IN THE SUPREME COURT OF FLORIDA

Case No. SC16-381
Lower Case No. 1D15-3048

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

PLAINTIFFS-PETITIONERS' MOTION TO REVIEW ORDER DENYING EMERGENCY MOTION TO STAY, AND FOR EXPEDITED BRIEFING AND CONSIDERATION

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I. INTRODUCTION

Plaintiffs-Petitioners ("Plaintiffs") move for review of the First District Court of Appeal's non-final order of March 14 denying Plaintiffs' emergency motion for a stay ("DCA Denial of Stay"). Plaintiffs seek a stay of the DCA's non-final order of February 26 ("DCA Order"), which reversed a temporary injunction of Chapter 2015-118, § 1, Laws of Florida, codified at § 390.0111(3), Fla. Stat. ("the Mandatory Delay Law" or "the Act") and allowed the Mandatory Delay Law's unprecedented restrictions on the right to abortion to take effect "immediately." DCA Order, attached hereto as App. B, at 7. That decision was in error, is already causing significant harm to women in Florida, and should be stayed until this Court has had an opportunity to weigh in on this matter of great public importance.

As a result of the DCA Order, virtually every woman seeking an abortion in Florida is now prevented from having the procedure for at least 24 hours after meeting with her physician, and must make an additional, medically unnecessary trip to her doctor in order to exercise her right to abortion guaranteed by the Florida Constitution. These sweeping restrictions are depriving women in Florida of their fundamental right to be free from unwarranted governmental interference with their private health care decisions. Moreover, these restrictions are forcing women in Florida to miss work, lose wages, and pay for additional child care and

travel; threatening women's ability to keep their decision to have an abortion confidential; exposing women to health risks by delaying their care, often by substantially longer than 24 hours; and possibly preventing some women from having an abortion altogether. In light of the irreparable harm that women in Florida are suffering each day that the Act is in effect, Plaintiffs request that this Court reverse the DCA Denial of Stay and enter a stay of the DCA Order for the pendency of Plaintiffs' appeal. Plaintiffs also request that this Court exercise its discretion to shorten the time for briefing on this motion. Fla. R. App. P. 9.300(a).

II. PROCEDURAL HISTORY

On June 10, 2015, Governor Rick Scott signed the Act into law with an effective date of July 1, 2015. The following day, on June 11, 2015, Plaintiffs filed this lawsuit alleging that the Mandatory Delay Law violates the Florida Constitution's Privacy and Equal Protection Clauses, and sought an emergency temporary injunction on their privacy claim. Following a hearing on Plaintiffs' emergency motion at which Defendants-Respondents ("the State") neither disputed Plaintiffs' evidence nor presented any evidence of their own, the trial court issued an order temporarily enjoining the Act ("TI Order"). *See* TI Order, attached hereto as App. C.

The State immediately filed a notice of appeal to the First DCA, triggering an automatic stay of the temporary injunction. Fla. R. App. P. 9.310(b)(2). On

Plaintiffs' motion and after a telephonic hearing on July 2, the trial court lifted the automatic stay. The State did not appeal the vacatur of the automatic stay.

The DCA heard oral argument on the State's appeal of the TI Order on February 9, 2016. On February 26, the DCA reversed the TI Order and also reversed, *sua sponte*, the circuit court's vacatur of the automatic stay, allowing the Mandatory Delay Law to take effect "immediately upon release of th[e] opinion." DCA Order, App. B at 7. Later that same day, Plaintiffs filed in the DCA a notice to invoke this Court's discretionary jurisdiction, explaining that this Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii) because the DCA Order expressly construes the Privacy Clause of the Florida Constitution. Plaintiffs filed their jurisdictional brief in this Court on March 7.

On the day the DCA Order was issued, Plaintiffs also filed an emergency motion to stay that decision pending this Court's review. Fla. R. App. P. 9.310. The DCA denied that motion on March 14. *See* DCA Denial of Stay, attached hereto as App. A.

The Mandatory Delay Law is currently in effect, and will continue to harm women in Florida unless this Court reverses the DCA Denial of Stay and stays the DCA Order for the pendency of Plaintiffs' appeal.

III. **ARGUMENT**

In deciding a motion to stay the order of a lower court pending review, the "[f]actors to be considered are the likelihood that jurisdiction will be accepted by

[this] Court, the likelihood of ultimate success on the merits, the likelihood of harm if no stay is granted and the remediable quality of any such harm." *State ex rel. Price v. McCord*, 380 So. 2d 1037, 1038 n.3 (Fla. 1980) (internal citation and quotation marks omitted). Each of these considerations weighs strongly in favor of staying the DCA Order until this Court has had an opportunity to assess Plaintiffs' likelihood of success under the appropriate constitutional standard. The DCA Denial of Stay was therefore in error.

A. Likelihood of Harm if No Stay is Granted

Women in Florida will suffer significant constitutional, medical, emotional, and financial harms absent a stay. Indeed, in support of their emergency stay motion, Plaintiffs submitted unrebutted evidence that their patients have been experiencing such harms from the moment the Mandatory Delay Law was allowed to take effect.[1] These harms are especially acute for vulnerable groups of Florida

[1] *See* Decl. of Kristin Davy, Feb. 26, 2016, attached hereto as App. D. Ms. Davy, the owner and administrator of Plaintiff Gainesville Woman Care, LLC, recounted in her declaration the massive disruption and harm experienced by the 13 women scheduled for procedures at her clinic the day the DCA Order was issued. *See id.* at ¶ 4. She also noted that, as of February 26, Gainesville Woman Care, LLC, already had over a dozen patients scheduled to obtain abortions in the coming week, and she anticipated that another 10–15 would call to schedule appointments for that week. *See id.* Ms. Davy explained that, absent a stay, she would be unable to provide these women with the medically appropriate care that they desire at the time that they and their physician believe is in their best interests, and that many of her patients would experience financial, medical, and emotional harm as a result of the mandatory delay and additional-trip requirements. *See id.* at ¶¶ 4–5, 13–23.

women, including low-income women; women who are victims of intimate partner violence; women with wanted pregnancies that involve a severe fetal anomaly; women whose pregnancies are the result of rape, but who do not have written proof of their assault; and women with medical complications that are not immediately life-threatening.[2] Absent a stay, the Act will continue to threaten these women's health and safety, subject them to greater costs and burdens, and possibly prevent them from having an abortion altogether. *See* Davy Decl., App. D at ¶¶ 5, 13–23; Decl. of Christine Curry, M.D., Ph.D., attached hereto as App. E, at ¶¶ 15–19.[3]

The Mandatory Delay Law is already causing a constellation of harms. First, the Act is significantly impinging the constitutional rights of Plaintiffs' patients. For the first time since the legalization of abortion in Florida over 40 years ago, Florida women are not allowed to exercise their fundamental right to

[2] There are two extremely limited exceptions to the Mandatory Delay Law: first, where a woman can present written proof that she is a victim of rape, incest, domestic violence, or human trafficking, § 390.0111(3)(a)(1), Fla. Stat.; second, where continuing the pregnancy would threaten a woman's life, § 390.0111(3)(b). Under these narrow exceptions, a woman who lacks written documentation that she is obtaining an abortion because of violence, trafficking, or incest would not be relieved from the Act's burdens, nor would a woman whose health, but not necessarily life, is jeopardized by continuing the pregnancy. *See infra* pp. 7–8 & n.4.

[3] Dr. Curry is a board-certified obstetrician-gynecologist at the University of Miami Hospitals and at Jackson Memorial Hospital. Plaintiffs submitted her sworn, verified declaration in support of their Emergency Motion for a Temporary Injunction on June 11, 2015, and the trial court relied on Dr. Curry's declaration in its TI Order. *See* TI Order, App. C at 8, 10.

abortion at the time that they and their physician believe is in their best interests. Instead, with this law, the State is affirmatively preventing these women from effectuating their decision to end a pregnancy for a minimum of 24 hours, and forcing them to make an additional, medically unnecessary trip to their doctor before they may exercise this right. Florida's right to privacy guards against precisely this type of "unwarranted governmental interference." *See Von Eiff v. Azicri*, 720 So. 2d 510, 516 (Fla. 1998).

Second, the mandatory delay is jeopardizing women's health. As a practical matter, the requirement that a physician—rather than a nurse or counselor—be at the health center to provide the required information on the patient's first visit will result in patient delays far greater than 24 hours, because most clinics will not be able to staff a physician every day of the week. *See* Davy Decl., App. D at ¶ 6 (the sole physician at Plaintiff Gainesville Woman Care, LLC, for the past ten years works no more than two days per week). Moreover, many women are not able to take time away from their existing obligations to travel on two consecutive days. *See* Davy Decl., App. D. at ¶¶ 5, 13–18. The Mandatory Delay Law thus inevitably forces many women to delay their abortion procedures by substantially longer than 24 hours. This, in turn, exposes them to increased medical risks: while abortion is an extremely safe procedure, the later an abortion takes place in pregnancy, the greater the medical risks for the woman. Curry Decl., App. E at ¶¶

13, 15; Davy Decl., App. D at ¶¶ 19–20. Further, the delays imposed by the Act will push some women past the point in pregnancy at which they can obtain a medication abortion, which is an early method of ending a pregnancy involving drugs rather than surgery. Curry Decl., App. E at ¶¶ 10, 15; Davy Decl., App. D at ¶ 15. Medication abortion is medically indicated for physiological or mental health reasons for some women, and is strongly preferred over surgical abortion by others for personal reasons. Curry Decl., App. E at ¶¶ 10–12; Davy Decl., App. D at ¶ 15. Nevertheless, because of the Mandatory Delay Law, some women will lose this health care option. Curry Decl., App. E at ¶ 15; Davy Decl., App. D at ¶ 15.

Third, women with wanted pregnancies who seek abortions to protect their medical well-being, or because they have received a diagnosis of a severe fetal anomaly, are also facing grave harms. While the Mandatory Delay Law incorporates a limited exception for "medical emergenc[ies]" that threaten a woman's life, there is no exception for other threats to a woman's life, and no exception for *any* threat to a woman's health.[4] The Act is thus imposing serious

[4] The "medical emergency" exception allows a physician to provide care without delay only if "continuation of the pregnancy would threaten the *life* of the pregnant woman." § 390.0111(3)(b), Fla. Stat. (emphasis added). If disciplinary action is taken against a physician for an alleged violation of the Mandatory Delay Law or pre-existing abortion-specific informed consent provisions, the physician may assert as an affirmative defense that she held a "reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient." § 390.0111(3)(c), Fla. Stat. This affirmative defense to disciplinary action in limited cases, which a physician must prove to the medical board before

health risks on women facing one of the many complications of pregnancy that do not fit within the narrow confines of the Act's exception for life-threatening medical emergencies. Curry Decl., App. E at ¶¶ 18–19. The Act also contains no exception for women whose pregnancies involve grave or even lethal fetal anomalies, whom the Act is threatening with psychological harm. *Id.* at ¶ 16.

Fourth, the additional-trip requirement is posing a very real threat to a woman's confidentiality and privacy by increasing the risk that partners, family members, employers, co-workers, or others will discover that she is having an abortion. Davy Decl., App. D at ¶¶ 21–22. For a woman with an abusive partner who is seeking an abortion without detection, the need for privacy—and thus the threat posed by the Act—is especially acute. Curry Decl., App. E at ¶ 17; Davy Decl., App. D at ¶ 21. Women in abusive relationships often are carefully monitored. Curry Decl., App. E at ¶ 17; Davy Decl., App. D at ¶ 21. Forcing these women to make an additional, medically unnecessary trip is putting them at risk of further violence. Curry Decl., App. E at ¶ 17; Davy Decl., App. D at ¶ 21.

Fifth, the Mandatory Delay Law is significantly increasing the costs and logistical burdens of accessing abortion. These additional expenses and difficulties are particularly harmful to women already struggling to make ends meet. The

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she can avail herself of it, does not constitute an adequate health exception, nor provide any protection to licensed abortion clinics for potential violations of the Act.

additional-trip requirement forces these women to rearrange inflexible work schedules at low-wage jobs, arrange and pay for additional child care and travel, pay any additional costs associated with a later procedure, and forego wages for additional missed work. Davy Decl., App. D at ¶¶ 13–17. For instance, Ms. Davy described one patient who presented at Gainesville Woman Care, LLC, on February 26:

> One woman who was terribly upset in our clinic today is a waitress with children at home. Because she is living below the federal poverty line, she qualifies for charitable assistance to help cover the cost of the abortion care itself, but she still has to carry the burden of transportation, missed work and wages, and childcare. She indicated that she absolutely could not take off work again next Wednesday (which was our next scheduled procedure day).

Id. at ¶ 14. Absent a stay, low-income women in Florida will continue to bear these unnecessary burdens.

Finally, to add insult, the DCA Order allows the State to communicate its condescending message that a woman seeking an abortion, alone among patients, is incapable of making a thoughtful, informed decision about her medical care without State intrusion. No other Florida law requires a delay before a patient can receive needed medical care. S*ee* TI Order, App. C at 10 (citing Curry Decl. at 4); Fla. H.R., recording of proceedings (Apr. 22, 2015), *available at* http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015041

243&TermID=86, 1:27:55–1:28:04 (Bill Sponsor Rep. Sullivan conceding that no other health care is subject to a mandatory delay under Florida law); *see generally* § 766.103(3)(a)(1)-(2), Fla. Stat. By imposing these restrictions on women seeking abortions and no one else, the Mandatory Delay Law stigmatizes these women and perpetuates the pernicious gender stereotype that women do not understand the nature of their medical procedures, have not thought carefully about their decision to end a pregnancy, or are less capable of making an informed decision about their health care than men.

By contrast, maintaining the pre-DCA Order status quo would impose no substantial harm on the State. For over 40 years—from the legalization of abortion in Florida until the DCA Order was issued on February 26—women in Florida have been able to make and effectuate this exceedingly private decision without a state-mandated delay. The State has presented no evidence that women seeking abortions are inadequately informed under Florida's existing informed consent scheme. *See* TI Order, App. C at 9–10. Likewise, the Florida Legislature made no findings that the Act is necessary to ensure that women seeking abortions in Florida are adequately informed, or that the mandatory delay and additional-trip requirements would in fact enhance a woman's ability to make this private decision. *Id.* at 10–11; *see generally* § 390.0111, Fla. Stat. The immediate and irreparable harm already being experienced by women in Florida as a result of the

Mandatory Delay Law, compared with the lack of any harm to the State if a stay is granted, weighs heavily in favor of granting Plaintiffs' motion. *See State v. Miyasato*, 805 So. 2d 818, 826 (Fla. 2d DCA 2001) (granting motion to stay where "the harm to [the non-movant] caused by a stay is minimal and the risks to the [movant] if no stay is granted are significant").

B. Irremediable Nature of Any Harm

As the State has conceded, the violation of Florida women's constitutional rights, even for a limited time, cannot be remedied at law. *See* TI Order, App. C at 3; *see also, e.g.*, *Coal. to Reduce Class Size v. Harris*, No. 02-CA-1490, 2002 WL 1809005, at *2 (Fla. Cir. Ct. July 17, 2002) (holding that plaintiffs would suffer irreparable injury in light of "the time constraints involved" and the "significant impact on the[ir] state and federal constitutional rights"), *aff'd sub nom. Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959 (Fla. 2002); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (a loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (the "right of privacy" is an "area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury"); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014) (loss of constitutional rights constitutes irreparable injury). Nor is the injury to Plaintiffs

flowing from the direct interference with the physician-patient relationship remediable: even if that injury could be quantified, which it cannot, Plaintiffs cannot seek damages from Defendants. *Thompson v. Planning Comm'n of Jacksonville*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985) (where calculation of damages is speculative, legal remedy is inadequate); *Stephens v. Geoghegan*, 702 So. 2d 517, 521 n.1 (Fla. 2d DCA 1997) ("[A] [v]iolation of privacy provisions of the Florida Constitution does not give rise to a cause of action for money damages" (citation omitted)); *Tucker v. Resha*, 634 So. 2d 756, 759 (Fla. 1st DCA 1994) (finding no legislative waiver of sovereign immunity as to the privacy provision of the Florida Constitution, and therefore concluding that money damages are not available for violations of that right), *aff'd on different grounds*, 670 So. 2d 56 (Fla. 1996).

C. Likelihood That Jurisdiction Will Be Accepted

This Court has discretionary jurisdiction to review the DCA Order because the DCA expressly misconstrued binding constitutional precedent. *See* Fla. R. App. P. 9.030(a)(2)(A)(ii). This Court has a long tradition of vigorously protecting the right to privacy,[5] and is therefore likely to agree to review the lower court's

[5] *See e.g., D.M.T. v. T.M.H.*, 129 So. 3d 320, 347 (Fla. 2013) (statute barring egg donor from asserting parental rights unconstitutional as applied to biological mother who intended to parent child); *State v. J.P.*, 907 So. 2d 1101, 1119 (Fla. 2004) (striking juvenile curfew law); *Sullivan v. Sapp*, 866 So. 2d 28, 38 (Fla. 2004) (striking grandparent visitation statute); *North Florida Women's Health &*

decision reducing constitutional protections for one of the most "personal [and] private decisions concerning one's body that one can make in the course of a lifetime." *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989). There is ample precedent for this Court's exercise of its discretionary jurisdiction in cases involving restrictions on the right to abortion, which are matters of great public importance. *See, e.g.*, *North Florida Women's Health & Counseling Servs. v. State*, 799 So.2d 218 (Fla. 2001) (granting review); *Renee B. v. Fla. Agency for Health Care Admin.*, 767 So. 2d 460 (Fla. 2000) (same). There is no reason to believe that this Court will reach a different conclusion here.

The Court is particularly likely to grant review in light of the far-reaching impact of the DCA Order, which affects all women seeking abortions in Florida, and which has consequences for *all* litigation in the First DCA involving the fundamental right to privacy.[6] *See* Pls.' Jurisdictional Br. at 6–10. The DCA Order raises the bar for when strict scrutiny applies to a law infringing upon the

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Counseling Servs. v. State, 866 So. 2d 612, 639–40 (Fla. 2003) (striking parental notification law for abortion and maintaining "strict scrutiny" standard for infringements upon the right to abortion); *Richardson v. Richardson*, 766 So. 2d. 1036, 1037 (Fla. 2000) (striking statute giving grandparents standing in custody disputes); *Von Eiff*, 720 So. 2d at 514 (striking grandparent visitation statute) ("[T]his Court [previously] noted that it could cite no cases in Florida in which 'government intrusion in personal decisionmaking' survived the compelling state interest test.").

[6] Because of the State's "home venue privilege," *see Bush v. State*, 945 So. 2d 1207, 1212 (Fla. 2006), all litigation involving the right to privacy is likely to arise in the First DCA.

right to abortion and defies this Court's precedent on what constitutes a compelling interest sufficient to justify an intrusion on the right to privacy. Indeed, the DCA did not merely misapply *North Florida*, 866 So. 2d 612 (Fla. 2003)—it held that this Court's constitutional analysis in *North Florida* had been *overruled* by ballot initiative. DCA Order, App. B at 5. This Court is likely to agree that these constitutional errors must be corrected, particularly in light of the significant, irreparable harm that women in Florida are facing as a result of the DCA Order.

Finally, Florida courts agree that matters with widespread social impact should be decided by the state's highest court. *See, e.g.*, *Am. Civil Liberties Union of Fla. v. Hood*, 881 So. 2d 664, 666 (Fla. 1st DCA 2004) ("In light of the long and contentious history of [the abortion] issue in Florida and the widespread social impact of [the proposed] legislation, we must conclude that the instant litigation presents a question of great public importance which should be decided by this state's highest court."), *pass-through certification review granted*, 882 So. 2d 384 (Fla. 2004). Because the DCA Order affects all women in Florida seeking to exercise their right to privacy in their reproductive decisions, this Court is likely to determine that clarification and oversight by the state's highest court is necessary.

D. Likelihood of Success on the Merits

Plaintiffs are likely to succeed on the merits. This Court has long held that strict scrutiny applies to all laws implicating the right to privacy, *In re T.W.*, 551

So. 2d 1186, 1192 (Fla. 1989), and no mandatory abortion delay law in this country has *ever* survived strict scrutiny.[7] Indeed, mandatory delays of as little as two hours have been invalidated under the same constitutional framework that Florida courts apply. *Eubanks v. Brown*, 604 F. Supp. 141, 145-46 (W.D. Ky. 1984). Courts across the country have consistently held that mandatory delays—particularly those that require a woman to make an additional, medically

[7] *See, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 449-51 (1983), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1535-39 (7th Cir. 1985), *aff'd*, 484 U.S. 171 (1987); *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *supplemented by* 664 F.2d 687 (8th Cir. 1981), *rev'd on other grounds*, 462 U.S. 476 (1983); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1014-16 (1st Cir. 1981); *Charles v. Carey*, 627 F.2d 772, 785-86 (7th Cir. 1980); *Wynn v. Carey*, 599 F.2d 193, 196 n.6 (7th Cir. 1979); *Eubanks v. Brown*, 604 F. Supp. 141, 145-46 (W.D. Ky. 1984); *Margaret S. v. Edwards*, 488 F. Supp. 181, 212-13 (E.D. La. 1980); *Women's Cmty. Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 550-51 (D. Me. 1979); *Leigh v. Olson*, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980); *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 552 F. Supp. 791, 797-98 (E.D. Pa. 1982); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1145-47 (D.R.I. 1982); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 22-24 (Tenn. 2000); *Mahaffey v. Attorney Gen. of Michigan*, No. 94-406793, 1994 WL 394970, at *6-7 (Mich. Cir. Ct. July 15, 1994), *rev'd on other grounds sub nom. Mahaffey v. Attorney Gen.*, 564 N.W.2d 104 (Mich. Ct. App. 1997). The very few decisions upholding a mandatory delay law under strict scrutiny were either reversed on appeal or overruled by a later decision of the same court. *Wolfe v. Schroering*, 541 F.2d 523, 526 (6th Cir. 1976), *effectively overruled by Akron Ctr. for Repro. Health, Inc. v. City of Akron*, 651 F.2d 1198, 1208 (6th Cir. 1981); *Akron Ctr. for Repro. Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1205 (N.D. Ohio 1979), *reversed in relevant part by same*.

unnecessary visit to her physician—infringe upon the right to abortion and do not further a compelling state interest using the least intrusive means.[8]

Florida's explicit constitutional right to privacy will not allow a different result here. In *City of Akron v. Akron Center for Reproductive Health, Inc.*—on which this Court relied in articulating the state constitutional standard of review for restrictions on abortion, *In re T.W.*, 551 So. 2d at 1193 (quoting 462 U.S. 416, 429-30 (1983))—the U.S. Supreme Court struck down a 24-hour mandatory delay for abortions. It cannot be the case that such a law would be invalid under *Roe v. Wade*, and yet lawful under the Florida Constitution's *explicit* right to privacy. *See North Florida*, 866 So. 2d at 634 (rejecting the "undue burden" standard established by the U.S. Supreme Court in *Planned Parenthood v. Casey* and continuing to apply *Roe*'s strict scrutiny standard to laws that infringe on a woman's fundamental right to abortion).

[8] *See, e.g.*, *Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985), *aff'd*, 484 U.S. 171 (1987) ("[A] waiting period places a direct and substantial burden on women who seek to obtain an abortion . . . ."); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1014 (1st Cir. 1981) (the mandatory delay "temporarily forecloses the availability of an abortion altogether" and therefore "constitutes a state-created obstacle and direct state interference" (internal quotations and citation omitted)); *Planned Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *9 (a mandatory delay "tell[s] a woman that she cannot exercise a fundamental constitutional right for a 24-hour period . . . . [I]t is a restriction on a woman's right . . . not supported by a compelling reason.").

The DCA Order reversing the TI Order was in error, and this Court is likely to reverse it and reinstate the temporary injunction. First, the circuit court properly applied strict scrutiny, *see* TI Order, App. C at 10–11, because the Mandatory Delay Law is a significant restriction on its face: "[t]he State . . . is telling a woman that she cannot exercise a fundamental constitutional right for a 24-hour period," *Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *9 (Mont. Dist. Ct. Mar. 12, 1999) (striking mandatory delay law under Montana's explicit constitutional right to privacy). Second, the circuit court properly determined that the State's failure to introduce *any* evidence that these sweeping restrictions actually advance any compelling state interest was fatal to its opposition to Plaintiffs' motion for a temporary injunction, particularly in the absence of any legislative findings. TI Order, App. C at 10–11; *see also Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1034 (Fla. 1999) (State's failure to present evidence in support of its asserted compelling interest was fatal to its defense). Finally, the circuit court properly reasoned that, given its finding that the Mandatory Delay Law would likely cause constitutional injury, it necessarily followed that the Act's enforcement would cause irreparable harm, and that enjoining such enforcement would serve the public interest. TI Order, App. C at 3–4; *see also supra* Section III(B). Plaintiffs' likelihood of success on the merits was the essential question at the temporary injunction stage, and the DCA erred in

holding that the trial court applied the wrong constitutional standard when it determined that Plaintiffs are likely to prevail.

IV. CONCLUSION

For more than forty years, women in Florida have made and effectuated the decision to end a pregnancy without the State mandating that they delay that decision or make an additional, medically unnecessary trip to their physician. The DCA Order allowing the Act to take effect upended this status quo and is imposing significant, irreparable harm on Plaintiffs and their patients that will continue indefinitely unless this Court grants a stay. By contrast, staying the DCA Order will pose no harm to the State. Consistent with its vigorous protection of Florida's fundamental right to privacy, this Court is likely to review the DCA Order—and consistent with the decisions of courts across this country striking down mandatory delay laws under strict scrutiny, this Court is likely to rule in Plaintiffs' favor.

For each of these reasons, Plaintiffs respectfully request that this Court hold that the DCA's Denial of Stay was in error and enter a stay of the DCA Order for the pendency of Plaintiffs' appeal. In light of the urgent need for relief, Plaintiffs further request that the Court exercise its discretion to shorten the time for response to this motion, *see* Fla. R. App. P. 9.300(a), and that consideration of this motion be expedited.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served by electronic mail on the individuals listed below, this 14th day of March, 2016.

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I hereby certify that this brief, prepared in Times New Roman 14-point font, complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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