicide: Prevention and Interventions in Youth Suicide* 3-110-3-137 (1989) 18
R. Antonucci, Mass. Dept. of Educ., *Massachusetts Youth Risk Behavior Survey Results* (1996) 17
Rebecca Gudeman, *Adolescent Confidentiality and Privacy Under the Health Insurance Portability and Accountability Act*, Youth Law News, July-September 2003.. 10
Ritch C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Sexual Minority Youth: Associations with School Problems, Running Away, Substance Abuse, Prostitution and Suicide*, 62 J. COUNSELING & CLINICAL PSYCHOL. 261 (1994).. 18
Sexual Information and Education Council of the United States, *Lesbian, Gay, Bisexual and Transgender Youth Issues*, http://www.siecus.org/pubs/fact/fact0013.html 18
Shelly Jackson and Thomas Hafemeister, *Impact of Parental Consent Notification Policies on the Decisions of Adolescents to Be Tested for HIV*, 29 J. ADOLESCENT HEALTH 81, 88 (2000).. 16
Society for Adolescent Medicine, *Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine* (1997)………………… 15
T.L. Cheng, *et al.*, *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes among High School Students*, 269 J. AM. MED. ASS'N 1404 (1993)... 15
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U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* 124 (1999) 13

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INTEREST OF *AMICUS CURIAE*

Florida's Children First, Inc. ("FCF"), is a non-profit advocacy organization, created to address the serious unmet legal needs of children who require representation in the legal forums affecting their lives. FCF's mission is to advance children's legal rights consistent with their medical, educational, and social needs. Its goal is to significantly improve all systems affecting children's lives through litigation, legislative and policy advocacy, executive branch monitoring, training and technical assistance to lawyers representing children, public awareness, and the education of law students. FCF has an interest in protecting children's rights to confidential communications with health and counseling professionals, thereby improving children's access to medical care and to psychiatric, psychological, and pastoral counseling.

SUMMARY OF ARGUMENT

A minor is entitled to seek redress for emotional damages suffered when his spiritual counselor breaches his fiduciary duty and discloses confidences revealed in counseling. Children are particularly vulnerable to psychological damage, high-risk behaviors, abuse, and other threats to their physical and emotional health. Minors dealing with sensitive issues, such as sexuality, alcohol and drug abuse, or mental health problems, will forgo counseling and treatment if confidentiality cannot be assured. These young people would rather do without counseling or

treatment than suffer the emotional trauma of having their confidences revealed. For adolescents grappling with their sexual identity, the need for confidentiality is even more critical. The stigmatization these adolescents suffer increases their risk for a myriad of health-related problems, and makes it less likely they will seek treatment and counseling because of the severe consequences if their secret is revealed. Counseling and health care professionals have adopted policies affirming the importance of confidentiality for minors. Law and public policy encourage minors to seek counseling and treatment. Federal and state laws afford minors confidentiality, especially concerning health care, mental health, and drug and alcohol treatment. These protections will be rendered meaningless without redress for breach of confidentiality for minors who do seek pastoral counseling.

ARGUMENT

I. The Impact Rule Should Not Be Applied to Strip Persons Seeking Pastoral Counseling of the Protections of Confidentiality.

A. The impact rule is inapplicable to the breach of confidentiality and fiduciary duty by disclosure of information confided to clergy for private counseling.

Clergy are the frontline mental health providers for millions of adults and children in the United States.[1] To exempt from traditional privacy protection persons who seek counseling from clergy rather than from psychologists or

psychotherapists violates public policy and implicates equal protection of the penitent seeking religious counseling. There is no valid reason to strip from legal protection the confidential disclosures made by persons, and especially minors, seeking counseling in a penitent-clergy fiduciary relationship.[2]

Appellee Bellhorn is a "Chaplain" at JCS, a private Christian, "Bible-centered" school. *Woodard v. Jupiter Christian School, Inc.*, 2005 WL 2508733 at *1 (Fla. 4th DCA 2005). Appellant Woodard, "a minor, believed that JCS Chaplain Bellhorn was a member of the clergy and believed that the ensuing conversation with Bellhorn was confidential." R115 (Compl. ¶ 54). "Bellhorn assured the student their conversation was confidential. Only after receiving this assurance, did the student disclose he was homosexual." *Woodard,* 2005 WL 2508733 at *1. "Woodard proceeded to confess his sexual orientation for the purpose of seeking spiritual counsel and advice from Bellhorn in his role as JCS Chaplain." R115 (Comp. ¶ 54). "[T]he chaplain's stated objective was to 'minister to high school teenagers' and 'to not only be a teacher to them, but also one whom they can trust

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[1] Andrew J. Weaver, *et al.*, *Collaboration Between Clergy and Mental Health Professionals: A Review of Professional Health Care Journals from 1980 Through 1999*, 47 COUNSELING AND VALUES 162, 162-3 (2003).

[2] Each year one in six adults and one in five children obtain mental health services from a health care provider, the clergy, a social services agency, or a school. U.S. Dept. of Health and Human Svces., *Mental Health: A Report of the Surgeon General* xvii, 406-407 (1999). In 2004, approximately 18% of children and 19% of adults who sought professional help for depression consulted a religious or spiritual advisor.

and approach without fear or intimidation.'" *Woodard,* 2005 WL 2508733 at *1. "As JCS Chaplain/counselor, Bellhorn had a relationship of trust and confidence with Woodard, and, as such, had a fiduciary duty to Woodard to keep all their communications confidential, particularly in light of Woodard's initial vulnerability as a minor . . . [and] the confidentiality of the relationship…." R115-16 (Compl. ¶ 56). Bellhorn disclosed the confidential confession "breaching his fiduciary and statutory duty of confidentiality" to Appellant. R116 (Compl. ¶ 57). "Taking these well-pled allegations as true for the purposes of the motion to dismiss, the plaintiff has alleged the disclosure of confidential information arising from a special relationship between the student and a member of the clergy." *Woodard*, 2005 WL 2508733 at *3.

Judge Farmer, in his dissent, opined:

> If the impact rule is not applicable against a patient's claim for a psychologist's breach of confidentiality, it is not even arguably applicable to a clergyman's breach. Psychotherapists may have displaced the clergy as the primary source of "spiritual" counseling, but as a profession they are immediate descendants of the clergy by a process of cultural selection. So close is the function of psychotherapists and clergy, so indistinguishable is the relationship between them and their patients and penitents, that if psychotherapists can be sued for breach of confidentiality by their patients without implicating the impact rule, then—by an even more formidable logic—clergy members may equally be sued.

Id. at *6 (Farmer, J. dissenting).

Florida Statutes define a "member of the clergy" as "a priest, rabbi,

practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church, *or an individual reasonably believed so to be by the person consulting him or her*." § 90.505(1) (a), Fla. Stat. (2005) (emphasis added). The legislature has specifically provided that a "communication between a member of the clergy and a person is 'confidential' if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication." *Id*. § 90.505(1) (b).

The statute creates a four-part test to establish the existence of a privilege. The communication must be made: (1) to a "member of the clergy"; (2) for the purpose of seeking spiritual counseling or advice; (3) and received in the usual course of the clergyman's practice or discipline; (4) privately and not intended for further disclosure. *Nussbaumer v. State*, 882 So. 2d 1067 (Fla. 2d DCA 2004). The statute sets forth the parameters of the confidential relationship, within which the penitent can reasonably expect confidential communications will not be divulged.[3]

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[3]There are currently fifty clergy-penitent statutes in our nation. Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege* 73 N.Y.U. L. REV. 225 (1998). "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, *in total and absolute confidence*, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."

This Court should not, by application of the impact rule, determine that counseling from clergy is less worthy of protection than counseling by a psychotherapist or other health care professional. To deny legal redress for breach of a fiduciary duty, particularly when it involves confidential information revealed by a minor in a time of crisis to a member of the clergy, has far-reaching policy implications for the health and well-being of minors in our state.

B. This Court has found the impact rule inapplicable to claims arising from unauthorized disclosure of a confidence gained in a fiduciary relationship because of the emotional harm undoubtedly caused by the disclosure and public interest in fostering health.

This Court has held the impact rule inapplicable to other tort actions arising from wrongful disclosure of confidences gained in the context of a fiduciary relationship. *Gracey v. Eaker*, 837 So. 2d 348 (2002). In *Gracey*, a couple sued a psychotherapist for negligent infliction of emotional distress after the therapist conducted what were supposed to be confidential individual counseling sessions and then disclosed the confidences of one spouse to the other. Refusing to apply

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Trammel v. United States, 445 U.S. 40, 51 (1980) (emphasis added). As described in *Roman Catholic Diocese of Jackson v. Morrison,* 905 So. 2d 1213 (Miss. 2005), "The general rule of the privilege is: 'A person has a privilege to refuse to disclose and prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.'" *Id*. *See also Kos v. State*, 15 S.W.3d 633, 639 (Tex. App. 2000) (same); *Waters v. O'Connor*, 103 P.3d 292 (Ariz. App. 2004); *Doe 2 v. Superior Court*, 132 Cal.App.4th 1504, 34 Cal.Rptr.3d 458 (Ca. 2 Dist. 2005).

the impact rule, the Court found a duty to keep confidential information disclosed in the fiduciary relationship between psychotherapists or physicians and their patients.[4] *Id.* at 353-54.

The Court held the fiduciary duty to maintain confidentiality grounded in public policy:

> The Florida legislature has recognized and found that one's emotional stability and survival must be protected to the same extent as physical safety and personal security. . . To preserve the health, safety and welfare of Florida's citizens, our legislature found itself compelled to take action to protect the confidentiality involved in the most private and personal relationships interwoven with mental health practitioners.
>
> . . . .
>
> If the legislative provision is to have any life or meaning and afford reliable protection to Florida's citizens, our people must have access to the courts without an artificial impact rule limitation, to afford redress if and when the fiduciary duty flowing from the confidential relationship and statutory protection is defiled by the disclosure of the most personal of information.

Id. at 352.

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[4]The United States Supreme Court characterizes the physician-patient privilege as "rooted in the imperative need for confidence and trust," noting that "the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel*, 445 U.S. at 51. The need for confidentiality is even greater in mental health treatment or counseling. "The mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996).

Gracey is consistent with established precedent that the impact rule does not apply to tort claims in which a grave and foreseeable, yet predominantly emotional injury results from breach of a fiduciary duty. For example, in *Rowell v. Holt*, 850 So. 2d 474, 478 (Fla. 2003) this Court held the impact rule is "not applied in cases in which the foreseeability and gravity of the emotional injury involved, and lack of countervailing policy concerns, have surmounted the policy rationale undergirding application of the impact rule." In *Kush v. Lloyd*, 616 So. 2d 415, 422 (Fla. 1992), this Court reasoned that as the impact rule does not apply to torts such as defamation and invasion of privacy, which result in predominantly emotional damages, it should also not preclude recovery for mental anguish flowing from a wrongful birth. *Kush* held that the impact rule is "inapplicable to recognized torts in which damages often are predominately emotional, such as ... invasion of privacy." *Id*. In *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997), the impact rule was not applied to preclude recovery for foreseeable mental anguish of parents of a stillborn child resulting from negligent medical care.

As Judge Farmer's dissent in *Woodard* correctly concludes, these cases establish that the impact rule does *not* apply to actions in which foreseeable grave emotional injury dominates over economic or other injuries resulting from the breach of a fiduciary duty. *Woodard*, 2005 WL 2508733 at *4. The impact rule does *not* bar redress for grave foreseeable harm resulting from breach of the

confidential disclosures made by a minor to a clergyman.

II. Society Has a Strong Interest in Protecting Minors' Confidentiality and Encouraging Them to Seek Counsel and Treatment From Health Care Providers and Clergy.

A. The judiciary, legislature and public policy have recognized the importance of protecting minors' confidentiality in seeking health care.

1. Federal and state laws protect minors' confidentiality and privacy interests in health care.

Courts and legislatures nationally recognize the importance of confidentiality in care for adolescents' physical and emotional needs. Federal and state courts have recognized that minors have a constitutionally protected right of privacy. *See, e.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."). State laws that bar minors' access to private reproductive health care have been ruled unconstitutional, unless laws requiring parental involvement contain alternatives, such as judicial bypass. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

States have passed laws authorizing minors to consent to health care related

to sexual activity, substance abuse, and mental health.[5] In certain states, older minors or those with special status (*e.g.*, emancipated, married or parents) can consent to all of their health care—not just in these sensitive areas. Many of these statutes also provide explicit confidentiality protections for information related to health care. Lawmakers recognize that while parental involvement is desirable, many minors will not seek services if obligated to tell their parents. Some programs, such as Title X of the Public Health Act, which provides funding for family planning clinics, require access to confidential services "without regard to age."[6] The Public Health Services Act protects confidentiality of drug and alcohol treatment records, sometimes providing greater protection than state law.[7] While

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[5]Abigail English, *et al.*, Center for Adolescent Health & the Law, *State Minor Consent Statutes: A Summary* (2d ed. 2001). For example, 25 states and the District of Columbia allow minors to consent to contraceptive services; 25 states and the District of Columbia allow minors to consent to testing for sexually transmitted diseases, including HIV; 44 states and the District of Columbia allow confidential counseling and medical care for minors suffering from drug and alcohol abuse; and 20 and the District of Columbia allow minors to consent to outpatient mental health services. *Id*. *See also* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005) 236 ("Legislators simply don't think about this subject in terms of children's rights. These are intelligent rules for society. Legislators recognize the terrible consequences to society (in other words, to the world inhabited by adults) when children with sexually transmitted diseases go untreated.").

[6]42 U.S.C. § 300a (2005); 42 C.F.R. § 59.5(a) (4) (2005).

[7]42 U.S.C. § 201, *et seq*.; Rebecca Gudeman, *Adolescent Confidentiality and Privacy Under the Health Insurance Portability and Accountability Act*, YOUTH LAW NEWS, July-September 2003, at 1-6 (When state law requires parental consent for a minor's substance abuse treatment, federal law generally prohibits providers

the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") regulations do not give minors confidentiality rights beyond state law, when adolescents have a right to consent under state law, the provider must comply with HIPAA's requirements to reduce the risk of disclosure.[8]

2. Florida law protects children's confidentiality and privacy.

Florida has also recognized the importance of confidentiality for minors in health care matters. This Court has held that Article I, § 23 of the Florida constitution affords the right to privacy to every natural person irrespective of age. *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).[9] Florida courts have also recognized that a minor child has a privilege in the confidentiality of communications with health and other professionals. *S.C. v. Guardian Ad Litem*, 845 So. 2d 953 (Fla. 4th DCA 2003) (psychotherapist); *Attorney Ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 307 (Fla. 4th DCA 2001) (psychotherapist); *Kasdaglis v. Dep't of Health*, 827 So. 2d 328 (Fla. 4th DCA 2002) (social worker).

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from disclosing any information without the written consent of *both* the minor and the minor's parents).

[8] *Id.*; 45 C.F.R. §164.510.

[9] The Florida constitution was subsequently amended to permit the legislature to require parental notification, along with a process for judicial waiver of the notification. Fla. Const. Art. X, § 22. In 2005, the legislature passed a parental notification and judicial bypass law. Minors seeking an abortion may petition the court for waiver of parental notification. § 390.01114, Fla. Stat. (2005). To ensure confidentiality, the judicial bypass procedure allows the minor to petition under a pseudonym and in a circuit court outside of the immediate home jurisdiction, and

The Florida legislature has provided that mature minors can consent to mental health services, alcohol and drug abuse treatment services, and treatment for sexually transmitted diseases. § 394.4784, Fla. Stat. (2005) (allowing a minor over age 13 who "experiences an emotional crisis to such degree that he or she perceives the need for professional assistance" to access therapy or counseling services); § 397.601(4)(a), Fla. Stat. (2005)(removing the disability of minority for the purpose of obtaining voluntary substance abuse services); § 397.501(7)(e), Fla. Stat. (2005) (protecting minor's treatment records from disclosure without minor's consent); § 384.30, Fla. Stat. (2005) (providing minors the right to consent to treatment for sexually transmitted diseases). Florida statutory law also allows unwed pregnant minors or minor mothers to give consent to medical services for themselves and their children. § 743.065, Fla. Stat. (2005).

3. The Florida Bar Commission on the Legal Needs of Children affirms the importance of safeguarding children's confidentiality.

The Florida Bar Commission on the Legal Needs of Children, although not addressing the question certified to this Court, has affirmed the importance of respecting the confidentiality interests of children. In addition to the core constitutional privacy interest, the Commission identified other interests implicated by preventing dissemination of children's intimate information: avoiding

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explicitly provides that all identifying information is confidential. § 390.01114; § 390.0116, Fla. Stat. (2005).

embarrassment or humiliation; protecting physical safety (*e.g*., domestic violence); avoiding discrimination or differential treatment (*e.g*., from schools and agencies); preventing denial of discretionary services (*e.g*., expulsion from private or parochial school); and encouraging adolescents to seek medical care.[10]

The Commission made the following recommendations:

> Children with the capacity to consent or withhold consent to the release of confidential information concerning health care treatment (e.g., records concerning mental health treatment, treatment for sexually transmitted diseases or HIV) should be consulted prior to an agency releasing such records and should be asked to give informed consent to the release of such information.
>
> Children over 14 should be allowed to request that private information not be disclosed when the disclosure involves extraordinarily sensitive issues concerning the child's privacy.[11]

B. Confidentiality is critical to minors' health.

Children are particularly vulnerable to psychological damage, high-risk behaviors, abuse, and other physical and emotional health risks. An estimated one in five children ages 9 to 17 has a mental, emotional or behavioral disorder.[12] Suicide is the third leading cause of death for adolescents.[13] In 2003, 900,000 children nationally were found to be abused or neglected, increasing their risk for

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[10]The Florida Bar Commission on the Legal Needs of Children Final Report, Confidentiality Subcommittee Report, C.2-C.5 (June 2002).
[11]*Id*. at C.19, 24.
[12]U.S. Dept. of Health and Human Svces., *Mental Health: A Report of the Surgeon General* 124 (1999).
[13]Elizabeth Ozer, *et al.*, National Adolescent Health Information Center, *America's Adolescents: Are They Healthy?* 21, 23 (2003).

other psychosocial problems.[14]

Even youth without a formal diagnosis or traumatic event experience emotional crises serious enough to warrant counseling. Among the 20.6% (or about 5.1 million) of adolescents who reported receiving "treatment or counseling for emotional or behavioral problems" in 2003, the most common reasons for seeking treatment were that they "felt depressed," followed by "breaking rules or acting out" and "felt very afraid or tense."[15] Adolescents face other health problems, many of which are attributable to risky behaviors, including tobacco use, alcohol and drug abuse, unsafe sexual practices, poor dietary habits, lack of exercise, carrying firearms, and risky vehicle use.[16] Because these behaviors are preventable, efforts to improve adolescent health require a focus on social and behavioral issues and the creation of environments that support healthy choices.[17] Encouraging adolescents to seek assistance from health professionals and counselors is critical to these efforts. A pastoral counselor can not only provide counseling during emotional crisis, but can encourage the child to seek other types

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[14]U.S. Dept. of Health and Human Svces., *Child Maltreatment 2003: Reports from the States to the National Child Abuse and Neglect Data Systems* 21 (2005).

[15]Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *2003 National Household Survey on Drug Abuse*, Chapter 8 (2004).

[16]Elizabeth M. Ozer, *America's Adolescents: Are they Healthy?* 1; Center for Disease Control, U.S. Dept. of Health and Human Svces., *Youth Risk Behavior Surveillance – United States, 2003* (2004).

[17]Elizabeth M. Ozer, *America's Adolescents: Are they Healthy?* at 1.

of treatment, thereby improving the minor's overall health and well-being.

Health and counseling professionals have long viewed confidentiality as *essential* to the delivery of care to adolescents.[18] "Because of the sensitive nature of the problems for which individuals [seek counseling], disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee*, 518 U.S. at 9 (1996). Minors have added concerns of not wanting to share this information with parents for fear of embarrassment, disapproval or violence.[19] In some cases, particularly those of sexual, physical or mental abuse, parents may be the cause of a teen's emotional or physical problems.

Without assurances of confidentiality, adolescents may forgo treatment.[20] One study indicated that only 45% would seek care for depression and 20% would seek reproductive health or substance abuse treatment if their parents were

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[18]Council on Ethical and Judicial Affairs, American Medical Association, Confidential Care for Minors 1 (1992); Society for Adolescent Medicine, *Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine* (1997).

[19]Carol A. Ford, *et al.*, *Forgone Health Care Among Adolescents*, 282 J. AM. MED. ASS'N 2227, 2228 (1999).

[20]Jeannie S. Thrall, *Confidentiality and Adolescents' Use of Providers for Health Information and for Pelvic Examinations*, 154 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 885 (2000); Carol A. Ford, *Forgone Health Care,* at 2228; T.L. Cheng, *et al.*, *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes among High School Students*, 269 J. AM. MED. ASS'N 1404 (1993).

notified.[21] Those who seek care may be less likely to share information, without which counselors or physicians cannot deliver accurate diagnoses or treatment.[22] "[P]hysician confidentiality assurances increase adolescents' willingness to discuss sensitive topics related to sexuality, substance use, and mental health and increase adolescents' willingness to return for future health care."[23]

Recognizing lack of confidentiality as a barrier to care, medical and counseling professionals have adopted policies supporting confidential services for adolescents.[24] The American Medical Association and the Society for Adolescent Medicine concluded that while adolescents should be encouraged to involve their families in health care decisions, they should be assured confidentiality under most

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[21]A. Marks, *et al.*, *Assessment of Health Needs and Willingness to Utilize Health Care Resources in a Suburban Population*, 102 J. PEDIATRICS 456 (1983).

[22]Shelly Jackson and Thomas Hafemeister, *Impact of Parental Consent Notification Policies on the Decisions of Adolescents to Be Tested for HIV*, 29 J. ADOLESCENT HEALTH 81, 88 (2000).

[23]Carol A. Ford, *et al.*, *Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care*, 278 J. AM. MED. ASS'N 1029, 1033 (1997).

[24]*See, e.g.,* American School Counselor Association, *Position Statement: The Professional School Counselor and Confidentiality* (1999), school counselor.org/ethics/index.htm (students "have the right to privacy and confidentiality," which "must not be abridged by the counselor except where there is clear and present danger to the student and or other person."); American Counseling Association, Code of Ethics, 2005, Section B, www.counseling.org/resources/codeofethics.htm (protecting minors' confidentiality consistent with laws and ethical standards); *see also* American Association of Pastoral Counselors, Code of Ethics, 1994, section IV, www.aapc.org/ethics.htm (requiring confidentiality for all clients); National Board

circumstances.[25] They recognize that "the health risks to the adolescents are so impelling that legal barriers and deference to parental involvement should not stand in the way of needed health care."[26]

C. Minors who are homosexual or questioning sexual identity especially require confidentiality and privacy in health care.

Minors grappling with their sexual identity or who are lesbian, gay, bisexual or transgender ("LGBT") confront severe stigmatization, placing them at an increased risk for a host of medical and psychosocial problems.[27] Empirical studies show that high school students frequently hear anti-gay epithets in their schools,[28] and students who are gay or perceived as gay are often victims of

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for Certified Counselors Code of Ethics, 1997, sections B.4-B.8, www.nbcc.org/ethics/nbcc-code.htm (same).

[25]American Medical Association, Code of Medical Ethics, *Professionalism: Confidential Care for Minors*, E-5.055, www.ama-assn.org/ama/pub/category/8355.html; Society for Adolescent Medicine, *Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine* (1997).

[26]*Archival Posting: Confidentiality in Adolescent Health Care*, American Academy of Pediatrics News, 2005, www.aapnews.aappublications.org/cgi/content/full/e2005175v1(Joint statement by five health care organizations recommending same degree of confidentiality protection for adolescent and adult patients).

[27]Janet H. Fontaine & Nancy L. Hammond, *Counseling Issues with Gay and Lesbian Adolescents*, 31 ADOLESCENCE 817 (1996).

[28]R. Antonucci, Massachusetts Dept. of Educ., *Massachusetts Youth Risk Behavior Survey Results* (1996) (finding that 93% of high school students heard anti-gay epithets "frequently"); A. Peters, *Isolation or Inclusion: Creating Safe Spaces for Lesbian and Gay Youth*, 84 SCHOOL SOCIAL WORK 332 (2003) (94% of students surveyed hear anti-gay epithets "frequently" or "sometimes" in their schools).

violence and bullying.[29] After coming out or being discovered as gay, many young people are rejected by their families and even subjected to violence in their homes.[30] Fear of being shunned or attacked forces many to keep their sexual questioning a tightly guarded secret, leading to stress and profound isolation.[31]

LGBT youth are at a disproportionate risk for suicide, substance abuse, and sexual risk-taking.[32] One key study found youth dealing with sexual identity issues are *three times more likely to commit suicide* than other young people.[33] These minors are also more likely to be homeless, often being forced out of their homes after their sexual identity is discovered, and are more likely to drop out of school to avoid harassment or violence.[34]

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[29] Sexual Information and Education Council of the United States, *Lesbian, Gay, Bisexual and Transgender Youth Issues*, http://www.siecus.org/pubs/fact/fact0013.html (finding 41.7% of LGBT youth surveyed did not feel safe in their school, and 69% experienced some sort of harassment or violence); Natl. Mental Health Assn., *Bullying in Schools: Harassment Puts Gay Youth At Risk*, http://nmha.org.pbedu/backtoschool/bullying GayYouth.cfm (31% of gay youth have been threatened or injured in the last year).

[30] Ritch C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Sexual Minority Youth: Associations with School Problems, Running Away, Substance Abuse, Prostitution and Suicide*, 62 J. COUNSELING & CLINICAL PSYCHOL. 261, 266 (1994)

[31] Janet H. Fontaine, 31 ADOLESCENCE, at 817

[32] Ritch C. Savin-Williams, 62 J. COUNSELING & CLINICAL PSYCHOL., at 266); Massachusetts Department of Education, 1999 Massachusetts Youth Risk Behavior Survey (2000).

[33] P. Gibson, Substance Abuse & Mental Health Services Administration, U.S. Dept. of Health and Human Svces., *Report of the Secretary's Task Force on Youth Suicide: Prevention and Interventions in Youth Suicide* 3-110-3-137 (1989).

[34] Ritch C. Savin-Williams, 62 J. COUNSELING & CLINICAL PSYCHOL. at 266.

Confidentiality is critical to address the unique challenges faced by LGBT youth.[35] These adolescents are unlikely to seek counseling unless they understand their conversations will remain private.[36] The emotional, social and physical costs are too severe if their secret is revealed. Even if they do seek help, many will not disclose sexual orientation even though it may be important to their care.[37] Thus, it is particularly important that all counselors and health professionals afford minors seeking counseling for these issues the utmost confidentiality.[38]

D. Confidentiality also is compelled by considerations of therapeutic jurisprudence.

In reaching its decision, this Court should consider the implications of its ruling on the psychological well-being of the individuals affected, and on society as a whole. Breach of the psychotherapist-patient privilege can have significant

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[35]Indeed, a U.S. District Court has just ruled that a gay public school student's privacy rights were implicated when the school principal called her mother and disclosed that she is gay. *See* Tamar Lewin, *Openly Gay Student's Lawsuit Over Privacy Will Proceed*, N.Y. TIMES (Dec. 2, 2005) at A21; *C.N.* et al. *v. Wolf,* et al., Case No. SACV 05-868 (C.D. Cal., Nov. 28, 2005) (plaintiff "sufficiently alleged that she has a legally protected privacy interest in information about her sexual orientation" Slip. Op. at 12).

[36]*Id*.

[37]Janet H. Fontaine, 31 ADOLESCENCE at 823-26 (adolescents will end up in counseling for different reasons but still not disclose their sexual identity).

[38]Michael Bahr, *et al.*, *Addressing Sexual Orientation and Professional Ethics in the Training of School Psychologists in School and University Settings*, 29 SCHOOL PSYCHOL. REV. 222 (2000) ("Confidentiality is critical in clinical work with sexual minority youth" and their families); Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools* (2001).

anti-therapeutic consequences for the patient:

> For most people, public revelation of private therapy disclosures would be extremely unpleasant and embarrassing. Moreover, it could produce significant negative consequences that might be harmful to them in such important areas of their lives as the family and the workplace. As a result, behavioral psychology would predict that people who are aware of this possibility may be seriously deterred from engaging in therapy.

Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 257 (1996).

Breach of the relationship between a penitent and a member of the clergy, particularly an adolescent grappling with sexual identity, is likely to deter the adolescent from seeking pastoral counseling and ultimately to destroy the trust vital to the formation of healthy relationships with family members, adults and peers in school, the workplace, and in society. Given the high incidence of emotional problems among children and adolescents, it is vitally important that society encourage them to seek counseling. Pastoral counseling is critical because most children in this situation will not seek out mental health counseling, and existing resources already are overburdened. Without counseling, problems may escalate, leading to substance abuse, sexually transmitted diseases, and suicide.

CONCLUSION

Based on the foregoing arguments, FCF requests that this Court answer the certified question in the negative and hold that the impact rule does *not* apply to confidences disclosed by a minor to a member of the clergy.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Amended *Amicus Curiae* Brief was served by U.S. Mail this 8th day of December, 2005, to W. Trent Steele, Esq., 2897 S.E. Ocean Blvd., Stuart, FL 34996; John L. Bryan, Esq., 4400 PGA Blvd., Suite 800, Palm Beach Gardens, FL 33410; Michelle Hankey, Esq. and William W. Booth, Esq., Legal Aid Society of Palm Beach County, Juvenile Advocacy Project, 423 Fern St., Suite 200, W. Palm Beach FL 33401.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a) (2).

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