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' REPLY BRIEF

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Considering all of the trial court's factual findings, it is clear that the State failed to meet its stringent burden of establishing that the Act furthers a compelling state interest by the least intrusive means. In allowing minors to obtain medical treatment related to sexual matters without parental involvement, the Legislature has recognized that requiring such involvement deters minors from seeking medical care as to those most private personal matters. Yet that impediment and its associated harms are now imposed upon pregnant minors who chose to terminate their pregnancies. None of the State's asserted interests justify imposing a parental notification requirement on abortion, but not on other medical services related to minors' pregnancies and sexual activity.

III. ARGUMENT

A. The State Has Ignored and Mischaracterized Factual Findings of the Trial Court.

The State misleadingly asserts that "the [trial] court accepted the legislative findings and did not make contrary findings of fact." (State's Br. at 27; *see also id.* at 4, 16)[1] Although the trial court concluded that many of the legislative findings were "fairly self evident," it also found that "some clarification and additional findings of fact are important to the legal analysis here" and set forth additional findings, which the State and the District Court ignore. (*See* R. v. XIV, p. 2191-94.) In particular, the trial court made factual findings regarding other medical care which the Legislature allows minors to receive without parental notification, thus laying the factual groundwork for its conclusion that the Act does not further a "compelling" state interest. (*Id.*)

Although the State does not even attempt to show that any of the trial court's factual findings were clearly erroneous, it seeks to have this Court reach contrary factual conclusions.[2] Thus, for example, although the trial court found that the Act

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[1] Plaintiffs-Petitioners' Amended Initial Brief is referred to herein as "Initial Br.;" Respondents' Answer Brief is referred to as "State's Br.;" Amicus Curiae Brief by the Florida Catholic Conference is referred to as "FCC Br.;" and Amicus Curiae Brief of the American Civil Liberties Union, *et al.* is referred to as "ACLU Br." Deposition testimony, added to the record pursuant to this Court's December 7, 2001 Order, is cited herein as Tab #, page:line and is appended to this brief.

[2] The difference between the trial court's findings and the State's depiction of the provision of abortions results from the State's heavy reliance on the testimony of Eric Harrah, Dr. Kathi Aultman, and Dr. Rebecca Moorhead. (*See* State's Br. at 7-12) Mr. Harrah had no experience with abortion clinics in Florida and violated some laws governing abortions provision in the states in which he did work. (R. v. X, p. 1495:6-9, 1528:4-20, 1535:8-1536:24) Dr. Aultman last worked in an abortion clinic in 1981 or 1982 and did not know what type of counseling currently was being provided by clinic personnel. (R. v. XI, p. 1653:17-1654:3, 1655:19-21, 1673:6-8) Dr. Moorhead lacked personal knowledge of any clinic practices other than in the Jacksonville area and her testimony regarding minors' difficulties in

will cause "some delay and thus increased risk to the minor child in having the abortion performed," R. v. XIV, p. 2201, the State recites evidence that it contends indicates that delay from the Act does not pose such risks. (*See* State's Br. at 12-13; *see also* Initial Br. at 18-22 [citing evidence supporting trial court's findings]) Similarly, the trial court found that the risk of "complications from abortion are very low" and "[m]ost minors, especially older minors, are perfectly capable of relaying the necessary medical information and history to the physician . . . [and] of following directions for aftercare treatment," R. v. XIV, p. 2192-93, while the State argues that "[its] evidence eliminated any uncertainty about the potential severity of post-operative complications and demonstrated that parents can be vital in intervening to alleviate them." (*See* State's Br. at 26-28) Moreover, while the trial court found that "[s]ome minors face significant health risks if they continue their pregnancy and thus an abortion in such instances is medically indicated," *id*., p. 2199-2200, the State claims that "the evidence at trial plainly showed that abortions . . . are not medically indicated." (*See* State's Br. at 34) Furthermore, whereas the trial court cited Dr. Moorhead's testimony regarding an emergency room patient who did not want her parents to know of her abortion, R. v. X, p. 1600:14-1601:21, as an illustration of the health risks minors take to avoid having parents know of an abortion, *see* R. v. XIV, p. 2202 n.7, the State claims this same testimony is evidence of the harms that result from not requiring parental notification. (*See*

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understanding post-operative instructions, informed consent forms, and medical history forms did not take into account that clinic counselors and physicians go over the forms and related information with their minor patients. (*See* Initial Br. at 3-4; TT 1133:14-1134:25, 1135:10-1137:18)

State's Br. at 8 & 27)[3]

The State also distorts some of the evidence it cites. For example, the Minnesota study referenced in the State's brief at 12-13 found that although fewer minors overall obtained abortions within Minnesota after its parental notice law was enacted, a greater proportion of the abortions obtained were performed after 12 weeks gestation, leading the researcher to conclude that those minors who sought abortions within the state might be experiencing delays in obtaining them. (*See* TT 398:8-10, 448:1-449:3, 1299:14-25; Pls. Exh. 43) The State also complains that Plaintiffs failed to establish, *e.g*., that minors do not inform a parent before undergoing other pregnancy-related surgery. (*See* State's Br. at 29-30) But requiring such evidence would turn the burden of proof on its head. That the State has failed to meet its evidentiary burden is well illustrated by the paucity of evidence that minors having abortions without parental knowledge suffer worse health outcomes than those whose parent has been notified.

Having failed to satisfy its heavy burden of proof at trial, the State now seeks to reargue the evidence to this Court.[4] However, the trial court's fact-

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[3] *Cf. compare* R. v. XIV, p. 2191-92, 2199 & Initial Br. at 11-14, *with* State's Br. at 13-14, 30-34 (regarding minors' maturity, emotional and psychological consequences from decisions); *compare* R. v. XIV, p. 2192, 2199 & Initial Br. at 5-11, *with* State's Br. at 29-30 (regarding risks associated with abortion and those associated with other pregnancy-related care); *compare* R. v. XIV, p. 2192, 2200-02 & Initial Br. at 9-10, 13-14, 18, 21-24, *with* State's Br. at 29-30 (regarding risks pregnant minors face prior to point at which a parent may learn of the pregnancy).

[4] The Amicus Curiae Brief filed by the Liberty Counsel goes even further, urging this Court to make contrary factual findings based on evidence considered by the trial court and on inadmissible evidence that was either not presented to the trial court or was excluded from evidence at trial. (*See, e.g*., Liberty Counsel Br. at 9-

finding is conclusive on these factual matters. (*See* Initial Br. at 27-28)

B. The State Has Misstated the Analysis This Court Should Undertake.

The State contends that this Court must consider the "context" of the intrusion of privacy at issue. (*See* State's Br. at 19-24) Plaintiffs agree that context is important: here, the context is an intrusion into the fundamental right to choose abortion, granted to minors by the Florida Constitution. *See* Art. I, § 23, Fla. Const.; Initial Br. at 29-32.

The State's discussion of the relevant "context" is flawed in three important respects. First, the State is incorrect regarding the relevance of the degree of intrusion into an asserted right. (*See* State's Br. at 19-21) This Court did not resolve the cases on which the State relies based on the degree of intrusion into a right, as the State contends, but rather on whether a protected right was in fact involved.

This Court's decision in *Krischer v. McIver* turned on the nature of the right

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10 n.17 [citing email to author of brief]; *id*. at 13 n.26 [citing article excluded from evidence, *see* TT 182:13-183:14-21])

intruded upon. *See Krischer v. McIver*, 697 So. 2d 97, 102-04 (Fla. 1997); *id.* at 104-06 (Overton, J., concurring); *id.* at 107-08 (Harding, J., concurring). This Court concluded that there *is* a meaningful distinction between the right to refuse medical treatment and the asserted right to commit physician-assisted suicide.[5] *Compare* 697 So. 2d at 102, *with* State's Br. at 20. Because of that distinction, the Court found that State interests that are *not* compelling in the context of the established right of a patient to refuse medical treatment *are* compelling in the context of an asserted right to assisted suicide. 697 So. 2d at 103-04; *accord* 697 So. 2d at 105-06 (Overton, J., concurring). However, that conclusion did not turn

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[5] Given the distinctions between the established right to refuse medical treatment and the asserted right to assisted suicide, the plurality opinion, although applying the compelling state interest test, also stated that it was not "broadly construing the privacy amendment to include the right to assisted suicide." 697 So. 2d at 104; *accord id.* at 108 (Harding, J., concurring; finding that "the constitutional right of privacy is not implicated here").

on the degree of the intrusion. The State's ban on assisted suicide clearly was a significant intrusion into the purported right, but this Court found that the asserted right was not worthy of constitutional protection.

In contrast, this Court has clearly determined that the right at issue here -- of minor women to determine whether or not to continue their pregnancy -- is encompassed by the fundamental right to privacy. *In re T.W.*, 551 So. 2d 1186, 1193, 1197 (Fla. 1989). Because requiring parental consent implicated that privacy right, this Court looked to see if the Legislature had consistently required parental consent in comparable situations and found such consistency lacking -- the compelling interest analysis Plaintiffs urge this Court to apply here. *See id.* at 1195; Initial Br. at 32-40; *see also J.A.S. v. State*, 705 So. 2d 1381, 1383-87 (Fla. 1998) (finding that interest previously found compelling in context of established privacy

right, based on consistent legislative treatment, was furthered by statute).

Second, the State creates a false dichotomy between a parental "consent" statute, at issue in *In re T.W.*, and the parental "notice" statute at issue here. This Court has already established that a minor has a fundamental right to choose abortion, 551 So. 2d at 1193, 1197, and therefore the threshold question is whether the Act intrudes upon that right. Without question, a parental consent statute does so. *See id.* at 1192-94, 1197. As the facts here establish, and as both the trial court and District Court found, a parental notice statute also does so. (*See* R. v. XIV, p. 2201; 26 Fla. L. Weekly at D421; Initial Br. at 30-31) Indeed, in some circumstances it deprives a minor of "control over the abortion decision," State's Br. at 22. (*See* R. v. XIV, p. 2201; Initial Br. at 17)

Third, the State misconstrues the "consistency inquiry" this Court has

applied in evaluating whether intrusions upon the right to privacy serve a state interest that is "compelling." The State argues incorrectly that this Court must give the Legislature "sufficient latitude to draw reasonable distinctions in furtherance of [its] duty [to determine social policy]" here. (State's Br. at 22-24) Of course, where the Legislature has intruded upon the fundamental right to privacy, it is not enough for the Legislature to have acted "reasonably," "sensibly," or "rationally." (*See* State's Br. at 22-23, 29, 35) In such situations, legislative acts are not entitled to deference; instead, the Court must determine if the State has met its burden of proof under the compelling state interest test. (*See* Initial Br. at 28, 32-33) In contrast, the commerce clause challenge in *Ivey v. Bacardi Imports Co.*, 541 So. 2d 1129 (Fla. 1989) (cited in State's Br. at 23-24), did not trigger a compelling state interest analysis. There, the Court rejected the State's contention that the

challenged tax scheme "rationally furthered health objectives" and found that the Legislature's selective approach to furthering that interest showed the "limited nature" of the interest. 541 So. 2d at 1139. Here, the stringent compelling state interest test clearly applies. (*See* Initial Br. at 27-32)

C. The Act Does Not Further a Compelling State Interest in Assisting Parents in Their Duty to Provide Care and Medical Treatment for Their Minor Children.

The State relies on a selective view of the facts to support the District Court's conclusion that the State's interest in assisting parents to provide care and medical treatment to their minor children is "compelling." In doing so, the State ignores the trial court's findings showing the importance of that asserted interest in the context of minors' access to medical treatment related to other sexual activity. Thus, the State ignores the medical risks that minors face if, for example, they fail to obtain prenatal care early in their pregnancy, they continue their pregnancy despite pre-existing or pregnancy-caused conditions that threaten their health, or they fail to follow treatment regimens for sexually transmitted diseases ("STDs"). (*Compare* State's Br. at 29-30 *with* R. v. XIV, p. 2191-94, 2199-2200 & Initial Br. at 5-14, 37-40)

The State's recitation of other contexts in which parental notification or

consent is required, *see* State's Br. at 28, is simply irrelevant. As the trial court noted, "[t]he distinction [between abortion and getting an aspirin at a school clinic or a tattoo] is that our law says that decisions concerning when and how one's body is to become a vehicle for another human being's creation [are] so profound, so intimate, that it is an area protected by the constitutional right of privacy -- even extending to minors." (R. v. XIV, p. 2196 n.4)

D. The Act Does Not Further Other Compelling State Interests.

1. The Act Does Not Further a Compelling State Interest in Protecting Minors' Health From Their Own Immaturity.

In *In re T.W.*, this Court considered the State's "significant" interest in "protecting immature minors" and found that it was not "compelling." 551 So. 2d at 1194-95, 1198-99 (discussing differing analysis under federal constitution and Florida constitution). This Court's reasoning in that decision leads to the same conclusion here and the State's arguments to the contrary are unpersuasive. (*See* State's Br. at 31-34; Initial Br. at 11-14, 35-37)

The need to select a competent physician arises with respect to any medical

treatment that a minor might need or seek. For example, a pregnant minor who intends to carry her pregnancy to term needs the services of a competent obstetrician, who will advise her of the importance of receiving prenatal care and modifying her behavior to avoid the risk of serious harm to her and/or her fetus. (*See* Initial Br. at 7-10, 13-14, 37-39) Similarly, a minor who tests positive for an STD needs to seek treatment from a competent physician in order to protect his or her health, fertility, or even life. (*See* Initial Br. at 11, 40) The State did not establish that a minor is at greater risk of obtaining the services of an "incompetent or unethical" provider in the context of seeking an abortion, *see* State's Br. at 31-32, as compared to an "incompetent or unethical" provider of other medical services that a minor may obtain without parental notification.

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" and did not conclude that information a parent might provide would be "essential" information. (R. v. XIV, p. 2193) In fact, the evidence established abortion providers' ability to obtain what *is* "essential" information from the medical tests they conduct. (*See* Initial Br. at 3-4) In contrast, more detailed medical histories are needed from minors who are carrying a pregnancy to term. (TT 641:15-642:16; *see also* TT 1026:8-1027:18 & State's Br. at 11 [regarding need for full medical history from minor continuing her pregnancy]; *cf*. R. v. X, p. 1618:5-9; Tab M 103:7-106:18 [State's witnesses testified that medical history is needed when prescribing birth control pills or treating HIV-positive patients])

Oddly, the State argues that the immaturity of minors does not justify requiring parental notification if a minor is HIV-positive or pregnant, because

seeking treatment would be “the only reasonable decision” for a minor to make. (State’s Br. at 33-34) It is illogical to claim that minors cannot safely obtain an abortion without state-mandated parental notification because they may make an inadequately informed decision due to immaturity, yet they can be trusted to make decisions such as continuing a pregnancy that poses risks to their health or seeking adequate prenatal care without which they risk their health. (*See* Initial Br. at 13-14; *see also id.* at 6-11) Moreover, the State’s analysis oversimplifies the nature of the decisions the law permits a minor to make without parental involvement; it is not simply *whether* to seek treatment for her pregnancy or a treatment of an STD. Under the law, a minor may choose without parental involvement among numerous competing treatments, such as whether to take potentially harmful drugs to suppress labor or to give birth prematurely. (*See* R. v. IV, p. 617-18, ¶¶ 5-7; *see*

also Initial Br. at 13-14) Thus, the law does not empower a minor to consent to the "only reasonable" course of action, but in fact allows her to choose among numerous competing options.

Finally, the State did not establish that the Act would in fact further this State interest. Nothing in the Act ensures that parents will provide medical history to abortion providers or even be involved in the selection of an abortion provider.

2. The Act Does Not Further a Compelling State Interest in Detecting and Preventing Sexual Abuse of Minors.

The State does not cite to any evidence to support its bald assertion that the Act furthers the State's interest in detecting and preventing sexual abuse of minors. (*See* State's Br. at 34-35) In fact, one of the State's expert witnesses testified that there is no evidence showing increased prosecutions for statutory rape, sexual abuse, or incest as a result of implementation of parental involvement laws. (TT 1312:3-1313:24) Also unsupported are the State's assertions that parental involvement laws heighten public awareness of the criminal prohibitions against

illegal sexual activity or "may actually deter adults from having sex with minors." (*See* State's Br. at 15, 35)

Moreover, the Act will not lead to detection of incest, as a father who impregnates his daughter and wants her to have an abortion can simply waive notice. *See* § 390.01115(3)(b), Fla. Stat. In addition, a minor who is willing to reveal rape or sexual battery will be able to do so in the absence of the Act, and the minor who is not can continue to hide the abuse by seeking a judicial bypass on the grounds of maturity or best interests. *See id.* § 390.01115(4)(c), (d). (*See also* Initial Br. at 24-25; TT 801:22-803:21; R. v. XI, p. 1738:15-1740:1)

If the State's premise were correct, much more sexual abuse would be uncovered if a parent were notified whenever a minor is engaging in sexual activity -- *e.g.*, before a minor is treated for a sexually transmitted disease, receives pregnancy-related care, obtains a pregnancy test, or purchases contraceptives.

(*See* R. v. XI, p. 1737:5-1738:10 [testimony by Dr. Aultman]; *see also* State's Br. at 15 ["parents who are notified of a minor's pregnancy may learn who fathered the child"]) Moreover, the State's assertion that "[t]here is no need to require notification" where a minor elects to carry a pregnancy to term, State's Br. at 35, ignores the facts, *inter alia*, that some pregnant minors miscarry and some minors give birth without parental knowledge. (*See* Initial Br. at 8-10, 37-39) *Cf. State v. Ashley*, 701 So. 2d 338, 339 (Fla. 1997) (minor was in 25th or 26th week of pregnancy unbeknownst to grandmother with whom she lived). In fact, victims of statutory rape are more likely to be found among minors who carry to term than those who abort. (*See* TT 414:4-416:5 & Pls. Exh. 46 [recent study found that minors with older sexual partners are less likely to terminate their pregnancy than were minors with sexual partners close to their age]; TT 1226:25-1228:11, 1287:16-

1289:2 & Defs. Exh. 90A-8, 90A-9 [a substantial majority of the minor women who give birth have sexual partners who are over 18])

3. The Act Does Not Further a Compelling State Interest in Preserving the Integrity of the Family.

This Court has found that the State's interest in preserving family unity is not a "compelling" State interest in the abortion context. *In re T.W.*, 551 So. 2d at 1195, 1198-99. In doing so, this Court acknowledged that the U.S. Supreme Court had found that interest justifies parental consent or notice requirements under the less stringent "significant" state interest test applied by that court. 551 So. 2d at 1194-95 (citing *Bellotti v. Baird*, 443 U.S. 622 (1979) [evaluating parental consent statute] and *H.L. v. Matheson*, 450 U.S. 398 (1981) [evaluating parental notice statute]). In light of the reasoning of this Court in *In re T.W.*, concluding that the State has established that enhancing family communication, family unity and parental authority are "compelling" interests in this case would be a "remarkable proposition." (*See* State's Br. at 38.) These concerns of the State apply with equal force in contexts in which parental notification is not required before a minor obtains medical treatment. (*See* Initial Br. at 6-14; *see also* Tab N 13:1-15:14; Tab M 138:11-139:8) [State's experts acknowledged the applicability of concerns about the effect of secrets on family dynamics to contexts in which parental notice is not required])

Moreover, the State mischaracterizes the nature of parental constitutional

rights. The "fundamental liberty interest in parenting" recognized under the Florida constitution is a right to be *free from governmental interference*. *See, e.g.*, *Von Eiff v. Azicri*, 720 So. 2d 510, 516 (Fla. 1998) (striking down law allowing court to award grandparent visitation rights over parent's objections); *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996) (same); *Padgett v. Dep't of Health and Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991) (limiting State's authority to terminate parental rights); *cf.* ACLU Br. (discussing parental liberty interest under federal Constitution). The State seeks to transform this shield, protecting against government interjection into family matters, into a sword, by which parents have a right to insist that the State mandate facilitation of family communication.

Not surprisingly, the State has no support for their proposition that a court ruling that the Act violates minors' rights to privacy constitutes "[c]onstitutionally

proscribed interference with parental rights." (*See* State's Br. at 37; *see also* FCC Br. at 9-14)[6] Finding the Act to be unconstitutional does not constitute State interference with or abrogation of parents' rights to raise their children. Such a ruling would not alter the ability parents had prior to passage of the Act to be involved with their children's decisions, much less *prevent* parental involvement. In contrast, the type of "judicial intrusion" at issue in *Von Eiff* (cited in State's Br. at 37), was a court order forcing parents, against their wishes, to allow grandparent

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[6] The federal courts have certainly not gone so far. In finding some parental involvement laws to be constitutional, the U.S. Supreme Court did not "balance" the constitutional rights of parents and of minors, but rather, as noted in *In re T.W.*, found that the State's interest in family unity was a "significant" state interest. *See* 551 So. 2d at 1194-95 (citing federal cases); *accord Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 368-69 (4th Cir. 1998) (holding that requiring parental notification was constitutional because, under federal analysis, it furthered a state interest in preserving parental rights), *cert. denied*, 525 U.S. 1140 (1999). *See also Arnold v. Board of Educ.*, 880 F.2d 305, 314 (11th Cir. 1989) (cited in State's Br. at 37) ("[holding] merely that the counselors must not coerce minors to refrain from communicating with their parents," but *not* "constitutionally mandating that counselors notify the parents of a minor who receives counseling regarding pregnancy . . . ."); ACLU Br. at 4-12.

visitation. *Von Eiff*, 720 So. 2d at 514-17.

E. The State Did Not Establish That the Act Uses the Least Intrusive Means to Further a Compelling State Interest.

The State also failed to establish that its asserted interests could not be furthered in a way that did not intrude so heavily on minors who wish to keep their abortion decision private. (*See* Initial Br. at 41-42) Indeed, the harms and burdens that the trial court found the judicial bypass process creates for mature, abused, or "best interest" minors constitute powerful evidence to the contrary. (*See* R. v. XIV, p. 2201-02; *see also* Initial Br. at 22-25, 31-32)[7]

IV. CONCLUSION

For all of the reasons set forth above and in Plaintiffs' Initial Brief, this Court should reverse the decision of the District Court of Appeal for the First District, declare the Act unconstitutional, and permanently enjoin its enforcement on one or more of the following alternative grounds: the Act violates minors' rights to privacy, equal protection, and due process and physicians' right to due process under the Florida Constitution.

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[7] Plaintiffs did not, as the State claims, suggest that minors should be required to return for aftercare under penalty of criminal sanctions, but rather that the issue of aftercare could be addressed less intrusively by requiring follow-up actions by abortion providers. (*See* Initial Br. at 41 & 41 n.11) Moreover, the counseling requirement in Connecticut, Conn. Gen. Stat. § 19a-601 (2000), does not suffer the infirmities of the statute enjoined in *State v. Presidential Women's Center*, 707 So. 2d 1145 (Fla. 4th DCA 1998). (*Compare* Initial Br. at 41, *with* State's Br. at 39)

Dated: February ___, 2002

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