IN THE SUPREME COURT OF FLORIDA

A CHOICE FOR WOMEN, INC.; EDWARD WATSON, M.D.; and MONICA NAVARRETE,	)	Supreme Court No. 04-903
Petitioners,	)	On Appeal from the Third District Court of Appeal Case No. 3D02-3039
v.	)	
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	There Heard On Appeal from the Department of Administrative Hearings. Case No. 02-3079RX
Respondent.	)	

PETITIONERS' BRIEF ON JURISDICTION

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INTRODUCTION

Petitioners seek review of the Third District Court of Appeal's determination that the exclusion of medically necessary abortions from the otherwise comprehensive Florida Medicaid program does not unconstitutionally discriminate on the basis of sex. The administrative rules challenged in this case deny medically necessary abortions to eligible women, even when the abortion procedure is needed to prevent conditions such as blindness, sterility, or epileptic seizures, at the same time that the program provides all medically necessary care to eligible men, including, for example, Viagra for impotency. The record establishes that this discriminatory funding ban forces women, but not men, to endure substantial harms to their health, causing them physical suffering and impairing their ability to participate fully in the workforce, family, and society.

The Third District Court of Appeal's decision eviscerates the Florida Constitution's protections against sex discrimination, and it threatens the health of the thousands of Medicaid-eligible women in Florida who each year seek abortions because of medical complications affecting their pregnancies. It is therefore imperative that this Court accept jurisdiction over this appeal. The Third District Court of Appeal recognized the broad import of this case and certified the issue of the challenged rules' constitutionality to this Court as a question of great public importance.

STATEMENT OF CASE AND FACTS

Petitioners challenge the constitutionality of rules and handbooks of the Agency for Health Care Administration ("AHCA") that prohibit Medicaid coverage for abortions except when the pregnant woman is in danger of death or when the pregnancy has resulted from rape or incest. *See* Fla. Admin. Code Ann. R. 59G-4.150; Fla. Admin. Code Ann. R. 59G-4.160; Fla. Admin. Code Ann. R. 59G-4.230, Florida Medicaid Physician Coverage and Limitations Handbook, January 2001, at 2-3; Florida Medicaid Provider Reimbursement Handbook at 7-37 through 7-39 (collectively "the funding ban"). The Florida Medicaid program covers all other services (except some organ transplants) upon a showing that they are medically necessary. *See* R. App. I at 324, 342. The factual record submitted to the Administrative Law Judge ("ALJ") demonstrates that the funding ban gives women fewer Medicaid benefits than men and prevents women from obtaining needed medical services, thereby impairing women's health and placing them at a disadvantage to men in their life opportunities. *See* R. 273; R. App. I at 39-47, 45-47, 96-97, 102-104, 106, 107-109, 111-118, 121-123, 156-158, 174-181, 183, 185-196, 200-201, 214, 223-225, 300-302, 324, 341-344; R. App. I, Ex. 1 at 39-41; R. App. I, Exs. 4-6, 8, 10-16.[1] Petitioners contend that this differential treatment of

[1] The record also demonstrates that the funding ban is more costly to the State than paying for medically necessary abortions, R. App. I at 101-102; and that it only

women cannot survive the heightened scrutiny applied to classifications based on sex under Florida's Equal Protection Clause, Art. I, § 2, Fla. Const.

On October 17, 2002, the ALJ issued a final order, dismissing the Petition on the grounds that she lacked jurisdiction to rule on the constitutionality of the funding ban. Petitioners' ensuing appeal required the Third District Court of Appeal to decide in the first instance whether the funding ban unconstitutionally discriminates against women. On September 3, 2003, the Third District Court of Appeal affirmed the Division of Administrative Hearing's dismissal of the Petition on the grounds that the funding ban is "rationally related to the legitimate state interests of protecting life and containing costs." App. A at 5.

On September 30, 2003, Petitioners filed motions for rehearing, rehearing *en banc* and certification with the Third District Court of Appeal, and Respondent filed a motion to correct clerical errors in the court's September 3, 2003, opinion. On April 21, 2004, the Third District Court of Appeal granted Respondent's motion and substituted a corrected opinion for its prior opinion. The corrected opinion is appended hereto as Appendix A. On that same day, the Third District Court of Appeal issued an order denying Petitioners' motions for rehearing and rehearing *en banc*, but granting their motion for certification. That order is

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promotes the state's interest in potential life when the pregnant women's health is at risk. R. App. I at 328-329, 346.

appended hereto as Appendix B. The lower court certified to this Court the following question of great public importance:

> Whether the exclusion of a medically necessary abortion procedure from the Florida Medicaid program that covers other medically necessary health care for both men and women, including all reproductive health care required by men, is unconstitutional sex discrimination under the Florida Constitution?

On May 24, 2004, Petitioners filed a notice of their intention to invoke the discretionary jurisdiction of this Court. On June 1, 2004, the Court issued an order postponing decision on jurisdiction and setting a briefing schedule for the appeal. On that same day, Respondent filed a motion for leave to file a jurisdictional brief. Petitioners opposed that motion on the grounds that jurisdictional briefs "shall not be filed" in appeals from decisions certified by a district court of appeal to pass upon a question of great public importance. *See* Fla. R. App. P. 9.120(d). On July 6, 2004, this Court granted Respondent's motion and set a briefing schedule for the filing of jurisdictional briefs. Petitioners now file this jurisdictional brief in accordance with the Court's order.

SUMMARY OF THE ARGUMENT

This Court should exercise its discretionary jurisdiction over this appeal for two reasons. First, the appeal passes upon a question that has been certified by the Third District Court of Appeal to be of great public importance and that profoundly impacts the health and equality of Florida women. Second, in upholding the

funding ban, the Third District Court of Appeal expressly construed the equal protection clause of the Florida Constitution in a manner that is contrary to decisions of this Court and that significantly reduces the clause's protections against sex discrimination.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction over this case on two independent grounds: (1) the District Court of Appeal has certified its decision as one that "passes upon a question of great public importance," *see* Art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v); and (2) the District Court of Appeal's decision "expressly construes a provision of the state . . . constitution." *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii).

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS JURISDICTION BECAUSE THIS CASE PASSES UPON A QUESTION OF GREAT PUBLIC IMPORTANCE.

The Court should exercise its jurisdiction to accept this appeal because the case presents a question of great public importance, namely whether the exclusion of medically necessary abortions from the otherwise comprehensive coverage of the Florida Medicaid program is sex discrimination. *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P. 2d 841 (N.M. 1998) (striking down analogous funding ban as unconstitutional sex discrimination). The answer to that question

profoundly affects the lives and health of the thousands of Medicaid-eligible women in Florida who each year face medical conditions complicating their pregnancies. *See* R. 274-75, R. App. I at 139-156. Pursuant to the funding ban, those women are unable to obtain medically necessary abortions through the Florida Medicaid program, and, as a result, many of them delay or forgo abortions that could help preserve their health. *Supra* at 2. This denial of access to medically necessary abortions impairs not only the health, but also the life opportunities, of low-income women. *Id*. The constitutionality of such a burden on women's ability to participate equally in society is indisputably a matter of great public importance. Moreover, the question presented by this case is important not only to the women directly affected by the funding ban, but to all Floridians who seek to have the State extend its benefits to men and women on equal terms. *See* Art. I, § 2, Fla. Const. (as amended in 1998 by the citizens of Florida to state that "female and male alike" are equal under the law); *see also Beal Bank v. Almand and Assocs.*, 780 So. 2d 45, 52 n.7 (Fla. 2001) (recognizing that amended provision now "expressly protects the equality of women").

The Third District Court of Appeal, although upholding the funding ban, recognized the issue presented by this case as one of great public importance and therefore certified the question of the ban's constitutionality to this Court. App. B. The importance of that question is underscored by the fact that this Court has

previously granted discretionary review to address the constitutionality of the funding ban. *See Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d. 1036 (Fla. 2001). In that case, this Court determined that the funding ban did not violate women's right to privacy, but "decline[d] to address the petitioners' [sex discrimination] claim" because of an "inadequate record . . . and the fact that neither the trial court nor the district court ruled on this issue." *Id.* at 1041 (footnote omitted). This case presents the important question left open by *Renee B.* along with a District Court of Appeal ruling on that question and a comprehensive record addressing the factual issues relevant to the sex discrimination analysis. Accordingly, the Court should exercise its jurisdiction to determine whether the funding ban unconstitutionally discriminates against women.

II. THIS COURT SHOULD EXERCISE ITS JURISDICTION BECAUSE THE THIRD DISTRICT COURT OF APPEAL CONSTRUED FLORIDA'S EQUAL PROTECTION CLAUSE IN A MANNER THAT EVISCERATES THE CLAUSE'S PROTECTIONS AGAINST SEX DISCRIMINATION.

The funding ban creates a classification under which Medicaid-eligible men can obtain virtually any health service they need upon a showing of medical necessity, whereas Medicaid-eligible women who need an abortion cannot get the procedure unless they show not only medical necessity, but also that their lives are in danger or their pregnancies were caused by rape or incest. Petitioners argued that the Third District Court of Appeal must subject this sex-based classification to

at least the intermediate scrutiny applied by federal and Florida courts to sex discrimination.[2] Nonetheless, the District Court of Appeal, assessing the level of scrutiny applicable under Florida's equal protection clause, Art. 1, § 2, Fla. Const., rejected Petitioners' argument and applied only rational basis review to the sex classification before it. App. A at 4-6. The District Court of Appeal applied this deferential level of review even though it implicitly recognized that the funding ban creates a sex-based classification.[3] *See Anthony v. Alachua County. Court Exec.*, 418 So. 2d 264, 266 (Fla. 1982) (striking down a law that automatically excused "stay-at-home" mothers, but not fathers, from jury duty because the law employed an impermissible "gender-based classification"); *see also New Mexico Right to Choose/NARAL*, 975 P. 2d at 855 (holding that New Mexico's exclusion of medically necessary abortions from its Medicaid program created a classification based on sex that was subject to "searching judicial inquiry").

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[2] Petitioners further argued that the 1998 amendment to the equal protection clause should be construed to increase the level of scrutiny applied to sex classifications. *See* Art. I, § 2, Fla. Const. (as amended to state that "female and male alike" are equal under the law). This Court need not resolve that issue in this case, however, because the challenged sex discrimination falls under intermediate scrutiny.

[3] The Third District Court of Appeal directly addressed and rejected Petitioners' contention that the 1998 amendments to the Florida Constitution raised the level of review for sex classifications from intermediate to strict scrutiny. App. A at 5-6. The lower court would not, and should not, have ruled on that issue unless it recognized that the funding ban creates a classification based on sex. *N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So.2d 612, 640 (Fla. 2003) (court should not decide constitutional questions "unnecessary for the disposition of [a] case").

The Third District Court of Appeal's application of rational basis review to sex discrimination conflicts with decisions of this Court which have consistently held that sex discrimination is subject to intermediate scrutiny under Florida's equal protection clause.[4] *See, e.g., Kendrick v. Everheart*, 390 So. 2d 53, 56 (Fla. 1980) (holding that a gender-based distinction must be "substantially related to achievement of an important state interest"); *Purvis v. State*, 377 So. 2d 674, 676 (Fla. 1979) (applying same test); *see also Frandsen v. County of Brevard*, 800 So. 2d 757, 760 (Fla. 5th DCA 2001) (applying same test). This court should accept jurisdiction to correct the Third District Court of Appeal's application of an incorrect legal standard, which severely diminishes the Florida Constitution's protections against sex discrimination.

Had the Third District Court of Appeal applied intermediate scrutiny to the funding ban's differential extension of benefits to men and women, it would have found the classification unconstitutional because that discrimination is not substantially related to any important state interest. *See Kendrick*, 390 So. 2d at 56. The ban undercuts the Medicaid program's objectives by posing a direct *threat* to women's health, and there exists no substantial, or even reasonable, relation

[4] To the extent the Third District Court of Appeal relied on *Harris v. McRae*, 448 U.S. 297 (1980), to determine the applicable level of review, that reliance was erroneous because *Harris* did not involve a sex discrimination claim. Rather, the *Harris* Court considered only discrimination based on indigency, *Harris*, 448 U.S. at 323, and age. *Id.* at 323-24 n.26.

between the denial of needed medical care only to women and the statutory goal of providing health care to the poor. *See In re Reed's Estate*, 354 So. 2d 864, 865 (Fla. 1978) (because "the factors causing need are not attributable to sex, there is no reasonable relation between the classification by sex and the statute's purpose").

CONCLUSION

For all of the foregoing reasons, this Court should exercise its discretion to review this case.

Dated: July 21, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this PETITIONERS' BRIEF ON JURISDICTION has been furnished by regular U.S. mail, on July 21, 2004 to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this Petitioners' Jurisdictional Brief is computer-generated, using Times New Roman 14-point font.

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