

IN THE SUPREME COURT OF FLORIDA

RENEE B.; BARBARA S. HUNTER; TAHARA D.)
WILSON; PRESIDENTIAL WOMEN’S CENTER,)
INC.; FLORIDA WOMEN’S MEDICAL CLINIC, INC.,)
d/b/a Women’s Clinic; AWARE WOMAN MEDICAL)
CENTER, d/b/a Magnolia Management and Marketing)
Group, Inc.; AWARE WOMAN CENTER FOR CHOICE,)
INC.; FEMINIST WOMEN’S HEALTH CENTER IN)
TALLAHASSEE, INC.; CENTRAL FLORIDA WOMEN’S)
ORGANIZATION, INC.; RANDALL BROOKS WHITNEY,)
M.D.; MICHAEL BENJAMIN, M.D.; EMERGENCY)
MEDICAL ASSISTANCE, INC.,)
Case No.

Petitioners,)

SC00-989)

vs.)

STATE OF FLORIDA, AGENCY FOR HEALTH CARE)
ADMINISTRATION,)

Respondent)

On Appeal From the District Court of Appeal, First District.

**BRIEF OF AMICI CURIAE
NATIONAL ABORTION AND REPRODUCTIVE RIGHTS
ACTION LEAGUE, INC. ET AL.**

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STATEMENTS OF INTEREST OF AMICI CURIAE

American Association of University Women (AAUW), AAUW-Florida. For well over a century, the American Association of University Women (AAUW), an organization of 150,000 members, including 5,500 members in Florida, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in cultivating advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW supports the right of every woman to safe, accessible, and comprehensive reproductive health care.

Sandy Bernard, President, AAUW

Sally Lewis, State President, AAUW-Florida

The American Jewish Congress is an organization of American Jews with members throughout the United States, including thousands of members in Florida. It is dedicated to the fight against all forms of discrimination, prejudice and inequality. The American Jewish Congress neither supports nor opposes abortion. It believes, however, that government must support each woman's right to make her own decisions in accordance with her personal beliefs. Since 1978 it has opposed limitations on public funding of abortion as a form of discrimination against poor women.

Lois C. Waldman, Director of Commission for Women's Equality,
AJC

Catholics for a Free Choice (CFFC) is an independent not-for-profit organization established in 1974, engaged in research, policy analysis, education, and advocacy on issues of gender equality, reproductive rights and health, and church reform. As Catholics committed to social justice teaching, CFFC opposes any restriction or elimination of reproductive health assistance to low-income women, including the Medicaid funding of abortion.

Our Catholic views also demand that we respect each individual's ability to make moral decisions based on his or her own conscience, and this free exercise of conscience cannot exist under coercion. When Medicaid pays for prenatal and childbirth costs but denies funding for abortions, it creates an economic coercion that infringes on a woman's moral right to act in accordance with her conscience.

Frances Kissling, President

Coalition of Labor Union Women (CLUW). We, the Florida First Coast Chapter, are writing in support of the Center for Reproductive Law and Policy's position in Renee B. v. State of Florida, challenging Florida's restrictions on public funding of abortions.

CLUW's Reproductive Rights Project's mission is to generate the support of union members for reproductive health issues and to increase their involvement in the pro-choice movement. Since the AFL-CIO Executive Council decision in 1991 to remain neutral on supporting or opposing the issue of a woman's right to choose, CLUW's Reproductive Rights Project is the only vehicle to join the pro-choice labor movement with the pro-choice

movement. CLUW's Reproductive Rights Project remains the only forum for labor union members to receive information on important medical, legal, research and political developments which affect the affordability and access of reproductive health services and to coordinate activities to defend reproductive health freedom on a national and grassroots level. The goals of the project are to increase assistance to the 75 statewide CLUW chapters and to unions for pro-choice education activities; to provide educational materials on reproductive health medical, legal, research, and political issues; and to increase coalition building between unions and pro-choice state coalitions.

The Coalition of Labor Union Women (CLUW) is a national association of over 20,000 union members who are women active in the national and local leadership of the 88 international unions. The labor movement represents 13 million working men and women; 20% of all working people in the United States. Eighty-five percent of the labor movement members say that they are pro-choice; that women should be able to have an abortion under any circumstances. (CLUW Membership Survey, 1994). These working men and women are activists in their unions, their workplaces, and their communities. Through CLUW's Reproductive Rights Project, these pro-choice union members can participate in the pro-choice movement to ensure that all women have access to family planning services, including abortion.

Carolyn Cornwell, Florida First Coast CLUW Chapter President

The Feminist Majority Foundation ("Foundation") is a non-profit

organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights and safe access to abortion and birth control. The Foundation actively pursues legal protection for reproductive health services, and provided legal counsel for Respondents in Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994), which upheld the use of clinic safety buffer zones. The Foundation also submitted an Amicus Curiae Brief in support of Respondents in Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997).

The Foundation runs the largest clinic access program in the nation and has been active in defending clinics across the country. Since 1989, the Foundation's National Clinic Access Project has mobilized and trained more than 43,000 volunteers in 43 cities in 25 states, including Florida, to assist clinics targeted by anti-abortion groups. The Foundation's Project has spent significant time and resources protecting access to abortion in Florida, providing emergency financial, legal, security and media assistance, as well as on-site security assessments and security training to clinic staff.

Sara N. Love, Legal Director, Feminist Majority Foundation
National Clinic Access Project

The Florida Association of Planned Parenthood Affiliates ("FAPPA") and Planned Parenthood Federation of America, Inc. ("PPFA"). FAPPA is an organization comprised of the following nine Florida-based Planned Parenthood affiliates that operate health centers throughout the State: Planned Parenthood of South Palm Beach and Broward Counties, Inc; Planned

Parenthood of North Central Florida, Inc.; Planned Parenthood of Northeast Florida, Inc.; Planned Parenthood of Central Florida, Inc.; Planned Parenthood of Collier County; Planned Parenthood of Greater Miami, Inc.; Planned Parenthood of Greater Orlando, Inc.; Planned Parenthood Association of Southwest Florida, Inc.; and Planned Parenthood of the Palm Beach and Treasure Coast Area, Inc.

All of the Planned Parenthood health centers provide counseling to pregnant women, outlining the options for managing a pregnancy, including abortion, adoption, keeping the child, placing the child in foster care, and referrals to appropriate providers upon request. In addition, Planned Parenthood of Northeast Florida, Inc. and Planned Parenthood of Southwest Florida, Inc. currently provide abortion services.

PPFA is the world's oldest and largest voluntary reproductive health care organization. PPFA provides leadership to 132 autonomous affiliates that manage 900 health centers in 47 states and the District of Columbia. PPFA affiliates provide education and medical services to nearly five million women and men a year, including contraceptive services and counseling, cancer screening and evaluation, emergency contraception, HIV testing, infertility treatment, medical and surgical abortion, pregnancy testing and counseling, sexuality education, testing for sexually transmitted diseases and infections, prenatal care and sterilization.

Both FAPPA and PPFA are dedicated to the principle that every individual has a fundamental right to choose when or whether to have children, regardless of the individual's income, marital status, race, ethnicity,

sexual orientation, age, national origin or residence. Both FAPPA and PPFA believe that the exclusion of abortion from Medicaid programs is a substantial barrier to reproductive health care for low-income women.

Barbara Zdravecky, President, FAPPA
Jennifer Jaff, Staff Attorney, PPFA

The Florida Women's Consortium is an advocacy and networking group of organizations and individuals committed to achieving full equality and empowerment for women and girls. The Florida Women's Consortium represents more than 250,000 Florida women, including health care professionals, educators, professional and grassroots activists, who advocate for civil and economic rights and full reproductive rights for all women. The Florida Women's Consortium represents thousands of women in Florida who are of child-bearing age, some of whom are eligible for or covered by Medicaid.

Jean Harden, President

Hadassah, the Women's Zionist Organization of America, Inc., is the largest women's organization and the largest Jewish membership organization in the United States with over 300,000 members nationwide, including thousands of members in Florida. Founded in 1912, Hadassah is traditionally known for funding and maintaining health care institutions in Israel. However, Hadassah also has a proud history of protecting the rights of women and the Jewish community in the United States, whether by supporting equal rights, freedom of choice, access to health care, or working

to eliminate all forms of discrimination against women. Hadassah has a longstanding commitment to supporting and working to protect a woman's right to choose, and have access to, abortion and other reproductive health options.

Tana Senn, National Director, American Affairs/ Domestic Policy

Medical Students for Choice represents over 4,000 medical students and residents who are demanding a comprehensive medical education including abortion training. Our goals are to build a network of support and resources for students and residents, to reform medical curricula and training to include abortion and reproductive health as a standard part of medical education, to increase reproductive health education and training opportunities for medical students and residents, and to advocate integrating abortion into medical training and practice by educating policy makers in medicine and government. We work on a grassroots basis at medical schools and residency programs throughout North America, hold national and regional meetings, maintain a presence on the Internet, and publish a quarterly newsletter.

Medical Students for Choice is dedicated to ensuring that women receive comprehensive reproductive health care, including abortion. One of the greatest obstacles to safe, legal abortion is the absence of trained providers. Abortion and reproductive health care must be a part of standard medical training and practice. As medical students and residents, we are committed to ensuring that medical practitioners are prepared to provide their

patients with the full range of reproductive health care choices.

Patricia K. Anderson, MPH, Executive Director

The National Abortion Federation is the professional association of abortion providers in the United States and Canada. NAF members include over 350 nonprofit and private clinics, women's health centers, Planned Parenthood facilities, and private physicians in 46 states, the District of Columbia, and Puerto Rico. NAF members care for over half of the 1.4 million women who choose abortion annually in the United States. As a professional association, NAF offers accredited post-graduate medical seminars on abortion care, and promulgates standards to promote the safety and quality of abortion services. NAF's programs include medical education and training, clinic defense, public and consumer education, and advocacy in furtherance of their mission to keep abortion safe, legal, and accessible.

Vicki A. Saporta, Executive Director

The National Abortion and Reproductive Rights Action League (NARAL) and The NARAL Foundation, with NARAL's 29 affiliated state organizations and over 200,000 members and supporters, develop and sustain a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. The NARAL Foundation supports and protects as a fundamental freedom a woman's right to make reproductive choices.

This mission is supported through education, training programs, and public policy initiatives. NARAL's New Mexico affiliate recently won a ruling before the New Mexico Supreme Court that a regulation limiting state medical assistance for abortion to cases of life endangerment, rape or incest is unconstitutional under the Equal Rights Amendment of the New Mexico Constitution. New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998). Here, NARAL seeks a similar victory on behalf of women of limited means in Florida.

Kate Michelman, President

National Black Women's Health Project (NBWHP). Since its inception in 1981, NBWHP has established and maintained an active and assertive presence on reproductive issues. It is uniquely positioned as the only health organization devoted solely to the progressive causes of wellness, empowerment, general health and reproductive health of African American women, especially women living on low incomes.

Historically, all women in the United States have struggled to achieve reproductive health and rights. But the struggle has been particularly acute for poor women and women of color. Over the years, Black women in the U.S. have been confronted with forced breeding, forced or involuntary sterilizations, court-ordered insertion of long-acting contraceptives, high death rates from illegal abortions, punitive welfare policies and arrest and prosecution for drug use while pregnant.

The National Black Women's Health Project provides public education

fact sheets and training to inform its members, legislators, women's health organizations and the general public to help their understanding of reproductive health and rights issues such as the right of all women, regardless of race, ethnicity or income, to have access to information and services; the freedom to make decisions about sexuality and reproduction free from coercion, violence or addictions. A major focus of our work centers around the removal of all restrictions on public funding of abortion.

The National Black Women's Health Project is a 501(c)(3) tax exempt organization. Its national office is located in Washington, D.C. We are an internationally known grassroots, health advocacy membership organization. Run by Black women for Black women, we have a nationwide constituency of approximately 10,000, with fifteen chapters, five emerging chapters and a state office in California.

Julia R. Scott, President/CEO

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all.

Founded in 1893, the National Council of Jewish Women, NCJW has members in over 500 communities nationwide. Given NCJW's National Priorities which state, "We endorse and resolve to work for comprehensive, confidential, accessible family planning and reproductive health services for

all, regardless of age or ability to pay," we join this brief.

Jan Schneiderman, National President

The National Family Planning and Reproductive Health Association (NFPRHA), founded in 1971, is a non-profit membership organization established to assure access to voluntary, comprehensive and culturally sensitive family planning and reproductive health care services and to support reproductive freedom for all.

A national non-profit membership organization, NFPRHA represents a broad range of family planning providers and patients including private non-profit clinics; state, county and local health departments; Planned Parenthood Federation of America affiliates; family planning councils and hospital-based clinics. NFPRHA members provide reproductive health care at over 4200 clinics nationwide, to more than four million low-income women per year. Our members in Florida include the Statewide Family Planning Project within the Florida Department of Health, the program that oversees the Title X system throughout the state.

Judith DeSarno, President and CEO

The NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services to support women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the

National Organization for Women. A major focus of NOW LDEF's work is to oppose gender discrimination and promote reproductive health. To this end, NOW LDEF has litigated numerous cases involving efforts to protect safe access to reproductive health services, including Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), and Schenck v. Pro-Choice Network, 117 S. Ct. 855 (1997). NOW LDEF is committed to protecting the reproductive rights of poor women and has played a leading role in advocating against provisions in the welfare law that explicitly attempt to control women's reproduction. NOW LDEF has also litigated against states that coerce the reproductive choices of poor women through "child exclusion" policies that deny benefits to any child born to a family receiving welfare. See Sojourner A. v. New Jersey Dept. of Human Services, No. ESX-L-10171-97 (N.J. Super. Ct. Law Div.); C.K. v. Shalala, 92 F.3d 171 (3d Cir. 1996).

Yolanda Wu, Staff Attorney

People for the American Way Foundation ("People For") is a national, nonpartisan, education-oriented citizens' organization established to promote civil rights and civil liberties. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has approximately 18,000 members in the state of Florida and over 300,000 members nationwide. People For has a Florida office that works to promote public education on civil rights and civil liberties in the state of Florida, including issues relating to privacy and

women's reproductive health. People For has filed *amicus* briefs before the United States Supreme Court in cases raising important questions relating to reproductive choice and the First Amendment. We join in this *amicus* brief because this case implicates the organization's concerns about protecting women's rights of privacy and autonomy and ensuring that all women, regardless of income, have access to safe, reproductive medical care, including abortion.

Eliot M. Mincberg, General Counsel
Lawrence S. Ottinger, Senior Staff Attorney

Physicians for Reproductive Choice and Health (PRCH) firmly supports the Center for Reproductive Law and Policy's position in *Renee B. v. State of Florida* and the attached *amicus* brief filed by NARAL. We oppose restrictions on the public funding of abortion that make it nearly impossible for poor women to exercise their constitutional right to obtain this critical health service.

PRCH is a national physician-led nonprofit organization founded in 1992. We represent more than 2,800 physicians of many disciplines and non-physician supporters. Our mission is to enable concerned physicians to take a more active and visible role in support of voluntary universal reproductive health. PRCH is committed to ensuring that all people have the knowledge, equal access to quality services and freedom of choice to make their own reproductive health care decisions.

It is our concern that restrictions on public funding of abortion inordinately impact on the health of poor women. Delay in or inability to

raise funds will cause some women to attempt dangerous self-induced abortions, resort to illegal unlicensed providers, and generally increase the risk of health complications. In addition, PRCH opposes any restriction on a physician's public health responsibility to exercise his/her medical judgment in the context of a confidential patient-doctor relationship concerning medically necessary treatment for their patients.

Seymour L. Romney, MD, Chair of the Board of Directors

The Pro-Choice Public Education Project (PEP) is a collaborative of 50 national pro-choice organizations dedicated to raising young women's awareness about their reproductive rights and freedoms. The membership organizations that comprise the project's Steering Committee include reproductive and women's rights organizations as well as religious and youth-oriented not-for-profits.

As a national pro-choice public education campaign whose project partners have an extensive grassroots presence in the state of Florida, we strongly support efforts to ensure that low-income women have access to a full range of quality reproductive health services including abortion. Looking after the needs of poor and traditionally underserved women who may not have the resources to exercise their constitutionally guaranteed rights is a matter of basic fairness. Public financing of abortion ensures that all women, particularly poor young women, are afforded similar reproductive health choices in theory and in practice.

Marion Sullivan, Project Director

The Religious Coalition for Reproductive Choice, founded in 1973, comprises more than 40 national religious organizations from 15 denominations and faith groups, including the Episcopal Church, Presbyterian Church (USA), United Church of Christ, United Methodist Church, Unitarian Universalist Association, and the Conservative, Humanist, Reconstructionist, and Reform movements of Judaism. All member organizations have official positions that support a woman's right to make reproductive decisions based on her religious beliefs and conscience, free of government interference. In addition to its member groups, the coalition has 22 affiliates, including the Pensacola, Florida Religious Coalition for Reproductive Choice.

The coalition, a non-profit, non-partisan education and advocacy organization, works to ensure reproductive choice through the moral power of religious communities. All programs of the coalition seek to give voice to the reproductive issues of people of color, those living in poverty, and other underserved populations. In keeping with our mission to ensure reproductive choice for all Americans, regardless of income level, the Religious Coalition joins in the amicus brief in support of the Center for Reproductive Law and Policy's position in Renee B. v. State of Florida. We believe, on moral and humanitarian as well as legal grounds, that Medicaid recipients should have access to the same legal abortion services as all other Americans. Abortion is a component of health care for women and, as such, should be covered along with all other forms of health care and not be denied to women because of their economic status. As a coalition of religious organizations and

individuals, we believe that Medicaid's exclusion of abortion from coverage creates an undue hardship for poor women and in effect denies them a legal medical procedure that is available to other American women.

Reverend Carlton W. Veazey, President and CEO

The Women's Law Project is a non-profit women's legal advocacy organization based in Philadelphia. Since its founding in 1974, the Law Project has specialized in high-impact litigation in the fields of reproductive rights and economic justice for low-income women. The Law Project was co-counsel for plaintiffs in the landmark case of Planned Parenthood v. Casey, 505 U.S. 833 (1992) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). It has represented plaintiffs in both federal and state court in challenges to reporting requirements and eligibility restrictions on Medicaid funding of abortions. It has also represented low-income women in recent class actions enjoining Pennsylvania's one-year welfare residency requirement, Maldonado v. Houstoun, 157 F.3d 179 (3d Cir. 1998), and challenging Pennsylvania's attempted elimination of child support benefiting poor children. In addition, the Law Project provides legal advice and support to reproductive health care providers and individual women seeking safe, legal, confidential abortion services.

Sue Frietsche, Staff Attorney

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case in the Brief of Plaintiffs-Appellants.

STATEMENT OF THE FACTS

Amici incorporate by reference the Statement of Facts in the Brief of Plaintiffs-Appellants.

SUMMARY OF ARGUMENT

Amici urge this Court to reverse the decision of the District Court of Appeal, First District, and to enter a permanent injunction ordering Respondent to provide funding to Medicaid-eligible women seeking medically necessary abortions.

The Medicaid program fully funds all medically necessary services. Yet, Florida refuses to provide Medicaid funding to eligible women seeking abortions necessary to preserve their health, choosing instead to provide Medicaid funding for abortion only when the abortion is necessary to save the life of the mother or when the pregnancy is a result of rape or incest. Fla. Admin. Code R. 59G-4.150(12) (dealing with inpatient services); 59G-4.160(3) (dealing with outpatient services); 59G-4.230 (dealing with physician services) (collectively the “Abortion Funding Ban”).

In this brief, amici will demonstrate that the Abortion Funding Ban violates two fundamental rights guaranteed by the Florida Constitution — the

right to privacy and the right to equal protection of the laws. Amici will show that the economic realities of the lives of poor women in Florida make the Abortion Funding Ban an extremely burdensome, and often entirely insurmountable, barrier to obtaining abortions that are necessary to preserve the health of the mother. This economic barrier unconstitutionally infringes on several aspects of the right to privacy. Amici further suggest to the Court that the doctor/patient relationship falls within the broad sweep of Florida's constitutional right to privacy and that the Abortion Funding Ban unnecessarily infringes on this relationship. The Abortion Funding Ban also violates constitutional guarantees of equal protection by depriving Medicaid-eligible women of medically necessary services while providing Medicaid-eligible men with all medically necessary services.

Amici also wish to remind the Court what this case is not about. This case is not "a referendum on the morality of abortion," Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982), and does not require the members of this Court to express their beliefs about the ethical dimensions of a woman's right to choose. Nor is this a case about the legality of abortion. Instead, this case is about the constitutional requirement that the state act neutrally with respect to the exercise of fundamental rights by its citizens. The Court is being asked only to decide whether a funding regime that denies funding to women seeking medically necessary abortions, while fully funding all other medically necessary services for pregnancy and for childbirth and all

medically necessary services sought by men, violates the Florida Constitution.

Amici submit that it does.

ARGUMENT

I. THE ABORTION FUNDING BAN VIOLATES POOR WOMEN’S STATE CONSTITUTIONAL RIGHTS OF PRIVACY.

A. The Economic Realities of Poor Women in Florida Leave No Doubt That the Abortion Funding Ban Poses a Major Economic Obstacle for Most Medicaid Recipients.

1. Brief Overview of Medicaid.

The Medicaid program is a means-tested health insurance program for low-income individuals that is jointly funded by the federal and state governments and administered by the states. In Florida, the Medicaid program is administered by the Agency for Health Care Administration. § 409.902, Fla. Stat. (1998). Very generally, certain groups of people are categorically eligible for Medicaid benefits; others are eligible based on satisfying other criteria. Most significantly for purposes of the discussion in this brief, participants in Florida’s cash assistance and work program, the Work and Gain Economic Self-Sufficiency (“WAGES”) Program,

¹ are categorically eligible for Medicaid benefits. Also categorically eligible

¹ The WAGES Program is Florida’s version of the federal Temporary Assistance for Needy Families (TANF) program. In 1996, the previous cash welfare program, Aid to Families with Dependent Children (AFDC), was replaced on the federal level with TANF. WAGES provides cash assistance to needy families subject to certain time limits and certain work or job

(continued...)

are pregnant women living in families that have income at or below 185% of the federal poverty level.

² § 409.903(1), (5), Fla. Stat. (1998). In addition, Florida has chosen to exercise the option provided under federal law to cover “medically needy” families and individuals. The “medically needy” are those who would qualify for categorical eligibility based on participation in, for example, the WAGES program, except that the family or individual exceeds the income and asset limitations of the program that would categorically qualify them for Medicaid. § 409.904(2), Fla. Stat. (1998).

³ In fiscal year 1997, nearly one million Florida women relied on Medicaid for their health care needs. This number represents approximately 15% of women in Florida. Health Care Finance Administration, Medicaid Recipients of Medical Care by Sex and State (1998) (987,483 Florida women on Medicaid).

Florida law generally provides that services under Medicaid shall be provided only when “medically necessary.” The services covered by

(...continued)

training requirements. See § 414.025, Fla. Stat. (1998).

² For 1998, the poverty level for a family of three (for example, a woman and two children) was \$13,133; thus 185% of that amount was \$24,296. U.S. Census Bureau Statistics (www.census.gov/hhes/poverty).

³ Fla. Admin. Code R. 65A-1.716(2) sets forth the “medically needy” income guidelines for Medicaid. The monthly income threshold for a pregnant woman with two children is \$303 per month. The asset limitation for a family of the same size is \$6,000.

Medicaid span a broad range and include screening, diagnosis and treatment services, hospital inpatient and outpatient services (subject to the Abortion Funding Ban), and physician services (again, subject to the Abortion Funding Ban). The Florida Administrative Code provides that “medically necessary” services must:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider.

Fla. Admin. Code R. 59G-1.010(166). The definition of “medically necessary” treatments is far broader than those deemed necessary to save the

patient's life.

As mentioned above, the federal and state governments share responsibility for funding the Medicaid program. Through recurring amendments to relevant appropriations bills (collectively the “Hyde Amendment”), federal law prohibits states from using federal Medicaid funds to pay for abortions other than those necessary to save the life of the mother or those where the pregnancy resulted from rape or incest. See, e.g., Department of Labor, Health and Human Services, Education and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-78 § 509, 111 Stat. 1467, 1516 (1997). States, however, using state Medicaid funds, can pay for abortions not covered under the federally funded program. Indeed, nineteen states provide funding for abortion under circumstances beyond those required by the Hyde Amendment.

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As discussed above, under the terms of the Abortion Funding Ban, Medicaid-eligible women may only receive Medicaid funding for an abortion if the abortion is necessary to save the woman's life or if the pregnancy results from rape or incest. Thus, a pregnancy that will threaten the health of the patient, even gravely, may not be terminated using Medicaid funds.

⁴ The nineteen states are: California, Connecticut, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, Washington, West Virginia, and Wisconsin. NARAL/NARAL Foundation, Who Decides? A State-by-State Review of Abortion and Reproductive Rights 254-55 (8th ed. 1999).

⁵ In stark contrast, Medicaid fully funds all medically necessary services relating to pregnancy and to childbirth.

2. Economic Realities.

By definition, women eligible for Medicaid, and accordingly subject to the Abortion Funding Ban, are among the state's very poorest and most vulnerable citizens. For these women, raising the funds for an abortion is often impossible or, at best, extremely burdensome. Amici believe that, before deciding the constitutionality of the Abortion Funding Ban, it will be helpful for the Court to have a sense of the economic difficulties facing poor women in Florida.

The income of Medicaid-eligible women varies depending on the basis of the woman's eligibility for Medicaid. The women who qualify for Medicaid categorically as a result of participating in the WAGES program generally have the lowest monthly income of all Medicaid recipients. In 1996, the average monthly welfare benefit in Florida for a woman with two children was \$303 per month – or just over \$3,600 per year, a mere 28% of the federal poverty level. Urban Institute, Assessing the New Federalism: State Database (1998). Pregnant women who qualify for Medicaid under the special eligibility provisions covering women in families with income below 185% of the poverty line may have substantially more income, up to \$24,296

⁵ In order for Medicaid to reimburse a provider for an abortion, the provider must complete an “abortion certification form” in which the provider attests, under penalties of perjury, that the abortion was necessary to save the life of the mother or that the terminated pregnancy resulted from rape or incest. Fla. Admin. Code R. 59G-4.150(12).

per year for a woman with two children. In addition to these benefits, most Medicaid-eligible women would also qualify for Food Stamps – an average, per family benefit of \$133 per month. Urban Institute, supra (based on 1994 data).

Turning now to the other side of the equation – the expenses facing poor women in Florida – it is clear that most women on Medicaid live on a very narrow economic margin. State and federal assistance barely cover the expenses of daily life, let alone the additional expense of an abortion. The U. S. Department of Housing and Urban Development releases annual fair market rents for apartments in each Metropolitan Statistical Areas (“MSA”) in the country. Among the Florida MSAs, the average fair market rent for a two-bedroom apartment was \$581 per month in 1997. Department of Housing and Urban Development, Fair Market Rents, 62 Fed. Reg. 50724 (1997). Thus, the average fair market rent for a two-bedroom apartment in Florida exceeds, in fact is nearly double, the amount of the average monthly cash welfare grant. This statistic is even more sobering in light of the fact that three out of four families receiving cash welfare benefits in Florida receive no housing subsidy whatsoever. U.S. Dept. of Health and Human Services, Characteristics and Financial Circumstances of AFDC Recipients FY 1996 Table 4 (1997).

Furthermore, November 1997 consumer price data indicate that the average Food Stamp allotment does not cover average food costs. Assuming a family of four with children between the ages of one and five, the national average food cost is \$83 per week under the Department of Agriculture’s

very cost-conscious, and some might say unrealistic, “Thrifty Plan.” U.S. Department of Commerce, Statistical Abstract of the United States 503 (1998). This is \$332 per month, compared to an average monthly food stamp allotment in Florida of \$133.

⁶ Of the thirteen Florida MSAs included in the Cost of Living Index for the fourth quarter of 1997, nine of the thirteen have grocery costs in excess of the national average, suggesting that actual grocery costs in much of Florida would exceed the national average. Id. at 493-96.

Thus, looking only at housing and food — by no means the only expenses a family incurs — it is apparent that the monthly budget of Medicaid-eligible families does not contain a margin for additional and unexpected expenses. Families must also pay for child care, utilities, transportation, clothing and personal items, such as diapers, which are not covered by Food Stamps.

Nationally, the average cost of an abortion at ten weeks after the last menstrual period is \$341. Stanley K. Henshaw et al., Factors Hindering Access to Abortion Services, 27 Family Planning Perspectives 54 (1995). The declarations and affidavits included in the record in the trial court indicate that the costs of abortions in Florida may be slightly lower than the

⁶ Amici have elsewhere in this brief referred to a three-person family. The United States Department of Agriculture’s data on food costs, however, are compiled only for four-person families. Reducing the \$332 average monthly cost by one-fourth to adjust for a three person family makes the average monthly cost \$249, still in excess of the average per family Food Stamp allotment.

national average. Sanford Decl. ¶ 3, R. Vol. V, at 962; Reis Decl. ¶ 3; R. Vol. V, at 953; Whitney Aff. ¶ 6, R. Vol. VI, at 1013; see also Henshaw, supra (noting that, of all the regions in the country, abortion services are least expensive in the South). After the tenth week of pregnancy, however, the cost of an abortion (and, as discussed below, the medical risk) increases steadily. The national average cost for an abortion at sixteen weeks of pregnancy is \$544.

⁷ Henshaw, supra. In addition, these figures do not account for transportation costs

⁸ involved in getting to the abortion facility, lost time from work, or other related expenses.

3. Effect of the Abortion Funding Ban.

From this generalized summary of the income and expenses of women on Medicaid in Florida, it is immediately apparent that a woman locked in poverty cannot readily muster the \$300 necessary to pay for even the earliest, simplest abortion procedure. Women eligible for Medicaid are not likely to have savings upon which they can draw for this emergency. Indeed, for a significant portion of women on Medicaid — those who qualify categorically

⁷ Late-term abortions are sometimes necessary when a pregnant woman's health is jeopardized by conditions discovered only later in the pregnancy.

⁸ For all medically necessary services other than abortion, Medicaid pays for transportation to the health care provider. § 409.905(12), Fla. Stat. (1998). Transportation can present a further barrier to women's access to abortion in light of the fact that over half a million women between the ages of 13 and 44 in Florida must travel outside of their county to receive abortion services. Henshaw Aff. ¶ 7, R. Vol. V, at 915.

due to participation in the WAGES program — having any meaningful amount of savings disqualifies them from receiving benefits. See § 414.075(1), Fla. Stat. (1998) (limiting eligibility to participate in the WAGES program to families with total family resources of no more than \$2,000). Thus, while it may be common for middle-class families to have a financial safety net to rely on in an emergency, low-income families seldom have that luxury. As recognized by a Connecticut court, in its review of the same issue, women on Medicaid are “the poorest of the poor.”

The abject poverty these women and their children are compelled to endure conclusively establishes that there is absolutely no fat in the AFDC grant that would enable a woman to skim enough from her budget for a medically necessary abortion. This is so even if time was not of the essence and a woman could pay for the abortion on a “layaway” plan.

Doe v. Maher, 515 A.2d 134, 141 (Conn. Super. Ct. 1986).

Faced with this economic reality, poor women have four options, all of which carry a great cost to the pregnant woman and her family. First, some women may be able to borrow funds from their partners, family members or friends or simply be given the money by such people with no expectation of repayment.

⁹ One study of Medicaid-eligible women indicated that, among women who

⁹ For the sake of convenience, amici will refer to this alternative as “borrowing” the money, even if there is no obligation or expectation to repay
(continued...)

were able to raise the money for the abortion, borrowing was the most common method. Stanley K. Henshaw and Lynn S. Wallisch, The Medicaid Cut Off and Abortion Sources for the Poor, 16 Family Planning Perspectives 170, 178 (1984) (the “Henshaw and Wallisch study”). There are several reasons why borrowing the funds may be less than ideal. First, the partners, relatives and friends of poor women are likely to be poor themselves so that borrowing funds may be extremely burdensome on such individuals and their families. See id. at 179. Second, having to ask for the money compromises a woman’s privacy and deprives her of the confidentiality afforded to other medical procedures that Medicaid will cover. Third, going into debt will compel further unfortunate and possibly health-compromising trade-offs to repay the loan. Finally, in the case of battered women, being required to borrow the money from someone else may be particularly difficult. Battered women are frequently cut off from the support systems of their families and friends, making it difficult to ask them for money, or to communicate with them at all. Walker Aff. ¶ 8, R. Vol. VI, at 970-71. In addition, batterers often use forced pregnancies to inflict physical and psychological abuse on their partners. Id. ¶ 9. Thus, in the case of battered women, looking to others for funds may be no real solution at all.

The second alternative for a Medicaid recipient in need of a medically necessary abortion is to divert the funds from other living expenses. In the Henshaw and Wallisch study, this alternative was the second most common

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the funds.

method of securing funds among Medicaid-eligible women who sought abortions at the clinic involved in the study. Henshaw and Wallish, supra, at 178. The perils of this alternative to the pregnant woman and her family are obvious. Utilities could be disconnected. Children could go hungry or without appropriate clothing. Families could become homeless. The fact that some women make these types of sacrifices only highlights their desperation and the profound disruption that an unhealthy pregnancy would cause in their lives.

Among women who are eventually able to raise funds, either through borrowing or by diverting funds from other uses, the effort expended in gathering the money frequently delays the abortion. In the Henshaw and Wallisch study, Medicaid women took an average of five days longer to obtain an abortion than non-Medicaid patients. Interviews with patients participating in the study indicated that the lack of funds was the primary reason for the delay. Id. at 172, 177. This delay both makes the procedure more expensive (thus exacerbating the woman's lack of money) and more dangerous (thus exacerbating the fact that the woman's health is already compromised). This is the most vicious of vicious cycles.

Under the third and fourth alternatives, women are simply not able to borrow funds or cut other living expenses to raise enough money for an abortion by a licensed abortion provider. These women face particularly grim choices. Some women who are unable to raise the money will resort to self-induced abortions or abortions by less expensive, unlicensed providers. Self-induced abortions or abortions by "back-alley" providers pose a grave threat

to women's health under the best of circumstances. By definition, poor women for whom pregnancy presents a health risk are not operating under the best of circumstances.

Finally, the remaining women will be forced to carry a perilous pregnancy to term. Not only will the woman suffer physically and psychologically from the pregnancy, but if the woman has other children, they may also suffer from their mother's forced pregnancy. The mother will be more tired, and possibly depressed or ill, rendering her less capable of offering her children love and supervision. In addition, many of the health conditions that pose dangers to the mother also pose dangers to the fetus. For example, for infants born to mothers with severe hypertension, there is an increased infant mortality and negative health effects for those who survive. Gerald W. Burrow, M.D. and Thomas F. Ferris, M.D., Medical Complications During Pregnancy 2 (1988). Babies born to diabetic mothers likewise face increased fatality rates, as well as increased rates of typically non-fatal illnesses such as respiratory distress syndrome and hypoglycemia. Id. at 47-48. Mothers with HIV obviously run the risk that their children will be infected. Furthermore, there is no way to quantify the negative impact on an infant whose mother has had to suffer a forced and risky pregnancy.

B. The Abortion Funding Ban Violates Poor Women's Right To Privacy by Intruding on Women's Autonomy in Personal Decisionmaking, Physical Integrity, and Relationships with Their Doctors.

1. The Right to Privacy Generally.

The Florida Constitution explicitly provides for a right to individual

privacy. Article I, Section 23 guarantees that every “natural person has the right to be let alone and free from governmental intrusion into his private life” Art. I, § 23, Fla. Const. This explicit guarantee of a right to individual privacy has no parallel in the U.S. Constitution and more vigorously protects Floridians’ right to privacy than does the U.S. Constitution. This Court has observed:

Since the people of this State exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985). This Court in Winfield further declared the right to privacy contained in Article I, Section 23 to be a “fundamental right” which “demands the compelling state interest standard” and noted that the amendment does not protect only against “unreasonable” or “unwarranted” government intrusions, but rather all government intrusions into an individual’s private life. Id. at 547-48.

Although the United States Supreme Court has interpreted the Federal Constitution not to protect poor women against denial of Medicaid funding for medically necessary abortions, Harris v. McRae, 448 U.S. 297 (1980), the Abortion Funding Ban runs afoul of the more stringent protection of privacy rights found in the Florida Constitution and must, therefore, be permanently

enjoined. This Court has recognized that the right to privacy under the Florida Constitution is “clearly implicated in a woman’s decision of whether or not to continue her pregnancy.” In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989).

2. The Right to Autonomy in Personal Decisionmaking.

The right to privacy in Florida encompasses a woman’s right to autonomy and freedom from coercion from the state in making the deeply personal and profound decision of whether to terminate her pregnancy. This Court has recognized the importance and centrality of such a decision: “We can conceive of few more personal or private decisions concerning one’s body that one could make in the course of a lifetime” Id. The Abortion Funding Ban impermissibly encroaches on that autonomy and exercises a coercive influence by making medically necessary abortions economically onerous or impossible, while simultaneously funding all other medically necessary services for pregnancy and for childbirth. In other words, the state presents women with a lopsided choice: choosing one way (the way favored by the state) guarantees the woman full funding of all medically necessary health care and transportation to receive such health care; choosing the other way presents the woman with a series of economic obstacles, frequently insurmountable for the “poorest of the poor.” Such a lopsided “choice” is no choice at all. In his cogent and persuasive dissenting opinion in Harris v. McRae, Justice Brennan noted that funding policies such as the Abortion Funding Ban

effectively remove[] this choice from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse.

Harris, 448 U.S. at 333-34 (Brennan, J. dissenting).

Of course, the state has no obligation to participate in the Medicaid program at all and has no other obligation to provide funding for pregnancy, childbirth or abortion. When the state has chosen, however, to provide such benefits it must provide them in a manner that is neutral with respect to the exercise of fundamental rights. “[O]nce [the government] chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds” Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 402 (Mass. 1981); see also Right to Choose v. Byrne, 450 A.2d 925, 935 (N.J. 1982) (“Once it undertakes to fund medically necessary care attendant upon pregnancy, however, government must proceed in a neutral manner.”); Committee to Defend Reprod. Rights v. Myers, 172 Cal. Rptr. 866, 880 (Cal. 1981) (“[T]he State is utilizing its resources to ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.”). As demonstrated above, the Abortion Funding Ban is far from neutral. Instead, it represents an attempt by the state to force poor women — even those who will pay a great price in terms of their health — to make the choice that the state has decided to favor.

Just in case there is any doubt that the Abortion Funding Ban is far from a neutral, rational policy choice of the state, it is useful to imagine the consequences of such a funding policy in any other aspect of the Medicaid program. Imagine if the State of Florida changed the Medicaid program such that doctors would be reimbursed for treating cancers determined to be life-threatening, but not for the treatment of cancers that will “merely” be debilitating to the Medicaid patient. Doctors and the public would rightly object that the application of a “life-endangerment standard” has no place in a profession bound to heal and relieve suffering. Now imagine that Florida changed the Medicaid program such that Medicaid would pay for non-life-threatening injuries sustained in an assault, but not those sustained by falling down the stairs. These analogies may seem absurd, and so does the Abortion Funding Ban. In all other contexts, a medically necessary treatment is just that — medically necessary— and the condition should not have to threaten the patient’s life or result from a crime to be covered by a government-funding regime that has chosen to provide medically necessary health care to its poor citizens.

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As the Supreme Court of Minnesota observed in striking down

¹⁰ Nor is it tenable to argue that medically necessary abortions differ from other medically necessary treatments because the patient made a choice to have intercourse which then resulted in the pregnancy. Medicaid routinely covers the cost of medical procedures that result from voluntary choices, such as treating heart disease caused by a high-fat diet or lung cancer caused by smoking.

Minnesota’s similar funding ban based on the Minnesota Constitution’s guarantee of a right to privacy, “[w]e simply cannot say that an indigent woman’s decision whether to terminate her pregnancy is not significantly impacted by the state’s offer of comprehensive medical services if the woman carries the pregnancy to term.” Women of Minnesota v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995). In the same way, the broad protection of individual privacy in the Florida Constitution cannot permit this intrusion on a decision which is “fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman.” T.W., 551 So. 2d at 1193.

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3. The Right to Physical Autonomy.

Not only does the Abortion Funding Ban encroach impermissibly on decisional autonomy, it also violates the right to physical autonomy protected by the privacy provisions of the Florida Constitution. This Court has

¹¹ The courts of numerous sister states have struck down laws similar to the Abortion Funding Ban based on this principle of government neutrality. See New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Gomez, 542 N.W. 2d 17; Jeannette R. v. Ellery, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995); Doe v. Wright, No. 91 Ch. 1959, slip op. (Ill. Cir. Ct. Dec. 2, 1994), leave to file late appeal denied, No. 78512 (Ill. Sup. Ct. Feb. 28, 1995); Roe v. Harris, No. 96977, slip op. at 7 (Idaho Dist. Ct. Feb. 1, 1994); Women’s Health Center of West Virginia, Inc. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993); Maher, 515 A.2d 134; Doe v. Celani, No. S81-84CnC, slip op. at 10 (Vt. Super. Ct. May 26, 1986); Planned Parenthood Ass’n v. Department of Human Resources, 663 P.2d 1247, 1259 (Or. Ct. App. 1983), aff’d on other grounds, 687 P.2d 785 (Or. 1984); Byrne, 450 A.2d 925; Moe, 417 N.E.2d 387; Myers, 625 P.2d 779.

recognized that the privacy protection includes “the inherent right to make choices about medical treatment” which “encompasses all medical choices.” In re Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990) (emphasis added). This Court has consistently and repeatedly held that the right to privacy includes a right to physical autonomy that is violated by the imposition by the state of unwanted medical procedures. See In re Debreuil, 629 So. 2d 819 (Fla. 1993); Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980).

Forcing a woman to undergo a pregnancy that her doctor has determined will be deleterious to her health presents an intrusion on her physical autonomy that is every bit as burdensome and as impermissible as a state’s attempts to force patients to undergo medical treatment against their wishes. The Supreme Judicial Court of Massachusetts, in a case striking down a similar Medicaid abortion funding policy, wrote: “We think that there can be no question that the magnitude of this invasion far exceeds that of . . . compelled medical treatments . . . ; the nine months of enforced pregnancy inherent in effectuating these regulations are only a prelude to the ultimate burden the State seeks to impose.” Moe, 417 N.E.2d at 404. This Court has made it clear that “a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one’s health.” Browning, 568 So. 2d at 11. The Abortion Funding Ban deprives women of that right and conscripts them into becoming mothers against their will.

4. The Right to Privacy in the Doctor/Patient Relationship.

The Abortion Funding Ban represents an intrusion on another aspect of individual privacy — the right to privacy in maintaining a relationship with one’s doctor, free from interference regarding treatment decisions. As previously noted, the right to privacy embodied in the Florida Constitution is broad, protecting the individual from all government intrusion into private life. Winfield, 477 So. 2d at 548. Certainly, the broad sweep of the “private life” of an individual encompasses decisions made with his or her physician regarding issues of personal health, especially given the uniqueness and special legal significance of the physician/patient relationship. See § 455.667, Fla. Stat. (1998) (protecting doctor/patient confidentiality). In fact, the courts of at least one sister state have recognized that the physician/patient relationship comes within the sweep of that state’s right to privacy. Maher, 515 A.2d at 150 (“This right to privacy also encompasses the doctor-patient relationship regarding the woman’s health, including the physician’s right to advise the woman on the abortion decision based upon her well-being.”).

The District Court of Appeal, Third District, acknowledged the inviolability of the doctor/patient relationship and recognized that the public policy of Florida mandates that it be left free from intrusion. Humana Health Plan v. Jacobson, 614 So. 2d 520 (Fla. 3d DCA 1992). In Humana, the court voided a liquidated damages provision in a physician-HMO contract as contrary to public policy, stating that “the public policy of this state is violated when the business relationship an HMO has with its affiliated

doctors interferes with something as fundamental as the doctor/patient relationship” Id. at 522. The Humana court is not alone in identifying the doctor/patient relationship as uniquely important and demanding of protection from outside intrusions; courts in other jurisdictions have also weighed in favor of protecting this relationship. DeKalb Chiropractic Ctr. v. Bio-Testing Innovation, 678 N.E.2d 412, 415 (Ind. Ct. App. 1997) (recognizing the protection of the integrity of the physician/patient relationship as a “well-established public policy” consideration in Indiana); see Maier, 515 A.2d at 142. While the liquidated damages provision in Humana presents different issues than the Abortion Funding Ban, the essential nature of the issue remains the same — a third-party intrusion on the fundamentally private relationship between doctor and patient.

It is beyond question that the Abortion Funding Ban intrudes on the functioning of the doctor/patient relationship. The decisional framework erected by the Abortion Funding Ban compromises physicians’ judgment by paying for medically necessary abortions only if the patient’s life is threatened or if the pregnancy is a result of rape or incest while fully funding all medically necessary care relating to pregnancy and childbirth. This funding regime often forces doctors to leave untreated an entire category of medical conditions that threaten (often severely) the health of their patients. This framework subverts the traditional role of the physician in rendering medical care to restore patients to health. A Connecticut court decried a similar “life-endangerment” standard of care that was thrust upon doctors as “alien and antithetical to the medical profession,” in determining that

Connecticut’s version of the Abortion Funding Ban was invalid under the Connecticut Constitution. Maier, 515 A.2d at 155. The treatment decisions compelled by the Abortion Funding Ban are likewise “alien and antithetical,” not only to the practice of medicine, but also to the right of privacy guaranteed by the Florida Constitution. The imposition of these decisions upon Florida’s physicians must not be sanctioned.

5. The Abortion Funding Ban Does Not Pass Strict Scrutiny.

This Court has made it clear that strict scrutiny applies in all cases in which the right to privacy is implicated. T.W., 551 So. 2d at 1194; Winfield, 477 So. 2d at 547. Strict scrutiny requires the state to prove that its policy furthers a compelling state interest with the least intrusive means possible. Winfield, 477 So. 2d at 547. The Court may quickly dispose of the strict scrutiny analysis in this case for the simple reason that the Abortion Funding Ban serves no compelling state interest. The state interest served by the Medicaid program — providing health care to low-income individuals — is not served by denying needed health care to a group of otherwise eligible participants. See Maier, 515 A.2d at 152 (noting that singling out one medically necessary procedure to exclude from funding “flies in the face of the [M]edicaid program’s admitted goals”); Myers, 172 Cal. Rptr. at 877.

Likewise, the state’s interest in fetal life fails to be a compelling interest under these circumstances. This Court has recognized that the state’s interest in preserving potential fetal life becomes compelling when the fetus could live outside the womb through the use of standard medical procedures. T.W., 551 So. 2d at 1193-94. This Court has also recognized, however, that

the state's interest in fetal life may not override the mother's health:
"Following viability, the state may protect its interest in the potentiality of life by regulating abortion, provided that the mother's health is not jeopardized." Id. at 1194 (emphasis added). The principle that an interest in fetal life may never trump the mother's health should be equally applicable in the context of funding medically necessary abortions. As demonstrated above, the Abortion Funding Ban can act as an effective prohibition of abortion for Medicaid-eligible women. By definition, Medicaid only covers medical services necessary to avert a threat to the patient's health. Since the Abortion Funding Ban will only apply to women whose health is jeopardized by their pregnancies, it is difficult to see how the state's interest in fetal life could ever be a sufficiently compelling interest in the context of the Abortion Funding Ban. This Court has recognized that the state may pursue its interest in protecting fetal life *only* provided that the mother's health is not jeopardized. Id. Without a compelling state interest, it is not necessary to determine whether the means are narrowly tailored.

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Furthermore, even if protection of the public fisc were a compelling state interest in the context of constitutional rights, the Abortion Funding Ban

¹² This Court has also recognized maternal health as a compelling state interest after the first trimester. T.W., 551 So. 2d at 1193. The state cannot plausibly assert maternal health as a compelling state interest justifying the Abortion Funding Ban because the Abortion Funding Ban, instead of protecting maternal health, jeopardizes maternal health by denying funding for medically necessary abortions.

is not even rationally related to such interest, let alone the least restrictive means possible of furthering that interest. The cost of the latest, most complicated abortion is far outstripped by the cost of even a healthy, uncomplicated pregnancy and delivery. *Henshaw Aff.* ¶ 5, R. Vol. V, at 915. The women at issue in this case, however, are not likely to have healthy, uncomplicated pregnancies and deliveries. Denying funding for medically necessary abortions simply drives the state’s Medicaid costs higher. After the pregnancy, the mother may very well be even more ill than she was before and therefore require significantly more Medicaid resources to treat her now-worsened conditions. In addition, children born to mothers with health conditions that make pregnancy perilous are also more likely to demand additional medical attention, adding further costs. Thus, the Abortion Funding Ban is particularly ill-tailored to any supposed state interest in cutting costs in the provision of public benefits and must be rejected.

II. THE ABORTION FUNDING BAN VIOLATES POOR WOMEN’S RIGHTS TO EQUAL PROTECTION UNDER THE LAW.

The Abortion Funding Ban also violates the equal protection clause of the Florida Constitution by making an impermissible distinction based on gender in the provision of public services. Article I, Section 2 of the Florida Constitution provides that “[a]ll natural persons, female and male alike, are equal before the law” Art. I, § 2, Fla. Const. In 1998, Article I, Section 2 was amended to add the phrase “female and male alike” to this Article I, Section 2. Prior to this amendment, this Court held that this

provision requires any law imposing a gender-based classification to be substantially related to an important objective. Purvis v. State, 377 So. 2d 674, 676 (Fla. 1979) (citing standard of scrutiny from Craig v. Boren, 429 U.S. 190 (1976)).

¹³ Amici submit that the addition of “female and male alike” indicates that Florida’s citizens expressed their intent to have an even more stringent standard applied to classifications based on gender. In any event, the Abortion Funding Ban cannot satisfy even the intermediate level of scrutiny applicable prior to the 1998 amendment, let alone the strict scrutiny that must now be imposed on gender-based classifications.

The Abortion Funding Ban discriminates on the basis of gender in that, although poor men and women alike qualify to participate in Medicaid, only women are foreclosed from receiving one particular medically necessary treatment. Other courts that have reviewed similar funding bans have recognized the essential gender inequality posed by such policies. See, e.g., New Mexico Right to Choose v. Johnson, 975 P.2d 841, 855 (N.M. 1998)

¹³ In the case that opened the doors of the Virginia Military Institute (“VMI”) to women, the United States Supreme Court required the state to demonstrate an “exceedingly persuasive justification” for VMI’s gender-based exclusionary policies, a standard that the State of Virginia failed to meet in that case. See U.S. v. Virginia, 518 U.S. 515, 533 (1996). Thus, even the federal constitutional standard which this Court applied in Purvis now appears to be more stringent, requiring instead of an “important” state interest an “exceedingly persuasive justification.” In any event, as discussed above, amici contend that the recent amendment to the Florida Constitution requires strict scrutiny to be applied.

(concluding that New Mexico’s funding ban is unconstitutional as it “undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women”); Maher, 515 A.2d at 159.

Medicaid covers virtually all medically necessary treatment for men, including all medically necessary reproductive health care, without requiring any showing that the treatment is necessary to save the patient’s life or that the condition necessitating the treatment resulted from a crime. In fact, the Medicaid program covers the cost of the anti-impotency drug Viagra. In Florida, Medicaid will pay for up to four Viagra pills per month, at an estimated cost to taxpayers of approximately \$5 million per year. Mary Warejcka, Medicaid’s Viagra Projections Down, Palm Beach Post, July 7, 1998, at 4A; see also Kris Mayes, Fla. Medicaid Patients Get 4 Viagra a Month, St. Petersburg Times, June 17, 1998, at 1A (noting that in its initial week of availability under Medicaid Viagra cost the Medicaid program \$20,363.12).

¹⁴

The fact that the Abortion Funding Ban does not discriminate against all women, but rather only those who are pregnant, does not change the analysis. Because pregnancy is an attribute only of women, classifications based on pregnancy are classifications based on gender and should be treated that way under the Florida Constitution. Cf. Maher, 515 A.2d at 159. Also,

¹⁴ Each Viagra tablet costs approximately \$8.60. Warejcka, supra, at 4A. The Florida Medicaid program pays for four tablets per month, or 48 per year. Thus, a Viagra prescription for a single year would cost the Medicaid program approximately \$425, not including the cost of physician’s visits.

this Court has previously recognized that a law can run afoul of the equal protection guarantees without uniformly disadvantaging all members of a particular gender. See Alachua County Court Executive v. Anthony, 418 So. 2d 264, 265 (Fla. 1982) (striking down law providing automatic exemption from jury duty for mothers with young children but not for similarly situated fathers).

Classifications based on gender have, in the past, been required to be substantially related to an important state interest in order to survive. Purvis, 377 So. 2d at 676. There is no important state interest implicated in the differential treatment of men and women under these circumstances, let alone a compelling interest as is now required. Such a distinction certainly does not further the purposes of the Medicaid program since such purposes include the provision of necessary health care to poor citizens, not the denial of such health care. As discussed above, the state's interest in fetal life fails to be an important state interest under these circumstances because an interest in fetal life is not permitted to trump the health of the mother, and the Abortion Funding Ban only affects Medicaid women who need abortions to protect their health. Without an important state interest – or, amici would contend in light of the recent amendment to Article I, Section 2, a compelling state interest – the Court need not concern itself with whether the classification is substantially related to such purpose.

CONCLUSION

The Abortion Funding Ban violates two distinct provisions of the Florida Constitution — the right to privacy and the right to equal protection of the laws. For this reason, amici urge this Court to enjoin permanently the Abortion Funding Ban and grant all other relief requested by Petitioners.

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Feminist Majority Foundation

Florida Association of Planned Parenthood Affiliates

Planned Parenthood Federation of America

Florida Women’s Consortium

Hadassah

Medical Students for Choice

National Abortion Federation

National Black Women’s Health Project

National Council of Jewish Women

National Family Planning and Reproductive Health Association

NOW Legal Defense and Education Fund

People for the American Way Foundation

Physicians for Reproductive Choice and Health

Pro-Choice Public Education Project

Religious Coalition for Reproductive Choice

Women's Law Project

CERTIFICATE OF COMPLIANCE

Pursuant to the Order of Chief Justice Harding dated July 13, 1998,
I hereby certify that 14-point proportionately spaced Times New Roman
font has been used in this brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
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