

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 Manhattan Magnolia Corporation; 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.,

Plaintiffs-Appellants,

CASE NO. SC00-989

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE
ADMINISTRATION,

Defendant-Appellee.

On Appeal from the District Court of Appeal,
First District, State of Florida

BRIEF OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
CERTIFICATE OF TYPE STYLE	vii
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
THERE IS NO CONSTITUTIONAL RIGHT TO ABORTION	6
THE CHALLENGED RULES DO NOT INFRINGE ON THE RIGHT TO PRIVACY	7
The Challenged Regulations Do Not Impose Additional Economic Burdens	8
The Exercise of Rights Is Not Coerced	9
The Right To Bodily Integrity Is Not Affected By The Funding Regulations	16
The State’s Funding Program Is Narrowly Tailored To Serve The Preservation Of Life	18
THE FUNDING REGULATIONS DO NOT VIOLATE THE RIGHT TO EQUAL PROTECTION	19
No Fundamental Right Or Suspect Class Is Involved	19

The Amendment To Florida’s Constitution Does Not Require Heightened Review	20
The Medicaid Funding Regulations Create No Irrational Classification	23
The Amendment To Article 1, Section 2 Has Prospective Effect Only	24
THE CIRCUIT COURT ACTED PROPERLY IN STRIKING PLAINTIFFS’ CLAIM FOR DAMAGES ON SOVEREIGN IMMUNITY GROUNDS	24
THE SEPARATION OF POWERS DOCTRINE BARS THE COURTS FROM ORDERING THAT THE STATE PAY FOR ABORTIONS NOT FUNDED BY THE LEGISLATURE	28
CONCLUSION	32
CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

Cases

<u>Agency for Health Care Administration v. Associated Industries of Florida</u> , 678 So.2d 1239, 1243 (Fla. 1996)	28
<u>Berek v. Metropolitan Dade County</u> , 396 So. 2d 756 (Fla. 3d DCA 1981)	25
<u>Bowen v. Massachusetts</u> , 487 U.S. 879 (1988)	26, 27
<u>Chiles v. Phelps</u> , 714 So.2d 453, 457 (Fla. 1998)	14
<u>Ciancio v. North Dunedin Baptist Church</u> , 616 So. 2d 61 (Fla. 1st DCA 1993)	23
<u>Committee to Defend Reproductive Rights v. Meyers</u> , 625 P.2d 779 (Cal. 1981)	13
<u>Corbett v. D’Alessandro</u> , 487 So. 2d 368, 371 (Fla. 2d DCA 1986)	17
<u>Department of Natural Resources v. Circuit Court of the Twelfth Judicial Circuit</u> , 317 So. 2d 772 (Fla. 2d DCA 1975), <i>aff’d</i> 339 So. 2d 1113 (Fla. 1976)	25
<u>Department of Revenue v. Kuhnlein</u> , 646 So. 2d 717 (Fla. 1994)	26
<u>Doe v. Childers</u> , No. 94CI02183, slip op. (Ky. Cir. Ct. Aug. 3, 1995)	12
<u>Doe v. Department of Social Services</u> , 487 N.W. 2d 166 (Mich. 1992)	11, 15
<u>Doe v. Wright</u> , No. 7851112 (Ill. Cir. Ct. Dec. 2, 1994)	12
<u>Fischer v. Department of Public Welfare</u> , 502 A.2d 114 (Pa. 1985)	20, 21, 22
<u>Fisher v. City of Miami</u> , 172 So. 2d 455 (Fla. 1965)	26
<u>Florida League of Cities, Inc. v. Florida Department of Environmental Regulation</u> , 603 So. 2d 1363, 1368 (Fla. 1 st DCA 1992)	20
<u>G.& J Investment Corp. v. HRS</u> , 429 So. 2d 391 (Fla. 3d DCA 1983)	25
<u>Geduldig v. Aiello</u> , 417 U.S. 484, 496-97 n. 20 (1974)	19

<u>Hampton v. State Board of Education</u> , 105 So. 2d 323 (Fla. 1925)	25
<u>Harris v. McRae</u> , 448 U.S. 297 (1980)	19, 31
<u>Hope v. Perales</u> , 595 N.Y.S. 2d 948 (N.Y. App. Div. 1993), <i>reversed</i> 634 N.E. 2d 183 (N.Y. 1994)	10, 11
<u>In re Debreuil</u> , 629 So. 2d 819 (Fla. 1993)	17
<u>In re Greenberg's Estate</u> , 390 So. 2d 40 (Fla. 1980)	15
<u>In re Guardianship of Barry</u> 445 So. 2d 365, 371 (Fla. 2d DCA 1984)	17
<u>In re Guardianship of Browning</u> , 568 So. 2d 4, 14 (Fla. 1990)	16, 17
<u>In re T.W.</u> , 551 So. 2d 1186 (Fla. 1989)	7, 18
<u>Jeannette R. v. Ellery</u> , No. VD-94-811	13
<u>Kirk v. Kennedy</u> , 231 So. 2d 246 (Fla. 2d DCA 1970)	25
<u>Krischer v. McIver</u> , 697 So. 2d 97 (Fla. 1997)	17
<u>Maher v. Roe</u> , 432 U.S. 464 (1977) 19	
<u>Loft v. Fuller</u> , 408 So.2d 619, 624 (Fla. 4th DCA 1981)	14
<u>Margaret Ann Supermarkets, Inc. v. Dent</u> , 64 So. 2d 291 (Fla. 1953)	26
<u>McElrath v. Burley</u> , 707 So. 2d 836 (Fla. 1 st DCA 1998)	15
<u>New Mexico Right to Choose/NARAL v. Johnson</u> , 975 P. 2d 841 (N.M. 1998)	21
<u>Norwood v. Harrison</u> , 413 U.S. 455 (1973)	15
<u>Pan-Am Tobacco v. Department of Corrections</u> , 471 So. 2d 4 (Fla. 1985)	25
<u>Perez v. Winn –Dixie</u> , 639 So. 2d 109 (Fla. 1 st DCA 1994)	9
<u>Pierce v. Society of Sisters</u> , 268 U.S. 510 (1925)	15
<u>Planned Parenthood v. Perdue</u> , No. 3AN 98-7004 CI, slip op. (Alaska Super. Ct. Mar. 16, 1999)	

<u>Public Health Trust v. Wons</u> , 541 So. 2d 96 (Fla. 1989)	17
<u>Republican Party of Florida v. Smith</u> , 638 So. 2d 26, 28 (Fla. 1994)	29
<u>Right to Choose v. Byrne</u> , 450 A.2d 925 (N.J. 1982)	19
<u>Satz v. Perlmutter</u> , 379 So. 2d 359 (Fla. 1980)	16
<u>Schwarz v. Kogan</u> , 132 F.3d 1387 (11 th Cir. 1998)	20
<u>Seaside Properties, Inc. v. State Road Department</u> , 121 So. 2d 204 (Fla. 3d DCA 1960)	25
<u>Stall v. State</u> , 570 So. 2d 257, 266-267 (Fla. 1990)	14
<u>State ex rel. Kurz v. Lee</u> , 121 Fla. 360, 384, 163 So. 859 (1935)	29
<u>State v. Lavazzoli</u> , 434 So. 2d 321 (Fla. 1983)	24
<u>State v. Presidential Women’s Center</u> , 707 So. 2d 1145 (Fla. 4 th DCA 1998)	7, 8
<u>Tucker v. Department of Professional Regulation</u> , 521 So. 2d 146 (Fla. 5 th DCA 1988)	26
<u>Williams v. Zbaraz</u> , 448 U.S. 358 (1980)	19
<u>Wills v. Sears Roebuck & Co.</u> , 351 So. 2d 29 (Fla. 1977)	3
<i>Statutes</i>	
§ 11.066(4), Fla. Stat	25
§ 216.212(3), Fla. Stat	32
§ 409.902, Fla. Stat.	29
§ 409.903, Fla. Stat.	29
§ 409.903(5), Fla. Stat.	8
§ 409.907, Fla. Stat.	27
§ 409.908, Fla. Stat	30

Constitutional Provisions

Article I, Section 2, Fla. Const.	5, 19, 21, 23, 24
Article I, Section 23, Fla. Const.	3, 6, 14
Article II, Section 3, Fla. Const. 6, 28	
Article II, Section 18, N.M.Const.	22
Article VII, Section 1(c) , Fla. Const.	28
Amendment XIV, Section 1, U.S. Const.	19

Public Laws

Pub. L No. 105-78(1997), 111 Stat 1467 , §§509, 510 31	
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Federal Statutes

28 U.S.C. § 1491 27	
------------------------	--

Law Journal Articles

Barbara Brown, et al., <u>The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women</u> , 80 Yale L.J. 871, 893 (April 1971)	21
Emerson & Lifton, <u>Should the ERA Be Ratified ?</u> , 55 Conn. B.J. 227, 232 (June 1981)	22

CERTIFICATE OF TYPE STYLE

The type style utilized in this brief is 14 point Times New Roman proportionally spaced.

STATEMENT OF THE CASE

This lawsuit began in 1993 as a challenge to the constitutionality of several provisions of the Florida Administrative Code administered by the Florida Department of Health and Rehabilitative Services (“HRS”). The appellants, plaintiffs below, originally filed their suit in the Fifteenth Judicial Circuit of Palm Beach County, Florida. With a reorganization among the executive agencies of the state, the Agency for Health Care Administration (“AHCA”) took over the Medicaid program from HRS. The regulations at issue originally were more restrictive of Medicaid funding for abortions. The regulations in their current form are reproduced in Appendix 1 hereto. When AHCA was created, HRS was dismissed as a party from the lawsuit. AHCA moved for, and was granted, a change of venue to the Second Judicial Circuit for Leon County, Florida. The cause was transferred to Leon County in January, 1997, after the plaintiffs had filed their fourth amended complaint for declaratory and injunctive relief. In the amended complaint, the plaintiffs requested that the regulations be enjoined as unconstitutional under the rights to privacy, equal protection and due process. They also demanded reimbursement for moneys spent by them to obtain abortions. R. vol. III, pp. 466-496. In November, 1997, AHCA filed motions to strike prayer for attorney’s fees, and to dismiss prayer for damages. The plaintiffs renewed their motion for

summary judgment in March, 1998. AHCA filed a motion to dismiss the action on June 6, 1998. On June 25, 1998, Circuit Judge Terry Lewis heard argument on all these motions. The transcript of that hearing was added to the record by stipulation just prior to the submission of briefs in the district court, so it has no citation in the record index. Citations to that transcript will be by “T,” followed by the page number of the transcript. At the hearing, AHCA receded from its motion to dismiss. T49. Judge Lewis granted AHCA’s motions to strike prayer for attorney’s fees and damages, and denied the plaintiffs’ motion for summary judgment. R. vol. VII, pp. 1290-1295. On March 16, 1999, Judge Lewis granted AHCA’s motion for summary judgment based on the record and previous arguments of the parties in the case. R. vol. VII, pp. 1296-1297. The plaintiffs appealed. Upon the appellants’ suggestion of certification to the Florida Supreme Court, the First District Court of Appeals certified the case directly to the Supreme Court as one of great public importance that required immediate resolution. On June 29, 1999, the Supreme Court declined jurisdiction over this matter because the judgment appealed did not require an immediate resolution by the Court. The Court remanded the case to the First District Court of Appeal “for appropriate further proceedings.” After hearing oral argument, the district court issued its opinion on April 20, 2000, affirming the trial court and certifying the following question as one of great public importance:

Does the exception from Medicaid coverage for medically necessary

abortions violate the express right of privacy found in Article I, Section 23 of the Florida Constitution?

STANDARD OF REVIEW

Contrary to the appellants' statement of the standard of review, that the review is *de novo*, a summary judgment carries a presumption of correctness on appeal. The presumption is simply not as forceful, since the reviewing court must look at the facts in a light most favorable to the appellants. See Wills v. Sears Roebuck & Co., 351 So. 2d 29 (Fla. 1977).

STATEMENT OF FACTS

The appellants' statement of facts, although argumentative, is not disputed. In addition to the facts noted by the appellants, the following facts are also pertinent: Each of the named plaintiffs received an abortion as they desired. T57. Medicaid does not pay for all medically necessary services. For example, certain organ transplants are not covered, and there are limitations on inpatient and outpatient hospital services. The Legislature has not, at least since 1993, appropriated funds to Medicaid for any abortions other than those allowed for by the Hyde Amendment. Neither has the Legislature appropriated any funds for Medicaid services for which federal participation was not also available. R. vol. pp. 1238-1241.

SUMMARY OF ARGUMENT

There is no constitutional right to abortion. The constitutional right to privacy extends its protection only as far as the right of a woman to decide that she wants an abortion. By protecting the right to choice, the constitution does not also guarantee that the woman choosing to have an abortion will be able to obtain one.

Administrative regulations promulgated by AHCA regarding Medicaid reimbursement for abortions mirror the federal Hyde Amendment. The regulations provide that Medicaid will pay for abortions in cases where the mother's life is in danger, or where the pregnancy is the result of rape or incest. The regulations regulate Medicaid funding, not abortions. Medicaid does not fund all medically necessary abortions. As a threshold matter, these regulations do not violate the right to privacy because they do not amount to governmental intrusion into a person's private life. By funding some, but not all, abortions, the Medicaid program does not intrude into a woman's decision to have an abortion, it just may not pay for it. Neither is reimbursement by Medicaid for health care costs of pregnancy and childbirth an unconstitutional coercion of a woman's right to choose. No new restrictions on obtaining an abortion are created by such funding that were not already extant. Again, this is not governmental intrusion, because there is no direct intervention into the woman's right to choose. Because the regulations do not

violate the right to privacy, the burden does not shift to the state to show a compelling interest.

The “bodily integrity” cases that recognize a privacy right in a patient’s decision to forego medical treatment cannot be extended to the case at hand. Those cases turned on the issue of whether the state’s compelling interest in preserving life outweighed the patient’s right to refuse medical treatment when that treatment was merely prolonging the individual’s death. Abortion is the only medical procedure that is the affirmative termination of a potential life, and thus does not conform to the analysis of the bodily integrity line of cases.

The challenged regulations do not diminish equal protection rights. No fundamental right is impinged, and no suspect class is involved. The recent amendment to Article I, Section 2 does not call for heightened review. The state’s decision to fund childbirth, and to fund only those abortions necessary to save the mother’s life, is rationally related to the state’s interest in preserving life. United States Supreme Court decisions have firmly established that the Hyde Amendment, to which the challenged regulations are identical, does not violate equal protection or privacy rights of the federal constitution. Similarly, state statutes limiting funding for medically necessary abortions have been upheld by the United States Supreme Court. Because Florida and federal equal protection provisions are essentially the same, federal decisions should control on this issue.

Sovereign immunity prohibits the appellants' demand for reimbursement for money paid to obtain abortions. The state has not waived its sovereign immunity from suit in this instance. The appellants' claim is nothing more than a claim for damages, and cannot be successfully recharacterized to remove it from the sovereign immunity preclusion.

The separation of powers doctrine provides additional grounds for affirmance. The appellants wish the court to order the Medicaid program to pay for medically necessary abortions. However, the appropriation of funds for Medicaid services is solely within the power of the Legislature. Under Article II, Section 3 of the Florida Constitution, the judicial branch may not make appropriations decisions, and thus the remedy sought by the appellants is not available under the Constitution.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL RIGHT TO ABORTION

At the outset, it must be acknowledged that Florida's Constitution does not guarantee the right to obtain an abortion. Article I, Section 23 of the Florida Constitution provides:

Right of privacy. – Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This Court has ruled that this right to privacy encompasses a woman's right to

choose to have an abortion. In re T.W., 551 So. 2d 1186 (Fla. 1989). The right to *choose* to have an abortion is not the same thing as the right to an abortion per se. Neither the plain language of the constitution nor the Court's interpretation of that language guarantees the right to an abortion. The challenged regulations do not interfere with the privacy guarantee of the right to choose.

THE CHALLENGED RULES DO NOT INFRINGE ON THE RIGHT TO PRIVACY

Circuit Judge Lewis struck to the core of the issue in deciding that the Medicaid regulations governing funding of abortions did not impinge on the right to choose. R. vol. VII, p. 1294. The regulations place no obstacles in the decisional path of a woman's right to choose to have an abortion that did not already exist. There is no governmental intrusion. In the absence of Medicaid and its myriad regulations, indigent women still would be faced with the prospect of not being able to afford to pay for an abortion. To the extent their choice may be hindered, it is not hindered by these funding regulations, but by the women's poverty, which was not created by the State.

Thus, this case is not akin to In re T.W., 551 So. 2d 1186 (Fla. 1989) or State v. Presidential Women's Center, 707 So. 2d 1145 (Fla. 4th DCA 1998). In those cases, the courts acknowledged that Florida's right to privacy protected a woman's right to choose an abortion. In T.W., the challenged statute required

parental consent before a minor could obtain an abortion. In Presidential Women's Center, the "Women's Right to Know Act" required a woman to undergo counseling prior to obtaining an abortion. In both cases, the State had added an extra step directly into the process of a woman's decision on her right to choose. No such intrusion exists here.¹

THE CHALLENGED REGULATIONS DO NOT IMPOSE ADDITIONAL ECONOMIC BURDENS.

Accordingly, the appellants' strained argument at pages 28 through 30 of their brief that "the challenged regulations thus force many Medicaid eligible women to delay a wanted abortion or carry their pregnancies to term" is plainly wrong. The regulations do not impose additional expenses or subtract from income.

Additionally, the appellants miscite and misconstrue certain statutes, and make statements of fact that do not appear to be in the record. For example:

"A single pregnant woman is only eligible if she earns less than \$278 a week. *See* §409.903(5), Fla. Stat. (1995 & Supp. 1999); R.vol. V, p. 916." Brief of Appellants ("Brief"), p. 27. The \$278 figure is established nowhere in the record. Neither do the cited statutes establish that figure.

¹ AHCA does not dispute that Florida's right to privacy is more explicit than the federal right to privacy. AHCA does dispute that the right is at all adversely affected in this case.

“Many Medicaid-eligible women . . . are . . . likely to be eligible for Florida’s cash assistance program. See §414.085(1), Fla. Stat. (Supp. 1999). A single woman in this program receives a maximum of \$45 a week to pay for housing and other non-food necessities. See §414.095(11), Fla. Stat. (Supp. 1999). . . . A woman with a dependent child and no other source of income receives a maximum of \$60 a week to care for herself and her child. See §414.095(11), Fla. Stat. (Supp. 1999).”

Brief, p. 28. Once again, the dollar figures are not in the facts of record, and the cited statutes do not support these claims.

This entire argument is speculative, as is appellants’ conclusion that a woman on cash assistance may lose benefits trying to raise funds for an abortion. Brief, p. 30. Nothing in the record indicates that the named plaintiffs had their welfare subsidies threatened, even though they all were able to obtain abortions. T57. Further, appellants presented no evidence or facts regarding the workings of the State’s cash assistance program in the lower court, and never raised this legal argument at the trial court level. It may not be made for the first time on appeal. See Perez v. Winn–Dixie, 639 So. 2d 109 (Fla. 1st DCA 1994). It would be highly prejudicial to the appellee if the Court were to consider this portion of the Brief, as it is dependent upon factual proof not attempted by the appellants in the circuit court.

B. THE EXERCISE OF RIGHTS IS NOT COERCED.

Appellants concede that there is no right either to public assistance or to funding of abortion on demand. Brief, p. 22. This concession belies appellants’

argument that the Medicaid funding of childbirth and not abortion somehow coerces a woman's choice. If there is no right to public funding in the first place, then not funding certain abortions interferes with nothing. If the State funded neither childbirth nor abortions, the pregnant indigent woman seeking abortion would be in the same position as she is now. To say that, because funding for childbirth is available, a woman will choose to carry to term simply to receive that funding, even though she risks her health to do so, does not make good sense. As the dissent in Hope v. Perales, 595 N.Y.S. 2d 948 (N.Y. App. Div. 1993), *reversed* 634 N.E. 2d 183 (N.Y. 1994),² recognized:

The decision to have a child is one laden with tremendous personal and economic consequence. It would not be rational to suppose that a woman not otherwise disposed to do so, would undertake to bear the considerable risks and discomforts of pregnancy and enormous ensuing responsibilities of parenthood simply because the government had offered to pay for some of the medical costs occasioned by the pregnancy. This is particularly true of the women for whom the entitlement to a government funded abortion is here at issue, for these women have, by hypothesis, been advised that an abortion is medically necessary. Obviously, the government's offer to fund the continuation of pregnancy cannot, under such circumstances[,] be regarded as an "inducement." One does not embrace serious and in some cases life threatening health risks simply to obtain a subsidy, particularly where, as here, the need for the subsidy can be eliminated along with the risk by following medical advice.

² On reversal, the Court of Appeals noted that there was no evidence that eligible women were "coerced, pressured, steered or induced" by the prenatal care assistance program to carry their pregnancies to term. Hope v. Perales, 634 N.E. 2d 183, 187 (N.Y. 1994).

Hope at 956-57.

To the extent the funding of childbirth may have some impact on the decision to carry out the pregnancy, the effect is not unconstitutional. The opinion of the Michigan Supreme Court in Doe v. Department of Social Services, 487 N.W. 2d 166, 178 (Mich. 1992) is illustrative:

The state's election to subsidize childbirth does not coerce a woman into forfeiting her right to choose an abortion any more than the state's election to subsidize public schools coerces parents into forfeiting their right to send their children to private schools. [Citation omitted.] As with the decision to fund public schools, the state may have made childbirth a more attractive option by paying for it, but it has imposed no restriction on obtaining an abortion that was not already there.

The weaknesses in the coercion argument are illuminated by the insightful comments of the New York and Michigan courts. The studies cited by the appellants show that only 18 to 23% of Medicaid-eligible women who desire an abortion actually carry to term in states that do not fund abortions.³ This means that approximately four out of five indigent pregnant women who would choose abortions had they been publicly funded still get abortions without the public subsidy. All the named plaintiffs in this case received abortions. T57. Thus,

³ There is no indication in the record that these studies are specific to abortions that are medically indicated, or that the abortions were desired in order to preserve the mother's health.

appellants' own proof provides little support for their coercion theory.

Although appellants raise the statistic that thirteen out of eighteen state courts that have considered abortion funding cases identical to this one have struck down funding bans, the statistic is superficial and misleading.⁴ Of the state courts of final jurisdiction that have considered the issue, six (California, Massachusetts, Minnesota, New Jersey, New Mexico and West Virginia) have ruled in favor of abortion funding advocates. Four (Michigan, New York, North Carolina and Pennsylvania) have ruled in favor of the state. Five of the thirteen decisions (Connecticut, Idaho, Illinois, Montana and Vermont) were unappealed or unreviewed trial court decisions. In the Connecticut, Montana and Vermont decisions, the courts based their judgments on grounds that the regulations were not authorized by statute; those decisions did not rely on constitutional grounds.

The appellants also maintain that all the states whose constitutions offer a greater right of privacy than does the federal constitution have struck down regulations such as Florida's. This is not accurate. In Doe v. Childers, No. 94CI02183, slip op. (Ky. Cir. Ct. Aug. 3, 1995), the court held that Kentucky's constitution afforded a greater right of privacy, but nevertheless upheld the non-funding of abortions. Other cases relied on by the appellants are distinguishable.

⁴ All the state court decisions are cited at pages 32 and 33 of the appellants' brief, and are reproduced in Appellants' appendix, so are not reiterated here.

The Illinois case, Doe v. Wright, No. 7851112 (Ill. Cir. Ct. Dec. 2, 1994) is nothing but a single-page handwritten order that contains no reference to the Illinois right of privacy. The Alaska decision, Planned Parenthood v. Perdue, No. 3AN 98-7004 CI, slip op. (Alaska Super. Ct. Mar. 16, 1999), is not analogous. It is founded on the court's finding that Alaska's constitution, unlike Florida's, guarantees the right to abortion, not just the right to choose. Perdue at 9. The Montana case, Jeannette R. v. Ellery, No. BDV-94-811, slip op. (Mont. Dist. Ct. May 22, 1995) is a trial court ruling on cross motions for summary judgment. The language of Montana's privacy clause is broader than Florida's, allowing for a broader construction: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Jeannette R. at 15. In the California case, Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981), the court was bound by precedent that required it to specially scrutinize government benefit programs, even if no new obstacle to exercise of the constitutional right was created. Id. at 781. Thus the weight of authority among other states' decisions is hardly overwhelming, and ought not direct the decision of this Court.

The principle of "neutrality" underlying some of the decisions favoring abortion funding (this principle is related to the coercion argument discussed above), that state governments must act neutrally when funding protected rights, is

flawed. It assumes that the funding of one woman's childbirth results in an infringement upon the privacy-protected decision of another woman to have an abortion. This "cause and effect" assumption does not connect logically. The encouragement of one alternative does not automatically result in the discouragement of another, especially where, as here, circumstances have not changed for the latter alternative. Any indirect effect the funding of pregnancy and childbirth may have on an indigent woman's decision to undergo abortion does not violate her right to privacy. This is confirmed by a close look at our right to privacy.

"Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of the provision's explicit language." Chiles v. Phelps, 714 So.2d 453, 457 (Fla. 1998). The explicit language of Article I, Section 23 provides that all natural persons have "the right to be let alone and free from governmental intrusion into his private life." This right to be let alone evolved from the tort concept known as "invasion of privacy" and addresses the same concerns as the tort. See Stall v. State, 570 So.2d 257, 266-267 (Fla. 1990), Kogan, dissenting. Florida's tort law does not recognize a violation of privacy rights when the alleged effect is indirect. Loft v. Fuller, 408 So.2d 619, 624 (Fla. 4th DCA 1981). The effect, if any exists, of funding childbirth on the indigent woman's right to choose an abortion is indirect; it in no way directly prevents her from choosing an abortion.

The plain meaning of the privacy clause prohibits an act of governmental intrusion into a person's private life. The state does not intrude on the indigent woman's zone of privacy because the challenged regulations do not change her private circumstances.

Further, government is not required to act in a precisely neutral manner. The state, for example funds public education without funding private schools. Parents have the right to choose to send their children to either public or parochial schools. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925). States do not violate this right to choose when funding public, but not private schools. *See* Norwood v. Harrison, 413 U.S. 455 (1973). Similarly, adults have the fundamental right to choose to marry or not. That does not mean that the state burdens the right not to marry by promoting marriage. *See* Doe v. Department of Social Services, 487 N.W. 2d at 185. Additionally, the "neutrality" argument is in reality an equal protection argument, not a privacy right argument because it is based on a difference in funding for two classes of women. Under equal protection, it is not necessary to treat all persons in an identical manner. McElrath v. Burley, 707 So. 2d 836,839 (Fla. 1st DCA 1998), citing In re Greenberg's Estate, 390 So. 2d 40 (Fla. 1980). "That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity." Greenberg's Estate at 42.

C. THE RIGHT TO BODILY INTEGRITY IS NOT AFFECTED BY THE

FUNDING REGULATIONS.

Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980) is the seminal decision of a line of cases wherein the courts have extended the right of privacy to include the right to refuse certain medical treatment. The appellants' attempt to apply this right to the pregnancy/abortion scenario is not supported by the applicable cases. Satz, as well as all the cases cited by the appellants at page 35 of their brief, concerned the right of a patient to refuse medical treatment to his or her own person, without which the patient would die. The medical situation of those patients was much different from that of a pregnant woman who wishes to end a potential life by aborting her fetus. The reasoning of the court in these cases was summarized in In re Guardianship of Browning, 568 So. 2d 4, 14 (Fla. 1990):

Cases decided by this Court have identified state interests in the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession, and have balanced them against an individual's right to refuse medical treatment. The state's interest in the preservation of life generally is considered the most significant state interest. However, " 'there is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether, but when, for how long and at what cost to the individual [his] [or her] life may be briefly extended.' " *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. 4th DCA 1978) (quoting *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 740-44, 370 N.E.2d 417, 425-26 (1977)), adopted, 379 So. 2d 359 (Fla.1980). Hence, in *Satz*, we determined that a competent person suffering from an incurable affliction could refuse medical treatment.

As explained by this Court in Browning, the state’s compelling interest in the preservation of life is outweighed in these “bodily integrity” cases only because the treatment being refused by the patient is not really prolonging life, but is actually prolonging their inevitable death. *See also In re Guardianship of Barry* 445 So. 2d 365, 371 (Fla. 2d DCA 1984); Corbett v. D’Alessandro, 487 So. 2d 368, 371 (Fla. 2d DCA 1986).⁵

Making the soul searching and courageous decision to forego life sustaining measures is a far cry from the decision to affirmatively terminate a potential life. The Court recognized this distinction in Krischer v. McIver, 697 So. 2d 97 (Fla. 1997). There, the Court ruled that Section 782.08, Florida Statutes, which prohibited assisted suicide, did not violate the federal equal protection and due process clauses, nor Florida’s constitutional right to privacy. It “did not agree that there is no distinction between the right to refuse medical treatment and the right to commit physician-assisted suicide through self administration of a lethal dose of medication.” Id. at 102. The Court held that the individual’s right to privacy was outweighed by the state’s compelling interest in preservation of life.

Even if a woman’s decision to have an abortion were protected by the right to bodily integrity, the state’s compelling interest in preservation of life assuredly

⁵ The compelling state interest advanced in In re Dubreuil, 629 So. 2d 819 (Fla. 1993) and Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989) was not the preservation of life, but the less significant “protection of third parties.”

would outweigh it. That is especially so here, where the abortion would not be to preserve the life of the mother.

THE STATE'S FUNDING PROGRAM IS NARROWLY TAILORED TO SERVE THE PRESERVATION OF LIFE.

As noted above, the preservation of life is the most compelling of state interests. However, the question of whether the state's interest outweighs a woman's right to privacy in this context is really not at issue, because, as established *supra*, the right to privacy is not impinged by the challenged rules. The state's decision to provide Medicaid funds for childbirth, however, does properly serve the state's interest in preserving life. The state's interest in fetal life becomes compelling upon viability of the fetus, which generally occurs at the end of the second trimester of pregnancy. In re T.W. at 1193-94. Childbirth of course occurs after viability, after the time the state's interest has activated. Further, the funding methodology operates to preserve the greatest number of lives. By funding abortions where the mother's life is in danger, and also funding birth, more opportunity for the preservation of life is created. Therefore, the state's Medicaid funding regulations serve the requisite compelling state interest.

THE FUNDING REGULATIONS DO NOT VIOLATE THE RIGHT TO EQUAL PROTECTION

A. NO FUNDAMENTAL RIGHT OR SUSPECT CLASS IS INVOLVED.

As observed by Circuit Judge Lewis, the federal and Florida equal protection

provisions are essentially the same. R. vol. VII, p.1293. Article I, Section 2 of Florida's constitution provides that "[a]ll natural persons, female and male alike, are equal before the law[.]" Amendment XIV, section 1 to the federal constitution provides that no state shall "deny any person within its jurisdiction the equal protection of the laws." Accordingly, federal decisions in this area are controlling. The United States Supreme Court, in cases on all fours with this one, has ruled that funding regulations such as the ones here at issue do not violate equal protection. *See Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). Since the classification under the regulations was based on indigency, which is not a suspect classification, the regulations readily passed constitutional analysis under the rational relationship test. The U.S. Supreme Court has also held that a state may enact a statute limiting medically necessary abortion funding without infringing on constitutional rights. *Williams v. Zbaraz*, 448 U.S. 358 (1980).

Further, classifications based on pregnancy are not impermissible sex based classifications. *See Geduldig v. Aiello*, 417 U.S. 484,496-97 n. 20 (1974). *See also Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) ("[n]either poverty nor pregnancy gives rise to membership in a suspect class"). Thus appellants' contention that "the state's refusal to fund medically necessary abortions clearly constitutes sex discrimination" (Brief, p. 40) is not universally supported. In *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), the Pennsylvania

supreme court, addressing a case identical to the one at bar, characterized as simplistic the argument that, because only a woman can have an abortion then the statute necessarily utilizes sex as a basis for distinction. The Fischer court pinpointed the actual classification:

To the contrary, the basis for the distinction here is not sex but abortion [citation omitted], and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women.

Id. at 125. The court ruled that the state statute limiting Medicaid abortion funding did not violate Pennsylvania's equal rights amendment ("ERA") and that strict scrutiny did not apply.

THE AMENDMENT TO FLORIDA'S CONSTITUTION DOES NOT REQUIRE HEIGHTENED REVIEW.

The fundamental right to privacy is not infringed by the administrative rules at issue, and no suspect class been implicated. Thus, contrary to the appellants' assertion that heightened review is called for, the appropriate test to be applied here is the rational basis test. *See* Florida League of Cities, Inc. v. Florida Department of Environmental Regulation, 603 So. 2d 1363, 1368 (Fla. 1st DCA 1992); Schwarz v. Kogan, 132 F.3d 1387, 1391 (11th Cir. 1998).

Citing New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M.1998), the appellants' hypothesize that the amendment to Article I, Section 2

to add the words “female and male alike” after the phrase “all natural persons” requires heightened review in the context of abortion funding because it implements an equal rights amendment. Heightened review does not follow from the ERA, because it does not prohibit or refer to the very classification to which the appellants would apply it.

New Mexico’s supreme court in New Mexico Right to Choose ruled opposite to Fischer in affirming the trial court’s holding that New Mexico’s abortion funding regulations violated its ERA. The New Mexico court’s reasoning is difficult to follow. It appears to simply declare the Fischer court’s analysis erroneous based on a scant statement regarding the term “similarly situated” from a law review article from 1949. New Mexico Right to Choose at 854. This does not comport with discussion in later articles that were written specifically in support of the ERA. The New Mexico decision appears to extend the operation of the ERA beyond its original intent. For example, in Barbara A. Brown, Thomas I. Emerson, Gail Falk and Ann E. Freedman *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 893 (April 1971) the authors write:

The fundamental legal principle underlying the Equal Rights Amendment, . . . that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex, does not preclude legislation . . . which . . . takes into account . . . a physical characteristic unique to one sex.

Also:

[The ERA] has nothing to do with the power of states to stop or regulate abortions, or the right of women to demand abortions. The state's power over abortions depends upon wholly different constitutional considerations, primarily the right of privacy, and would not be affected one way or the other by passage of the ERA.

Emerson and Lifton, *Should the ERA Be Ratified?*, 55 Conn. B.J. 227, 232 (June 1981). The more recent articles point out that the Fischer court's reasoning demonstrated a better understanding of the intent of the ERA, while the New Mexico court stretched it beyond its espoused bounds. Indeed, the prevailing view among other ERA jurisdictions is that the ERA "does not prohibit differential treatment among the sexes when, as here that treatment is reasonably and genuinely based on physical characteristics unique to one sex. [citations omitted]" Fischer at 125.

Additionally, Florida's "ERA" is not the same as that adopted by New Mexico or other states. The ERA in place in New Mexico reads: "Equality of rights under law shall not be denied on account of the sex of any person." Article II, Section 18, New Mexico Constitution. In Florida, the "female and male alike" were already included by definition in the term "all natural persons." The addition to Article I, Section 2 of the Florida Constitution thus did not change the meaning of equal protection under the Florida Constitution. Therefore, the "rational basis" test continues to be the level of review for equal protection in Florida.

THE MEDICAID FUNDING REGULATIONS CREATE NO IRRATIONAL CLASSIFICATION.

As noted under the discussion of neutrality, *supra*, it can hardly be contested that Medicaid's funding of childbirth and those abortions necessary to save the mother's life has a rational basis in the state's interest in preservation of life.

"Under the rational basis test, it is not necessary to inquire whether the statutory classification effects a permissible goal in the best possible manner, as some degree of imprecision or inequality is permitted." Ciancio v. North Dunedin Baptist Church, 616 So. 2d 61, 62 (Fla. 1st DCA 1993). The state's funding plan not only promotes the potential life of the unborn, but the threatened lives of mothers as well, while continuing to support the mother's health. Medicaid funds all other aspects of the mother's health during pregnancy, including problems brought on by the pregnancy. Thus, Medicaid's funding regulations also promote the health of the mother during gestation. There is nothing irrational in the way the regulations operate to preserve life.

D. THE AMENDMENT TO ARTICLE 1, SECTION 2 HAS PROSPECTIVE EFFECT ONLY.

Finally, all of the appellants' arguments based on the November, 1998 amendment to Article I, Section 2 of the Florida Constitution are inapplicable to this

appeal.⁶ Constitutional amendments are given prospective effect only unless there is clear legislative expression that they operate retrospectively. State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983).

While as a general rule it is true that disposition of a case on appeal is made in accordance with the law in effect at the time of the appellate court’s decision rather than the law in effect at the time the judgment appealed was rendered [citations omitted], this rule is not applicable when a substantive right is altered.

Id. at 323. As demonstrated above, the amendment did not actually change the meaning or impact of Florida’s equal protection clause. Assuming for the sake of argument that the appellants were correct, however, then the amendment cannot apply to this appeal because it changes a substantive right that did not exist at the time the decision was made in the circuit court.

IV. THE CIRCUIT COURT ACTED PROPERLY IN STRIKING PLAINTIFFS’ CLAIM FOR DAMAGES ON SOVEREIGN IMMUNITY GROUNDS

The appellants cite as error the circuit court’s striking their claim for reimbursement of money spent on obtaining abortions on the basis of sovereign immunity. Characterizing their claim as one for specific relief, the appellants argue that sovereign immunity does not apply to bar said claim.

That the state is protected from suit by sovereign immunity “is the rule, rather

⁶ All abortions of the representative plaintiffs occurred before July 25, 1998. T57.

that the exception.” Pan-Am Tobacco v. Department of Corrections, 471 So. 2d 4, 5 (Fla. 1985). Absent a waiver of sovereign immunity, it stands as a complete bar to suit against the state. Department of Natural Resources v. Circuit Court of the Twelfth Judicial Circuit, 317 So. 2d 772 (Fla. 2d DCA 1975), *aff’d* 339 So. 2d 1113 (Fla. 1976). The proscription against suits against the state is broad and extends to suits in equity and to such actions as garnishment proceedings. Hampton v. State Board of Education, 105 So. 2d 323 (Fla. 1925); Seaside Properties, Inc. v. State Road Department, 121 So. 2d 204 (Fla. 3d DCA 1960); G.& J Investment Corp. v. HRS, 429 So. 2d 391 (Fla. 3d DCA 1983). Neither can equitable liens be placed against the property or funds of the state. *See* §11.066(4), Fla. Stat. (1997); Berek v. Metropolitan Dade County, 396 So. 2d 756 (Fla. 3d DCA 1981); Kirk v. Kennedy, 231 So. 2d 246 (Fla. 2d DCA 1970).

Although the appellants argue correctly that sovereign immunity does not prevent a lawsuit seeking to restrain the enforcement of an unconstitutional law, the appellants are asking for more than that. They repeatedly request reimbursement for their out of pocket expenses paid to have abortions; in other words, they seek compensatory damages or possibly an equitable lien against state funds. Without an express waiver of sovereign immunity, both such remedies are barred. The line of cases cited by the appellants at page 47 of their brief, characterized by Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), is inapposite. Those cases

concerned the assessment by the state of an illegal tax. The state was required to reimburse moneys that it had taken from the taxpayers under the unconstitutional assessment. In the case at bar, the state has made no assessment against the appellants, and it therefore is not required to reimburse them.

The appellants' attempt at recasting their damages claim as one for restitution must fail. Reclamation of money already spent by the appellants on abortions is a basic compensatory damages claim. "Compensatory damages are awarded as compensation for the loss sustained to make the party whole so far as that is possible. Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965). They arise from actual and indirect pecuniary loss. Margaret Ann Supermarkets, Inc. v. Dent, 64 So. 2d 291 (Fla. 1953)." Tucker v. Department of Professional Regulation, 521 So. 2d 146, 147 (Fla. 5th DCA 1988).

Bowen v. Massachusetts, 487 U.S. 879 (1988), cited by the appellants at page 46 of their brief, is readily distinguishable. First, it dealt with the sovereign immunity of the federal government, not Florida's sovereign immunity. Unlike Florida, the United States government has waived its sovereign immunity for a broad variety of claims, including "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28

U.S.C. §1491(a)(1). From the authorities cited above, it is clear that Florida has protected its sovereign immunity to a much greater extent. Second, in Bowen, the federal government had disallowed some of its advances of the federal share under Medicaid. Bowen was confined to the very narrow issue of whether Massachusetts could sue the federal government through Section 702 of the federal Administrative Procedures Act to enforce specific provisions of the Medicaid act that required the payment of certain amounts to the state for Medicaid services. That is not the case here. Third, under state law, Medicaid reimbursements may be made only to providers, not recipients, and only to providers who have a contract with AHCA: “The agency may make payments for medical assistance and related services rendered to Medicaid recipients only to an individual or entity who has a provider agreement in effect with the agency [.]” §409.907, Fla. Stat. Accordingly, the Medicaid recipients who seek to be reimbursed for the money they spent obtaining abortions are not eligible for such Medicaid reimbursement. They cannot claim an entitlement, as was being sought by the state in Bowen, and therefore cannot sue for an entitlement to reimbursement. Their only potential claim is for damages, which is barred by sovereign immunity.

V. THE SEPARATION OF POWERS DOCTRINE BARS THE COURTS FROM ORDERING THAT THE STATE PAY FOR ABORTIONS NOT FUNDED BY THE LEGISLATURE

[T]he judicial branch must be cautious when evaluating the choices made by

the legislative branch as to the appropriate funding for programs it has deemed important to the public welfare. We must avoid unnecessarily limiting the funding options available to the legislature when addressing today's policy problems.

Agency for Health Care Administration v. Associated Industries of Florida, 678

So.2d 1239, 1243 (Fla. 1996).

The remedy sought by the appellants, that the court order the Medicaid program to fund all medically necessary abortions, is not constitutionally permissible. The Florida constitution distributes governmental powers among the three branches of government, and prohibits one branch from exercising the powers of another.

Article II, Section 3 of the Florida Constitution provides: "Branches of government. – The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Article VII, Section 1(c) provides: "No money shall be drawn from the treasury except in pursuance of appropriation made by law." "This provision gives to the Legislature 'the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.' State ex rel. Kurz v. Lee, 121 Fla. 360, 384, 163 So.2d 859, 868 (1935)." Republican Party of Florida v. Smith, 638 So. 2d 26, 28 (Fla. 1994).

In each of the three counts of the appellants' fourth amended complaint

below, they demand that the court declare that Medicaid funds will be available to pay for medically necessary abortions. R. vol. III, pp.466-496. As only the legislature can make funds available for any state program, the court may not cross over into the legislative realm and declare funding to be available for anything, no matter how important.

Pursuant to its lawmaking authority, the legislature has laid out the parameters under which payment for Medicaid services will be made. §409.902, Florida Statutes provides:

The Agency for Health Care Administration is designated as the single state agency authorized to make payments for medical assistance and related services under Title XIX of the Social Security Act. These payments shall be made, subject to any limitations or directions provided for in the General Appropriations Act, only for services included in the program, shall be made only on behalf of eligible individuals, and shall be made only to qualified providers in accordance with federal requirements for Title XIX of the Social Security Act and the provisions of state law. This program of medical assistance is designated the “Medicaid Program.”

§409.903, Florida Statutes, provides in pertinent part: “Payment on behalf of these Medicaid eligible persons is subject to the availability of moneys and any limitations established by the General Appropriations Act or Chapter 216.” §409.908, Florida Statutes provides in its preamble:

Reimbursement of Medicaid providers. – Subject to specific appropriations, the agency shall reimburse Medicaid providers, in accordance with state and federal law, according to methodologies set forth in the rules of the agency and in policy manuals and

handbooks incorporated by reference therein.

The above quoted provisions establish that payments under Medicaid in Florida are limited by federal requirements and the availability of appropriated money, and are limited to services actually included by AHCA in the program. The Legislature has also given AHCA the authority to determine reimbursement policy through its rules.⁷

The Hyde Amendment is one such limiting federal requirement. After stating the limited categories of abortions which are covered under Medicaid (rape, incest, and where the mother's life is in danger) the Hyde Amendment reads: "Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local or private funds (other than a State's or locality's contribution of Medicaid matching funds.)" (Emphasis supplied).

Department of Labor, Health and Human Services, and Education and Related Agencies appropriation act, 1998, Pub. L No. 105-78(1997), 111 Stat. 1467, §§509, 510. The limiting language is clear. The Hyde amendment does not limit expenditure of a State's funds **except** for that State's contribution of Medicaid matching funds. Since the only state funds in Medicaid are its matching funds, the

⁷ The appellants have challenged only the rules relative to funding, not the statutes. Even if the rules were struck down, the statutes allowing funding only in accordance with federal law would still permit the current policy on abortion funding.

Hyde amendment expressly limits a state's expenditures under Medicaid.

The United States Supreme Court has explained the workings of the Medicaid program as follows:

The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State. Nothing in Title XIX as originally enacted, or in its legislative history, suggest that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan. Quite the contrary, the purpose of Congress in enacting title XIX was to provide federal financial assistance for all legitimate state expenditures under an approved Medicaid plan. . . . [T]he Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan . . . [T]he legislative history suggests that Congress has always assumed that a participating State would not be required to fund medically necessary abortions once federal funding was withdrawn pursuant to the Hyde Amendment.

Harris v. McRae, 448 U.S. at 308-309.

The foregoing establishes that a state cannot provide for services not approved under Title XIX in its Medicaid plan, because it would receive no federal contribution for such services and therefore would have no federal funds to match with the states' contribution. Stating the obvious, the federal government would not approve a plan that was contrary to federal requirements. Thus, a state would have to set up an additional funding source, or "overmatch" federal dollars, if it wanted to fund services not covered by Medicaid.

AHCA cannot spend any money, whether under Medicaid or some other program, including federal funds, if the money has not been appropriated by

Florida's legislature. *See* §216.212(3), Fla. Stat. The legislature has appropriated no moneys to the Medicaid program for medically necessary abortions at least since 1993. R.vol. VII, pp. 1238-1241. Unless and until the legislature approves and appropriates funds beyond the 45% match for Medicaid, no dollars exist to pay for services not included in AHCA's budget.

CONCLUSION

By choosing to provide Medicaid funds for abortions where the mother's life is in danger, or where the pregnancy is a result of rape or incest, as well as for pregnancy and childbirth, the state Medicaid program does not violate the right to privacy. The challenged rules regulate funding, not abortion. Neither is the guarantee of equality before the law violated. The challenged regulations advance a compelling state interest. The state's sovereign immunity protects it from those aspects of the appellants' claims that seek reimbursement for money expended on abortions. Furthermore, the relief the appellants seek cannot be granted by the judiciary under the constitution's separation of powers.

The certified question should be answered in the negative and the decision of the district court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following persons on this ____ day of June, 2000.

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