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.

Discretionary Proceeding to Review the Decision of the
First District Court of Appeal

APPENDIX TO PLAINTIFFS-PETITIONERS' INITIAL BRIEF ON THE MERITS

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INDEX TO APPENDIX

Appendix A

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

GAINESVILLE WOMAN CARE LLC d/b/a BREAD AND ROSES WOMEN'S HEALTH CENTER, on behalf of itself, its doctor, and its patients; and MEDICAL STUDENTS FOR CHOICE, on behalf of its members and their patients,

Plaintiffs,

v.

STATE OF FLORIDA; FLORIDA DEPARTMENT OF HEALTH; JOHN H. ARMSTRONG, M.D., in his official capacity as Secretary of Health for the State of Florida; FLORIDA BOARD OF MEDICINE; JAMES ORR, M.D., in his official capacity as Chair of the Florida Board of Medicine; FLORIDA BOARD OF OSTEOPATHIC MEDICINE; ANNA HAYDEN, D.O., in her official capacity as Chair of the Florida Board of Osteopathic Medicine; FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION; and ELIZABETH DUDEK, in her official capacity as Secretary of the Florida Agency for Health Care Administration,

Defendants.

Case No. _____

DECLARATION OF CHRISTINE L. CURRY, M.D., Ph.D.

I, CHRISTINE CURRY, M.D., Ph.D., declare under penalty of perjury that I am over 18 years of age, and that the following statements are true and correct:

1. I am a physician licensed to practice medicine in Florida. I am board certified by the American Board of Obstetrics and Gynecology. I currently serve as an Assistant Professor in the Obstetrics and Gynecology Department at University of Miami Hospitals and at Jackson Memorial Hospital, where I supervise, mentor, and train medical students and residents. I

mention these affiliations for purposes of identification only; the opinions I offer here are my own, and do not reflect those of any institution with which I am affiliated.

2. In 2009, I received an M.D. from Loyola University Stritch School of Medicine and a Ph.D. from Loyola University's Department of Microbiology and Immunology. I completed my residency in obstetrics and gynecology at Boston University Medical Center in 2013, where I also completed the Ryan Program in Abortion and Family Planning. As part of the Ryan Program, I received specialized training in abortion care. My experience and credentials are more fully set forth in my curriculum vitae, a true and accurate copy of which is attached to this declaration.

3. In my practice, I provide a full spectrum of obstetrical and gynecologic care to patients, including prenatal care and labor and delivery; outpatient well-woman care, such as pap smears, cancer screening, STI testing and treatment, and contraception counseling and provision; medical and surgical abortions; and inpatient gynecologic surgeries, such as hysterectomies and fibroid removals. I provide surgical abortions up to thirteen weeks, as measured from the first day of a woman's last menstrual period ("LMP") and medication abortions up to nine weeks LMP.

4. I have read the challenged Act, Florida House Bill 633, and understand that it requires the physician who will perform the abortion procedure, or the referring physician, to provide information and counseling to a patient in person and twenty-four hours before the abortion procedure. I also understand that the Act contains two extremely narrow exceptions: one for women who have become pregnant as a result of abuse and reported the abuse to the authorities, and another for a woman whose very life is threatened by their pregnancy in medical emergencies.

5. I provide the following facts and opinions as an expert in the fields of obstetrics and gynecology and reproductive health. The statements below are based on my education, teaching, and clinical experience, as well as my review of the relevant medical and scientific literature.

Safety of Legal Abortion in the United States and Florida

6. Legal abortion is one of the most common medical procedures performed in the United States. Nearly one in three women in the United States will have an abortion by the age of 45, and the majority of women who have abortions are already mothers. The vast majority of abortion procedures performed in the United States occur in the first trimester.

7. Abortion is also one of the safest medical procedures in the United States and is substantially safer than childbirth. A woman's risk of death associated with childbirth is approximately 14 times higher than her risk of death associated with abortion.[1] The risk of death is less than one out of every 100,000 legal induced abortions.[2] Because abortion is so safe, the vast majority of abortions in the United States can be, and are, safely and effectively performed in an outpatient setting. This is also true in Florida.

8. From my experience, women have abortions for a variety of reasons, including medical, familial, personal, and financial reasons. Some women have abortions to preserve their life or their health. For these women, carrying a pregnancy to term can put their lives at grave risk, significantly shorten their life expectancy, or cause permanent damage. Other women have abortions to terminate wanted pregnancies after the fetus has been diagnosed with an anomaly.

[1] Raymond, Elizabeth G., & Grimes, David A., "The Comparative Safety of Legal Induced Abortion and Childbirth in the United States," Ob. & Gyn. 119 (Feb. 2012): 215-19.

[2] Raymond, Elizabeth G., Grossman, Daniel, Weaver, Mark A., Toti, Stephanie, & Winikoff, Beverly, "Mortality of induced abortion, other outpatient surgical procedures, and common activities in the United States," Contraception 90, no. 5 (July 2014): 476-79.

Others have abortions because their pregnancy was a result of rape or sexual assault. Still other women have abortions because they appreciate the responsibilities of motherhood and feel they cannot adequately provide for a child at that time. In my experience, whatever a woman's reasons for terminating a pregnancy, she makes the decision thoughtfully after much consideration and deliberation with those she includes in her process: her family, friends, and/or physician.

9. There are two methods of abortion in the United States: surgical abortion and medication abortion. Surgical abortion involves the use of instruments to evacuate the contents of the uterus. Despite its name, surgical abortion involves no incision into the woman's skin or other bodily membrane. In Florida, surgical abortion is available through 23.6 weeks LMP. Surgical abortion is comparable to other gynecological procedures in terms of risk, invasiveness, instrumentation, and duration. For example, first-trimester surgical abortions are nearly identical to diagnostic dilation and curettage ("D&C") and to surgical completion of miscarriage. Second-trimester surgical abortions are similar to hysteroscopy, a gynecological procedure that uses endoscopy for diagnostic and operative purposes. Florida law does not require a twenty-four-hour waiting period before either of these other gynecological procedures with comparable risks, nor indeed any other procedure I perform in my practice.

10. Medication abortion (also called medical abortion) involves administration of medication to induce an abortion. Medication abortions are available for women up to 9 weeks LMP. In the most commonly used medication abortion protocol, women take mifepristone and misoprostol to induce an abortion. The patient takes the mifepristone in the clinic, which blocks the hormones needed to maintain a pregnancy, and the misoprostol at home, which causes her uterus to contract and expel its contents.

11. In my experience, most patients will have a strong preference for either surgical or medical abortion. For example, young women, women who are survivors of sexual assault, and women who are otherwise fearful of undergoing a "surgical procedure" or of having instruments inserted into the vagina, often prefer medication abortion. From the patient perspective, a medication abortion is similar to a spontaneous miscarriage, and feels more private, by allowing the patient to experience the abortion in her own home. For many women who have experienced physical or sexual trauma, having the abortion experience in private, with family members or friends available for support (rather than hospital staff), helps them feel more in control of the situation and is therefore important to their mental and psychological health.

12. For some women, including some of my patients, medication abortion is medically indicated for physiological reasons that make surgical abortion difficult or impossible to perform, including women with uterine anomalies, such as uterine fibroids, or women who are morbidly obese.

13. Although abortion is an extremely safe procedure, the risk of medical complications increases as the pregnancy advances.[3] Thus delay in obtaining an abortion increases the risk of complications.

The Act Will Harm Women's Health

14. The Act singles out abortion procedures from all other medical procedures to impose a twenty-four-hour delay and an additional-trip requirement, with no medical benefit to the patient. For example, having obtained informed consent from a woman, a physician can perform a D&C procedure for diagnostic purposes, or to complete a miscarriage—which is the same procedure used to perform a first-trimester abortion—without requiring the patient to delay

[3] Bartlett, Linda A., *et al.*, "Risk Factors for Legal Induced Abortion-Related Mortality in the United States," Ob. & Gyn. 103, no. 4 (Apr. 2004): 729-37.

for any period of time, or to make an additional, separate visit to the medical facility. It is my opinion that by forcing women seeking abortions—but not patients seeking any other medical procedure, including those riskier than abortion—to wait twenty-four hours and to make an additional visit to the medical provider before they can obtain the treatment, the Act will harm Florida women seeking abortion and undermine the physician-patient relationship. It will prevent physicians from administering the care they believe will protect their patients' well-being.

15. By forcing women to delay the procedure at least twenty-four hours and to make arrange for an additional trip to a provider, the Act will cause women to delay their abortion by at least one day, and in some cases, even longer. Such delays may push women past the gestational limit when medication abortion is available. This will force women for whom a medication abortion is clinically indicated to undergo a procedure that is less safe for them. It will also force a woman who prefers a medication abortion for psychological reasons to undergo a surgical abortion, which may harm her emotional and psychological state, and this pertains especially to victims of sexual trauma. In other cases, delays may push women past the gestational limit of the nearest abortion provider, forcing them to travel farther. This, in turn, is very likely to create further delay, increasing the risks of the procedure. Additionally, the later an abortion takes place in the pregnancy, the greater the cost of the procedure for the patient.

16. Moreover, by forcing virtually all women to wait twenty-four hours and make an additional trip to the clinic, the Act will inflict emotional distress and psychological trauma on women who seek abortions under distressing circumstances. This includes women who have made the extremely difficult decision to terminate a wanted pregnancy because of grave or even

lethal fetal anomalies, such as anencephaly, where the fetal brain stem has failed to develop, or a severe cardiac defect.

17. Additionally, the twenty-four-hour waiting period may prevent some women from obtaining an abortion altogether, such as women who are victims of domestic violence. For example, I recently saw a patient who was being physically and verbally abused by her husband. She came to my practice seeking an abortion; however, she had forgotten her wallet and said she would return the next day for the procedure. When she did not return the next day, we called her on her cell phone and learned that her husband, who had discovered that she was trying to obtain an abortion, had locked her in the house to prevent her from leaving. She asked us not to alert the authorities because she feared that doing so might lead to further abuse and violence. We followed the patient's wishes and she did not present for her rescheduled appointment. If women who are victims of domestic violence are required to make an additional, dangerous trip to the clinic, the chances that the woman's abuser will learn of the woman's intention to have an abortion increases, thereby increasing the chances that a woman will be furthered abused and/or forced to carry the pregnancy to term.

18. Further, the Act fails to provide an adequate health and life exception for women with health issues, including conditions caused by or exacerbated by pregnancy. As a result, the Act will impose serious medical risks on women facing pregnancy complications such as placenta previa (abnormal presentation of the placenta which can cause life-threatening bleeding), hypertension and preeclampsia (which can lead to stroke, heart attack, or death if untreated), and premature rupture of membranes (which, if untreated, can lead to serious infection). Conditions such as these pose an immediate threat to a woman's health and threaten her life if untreated, but do not always occur in the context of a medical emergency. For a

woman who has decided to terminate her pregnancy because of one or more of these conditions, delay poses serious medical risks. In such cases, the standard of care is to terminate the pregnancy as soon as the woman decides to, not to wait until the woman's condition rises to the level of a life-threatening medical emergency. Yet the Act would prevent physicians from providing this necessary and important medical care as soon as is medically appropriate.

19. Forcing women in these circumstances to wait twenty-four hours harms them, both physically and psychologically, and will undermine the physician-patient relationship. A physician treating a patient needs to be able to deliver care in the manner and at the time that she or he, in the exercise of medical judgment, decides best promotes the patient's health. The Act would prevent physicians from doing so, and force them to unnecessarily delay delivering medically appropriate care.

20. Finally, if the Act goes into effect, the mandatory delay requirement will create extra administrative burdens for physicians who will have to counsel and obtain consent from every single abortion patient during a separate visit on a different day—and coordinate those visits to minimize the disruption for women. This added administrative burden will reduce the hours physicians have to see all their patients, including those seeking obstetrical and well-woman care. This, in turn, will exacerbate Florida's existing shortage of qualified physicians who provide abortions.

21. For all of these reasons, it is my expert opinion that rather than promote women's health, the Act will have the opposite effect: it will be detrimental and dangerous to women's health.

Executed on June 8, 2015 in Miami, Florida.

/s Christine Curry
Christine Curry, M.D., Ph.D.

CV of Christine Curry

CHRISTINE L CURRY MD PHD

ACADEMIC APPOINTMENTS

09/2014 - Assistant Professor, Obstetrics and Gynecology
University of Miami Hospitals, Miami FL

09/2014 - Assistant Professor, Obstetrics and Gynecology
Jackson Memorial Hospital, Miami FL

07/2013-07/14 Clinical Instructor, Obstetrics and Gynecology
Associate Clerkship Director, Third Year Medical Student Clerkship, Obstetrics and Gynecology
Teaching Attending, Resident Continuity Clinic
Boston University Medical Center, Boston MA

07/2013-07/14 Consultant, Obstetrics and Gynecology
Massachusetts Correctional Institution, Framingham MA

07/2013-07/14 Consultant, Gynecology
Lemuel Shattuck Hospital, Jamaica Plain MA

MEDICAL EDUCATION

2009-2013 Residency, Obstetrics and Gynecology
Administrative Chief Resident, Obstetrics and Gynecology
AΩA Medical Honor Society
Boston Medical Center, Boston MA

2001-2009 MD, Stritch School of Medicine
PhD, Department of Microbiology and Immunology, Defended with Distinction
Loyola University Stritch School of Medicine, Maywood IL

1997-2001 BS, Biology with Honors, Spanish Minor
University of Iowa, Iowa City IA

STATE LICENCES

2014-2016 Florida State License, Number ME119383

2013-2015 Massachusetts State License, Number 254432

LANGUAGE SKILLS

Spanish Conversational oral, written and medical

Haitian Creole Fluent oral, written and medical

TEACHING EXPERIENCE

UNIVERSITY OF MIAMI MILLER SCHOOL OF MEDICINE

2014-2015 Faculty Mentor: Multispecialty Learning Initiative in Graduate Medical Education

2014- Faculty Advisor: Small Group Sessions, Obstetrics and Gynecology Clerkship

2014- Teaching Faculty: Obstetrics and Gynecology Clerkship

2014- Resident Research Committee Member: Obstetrics and Gynecology Residency Program

BOSTON UNIVERISITY MEDICAL CENTER

2013-2014 Curriculum Development: Social Determinants of Health and Physician Advocacy

2013-2014 Associate Clerkship Director: Obstetrics and Gynecology

2013-2014 Course Director: Haitian Creole Language and Culture

2010-2013 Instructor: Haitian Creole Language and Culture

LOYOLA UNIVERSITY STRITCH SCHOOL OF MEDICINE

2008-2009 Co-Facilitator: Patient Centered Medicine

2008 Curriculum Designer: Global HIV and TB, Neiswanger Institute for Bioethics

2004-2005 Teaching Assistant: Immunology

2005 Teaching Assistant: Medical Virology

UNIVERSITY OF ILLINOIS AT CHICAGO COLLEGE OF MEDICINE

2005-2007 Instructor: Global AIDS Seminar

TEACHING EXPERIENCE, Cont.

UNIVERSITY OF IOWA

2000-2001 Supplemental Instructor: Principles of Biology
1999-2000 Teaching Internship: Principles of Biology Laboratory

NATIONAL ORGANIZATIONS

2006 Curriculum Designer: Online microbicides module, Global Health Education Consortium
2004-2007 Curriculum Designer: Global Health Scholars Program, American Medical Student Association

RESEARCH EXPERIENCE

UNIVERSITY OF MIAMI

2015- Principle Investigator, Resident Research Project
Reproductive health medical student advocate project

2015- Principle Investigator, Resident Research Project
Gynecologic risk of malignancy with surgery for fibroids

2015- Principle Investigator, Resident Research Project
Training in substance abuse in pregnancy, national resident survey

2015- Principle Investigator, Resident Research Project
Evidence based curriculum design and implementation, substance abuse in pregnancy

2015- Principle Investigator, MD/MPH Capstone Student Project
Access to Long-Acting Reversible Contraception for Homeless Women in Miami

BOSTON UNIVERSITY MEDICAL CENTER

2012-2014 Principal Investigator
Provider Attitudes of Post-Placental IUD Placement

2009-2011 Research Assistant
Minimally Abnormal Pap Tests in HIV Positive Women

PHYSICIANS FOR HAITI

2014- Co-Principle Investigator
Teach the Teacher Curriculum

2012-2013 Principal Investigator
Continuing Medical Education Needs Assessment of Haitian Physicians

PARTNERS IN HEALTH

2007-2009 Research Assistant
Food Insecurity and Sex Work
Physician Initiated HIV Testing through Mobile Clinics in Rural Haiti

LOYOLA UNIVERSITY STRITCH SCHOOL OF MEDICINE

2003-2006 Graduate Research Assistant, Department of Microbiology and Immunology
Notch Signaling and Mitotic Catastrophe in Kaposi's sarcoma

2002 Research Internship
The HIV-1 Envelope Glycoprotein gp160 and Reactivation of KSHV

UNIVERSITY OF IOWA

2000-2001 Research Assistant, Department of Biology
Honors thesis: The Role of the MAP kinase kinase MEK1 reveals a new pathway that selectively regulates cell motility in *Dictyostelium* chemotaxis

2000 Howard Hughes Research Internship
Cell Motility in *Dictyostelium* Chemotaxis

HONORS AND AWARDS

INTERNATIONAL AWARDS

2008 Velji Award for Emerging Leaders in Global Health, Global Health Education Council
2008 Travel Grant Recipient, International Union Against TB and Lung Disease
2004 Nevin Narayan Achievement Award for Health and Human Rights Activism, Physicians for Human Rights

NATIONAL AWARDS

2012 Gold Humanism Honor Society, Humanism and Excellence in Teaching Award
2005 Albert Kligman Travel Fellowship, Society for Investigative Dermatology

HONORS AND AWARDS

BOSTON MEDICAL CENTER, DEPARMENT OF OBSTETRICS AND GYNECOLOGY

2014 Faculty Teacher of the Year Award
2013 Excellence in Minimally Invasive Gynecologic Surgery
2012 Resident Teacher of the Year Award
2011 Resident Teacher of the Year Award
2010 Resident Teacher of the Year Award

LOYOLA UNIVERSITY STRITCH SCHOOL OF MEDICINE

2008 President's Medallion
2007 Alpha Sigma Nu Outstanding Nominee
2007 Alpha Sigma Nu Jesuit Honor Society

UNIVERSITY OF IOWA

2001 Hesseltine Biology Scholarship

PROJECT AND RESEARCH FUNDING

2015 University of Miami Department of Public Health Springboard Grant. Contraception Decisions, Education, and Access for Women Experiencing Homelessness ($4000)
2007 Neiswanger Bioethics Institute Fellowship. Project: Creation of health justice curriculum modules based on medical and socioeconomic realities in rural Haiti. ($4000)
2004 American Skin Association Medical Student Grant. Project: Targeting Notch in Kaposi's Sarcoma. ($7000)
2002 American Medical Association Seed Grant Recipient. Project: The HIV-1 envelope glycoprotein gp160 and reactivation of KSHV. ($1600)

GLOBAL HEALTH CLINICAL EXPERIENCE

2012 Saint Boniface Hospital, Resident Clinical Elective, Fonds de Blanc Haiti
2009 Partners In Health/Zanmi Lasante, Medical Student Elective, Belladere Haiti
2009 Landour Hospital, Medical Student Elective, Mussoorie India
2007-2008 Partners In Health/Zanmi Lasante, Clinical and Research Externship, Belladere Haiti
2001 Loyola University Stritch School of Medicine, Clinical Service Immersion, Dolores Guatemala

PEER REVIEWED PUBLICATIONS

Holland E, Michelis L, Sonalkar S, **Curry CL**. Barriers to Immediate Post-placental Intrauterine Devices Among Attending Level Educators. Women's Health Issues. In press 2015.

Nadas M, Bedenbaugh R, Morse M, McMahon G, **Curry CL**. A needs and resource assessment of continuing medical education in Haiti. Annals of Global Health. In press 2015.

Hudspeth J, **Curry C**L, Surena C, Sacks Z. Continuing professional development in low-resource settings: Haiti as an example. Annals of Global Health. In press 2015.

Rindos N, **Curry CL,** Tabbarah R, Wright V. Port-Site Metastases After Robotic Surgery for Gynecologic Malignancy. *JSLS*. 2014 PMID:24680146

Foust-Wright C, Shobeiri S, **Curry CL**, Quiroz L, Nihira M. Medical Student Knowledge of Global Health Problems: Obstetric Fistulas in Developing Countries. J Reprod Med. 2012 PMID:23091991

Curry CL, Hoffman Sage Y, Vragovic O, Stier E. Minimally Abnormal Pap Testing and Cervical Histology in HIV-Infected Women. *J Women's Health*. 2011 PMID:22011239

Rattan R, **Curry CL.** A New Method of HIV Prevention in Africa. *The Lancet Student*. 2008.

PEER REVIEWED PUBLICATIONS, Cont.

Curry CL, Reed L, Broude E, Golde T, Miele L, Foreman K. Notch Inhibition in Kaposi's Sarcoma Tumor Cells Leads to Mitotic Catastrophe through NF-kappaB Signaling. *Mol Cancer Ther*. 2007 PMID:17604336

Curry CL, Reed L, Nickoloff B, Miele L, Foreman K. Notch-Independent Regulation of Hes-1 Expression by C-Jun N-Terminal Kinase (JNK) Signaling in Human Endothelial Cells. *Lab Invest*. 2006 PMID:16732296

Curry CL, Reed L, Golde T, Miele L, Nickoloff, B Foreman K. Gamma secretase Inhibitor Blocks Notch Activation and Induces Apoptosis in Kaposi's Sarcoma Tumor Cells. *Oncogene*. 2005 PMID:15940249

Young H, Foreman K, Shin J, Hirakawa S, **Curry CL**, Sage D, Libermann T, Dezube B, Fingeroth J, Detmar M. Lymphatic Re-Programming of Blood Vascular Endothelium by Kaposi's Sarcoma Associated Herpesvirus. *Nat Gen.* 2004 PMID:15220917

LEADERSHIP

INTERNATIONAL ORGANIZATIONS

2014 Expert Witness: Medical testimony for El Salvadorian Supreme Court
2014-Current Advocacy Consultant: 100 Campaign for Global Access to Insulin
2012-Current Board Member: Board of Directors, Physicians for Haiti
2011-Current Chair: Monitoring and Evaluation Committee, Physicians for Haiti
2010-2011 Chair: Outreach Committee, Physicians for Haiti
2005-2007 Board Member: Board of Directors, Physicians for Human Rights

BOSTON UNIVERSITY MEDICAL CENTER

2013-Current Department Leader: Academy for Faculty Advancement
2012-2013 Administrative Chief Resident: Obstetrics and Gynecology, Boston Medical Center

LOYOLA UNIVERSITY STRITCH SCHOOL OF MEDICINE

2002-2003 Chapter President: Physicians for Human Rights
2001 Founding Member: Chapter Physicians for Human Rights
2002-2003 Participant: Innovations in Leadership Seminar

AMERICAN MEDICAL STUDENT ASSOCIATION

2005-2010 Co-Founder and Advisor: Global Health Scholars Program
2005-2007 Chair: Steering Committee, AIDS Advocacy Network
2003-2005 Coordinator: National and Regional AIDS Advocacy Network

ACADEMIC PRESENTATIONS

INTERNATIONAL

2012 Physicians for Haiti, Third Trimester Vaginal Bleeding, Port au Prince, Haiti
2012 St. Boniface Hospital, Morning Report, Third Trimester Vaginal Bleeding, Fond des Blancs, Haiti
2004 Makerere Medical School Grand Rounds, Kampala Uganda, Targeting Notch in Kaposi's Sarcoma and a Unique Model System

UNIVERSITY OF MIAMI

2015 AIDS Education and Training Center, Regional Webinar, Triple Threat of HIV, Pregnancy and Addiction
2015 Neonatal Intensive Care Unit Nursing Continuing Education Conference, The Distressed Infant
2014 OB/GYN Grand Rounds, Reproductive Health and the Correctional System

BOSTON UNIVERISTY MEDICAL CENTER

2013 Pregnancy and the Immune System Response
2011 OB/GYN Grand Rounds, Women in Control: HIV prevention
2011 Departmental Resident Research, Minimally Abnormal Pap Testing in HIV-Infected Women
2011 Gynecology Conference, Pelvic Anatomy Jeopardy
2011 Maternal Fetal Medicine Conference, Fetal Outcomes in Pregnancies with Subchorionic Hemorrhage
2011 OB/GYN Grand Rounds, Pulmonary Hypertension in Pregnancy
2011 Maternal Fetal Medicine Conference, Midtrimester PPROM
2011 Maternal Fetal Medicine Conference, Breech Vaginal Delivery

ACADEMIC PRESENTATIONS, Cont.

2011 Gynecology Conference, Reproductive Infections Disease Jeopardy
2011 Maternal Fetal Medicine Lecture, Predictors of Sepsis in Women with Chorioamnionitis
2009 CREOG Review, Endocrine Disorders in Pregnancy

ACTIVISM AND GLOBAL HEALTH PRESENTATIONS

FLORIDA INTERNATIONAL UNIVERSITY

2015 Medical Students for Choice, Screening of After Tiller

BOSTON UNIVERISTY MEDICAL CENTER

2014 Boston Student Health Activist Summit Keynote, The Last Excuse
2013 Global Health Elective Program, Finding the Meaning in Global Health
2013 Spectrum of Physician Advocacy Panel,Incorporating Advocacy into Medicine
2012 World AIDS Day, Global Health Activism for Medical Professionals
2012 International Human Rights Day, Toward a Better Haiti: Global Health through Research, Education and Advocacy

LOYOLA UNIVERSITY STRITCH SCHOOL OF MEDICINE

2010 Invited Speaker, Haiti. Healthcare. Before. After.
2008 Service and Global Health Workshop, Brain Drain: Perspectives from Haiti
2007 Association of Pre-Medical Students, Preventing HIV with Microbicides
2007 Global AIDS Week of Action, Microbicides: Gender Disparities and HIV
2006 American Medical Student Association, The Science and Advocacy of Microbicides
2006 St. Luke's Day Presentation, Healthcare-worker Brain Drain: Pushes, Pulls and Solutions
2006 Health and Justice Conference, Hand in Hand: Poverty and HIV
2004 AIDS Advocacy Network, HIV/AIDS: Treat the People
2003 Global AIDS Week, Global AIDS and Student Activism

REGIONAL

2007 AIDS Foundation of Chicago, Chicago Coalition for Microbicides, Biologic, Social and Economic Factors Increasing a Women's Risk for HIV
2006 AIDS Foundation of Chicago Microbicides Training, The Science Behind the Hope
2006 American Medical Student Association Region 8 Conference, Speaking Truth to Power: Bird-dogging 101
2006 American Medical Student Association Region 8 Conference, Microbicides: User-Controlled HIV Prevention
2005 American Medical Student Association AIDS Regional Advocacy Coordinators Retreat, HIV Treatment: How Close Are We to a Cure?
2004 American Medical Student Association Region 4 Conference, Topical Microbicides: New Hope for Non-Condom Prevention of HIV and other STDs
2004 American Medical Student Association Political Leadership Institute, Overview of Global AIDS Crisis

NATIONAL

2010 Medical Students for Choice National Conference, Choosing a Career in Women's Health
2008 Microbicides Leadership Institute, Success in Student Activism
2007 International Federation of Medical Students National Conference, Non-Condom HIV Prevention: Microbicides
2007 American Medical Student Association Global Health Leadership Institute,The Future of HIV Prevention: Vaccines and Microbicides
2006 Physicians for Human Rights National Student Conference, Fighting Global AIDS in the Context of Human Rights
2006 American Medical Student Association AIDS Institute, Update on Microbicide and Vaccine Research
2006 Annual National Catholic HIV/AIDS Ministry Conference, Advocacy 101: Brain Drain in Africa
2006 American Medical Student Association National Convention, Microbicides: Non-condom HIV Prevention
2005 American Medical Student Association AIDS Leadership Retreat, HIV Prevention: Vaccines and Microbicides
2005 American Medical Student Association National Convention, Topical Microbicides: Non-Condom Prevention of HIV and Medical Student Advocacy

ACTIVISM AND GLOBAL HEALTH PRESENTATIONS

2005 American Medical Student Association National Convention, The Health Professional Student AIDS Advocacy Network

2005 Physicians for Human Rights National Student Conference, Effective Student Organizing on HIV/AIDS

2004 Physicians for Human Rights Student National Conference, How to Set Up a PHR Student Chapter and Keep It Going

INTERNATIONAL

2013 International Federation of Medical Students' Associations, Panel Moderator, Integrative Global Health: Connecting Education, Infrastructure, Research, and Activism for Social Justice

2012 St. Boniface Hospital International Women's Day, Fond des Blancs Haiti, Human Rights are Women's Rights

ABSTRACTS

MENTORED MEDICAL STUDENT ABSTRACTS

2015 Poster Presentation at University of Miami Research and Innovations in Medical Education Reception
Melillo A, Ganesh D, Perez C, Collins T, **Curry CL**. Bootcamp Proposal for MS4 STudenst Pursuing Careers in Obstetrics and Gynecology

2015 Poster Presentation at University of Miami Research and Innovations in Medical Education Reception
Khaja A, Winer L, Abern L, Blankenship S, Fiorentino D, Funk B, Gulati A, Maguire K, Tappy E, Mundly L**, Curry CL**. Addressing Gaps in Medical School Reproductive Health Education

2014 Oral Presentation at John McCahan Medical Campus Education Day, *Awarded Best Abstract*
Yu L, Economou N, Holland E, **Curry CL.** Assessment of Structured Advocacy Training Integrated into the Third year OB/GYN Clerkship

2014 Poster Presentation at Northeast Osteopathic Medical Education Network Research and Scholarship Forum
Davis BW, Sacks Z, Morse M, Fox C, Louis-Charles C, **Curry CL**. Initial Analysis of a Healthcare Leadership and Quality Improvement Pilot Program in Rural Haiti

2013 Poster Presentation at National Osteopathic Medical Conference
Davis BW, **Curry CL**, Nadas M. If You Build it They Will Come: A Bidirectional Approach to Continuing Medical Education in Haiti.

2013 Poster Presentation at University of New England College of Osteopathic Medicine Research Forum
Davis BW, **Curry CL,** Nadas M. If You Build it They Will Come: a Bidirectional Approach to Continuing Medical Education in Haiti.

MENTORED RESIDENT ABSTRACTS

2014 Poster Presentation at Council on Resident Education in Obstetrics and Gynecology Conference
Holland E, Allen K, Abbott J, **Curry CL**. Teaching Patient Advocacy: A Resident Led Curriculum for Third Year Medical Students in OB/GYN.

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Appendix B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

GAINESVILLE WOMAN CARE, LLC, et al., **Case No. 2015 CA 1323**

Plaintiffs,

CORRECTED PAGES: 1, 3, 5, 6, 7, 8, 9, 11
CORRECTIONS ARE IN RED

v.

STATE OF FLORIDA, et al.,

Defendants.
_____/

CORRECTED
ORDER GRANTING PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

Plaintiffs filed their Complaint on June 11, 2015, challenging the validity of Chapter 2015 - 118, Laws of Florida (House Bill No. 633) as an intrusion upon and violation of the privacy rights of Florida women as protected and guaranteed pursuant to Article I, section 23 of the Florida Constitution, and as a violation of Plaintiffs' and their patients' rights of equal protection of the laws of the State of Florida as guaranteed by Article I, section 2 of the Florida Constitution. The same day, Plaintiffs filed a Motion for an Emergency Temporary Injunction and/or Temporary Injunction that was grounded solely upon the right to privacy challenge set forth in Count I of their Complaint. A case management conference was held on June 16, 2015, at which time a pleading schedule was established and an evidentiary hearing was scheduled for June 24, 2015. The parties agreed that the Court was to consider the pleadings, together with the declarations filed with Plaintiffs' motion and supplemental reply, and that the parties were authorized but not required to present any witnesses or other evidence at that time. It should be made perfectly clear that this order does not address or otherwise rule on any aspect of the equal protection challenge set forth in Count II of the Complaint.

Having considered the Complaint, Plaintiffs' motion with declarations submitted, Defendants' response in opposition, Plaintiffs' reply in support, the arguments of counsel and being otherwise fully advised in the premises, the Court finds and rules as follows:

JURISDICTION AND VENUE

The Court has jurisdiction over this action pursuant to Article V, section 5(b) of the Florida Constitution and sections 26.012 and 86.011, Florida Statutes. Venue is proper in this Court pursuant to section 47.011, Florida Statutes.

STATUTORY SCHEME AND CHALLENGED LEGISLATIVE AMENDMENT

Section 390.0111, Florida Statutes is the current statutory law as to the termination of pregnancies in Florida, and section 390.0111(3), Florida Statutes, sets forth the "voluntary and informed written consent" requirements. Currently, the requirement is that the "physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, in person, informed the woman of . . ." certain required information set forth in said section. Section 390.0111(3)(a) 1, Florida Statutes. The actual information required to be given or provided to the patient will not be changed by Chapter 2015-118, Laws of Florida (House Bill No. 633) (hereinafter referred to as "HB633"), however, the timing for providing the information and the limited exception to the timing of delivery of the information will be changed. HB633 amends section 390.0111(3)(a)1 to read as follows:

> The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, *while physically present in the same room, and at least 24 hours before the procedure (emphasis added)*, informed the woman of . . .

Additionally, HB633, which is effective July 1, 2015, amends section 390.0111(3)(a)1c to add the following language:

> The physician may provide the information required in this subparagraph within 24 hours before the procedure if requested by the woman at the time she schedules or arrives for her appointment to obtain an abortion and if she presents to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking.

EXTRAORDINARY REMEDY OF TEMPORARY INJUNCTION

The parties are in agreement that the standard for issuance of a temporary injunction and that a temporary injunction is an extraordinary remedy in which the burden is:

> The issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly, [and] which must be based upon a showing of the following criteria: (1) The likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of public interest.

Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (*quoting Shands at Lake Shore, Inc. v. Ferrero*, 898 So. 2d 1037, 1038-39 (Fla. 1st DCA 2005.))

The failure of Plaintiff to meet its burden as to any of the four criteria will require denial of the temporary injunction. The parties diverge greatly from this point as to what standard will be applicable to this proceeding, with Plaintiffs arguing the "strict" scrutiny standard as set forth in the case of *In re T. W., A Minor*, 551 So. 2d 1186 (Fla. 1989), and *North Florida Women's Health and Counseling Services, Inc. v. State of Florida,* 866 So. 2d 612 (Fla. 2002), and Defendants arguing the "undo burden" standard as applied in the analysis of the Florida Supreme Court in *State v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006), and the Supreme Court of the United States in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Defendants concede the unavailability of an adequate remedy at law if the law goes into effect and is found to be unconstitutional. This Court's decision on whether Plaintiffs have carried their burden to show that they are likely to succeed on their position that the constitutional right of privacy is implicated by HB633, and if so,

whether the Defendants have sufficiently shown that HB633 meets the "strict" scrutiny standards required will provide the answers to whether there is irreparable harm and determine the public interest issue. In simple terms, the question presented to this Court is whether Plaintiffs have sufficiently shown that the requirements of HB633 impose a "significant burden," as opposed to insignificant burden, on a woman's right to an abortion.

ARTICLE I, SECTION 23

The only constitutional amendment at issue for the purpose of this motion is Article I, section 23 of the Florida Constitution which provides as follows:

> 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.

The Supreme Court of the United States in *Roe v. Wade*, stated: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 400 U. S. 113, 154 (1973). Ever since, there has been substantial litigation throughout the nation in both the federal and state courts as to the meaning and extent of the right recognized and the authority of the states to regulate any aspect of the right. It is not this Court's intention to discuss the history of such litigation or the numerous specific rulings cited and discussed in detail by the parties in their pleadings. It is this Court's limited function at this time to decide whether the Plaintiffs are entitled to the issuance of a temporary injunction, and what standard of review should be applied in making that decision.

"UNDUE BURDEN" AND "STRICT" SCRUTINY STANDARDS

Defendants' position is a straight forward claim that the 24-hour waiting period imposed by HB633 does not impose a substantial or significant burden on a woman's right to terminate pregnancy and should be analyzed under the "undue burden" standard as described in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in which it was noted that:

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the 'undue burden' standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

Id. at 876.

The Court, to further explain the meaning of "undue burden," stated:

> A finding of an 'undue burden' is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the 'undue burden' standard in a manner that is inconsistent with this analysis, we set out what, in our view, should be the controlling standard. (citations omitted).

Id. at 877.

Plaintiffs, on the other hand, claim that the use of the "undue burden" standard is totally inapplicable to this situation and is inconsistent with the pronouncements set forth in *In re T. W., A Minor*, 551 So. 2d 1186 (Fla. 1989), and *North Florida Women's Health and Counseling Services, Inc. v. State of Florida,* 866 So. 2d 612 (Fla. 2002). The Florida Supreme Court had made it explicitly clear that "the amendment embraces more privacy interests, and embraces more protection to the individual in those interests, than does the federal Constitution." *In re T. W., a Minor, 551 So. 2d* at 1192. The Court then went on to explain the correct standard to use:

> The privacy section contains no express standard of review for evaluating the lawfulness of a government intrusion into one's private life, and this Court when called upon, adopted the following standard:
>
> Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. *Winfield,* 477 So. 2d at 547. When this standard was applied in disclosural cases, government intrusion generally was upheld as sufficiently compelling to overcome the individual's right to privacy. We reaffirm, however, that this is a highly stringent standard, emphasized by the fact that no government intrusion in the personal decisionmaking cases cited above has survived.

In re T. W., a Minor, 551 So. 2d at 1192.

Applying the standard set forth above, the in *In re T.W., A Minor*, held that "section 390.001(4)(a), Florida Statutes (Supp. 1988), violates the Florida Constitution. Accordingly no further analysis under federal law is required." *Id.* at 1196.

Later, when the validity of section 390.01115, Florida Statutes (1999), entitled the (Parental Notice of Abortion Act) was held unconstitutional by the trial court, and affirmed by the District Court, the Supreme Court of Florida refused to retreat from or overturn the ruling or the "strict" scrutiny standard applied in *In re T.W., A Minor*, *supra*, and reinforced its application in privacy cases while clearly rejecting the State's attempt to have it apply the "undue burden" standard as used in federal cases. *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003). Addressing the State claim, the Court stated:

> The State claims that, despite the ruling of the trial court below, we should find the Parental Notice Act constitutional because the United States Supreme Court has approved similar parental notification statutes under the federal constitution. Further, the State relies on the United States Supreme Court decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), wherein a plurality of the Court abandoned the 'strict'

> scrutiny standard in favor of the less stringent 'undue burden' standard. The State urges this Court to recede from T.W. and adopt the same 'undue burden' standard in Florida. We decline to do so. (footnotes omitted).

Id. at 634.

The Court went on to state:

> . . .it is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right. Legislation intruding on a fundamental right is presumptively invalid and, where the right of privacy is concerned, must meet the 'strict' scrutiny standard. Florida courts consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity. The 'undue burden' standard, on the other hand, is an inherently ambiguous standard and has no basis in Florida's Right of Privacy Clause.

Id. at 635.

Having fully settled the issue of the applicability of the "strict" scrutiny standard and the unavailability of the "undue burden" standard in Right of Privacy Clause cases, especially as is applicable in termination of pregnancy cases, the Supreme Court of Florida decided *State v. Presidential Woman's Center*, 937 So. 2d 114 (Fla. 2006). The Court upheld the consent requirements of subsection 390.0111(3)(a)(1), Florida Statutes, without any discussion whatsoever of the "strict" scrutiny or "undue burden" standards. The Court stated:

> The termination of a pregnancy is unquestionably a medical procedure . . . the State may require physicians to obtain informed consent from a patient prior to terminating a pregnancy. This basic premise is without dispute in this litigation.(. . .) Therefore, it is reasonable to conclude that if the informational requirements of subsection (3)(a)(1) are comparable to those of the common law . . . this subsection which addresses informed consent certainly may have no constitutional prohibition or generate the need for an analysis on the issue of constitutional privacy.
>
> In considering whether the informational requirements of subsection (3)(a)(1) are analogous to the common law or other informed consent statutes implementing the common law concept . . .

Id. at 118.

It is within the confines of these cases, and the more detailed discussions contained therein, that Plaintiffs insist that all aspects of this case must be analyzed under the "strict" scrutiny standard, and Defendants just as rigorously insist that it be analyzed under the "undue burden" standard.

SUBSTANTIAL OR SIGNIFICANT BURDEN

Plaintiffs allege in the motion for temporary injunctive relief that:

> Absent injunctive relief from this Court, a sweeping restriction on Florida women's ability to access abortion services, unprecedented in this state, will take effect on July 1, 2015. Section one of Florida House Bill 633, signed by Governor Scott last night (June 10, 2015) would require a woman seeking an abortion to make an additional, unnecessary trip to her health care provider at least twenty-four hours before obtaining an abortion, in order to receive the same information she may currently receive on the day of the procedure. (citation omitted) The Act's unnecessary and burdensome requirements are imposed regardless of the distance the woman must travel to reach her provider, her own medical needs, her judgment, her doctor's judgment, or her individual life circumstances. By subjecting no other medical procedure in Florida, much less a medical procedure protected by the state Constitution as a fundamental right - the Act can only serve to deter women from seeking abortions, and to punish and discriminate against those who doting all women seeking abortions care to both a mandatory twenty-four hour delay and an additional-trip requirement - a burden placed on patients seeking abortions, and to punish and discriminate against those who do.

Plaintiffs' Motion, page 2.

At the hearing, Plaintiffs relied on the Declarations of Kristen Davey (owner and director of the clinic); Christine L. Curry, M.D., Ph.D.; Kenneth W. Goodman, Ph.D.; Sheila Katz, Ph.D.; and Lenore E. A. Walker, Ed.D. No additional evidence was offered. It should be noted that only the Declaration of Christine L. Curry, M.D., Ph.D. was properly verified as required by Rule 1.610, Fla. R. Civ. P. and in accordance with section 92.525, Florida Statutes. The Complaint and motion were not verified, and the declarations of Katz and Walker were not sworn, affirmed or verified. The Declarations of Davey and Goodman were affirmed to the best of their knowledge and belief.

Although the Defendants did not object to the infirmity in the pleading and declarations, the Court is aware of the strict compliance requirements of Rule 1.610, Fla. R. Civ. P. and case law relating to the same. This is especially so in a case in which the Court is being asked to enjoin the operation of a duly enacted legislative provision. The Court is also duly aware of the significance of the constitutional rights under review.

Defendants respond in summary by arguing:

> Contrary to Plaintiffs' contentions, this case - like the new legislation they are challenging - is not about preventing pregnant woman from obtaining abortions, or about curtailing their freedom of choice or their privacy. Rather, this case is about legislation crafted to improve existing law, the better to ensure that pregnant women are truly afforded a fair (albeit brief) opportunity to reflect and to consider more fully whether to consent to having abortions. The challenged legislation augments existing informed-consent provisions by requiring (with notable exceptions) that a 24-hour period elapse between the time when pertinent information is provided to a woman and the time she gets an abortion. Plaintiffs' contention that the legislation's 24-hour provision is an unconstitutional intrusion into the privacy of pregnant women is misguided and incorrect, as are Plaintiffs' attempts to subject the legislation to the strict scrutiny standard. But regardless of the standard applied, the legislation passes muster, and brings Florida in line with the majority of State in requiring a 24-hour waiting period.

Defendants' Response in Opposition, pp.1-2.

Defendants are clearly basing their defense of the legislation to the ruling of the Florida Supreme Court in *State v. Presidential Woman's Center*, 937 So. 2d 114 (Fla. 2006). Their logic is simplistic, but not necessarily incorrect. The legislature's right to require informed consent has been upheld as being grounded in the common law. *Id.* at 118. The Defendants' pleading clearly establishes that a number of states have a waiting period, although it is also clear that most, if not all, were established under the "undue burden" standard. *See* cases cited in Defendants' Response in Opposition, pp 10-11. What the Defendants have failed in any way to provide this Court is any

evidence that there is a compelling state interest to be protected in enhancing the informed consent already required of women and approved by the Supreme Court of Florida in *Presidential Woman's Center, supra.* There are no findings of fact or statements of legislative intent set forth in HB633. After an evidentiary hearing, the Court has no evidence in front of it in which to make any factual determination that a 24-hour waiting period with the accompanying second trip necessitated by the same is not an additional burden on a woman's right of privacy under the Florida's Right of Privacy Clause.

Defendants' statements and assumptions that somehow the Supreme Court of Florida has receded in any way from its rulings in *In re T.W.* or *North Florida Women's Health Counseling Services, Inc.,* on the grounds that the Court did not mention or discuss "strict" scrutiny and "undue burden" is unfounded in this jurist's humble opinion. They did not because in *Presidential Woman's Center*, there was no dispute about the right of the state to require informed consent prior to performing the medical procedure. 937 So. 2d at 118. The Court in *Presidential Woman's Center* was considering "whether the informational requirements of subsection 3(a)(1) are comparable to those of the common law **and other Florida informed consent statutes** (emphasis added) implementing the common law. . ." *Id.* at 118. Once it was determined that they were, there was no need to go further.

In this proceeding, the only evidence before the Court is that "Florida law does not require a twenty-four-hour waiting period for other gynecological procedures with comparable risk, or any other procedure I perform in my practice." Declaration of Christine Curry, M.D., Ph.D., p 4. This is a major issue in the case that the Defendants fail to address. Defendants simply state that thirteen other states have a waiting period and the United States Supreme Court has ruled it is not

unconstitutional under federal law. However, our Supreme Court has clearly stated that federal law has no bearing on Florida's more extensive right of privacy. This Court cannot agree that there is a presumption of constitutionality as to HB633, or that it is the Plaintiffs' burden to show that the added requirements to Florida women's exercise of termination of pregnancy decisions pursuant to the Florida Right of Privacy Clause are not a substantial or significant burden on that right. There is simply no record evidence at this time from which this Court may draw such a conclusion. No witnesses were presented at the scheduled hearing, and no affidavits or verified statements or declarations were offered into evidence. There was no legislative history or other evidence presented to this Court.

The Court finds that Plaintiffs have carried their burden for the issuance of temporary injunction under the "strict" scrutiny standard announced in *In re T.W., A Minor and North Florida Women's Health Counseling Services, Inc.* Plaintiffs have shown a substantial likelihood of success on the merits, that irreparable harm will result if the 2015- 118 Laws of Florida (HB633) is not enjoined, that they lack an adequate remedy at law, and that the relief requested will serve the public interest.

It is therefore **ORDERED and ADJUDGED** that Defendants are enjoined from enforcement of 2015- 118 Laws of Florida (HB633) until further order of the Court. This Court renders no opinion as to the matters set forth in the equal protection Count II of the Complaint.

DONE and ORDERED in Tallahassee, Leon County, Florida, July 1, 2015.

Charles A. Francis

CHARLES A. FRANCIS
Circuit Judge

Copies furnished to:
Served electronically through the Court's E-Portal to counsel of record

Signed JUL - 1 2015
Original to Clerk JUL - 1 2015
Copies sent JUL - 1 2015

Appendix C

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D15-3048

STATE OF FLORIDA; THE FLORIDA DEPARTMENT OF HEALTH; JOHN H. ARMSTRONG, M.D., IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH FOR THE STATE OF FLORIDA; THE FLORIDA BOARD OF MEDICINE; JAMES ORR, M.D., IN HIS OFFICIAL CAPACITY AS CHAIR OF THE FLORIDA BOARD OF MEDICINE; THE FLORIDA BOARD OF OSTEOPATHIC MEDICINE; ANNA HAYDEN, D.O., IN HER OFFICIAL CAPACITY AS CHAIR OF THE FLORIDA BOARD OF OSTEOPATHIC MEDICINE; THE FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION; AND ELIZABETH DUDEK, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION,

Appellants,

v.

GAINESVILLE WOMAN CARE LLC, ET AL.,

Appellees.

_____/

Opinion filed February 26, 2016.

An appeal from the Circuit Court for Leon County.
Charles A. Francis, Judge.

Pamela Jo Bondi, Attorney General; Allen C. Winsor, Solicitor General; Denise M. Harle, Deputy Solicitor General; and Blaine Winship, Special Counsel, Tallahassee, for Appellants.

Richard E. Johnson of the Law Office of Richard E. Johnson, Tallahassee; Benjamin James Stevenson, American Civil Liberties Union Foundation of Florida, Pensacola; Nancy Abudu, American Civil Liberties Union Foundation of Florida, Miami; Jennifer Lee, Susan Talcott Camp, and Julia Kaye, American Civil Liberties Union Foundation, New York, New York, pro hac vice, for Appellee Gainesville Woman Care, LLC; Autumn Katz and Tiseme Zegeye, Center for Reproductive Rights, New York, New York, pro hac vice, for Appellee Medical Students for Choice.

PER CURIAM.

The State of Florida appeals a temporary injunction against enforcement of a 24-hour waiting period added to Florida's abortion statute in 2015. § 390.0111(3)(a), Fla. Stat. (2015). Because we find the trial court's injunction order deficient both factually and legally, we reverse.

Florida law clearly defines preliminary injunctive relief as "'an extraordinary remedy which should be granted sparingly.'" City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So. 2d 750, 752 (Fla. 1st DCA 1994) (quoting Thompson v. Planning Comm'n, 464 So. 2d 1231, 1236 (Fla. 1st DCA

1985)). The party moving for a temporary injunction must make a showing sufficient to satisfy each of four prerequisites: likelihood of irreparable harm, lack of adequate legal remedy, substantial likelihood of success on the merits, and that the public interest supports the injunction. Weltman v. Riggs, 141 So. 3d 729, 730 (Fla. 1st DCA 2014) (holding order lacking specific factual findings on each element was legally insufficient to enjoin a shareholder meeting). A court entering a temporary injunction must set forth in its order "'clear, definite, and unequivocally sufficient factual findings'" to support each of these four elements. Weltman, 141 So. 3d at 730 (quoting Richard v. Behavioral Healthcare Options, Inc., 647 So. 2d 976, 978 (Fla. 2d DCA 1994)); see Fla. R. Civ. P. 1.610(c) (requiring every injunction to specify the reasons for entry). Courts entering injunctions must "do more than parrot each tine of the four-prong test. Facts must be found." City of Jacksonville, 634 So. 2d at 754.

In the abortion context as in any other, injunctive relief requires competent, substantial evidence to support the necessary findings of fact. See N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 615-16, 626-27, 630 (Fla. 2003) (noting repeatedly and with approval that the trial court conducted a two-and-one-half-day evidentiary hearing and made detailed factual findings supported by extensive legally sufficient evidence to support temporary injunction, followed by five-day bench trial for permanent injunction). Here, in contrast, the trial court

conducted a *one-hour* hearing and then rendered the order under review, in which the court noted repeatedly the *lack* of evidence before it. The trial court recited in the order that it had no evidence on the lack of burden on the right of privacy, no witnesses at the hearing, and insufficient sworn affidavits or verified statements or declarations. The limited declarations that Appellees filed, in addition to failing to meet all evidentiary requirements of Florida law, consisted of conclusory statements lacking evidentiary support, and thus were legally insufficient to justify this injunctive relief.

The trial court failed to set forth clear, definite, and unequivocally sufficient factual findings supporting the three disputed elements of an injunction (after the State essentially conceded inadequacy of any legal remedy). Indeed, the trial court here could not set forth the requisite evidence-supported factual findings because it had no legally sufficient evidentiary basis to do so. Without such clear and sufficient factual findings, supported by record evidence, the order is defective and meaningful review is not possible.

In addition to lacking competent, substantial evidence and factual findings on each element of injunctive relief, the trial court had before it no legislative history or statements of legislative or voter intent as to either the 2015 statutory amendments or even the privacy amendment itself. See Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978) ("In construing the Constitution, we first seek to ascertain the intent of

the framers and voters, and to interpret the provision before us in the way that will best fulfill that intent."). The trial court did not address the State's arguments, such as whether, in passing the privacy amendment in 1980, voters intended to deprive Florida and its citizens of the benefits of advances in medical knowledge and evolutions in federal law recognizing increasingly compelling state interests arising from, among other factors, the potentiality of life uniquely represented by the human fetus. Likewise, the trial court did not address the evidence of intent reflected in the State's many post-1980 laws and regulations specific to abortion; nor the evidence of voter intent reflected in the 2004 adoption of article X, section 22, of the Florida Constitution, which in effect overruled North Florida Women's and authorized a requirement of parental notice of termination of a minor's pregnancy.

It is not clear from this limited record whether the trial court applied the correct legal standard to determine whether Appellees adequately demonstrated a substantial likelihood of success on the merits. Here, the court failed to make sufficient factually-supported findings about the existence of a significant restriction on a woman's right to seek an abortion. The court failed to make *any* findings regarding the State's compelling interests in support of this statute, which the State has argued include compelling interests in providing women a short time to reflect privately after receiving required relevant information, in maintaining the integrity of the medical profession by making that post-informed reflective time free from

influence by a physician or clinic personnel, in protecting the unique potentiality of human life, in protecting the organic law of Florida from interpretations and impacts never contemplated or approved by Floridians or their elected representatives, and in protecting the viability of a duly-enacted state law. The trial court's failure to make sufficient factually-supported findings about whether the law imposes a significant restriction, and about the State's compelling interests, renders the trial court's sparse legal analysis and conclusions unsupportable and the injunction deficient, and hampers meaningful appellate review.

The order is also deficient in failing to address the legal requirements for a facial constitutional challenge to a statute, an issue the parties disputed below. The State advocated a "no-set-of-circumstances" test. See, e.g., Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2010); Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004); see also Gonzalez v. Carhart, 550 U.S. 127, 168 (2007) (upholding abortion law against facial challenge where challengers failed to sustain heavy burden of, at a minimum, proving the law to be unconstitutional in "a large fraction" of relevant cases). Appellees argued that the "no circumstances" test does not apply in Florida abortion cases. Neither the record nor the order reflects whether the trial court applied the appropriate facial challenge analysis, and this omission thwarts meaningful appellate review of the injunction order.

Taken together, the inadequate record before the trial court, the inadequate factual findings on the three disputed elements of an injunction, and the trial court's failure to demonstrate that it applied the proper legal analysis, render this temporary injunction invalid and thwart meaningful appellate review. Accordingly, we reverse the temporary injunction enjoining the enforcement of Chapter 15-118, Laws of Florida (amending section 390.0111(3), Florida Statutes). We also, effective immediately upon release of this opinion, reverse the trial court's order vacating the automatic stay created by Florida Rule of Appellate Procedure 9.310(b)(2), notwithstanding the filing of any post-decision motions. See Fla. R. App. P. 9.330, 9.331.

REVERSED.

KELSEY, J. and STONE, WILLIAM F., Associate Judge, CONCUR; THOMAS, J., CONCURS with opinion.

THOMAS, J., CONCURRING.

I fully concur with the majority opinion but write to further address Appellees' likelihood of success on the merits. Here, the trial court impermissibly shifted the burden of persuasion to the State to *disprove* the assertion that the 24-hour waiting period imposed a significant restriction on the right to seek an abortion. By assuming the one-day waiting period imposed a significant restriction, the trial court erroneously applied a strict scrutiny analysis.

This was legal error for at least two reasons. First, Appellees are the movants and thus bear the burden of persuasion on proving that the law imposes a significant restriction on the right to seek an abortion. Second, an abortion regulation invokes strict scrutiny only if the regulation imposes a significant burden on the right of privacy; if the court finds the statute imposes a significant burden, then it may evaluate whether the regulation furthers a compelling State interest through the least intrusive means. N. Fla. Women's Health and Counseling Servs. v. State, 866 So. 2d 612, 621 (Fla. 2003) (citing In re T.W., 551 So. 2d 1186, 1194-95 (Fla. 1989)). "The Court ultimately held that . . . if a legislative act imposes a *significant restriction* on a woman (or minor's) right to seek an abortion, the act must further a compelling State interest through the least intrusive means . . . ." Id. (emphasis added). Here, the trial court erroneously proceeded to decide, without any evidentiary basis, that (a) the one-day waiting period somehow imposed a significant

restriction on a woman's (or minor's) opportunity to seek an abortion, and (b) the State failed to provide a compelling State interest in the regulation that was effectuated by the least intrusive means possible.

On remand, if the trial court cannot determine that the law imposes a significant restriction on a woman's right to seek an abortion, then the statute is not subject to a strict scrutiny analysis. State v. Presidential Women's Center, 937 So. 2d 114 (Fla. 2006) (declining to apply strict scrutiny applied to previous informed-consent law and omitting discussion of privacy implications). There can be no shifting of the burden of persuasion to the State to defend the statute's constitutionality, absent the critical threshold determination that the law significantly restricts a fundamental right.

Appendix D

Planned Parenthood v. State

First Judicial ***District*** Court of ***Montana***, Lewis and Clark County

March 12, 1999, Decided

Cause No. ***BDV 95-722***

Reporter
1999 Mont. Dist. LEXIS 1117

PLANNED PARENTHOOD OF MISSOULA; INTERMOUNTAIN PLANNED PARENTHOOD; CLAYTON McCRACKEN, M.D.; YELLOWSTONE VALLEY WOMEN'S CLINIC, INC.; and DOUGLAS WEBBER, M.D., on behalf of themselves and their patients, Plaintiffs, v. STATE OF ***MONTANA***; JOSEPH P. MAZUREK, ATTORNEY GENERAL, in his official capacity, Defendants.

Core Terms

abortion, woman, right to privacy, infringe, waiting period, patient, vague, provides, privacy, medically, pregnancy, Clinic, summary judgment, woman's right, disclosure, performing, mandatory, summary judgment motion, injunction, compelling state interest, fundamental rights, abortion services, breast cancer, deposition, full-time, indicates, delays, words

Judges: **[*1]** JEFFREY M. SHERLOCK, ***District*** Court Judge.

Opinion by: JEFFREY M. SHERLOCK

Opinion

ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter is presently before the Court on Plaintiffs' motion for summary judgment. Plaintiff is seeking a declaratory judgment and permanent injunction against Senate Bill 292, which is commonly known as the "Women's Right to Know Act" (hereinafter the Act). This Court entered a preliminary injunction against the Act on November 28, 1995.

The statutory provisions which are of concern to the Plaintiffs are now found in Section 50-20-101, et seq., MCA. Specifically, Plaintiffs contend that certain provisions of this Act violate their rights to privacy and due process as guaranteed by the ***Montana*** Constitution. One statutory provision with which Plaintiffs are concerned is now found at Section 50-20-104 (5), MCA, which provides as follows:

> "Informed consent" means voluntary consent to an abortion by the woman upon whom the abortion is to be performed only after full disclosure to the woman by:
>
> (a) the physician who is to perform the abortion of the following information:
>
> (i) the particular medical risks associated with the **[*2]** particular abortion procedure to be employed, including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility;
>
> (ii) the probable gestational age of the unborn child at the time the abortion is to be performed; and
>
> (iii) the medical risks of carrying the child to term;
>
> (b) the physician or agent of the physician:
>
> (i) that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;
>
> (ii) that the father is liable to assist in the support of the child, even in instances in which the father has offered to pay for the abortion; and
>
> (iii) that the woman has the right to review the printed materials described in 50-20-304; and
>
> (c) the physician or the agent that the printed materials described in 50-20-304 have been provided by the department and that the materials describe the unborn child and list agencies that offer alternatives to abortion.

Plaintiffs are also concerned with Section 50-20-106 (1), MCA, which provides that "[a]n abortion may not be performed without the informed consent of the woman

upon whom the abortion is to [*3] be performed. The informed consent must be received at least 24 hours prior to the abortion and certified prior to at the time of the abortion."

In sum, the statutes with which Plaintiffs are concerned require physicians or their agents to provide certain specified information to a woman seeking an abortion, at least 24 hours prior to the abortion.

Plaintiffs are abortion providers from across ***Montana*** bringing this case for themselves and on behalf of their patients. As will become evident later, the individual characteristics of the various abortion clinics are quite important. For example, the Yellowstone Valley Women's Clinic in Billings provides abortions on alternate Tuesdays and every Thursday. The abortions are provided by Dr. Clayton McCracken and Dr. David Healow. Dr. Healow has a full-time practice, in addition to his duties at the Yellowstone Valley Women's Clinic. Most of the abortions performed at this Clinic are within the first trimester of a woman's pregnancy.

Dr. McCracken flies in from Billings to provide abortion services in Helena every other Friday. He is the only provider at the Helena Clinic. In Helena, abortions are only provided through ***12*** [*4] weeks of pregnancy.

In Missoula, abortions are provided one day per week. One of the physicians who performs the abortions there is employed full-time elsewhere as an emergency room physician. He is unable, in his emergency room job, to receive calls from abortion patients or to meet with them during emergency room hours. The other abortion physician in Missoula is engaged in full-time family practice.

I. Standard of Review

Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Minnie v. City of Roundup, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993)*. The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for trial. *Sunset Point v. Stuc-O-Flex Int'l, 954 P.2d 1156, 1159, 55 St.Rep. 141, 142 -43 (1998)*. [*5] The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

Summary judgment motions encourage judicial economy through the elimination of unnecessary trial, delay and expense. *Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977)*. However, summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. *Brohman v. State, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988)*. "Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys., Inc., 279 Mont. 279, 283, 927 P.2d 995, 997 (1996)* (citations omitted). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983)*; *Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978)*; *Kober v. Stewart, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966)*.

II. Right to Privacy

The Court must first determine whether ***Montana***'s right to privacy [*6] encompasses a woman's right to seek an abortion. ***Montana***'s right to privacy is contained at Article II, Section X of the ***Montana*** Constitution, and provides as follows:

"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."

This Court has previously ruled that ***Montana***'s Right to Privacy covers a woman's decision as to whether to bear or beget a child. Intermountain Planned Parenthood v. State, No. BDV 97-477 (1st Jud. Dist. Mont., Ord. Mot. Summ. J., June 29, 1998); Jeannette R. v. Ellery, No. BDV 94-811 (1st Jud. Dist. Mont., Ord. Mots. Summ. J., May 22, 1995.) The ***Montana*** Supreme Court has long held that ***Montana***'s constitution affords citizens broader protection of their right to privacy than does the federal constitution. *Gryczan v. State, 283 Mont. 433, 448, 942 P.2d 112, 121 (1997)*. Since ***Montana***'s constitutional right to privacy affords citizens broader protection than does the federal constitution, it must necessarily include those privacy rights recognized by the United States Supreme Court. In the case of *Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d. 147*

(1973). **[*7]** the United States Supreme Court recognized a woman's right to pre-viability abortion as being protected by the federal right to privacy.

Montana's right to privacy has been described as a fundamental right. Therefore, any legislation regulating this fundamental right to privacy must be reviewed under a strict-scrutiny analysis. To withstand such scrutiny, the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest. *Gryczan, 283 Mont. at 449, 942 P.2d at 122*.

The ***Montana*** Supreme Court has adopted the two-prong test set forth in *Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* to determine whether a particular activity is covered by the right to privacy. Id. The first prong questions whether individuals have an expectation of privacy in the involved activity. What could be more private than an individual's decision as to whether to conceive and/or carry a child? As is the case in almost any medical procedure, a woman's decision to consider abortion certainly carries with it an expectation of privacy. The second prong considers whether society **[*8]** is willing to recognize as reasonable, an expectation of privacy as to a woman's decision on whether or not to have abortion. While many Montanans do not approve of abortion, this Court cannot say that society is unwilling to recognize as reasonable, a woman's expectation of privacy in her very personal decision as to whether she should carry a pre-viable fetus. This Court concludes that a woman's decision to choose a pre-viability abortion is covered by ***Montana***'s right to privacy.

Once it has been determined that the right to privacy applies, the Court must then determine whether that right has been infringed and, if so, is there a compelling state interest that justifies such an infringement. In this case, the answer to the latter question, the existence of a compelling state interest, is simple. The State has not advanced any suggestion that it is protecting any compelling state interest by the enactment of the aforementioned statutes. Thus, the decisive question becomes whether the above provisions of the Act "infringe" on the right to privacy. [1]

[*9] a. 24-Hour Waiting Period

As noted above, part of the Act with which Plaintiffs are concerned requires that 24 hours pass between the performing physician providing the woman with certain information and the actual performance of the abortion. Section 50-20-106, MCA. The question then arises, does this 24-hour waiting period infringe on a woman's right to privacy? The Court holds that it does. Indeed, the very legislative statement of intent on this statute indicates to us that the legislature intends to restrict abortion to the extent permissible. Section 50-20-103, MCA.

The fact that the 24-hour waiting period violates the right to privacy is apparent under two distinct forms of analysis. First, the State has advanced no compelling interest to support this 24-hour waiting period. The State, through its 24-hour waiting period, is telling a woman that she cannot exercise a fundamental constitutional right for a 24-hour period. Although this may be considered a short time frame, it is a restriction on a woman's right nonetheless, and the infringement is not supported by a compelling reason. Therefore, since the waiting period infringes **[*10]** on a woman's right to exercise a fundamental constitutional right and is not supported by a compelling reason, it is in violation of ***Montana***'s right to privacy.

The second form of analysis focuses on the unique nature of the provision of abortion services in the state of ***Montana***. Of utmost importance here is that the various clinics do not perform abortions on an every day basis. Plaintiffs have provided affidavits and depositions that the 24-hour waiting period, in reality, imposes delays far in excess of 24 hours. For example, according to the affidavit of Dr. McCracken:

> A woman who calls the day before (but less than 24 hours before) the day we provide second trimester abortions will have to be delayed one full week, until the next time that we provide such procedures, by which time her pregnancy may have passed our 19 week limit. Such a woman will have to seek an

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[1] The Court acknowledges that the State of ***Montana*** wishes the Court to adopt the analysis of the United States Supreme Court announced in *Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992)*. In that case, the United States Supreme Court, in analyzing whether a statute violated a woman's federal right to privacy, looked to see if the woman's decision-making autonomy had placed upon it an undue burden that substantially infringed her rights. However, as noted above, ***Montana*** does not have the same right to privacy as is recognized by the United States Supreme Court. ***Montana***'s right to privacy is broader. *Gryczan, 283 Mont. at 448, 942 P.2d at 121*. Therefore, the Casey analysis is not applicable. The proper test in ***Montana*** is whether the right has been infringed upon, not whether it has been substantially infringed.

abortion in another city (the nearest provider of abortions after 19 weeks is in Great Falls) and incur added expenses for travel and for the abortion itself, as well as greater risk to her health.

(McCracken Aff., P ***12***.) (See also Dell Aff., PP 9, 11.)

Due to the unique nature of these medical **[*11]** services in ***Montana***, a 24-hour delay may well mean a delay of one to two weeks. Such a delay may push a woman well beyond the second trimester, at which time she will not be allowed to have an abortion at all. Rebecca Dell, clinic manager of the Yellowstone Valley Women's Clinic in Billings, explains that in Helena if a woman cannot talk with the physician 24 hours prior to the abortion, she may have to wait up to two weeks, since Dr. McCracken only performs abortions in Helena on alternate Fridays. (Dell Aff., P 7). This is of great importance because as the duration of a pregnancy goes on, the health risks and complexity related to an abortion increase. (Webber Aff., PP 7-8; McCracken Aff, P 13.)

In her deposition, Erin Ingraham details the fact that the 24-hour waiting period may well increase hardship, cause lost wages, and increase child care and travel costs. (Ingraham Dep. at 76-77). Dr. Douglas Webber tells us that the 24-hour notice provision may well deter women from being able to exercise their right to an abortion because it will impose substantial additional costs on them concerning lost work time, increased child care costs and loss of confidentiality, all at no **[*12]** particular gain to the patient. (Webber Dep. at 21.)

Also troublesome is the fact that it is very difficult for patients to contact the physician 24 hours prior to an abortion. For example, Dr. Webber, who performs abortions in Missoula, is a full-time emergency room physician. He is not able to take calls from patients in the emergency room and cannot meet with them at the hospital. The two providers in Missoula have full-time jobs away from the clinic, and Dr. McCracken is often traveling between Billings and Helena. The difficulty alone of coordinating the schedule of the abortion providers and the patients, given the unique aspects of the provision of abortion services in ***Montana***, indicates that getting the physician and patient together 24 hours prior to an abortion is going to be extremely difficult and could well cause the delays suggested above.

The requirement of a 24-hour waiting period seems to imply that ***Montana*** women are incapable of making decisions concerning their health care. In the alternative, it may even suggest that the physicians providing abortion services are somehow rushing reluctant women into having an abortion. Dr. McCracken testified in his **[*13]** deposition that if he feels a woman is not firm in her decision to obtain an abortion, he will not provide that service. (McCracken Dep. at 26.) There is no evidence in the record that would in any way indicate that the Plaintiff physicians are in any way, shape, or form pressuring women into having unwanted abortions. Further, the Court will not presume that a ***Montana*** woman who chooses to have an abortion has not agonized over the decision and is somehow incapable of making that decision on her own. This Court is not alone in its thinking. A two-day waiting requirement was ruled unconstitutional on similar grounds by a Tennessee court in Planned Parenthood Assoc. of Nashville v. McWherter, No. 92C-1672 (Davidson Co. Tenn. 1st Cir., Ord., Nov. 29, 1992).

b. Physician-Only Provision of Information

This portion of Plaintiffs' complaint deals with Section 50-20-104 (5)(a), MCA, which provides that certain information must be given to the patient prior to the abortion by the physician who is to perform the abortion. Much of Plaintiffs' concern with this statute arose out of the requirement that the performing physician provide this specific information **[*14]** 24-hours prior to the scheduled abortion. Since this Court rules that Plaintiffs are entitled to a permanent injunction against the enforcement of the 24-hour waiting period, much of the Plaintiffs' complaint concerning the physician-only requirement vanishes.

Plaintiffs argue that other individuals besides the performing physicians should be allowed to provide the information required. Plaintiffs argue that it would be very difficult for patients to reach the limited ***number*** of physicians who do abortions during the narrow time-frame when these physicians are available. Plaintiffs argue further that this situation would lead to delays, increased costs and increased health risks that are associated with delays in provision of abortion services.

However, without the 24-hour waiting period, the showing made by Plaintiffs is insufficient for this Court to rule, on summary judgment, that the physician-only requirement of Section 50-20-104 (5)(a), MCA, is unconstitutional. In order for there to be a cognizable constitutional complaint, it must be shown that the

statute infringes on the right to privacy. Here, the key word is "infringes." The Court **[*15]** concludes that no showing has been made that having the physician provide the information required by the statute just prior to the abortion would, in any way, infringe on a woman's right to an abortion. Therefore, the Court declines Plaintiffs' request to grant summary judgment and a permanent injunction on the physician-only requirement of Section 50-20-104 (5)(a), MCA.

c. Mandatory Information

Plaintiffs complain about the nature of the mandatory information contained in Section 50-20-104 (5)(a), (b), MCA. Plaintiffs argue that requiring physicians to give this information in many cases may be cruel and harmful to the patient and may be seen as insensitive. At a minimum, Plaintiffs argue that the provision of this information in many cases may be irrelevant.

The United States Supreme Court, at one point, held that a similar statute "comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks . . . ." *Thornberg v. American College of Obstetrics and Gynecology, 476 U.S. 747, 763, 106 S. Ct. 2169, 90 L. Ed. 2d 779*. Further, the United States Supreme Court held that similar **[*16]** requirements are "poorly disguised elements of discouragement for the abortion decision." *Thornberg, 476 U.S. at 763*.

Dr. Marshall White, in his deposition, indicates that it would be irrelevant to provide some of this information to a husband and wife who chose to end a pregnancy due to a fetal defect. (White Dep. at 75.) To this couple, it would be irrelevant, for example, that the father would be "liable to assist in the support of the child."

Further, telling a rape victim of the father's duty to support the child, or that the patient could get medical assistance benefits, could re-traumatize the rape victim. (Allison Dep. at 14-15.) Dr. Webber indicates that some of the mandatory information may be harmful and demeaning and may interfere with a physician's judgment. (Webber Dep. at 23.) Dr. Webber also indicates how demeaning it would be if he were to be required to tell a female physician seeking an abortion, that she might be eligible to receive welfare benefits. (Webber Dep. at 23-24.)

The Court must note, with all due respect, that much of Plaintiffs' argument on this point is speculative. Further, the Court is unclear as to exactly how the mandatory **[*17]** recitation of this information violates any particular provision of the ***Montana*** Constitution. There has been no showing, for example, that the provision of this mandatory information, as cruel and irrelevant as it may be in some particular cases, would in any way infringe on a woman's constitutional right to seek an abortion.

Therefore, this Court will not grant Plaintiffs' motion for summary judgment dealing with the content of the material that must be provided by the physician or his/her agent to the woman seeking an abortion.

3. Equal Protection

Plaintiffs also contend that the statutes mentioned above deprive ***Montana***'s women of the equal protection guarantee of *Article II, Section 4 of the Montana Constitution*. According to Plaintiffs, the statutory scheme creates classifications that infringe upon womens' fundamental rights. According to Plaintiffs, it singles out abortion and separates it from all other types of medical care. Further, Plaintiffs argue that the statutory scheme singles out abortion from other medical procedures by requiring a physician, not his agent, to provide the mandatory information.

However, with this Court's ruling on the 24-hour **[*18]** waiting period, much of the force behind the Plaintiffs' argument in this regard is lost. Plaintiffs claim that the classification infringes on the Plaintiffs' fundamental rights. However, with the waiting period struck down, the Court concludes that there has been an inadequate showing, at this stage in the proceedings, that the remaining portions of the statutory scheme infringe on women's fundamental rights. That determination will have to await a trial.

4. Vagueness of Some Required Information

Plaintiff's final objection to the Act again relates to the mandatory information the performing physician must provide to the patient, pursuant to Section 50-20-104 (5), MCA. Section 50-20-104 (5)(a)(i), MCA requires full disclosure of certain information by the physician including, "when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies and infertility." (Emphasis added.) Failure to give the required information is a misdemeanor. Section 50-20-106 (8), MCA.

Plaintiffs contend that the words "full disclosure" and "when medically **[*19]** accurate" are vague, thus

violating the physician's right to due process guaranteed by the ***Montana*** Constitution. If a statute is indeed vague, it may be declared unconstitutional. In *Grayned v. City of Rockford (1972), 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222*, the elements of the void-for-vagueness doctrine were enunciated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, we assume that man is free to steer between lawful and unlawful conduct, and we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, where a vague statute abuts upon **[*20]** sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned, 408 U.S. at 108*[-09].

City of Whitefish v. O'Shaughnessy, 216 Mont. 433, 440, 704 P.2d 1021,1025-26 (1985).

In considering the language "when medically accurate," the Plaintiffs point out that physicians do not agree among themselves on the link, if any, between abortion and breast cancer and between abortion and danger to subsequent pregnancies. In Dr. White's deposition, he discusses the differences of opinion in the medical community concerning the link between abortion and breast cancer. (White Dep. at 79-81.) Dr. White also informs us that what is medically accurate is "what you choose it to be." (*Id. at 80.*)

As a result of the lack of medical consensus, and since this statute carries a criminal penalty, this Court must rule that words "when medically accurate" in Section 50-20-104 (5)(a)(i), MCA, are unconstitutionally vague. If there is **[*21]** a debate among physicians as to the links between abortion and breast cancer and abortion and danger to later pregnancies, it is unclear to the Court how any physician is going to provide a woman with information that is "medically accurate" as to these relationships, if physicians themselves do not agree upon them. This could impose upon a physician a danger of not knowing exactly what conduct is proscribed.

The Court has some concern about the words "full disclosure" contained in Section 50-20-104 (5), MCA. However, if the word "full" is stricken from its companion "disclosure," then the physician will not be left guessing as to the conduct that is required of him or her. The statute, then, would still require physicians to disclose the information, but it would not impose upon them the uncertainty of determining whether that disclosure had been "full" due to the factors mentioned above.

Therefore, the Court rules that the words "when medically accurate" contained in Section 50-20-104 (5)(a)(1), MCA, are unconstitutionally vague and deprive Plaintiff physicians of their right to due process. The Court also rules **[*22]** that the word "full," when coupled with its companion word "disclosure" contained in the same statutory scheme, is unconstitutionally vague as well. 5. Summary

In sum, this Court partially grants Plaintiffs' motion for summary judgment, and issues a permanent injunction against the State or any of their agents from enforcing the following provisions against the Plaintiffs:

a. The 24-hour waiting period provided in Section 50-20-106 (1), MCA.

b. The words "full" and "when medically accurate" contained in Sections 50-20-104 (5)(a), (5)(a)(i), MCA, respectively, are unconstitutionally vague and the State of ***Montana*** and all of its agents are prohibited from enforcing those portions of Section 50-20-104, MCA, against the Plaintiffs.

The balance of Plaintiffs' request for summary judgment is DENIED.

Further, this Court's preliminary injunction of November 28, 1995, shall remain in full force and effect until further order of this Court.

DATED this ***12th*** day of ***March***, ***1999***.

JEFFREY M. SHERLOCK

District Court Judge

Appendix E

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D15-3048
L.T. CASE NO.: 2015-CA-1323

STATE OF FLORIDA, ET AL.,

Appellants,

v.

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Appellees.

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM A NONFINAL ORDER OF THE
SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

As the Florida Supreme Court recognized decades ago, "[t]he decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). For nearly twenty years, Florida has therefore maintained the "Woman's Right to Know Act," which prohibits abortions "unless either the referring physician or the physician performing the procedure first obtains informed and voluntary written consent." *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 115 (Fla. 2006). The concept was simple: a woman must consent to the procedure; and without a full understanding of what she faces, "a 'consent' does not represent a choice and is ineffectual." *Id.* (quoting *Bowers v. Talmage*, 159 So. 2d 888, 889 (Fla. 3d DCA 1963)). The Florida Supreme Court upheld the Woman's Right to Know Act, rejecting claims that the law substantially burdens women's abortion rights. *Id.*

This year, Florida joined the majority of states in requiring abortion providers to offer women not only adequate information to guide their decision, but also adequate time to consider it. *See infra* note 3 (collecting other states' statutes). The Legislature enhanced the Woman's Right to Know Act by adding a 24-hour waiting period to ensure that consents to abortions are genuinely informed and voluntary. *See* Ch. 2015-118, Laws of Fla. (the "New Law").

The Preexisting Law

Under preexisting law, "[a] termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman." § 390.0111(3), Fla. Stat. The physician (either the abortion provider or the referring physician) must inform the woman, "orally, in person," of "[t]he nature and risks of undergoing or not undergoing the proposed procedure." *Id.* § 390.0111(3)(a)1.a. The physician must also inform the woman of the probable gestational age of her fetus, conduct an ultrasound, and allow the woman to view live ultrasound images and hear an explanation of them. *Id.* § 390.0111(3)(a)1.b.(I)-(II). There is an exception for medical emergencies, and the law specifies the means for determining the existence of an emergency. *Id.* § 390.0111(3)(b). The law also provides that a physician's violation of the informed-consent provisions constitutes grounds for disciplinary action, but allows as a defense "[s]ubstantial compliance or a reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient." *Id.* § 390.0111(3)(c).

The plaintiffs challenge none of these provisions.

The 2015 Amendment

On June 10, 2015, the Governor approved the New Law, which amends the

Woman's Right to Know Act. *See* Ch. 2015-118, Laws of Florida. While the content of the disclosure and the ultrasound requirement remain unchanged, the New Law now requires the physician's disclosure "while physically present in the same room, and at least 24 hours before the procedure." The New Law also includes this exception:

> The physician may provide the information required in this subparagraph within 24 hours before the procedure if requested by the woman at the time she schedules or arrives for her appointment to obtain an abortion and if she presents to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking.

Id. at Section 1.(3)(a)1.c. The New Law's effective date was July 1, 2015. *Id.* at Section 3.

The Litigation and Procedural History

Shortly before the New Law's effective date, plaintiffs sued to enjoin its enforcement. R. I at 7-25.[1] The plaintiffs—which included an abortion provider

[1] The clerk of the circuit court prepared and filed an Index and Record on Appeal for this appeal of a nonfinal order. *But see* Fla. R. App. P. 9.130(d). This brief will refer to the Record as "R. [*volume*] at [*page or paragraph*]."

and a student group,[2] but no women seeking abortions—alleged that the New Law violated the right of privacy and equal protection. R. I at 23. They sought a temporary injunction based exclusively on privacy claims, arguing the New Law would impose a substantial burden on women's (but not on plaintiffs') rights under Article I, Section 23 of the Florida Constitution. They submitted a handful of declarations generally alleging that a 24-hour waiting period would inflict psychological trauma on women, R. II at 106, 220, undermine the doctor-patient relationship, R. II at 106, 121, endanger pregnant women who are victims of domestic violence, R. II at 98, 107, disproportionately affect low-income women because of added travel or childcare costs, or lost wages, R. II at 93, 194, and force women to carry unwanted pregnancies to term, R. II at 93, 107.

[2] The two Plaintiffs (hereinafter, "Abortion Providers") are (i) Gainesville Woman Care LLC d/b/a Bread and Roses Women's Health Center, an abortion clinic, and (ii) Medical Students for Choice, a non-profit organization of medical students being trained in abortion care and assisting in providing abortions. R. I at 9-10.

The Appellants are the State of Florida; the Florida Department of Health; John H. Armstrong, M.D., in his official capacity as Secretary of Health for the State of Florida; the Florida Board of Medicine; James Orr, M.D., in his official capacity as Chair of the Florida Board of Medicine; the Florida Board of Osteopathic Medicine; Anna Hayden, D.O., in her official capacity as Chair of the Florida Board of Osteopathic Medicine; the Florida Agency for Health Care Administration; and Elizabeth Dudek, in her official capacity as Secretary of the Florida Agency for Health Care Administration (collectively, "the State"). R.I at 10-11.

After a hearing in which both sides presented argument but neither side presented testimony, the trial court entered the order on appeal (the "Order"). The Order noted that "[n]o witnesses were presented at the scheduled hearing, and no affidavits or verified statements or declarations were offered into evidence." R. III at 365. It further noted that "[t]here was no legislative history or other evidence presented to this Court." R. III at 364. Nonetheless, despite noting the absence of evidence, the court found that "Plaintiffs have shown a substantial likelihood of success on the merits, that irreparable harm will result if [the New Law] is not enjoined, that they lack an adequate remedy at law, and that the relief requested will serve the public interest." R. III at 365. Ultimately, the court concluded, "Plaintiffs have carried their burden for the issuance of temporary injunction under the 'strict' scrutiny standard." *Id.*

The State timely appealed. R. III at 366. This Court has jurisdiction. *See* Fla. Const. art. V, § 4(b)(1); Fla. R. App. P. 9.030(b)(1)(B).

SUMMARY OF ARGUMENT

The Order on appeal—a temporary injunction prohibiting enforcement of recent revisions to Florida's Woman's Right to Know Act—is flawed in many respects. First, while orders granting temporary injunctions must strictly comply with Florida Rule of Civil Procedure 1.610, this one does not: It does not include

specific findings of fact supporting the plaintiffs' likelihood of success on the merits. It includes no specific findings of irreparable harm. And it includes no specific findings regarding the public interest.

The trial court's more fundamental legal error, though, was holding the challenged law likely unconstitutional. A majority of states have laws requiring 24-hour waiting periods, and courts have routinely upheld them. Although the Florida Constitution includes broader privacy protections than its federal counterpart, there is nothing to suggest that the voters approving Florida's Privacy Amendment intended to preclude the reasonable regulation at issue here.

The New Law imposes a modest waiting period. It does not interfere with a woman's decision whether to have an abortion, and it imposes no substantial burden on privacy rights. Therefore, the trial court was wrong to apply strict scrutiny. But even if strict scrutiny applied, the court was wrong to enjoin the law, which serves compelling interests. The law protects pregnant women from undergoing serious procedures without an opportunity to reflect on the risks and consequences they face. The law therefore ensures that a woman's consent to abortion is truly voluntary and informed. It does not violate the Florida Constitution in doing so.

Even if the trial court could conceive of some unconstitutional applications,

it had no basis to enjoin the law as facially unconstitutional. Outside of the First Amendment context—inapplicable here—a court should order facial relief only when there is no set of circumstances under which a law could operate constitutionally.

Finally, the trial court should not have granted relief because the Abortion Providers cannot establish the elements necessary to sustain an injunction. There is no substantial likelihood that the Abortion Providers can succeed on the merits; indeed, the Abortion Providers have not put forth substantial, competent evidence to make such a difficult showing. And the Abortion Providers cannot show irreparable harm, when the asserted harms are nonexistent as a matter of law. Nor can the Abortion Providers show that the balance of public interest tips in their favor. Rather than serve the public interest, the injunction harms it by preventing the State from enforcing a statute enacted by representatives of the people of Florida, and by halting the protections the New Law provides.

This Court should reverse.

ARGUMENT

There is nothing novel about a law affording women a reasonable amount of time to contemplate whether to terminate pregnancy. No fewer than twenty-seven

states have abortion waiting periods.[3] The United States Supreme Court upheld a 24-hour waiting period against a federal constitutional challenge, finding the requirement presents no "substantial obstacle in the path of a woman seeking an abortion." *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 877 (1992) (joint opinion). And a number of other courts have likewise rejected the argument that a waiting period substantially burdens women's rights.[4]

The Abortion Providers contest none of this. Instead, they argue that Florida's constitution prohibits the same informed-consent measures that most other states have embraced. Florida's constitution does encompass privacy rights beyond those implicit in the federal constitution, *see In re T.W.*, 551 So. 2d at 1191, but nothing in the Florida Constitution—or any decision interpreting it—suggests that voters who approved Article I, Section 23 (the "Privacy

[3] *See* Ala. Code § 26-23a-4; Ariz. Rev. Stat. §36-2153; Ark. Code § 20-16-903; Ga. Code § 31-9A-3; Idaho Code § 18-609(4); Ind. Code § 16-34-2-1.1(a); Kan. Rev. Stat. § 65-6709(a); Ky. Rev. Stat § 311.725(1)(a); La. Rev. Stat. § 40:1299.35.6(B)(3); Mich. Comp. Laws § 333.17015(3); Minn. Stat. § 145.4242(a)(1); Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327(1); N.C. Gen. Stat. § 90-21.82; N.D. Code § 14-02.1-03; Ohio Rev. Code § 2317.56(B); Okla. Stat. § 1-738.2(B); 18 Pa. Cons. Stat. § 3205(a)(1); S.C. Code § 44-41-330(C); S.D. Codified Laws § 34-23A.10.1; Tenn. Code § 39-15-202(d)(1); Tex. Health & Safety Code § 171.012(a)(4); Utah Code § 76-7-305(2)(a); Va. Code § 18.2-76(B); W. Va. Code § 16-2I-2(b); Wis. Code § 253.10(3)(c).

[4] *See infra* Section I.B.2. & note 6 (collecting cases).

Amendment") sought to preclude the same commonsense waiting period widely accepted throughout the country.

The trial court nonetheless held that "Plaintiffs have carried their burden for the issuance of [a] temporary injunction under the 'strict' scrutiny standard." R. III at 365. This was error for several reasons. First, the strict scrutiny standard is inapplicable because the Abortion Providers have not established any substantial burden. Second, even if strict scrutiny applied, the court erred by finding the State's interests insufficient to justify the law. Third, even if there were some circumstances in which the New Law posed a substantial burden as applied to certain women, the court erred in concluding that the law would be facially invalid. And fourth, the court made no actual findings supporting its decision.

"A preliminary injunction is an extraordinary remedy which should be granted sparingly." *City of Jacksonville v. Naegele Outdoor Advertising Co*., 634 So. 2d 750, 752 (Fla. 1st DCA 1994). Before enjoining anything—much less an act of the Legislature—the trial court should have demanded substantial factual showings that (i) plaintiffs are substantially likely to succeed on the merits, (ii) irreparable harm absent injunction is likely, (iii) adequate remedy at law is unavailable, and (iv) the balance of public interest favors the injunction. *Id.*; *see also St. Johns Inv. Mgmt. Co. v. Albaneze*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009)

(party seeking a temporary injunction bears the burden of providing substantial, competent evidence on each element). This Court should reverse because the Abortion Providers did not satisfy the extraordinary burden they faced.

Standard of Review

"An appellate court's review of a ruling on a temporary injunction is hybrid in nature in that legal conclusions are reviewed de novo while factual findings implicate the abuse of discretion standard." *SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012). Because the trial court's incorrect legal conclusions are dispositive and the trial court made no findings of fact, this Court's review is de novo.

I. STRICT SCRUTINY DOES NOT APPLY BECAUSE THE 24-HOUR INFORMED-CONSENT PERIOD DOES NOT SIGNIFICANTLY BURDEN THE RIGHT OF PRIVACY.

A. *Strict Scrutiny Applies Only to Statutes That Significantly Burden the Right of Privacy*.

The trial court's first misstep was applying strict scrutiny, incorrectly assuming that *In re T.W.*, 551 So. 2d 1186, and *North Florida Women's Health Counseling Services, Inc*., 866 So. 2d 612 (Fla. 2003), compelled it. Neither case, though, suggests that every law implicating abortion is subject to strict scrutiny. Instead, strict scrutiny is reserved for laws that *significantly* burden the right to abortion.

In *T.W.*, the Florida Supreme Court evaluated a statute limiting minors' abortion options. 551 So. 2d at 1189. The Court applied strict scrutiny and invalidated the law, but only after recognizing that the statute caused a "*substantial* invasion of a pregnant female's privacy." *Id.* at 1194 (emphasis added). Far from imposing a short waiting period, the law in *T.W.* forbade a minor's abortion altogether, unless her parents consented or she convinced a court to allow it. *Id.* As the Court later explained in *North Florida Women's*, the Court in *T.W.* held that "if a legislative act imposes a *significant* restriction on a woman's (or minor's) right to seek an abortion, the act must further a compelling State interest through the least intrusive means." *North Florida Women's*, 866 So. 2d at 621 (emphasis added); *accord In re T.W.*, 551 So. 2d at 1193 (in first trimester, abortion decision "may not be *significantly* restricted by the state"; later, "state may impose *significant* restrictions only in the least intrusive manner") (emphasis added).

In *North Florida Women's*, the Court evaluated a statute requiring parental notification or court approval before a minor's abortion. Again, the Court applied strict scrutiny, and again, it invalidated the statute. But (again) it did so only after finding a significant burden. The pertinent questions were "(1) Does the Parental Notice Act impose a *significant restriction* on a minor's right of privacy? And *if so*, (2) does the Act further a compelling State interest through the least intrusive

means?" *North Florida Women's*, 866 So. 2d at 631 (emphasis added). The Court affirmed the trial court's determination that the notification requirement was "a significant intrusion" on women's privacy rights. *Id.* at 632.

The rule in *T.W.* and *North Florida* is the same: Strict scrutiny applies when legislation significantly burdens abortion rights. On the other hand, when the law merely imposes reasonable informed-consent requirements, there is no significant burden and no strict scrutiny. Therefore, in *State v. Presidential Women's Center*, the Florida Supreme Court upheld the Woman's Right to Know Act—the pre-amendment version of the law challenged here—without applying strict scrutiny or identifying any burden on the right of privacy. 937 So. 2d 114, 116-20 (Fla. 2006). As explained above, that law required "voluntary and informed written consent" before any abortion (absent emergency circumstances) and specified that physicians must inform each woman, orally and in person, of the nature and risks of abortion, the probable gestational age of the woman's fetus, and any medical risks—to the woman and her fetus—of carrying the pregnancy to term. *Id.* at 115 n.1 (quoting § 390.0111(3)(a)(1)(b), Fla. Stat.).

Before the Florida Supreme Court upheld the Woman's Right to Know Act, the Fourth District had invalidated it. The Fourth District's error was holding the law "unconstitutional because, on its face, it imposes significant obstacles and

burdens upon the pregnant woman which improperly intrude upon the exercise of her choice between abortion and childbirth." *State v. Presidential Women's Center*, 884 So. 2d 526, 530 (Fla. 4th DCA 2004). The Fourth District's error was not unlike the trial court's here: The Fourth District viewed *T.W.* as mandating strict scrutiny, and it found the law furthered no compelling state interest. *Id.* at 530-31, 532, 535.

In rejecting the Fourth District's conclusions, the Florida Supreme Court did not apply (or even mention) strict scrutiny. Rather than find some significant burden, the Court explained that the law "is fundamentally an informed consent statute" that imposes disclosure requirements "comparable to those of the common law and other Florida informed consent statutes implementing the common law" and does not "generate the need for an analysis on the issue of constitutional privacy." *Presidential Women's Ctr.*, 937 So. 2d at 118. Although the law was unquestionably abortion specific (other procedures would not require discussion of probable gestational age), in a broad sense, it was not unlike other informed-

consent requirements. *Id.*[5] And "[n]o legitimate reason has been advanced to support a theory that physicians who perform these procedures should not have an obligation to notify their patients of the risks and alternatives to the procedure." *Id*.

As *Presidential Women's Center* shows, strict scrutiny does not apply every time a statute addresses abortion, even if it affects privacy interests:

> Practically any law interferes in some manner with someone's right of privacy. The difficulty lies in deciding the proper balance between this right and the legitimate interest of the state. As the representative of the people, the legislature is charged with the responsibility of deciding where to draw the line. Only when that decision *clearly transgresses private rights* should the courts interfere.

Stall v. State, 570 So. 2d 257, 261 (Fla. 1990) (quoting *In re T.W.*, 551 So. 2d at 1204) (Grimes, J., concurring in part, dissenting in part) (emphasis added). Any

[5] The trial court apparently read *Presidential Women's Center* to require an informed-consent statute for abortion to be identical to other informed-consent statutes. R. III at 364 (concluding that "a major issue in the case" is that other gynecological procedures are not subject to 24-hour statutory waiting periods). This was incorrect. First, *Presidential Women's Center* does not hold that an abortion-related informed-consent statute must be identical to informed-consent statutes for other medical procedures; indeed, the Woman's Right to Know Act contains several provisions that do not apply to other procedures. *See* 937 So. 2d at 120 (upholding section (3)(a)(1) of the informed-consent statute because it is "neutral" and "comparable to the common law and to [other] informed consent statutes" in its specificity). Second, an abortion is a decision "fraught with specific physical [and] psychological . . . implications of a uniquely personal nature," *In re T.W.*, 551 So. 2d at 1193, making it unlike other gynecological procedures. Third, Abortion Providers put forth no evidence that, as a practical matter, women are able to walk into a physician's office and undergo other nonemergency invasive gynecological procedures the same day they first obtain a consultation.

other rule would be unworkable. As just one example, Florida provides that only physicians may perform abortions. § 390.0111(2), Fla. Stat. Suppose the Abortion Providers challenged that provision, for example arguing that nurse practitioners or others should be authorized. Would the Court presume the physician requirement unconstitutional? *Cf. Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999) (statutes subject to strict scrutiny are presumed unconstitutional). Would the State bear the burden of proving the physician requirement is the least restrictive means of addressing a compelling governmental interest? *Cf. D.M.T. v. T.M.H.*, 129 So. 3d 320, 339 (Fla. 2013) (noting State's burden under strict scrutiny). The answer to both questions is no, because the requirement imposes no significant burden. *Cf. Wright v. State*, 351 So. 2d 708, 711 (Fla. 1977) (noting that "*Roe* [*v. Wade*] states clearly that, regardless of the stage of pregnancy, States are free to require that abortions be performed by physicians."). This is true even if it means *some* women might have a harder time securing an abortion.

There are countless other safety and welfare regulations dealing with abortion specifically. *See, e.g.*, § 390.0111(3)(a)(1), Fla. Stat. (requiring that the physician perform an ultrasound and "offer the woman the opportunity to view the live ultrasound images and hear an explanation of them"); § 797.03(1), Fla. Stat. (requiring that, absent emergency, abortions must be performed only "in a validly

licensed hospital or abortion clinic or in a physician's office"); Fla. Admin. Code R. 59A-9.021(3) (all inspections of abortion clinics "shall be unannounced," although this may cause some "disruption to clinic activities" and may implicate "the privacy and confidentiality of any patient who is present"); Fla. Admin. Code R. 59A-9.023 (requiring abortion clinic staff training to include "[i]nfection control, to include at a minimum, universal precautions against blood-borne diseases, general sanitation, personal hygiene such as hand washing, use of masks and gloves, and instruction to staff if there is a likelihood of transmitting a disease to patients or other staff members"); Fla. Admin. Code R. 59A-9.025(1)(c)2 (requiring for second-trimester abortions "ultrasonography to confirm gestational age and a physical examination including a bimanual examination estimating uterine size and palpation of the adnexa"); Fla. Admin. Code R. 59A-9.025(4), (8) (woman seeking second-trimester abortion must undergo blood testing for anemia and Rh factor); Fla. Admin. Code R. 59A-9.028 (requiring with second-trimester abortions that "[a] urine pregnancy test []be obtained at the time of the follow-up visit to rule out continuing pregnancy"); Fla. Admin. Code R. 59A-9.030 ("Fetal remains shall be disposed of in a sanitary and appropriate manner and in accordance with standard health practices . . . ."). These should not be subject to

strict scrutiny because, as a matter of law, they impose no substantial burden. The same is true for the 24-hour waiting period.

B. *A 24-Hour Waiting Period Does Not Significantly Burden the Right of Privacy.*

As a preliminary matter, there is no evidentiary basis to find any burden. Despite its obligation to provide factual findings necessary to support the injunction, *see infra* Section IV, the trial court made no specific findings of any burden to anyone—much less a finding of a significant burden. Instead, the court inexplicably flipped the inquiry, saying that "the Court has no evidence in front of it in which to make any factual determination that a 24-hour waiting period with the accompanying second trip necessitated by the same is *not* an additional burden on a woman's right of privacy under the Florida's [sic] Right of Privacy Clause." R. III at 364 (emphasis added). If it had no evidence of a burden (and it did not), that should have ended the inquiry. Indeed, the court's observation that "the only evidence before the Court is that 'Florida law does not require a twenty-four-hour waiting period for other gynecological procedures with comparable risk, or any other procedure I perform in my practice,'" R. III at 364 (quoting declaration)—even accepting that summations of Florida law are "evidence"—should have sealed the injunction's fate. *SunTrust Banks, Inc.*, 78 So. 3d at 711 (temporary injunction must fail unless petitioner demonstrates "a prima facie, clear legal right

to the relief requested" by "providing competent, substantial evidence" to satisfy each required element).

1. *As a matter of law, the New Law imposes no significant burden on the right of privacy.*

Putting aside any evidence, and the trial court's failure to require any, it is clear as a matter of law that the New Law imposes no burden on the right of privacy. This is not like *North Florida Women's*, where the law "prohibit[ed] a pregnant minor from keeping [the] matter private." 866 So. 2d at 632. Nor is it like *In re T.W.*, where the law precluded minors' abortions altogether, absent parental or judicial approval. 551 So. 2d at 1189; *accord Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997) (describing law challenged in *T.W.* as "prohibit[ing] affirmative medical intervention" by abortion). Instead, the New Law only enhances the informed-consent provisions approved in *Presidential Women's Center* by affording women adequate time to consider all pertinent information in making their decisions. Even where a State may not restrict a woman's freedom to choose abortion, a "State may take measures to ensure that the woman's choice is informed." *Casey*, 505 U.S. at 878 (joint opinion).

Because the New Law does not restrict the right to choose an abortion, it does not implicate the right of privacy. Florida's privacy right "was not intended to be a guarantee against all intrusion into the life of an individual." *City of N. Miami*

v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995). Instead, before the right attaches, "a reasonable expectation of privacy must exist." *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985). The Florida Supreme Court found "a woman has a reasonable expectation of privacy in deciding whether to continue her pregnancy," *N. Fla. Women's*, 866 So. 2d at 621; but that is not to recognize a right to have an abortion without adequate time for reflection.

A right of privacy in a general context does not extend to every particular circumstance related to it. *See City of N. Miami*, 653 So. 2d at 1028 (right of privacy "is circumscribed and limited by the circumstances in which it is asserted"); *Shapiro v. State*, 696 So. 2d 1321, 1326 (Fla. 4th DCA 1997) (recognizing reasonable expectation of privacy in sexual relationships but finding "no legitimate reasonable expectation of privacy in using therapeutic deception to promote and engage in sexual activities with a patient") (citations omitted). "Determining whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation." *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) (citations omitted); *see also Fredman v. Fredman*, 960 So. 2d 52, 57 (Fla. 2d DCA 2007) (mother lacks privacy right "to decide in what state her children live, with

respect to the Father," even though she would "as to a third party," meaning privacy right not implicated "in this particular circumstance"). In this particular circumstance, the issue is whether there is there is a reasonable expectation of privacy in having an abortion without adequate informed consent. There is none.

Just as the preexisting Woman's Right to Know Act did not violate the right of privacy, *Presidential Women's Ctr.*, 937 So. 2d at 118, neither does the new 24-hour requirement. There is nothing less private about a woman's abortion after 24 hours than before. And there is nothing less free about her choice to have an abortion after 24 hours than before. This challenge is therefore not so much about privacy or choice as it is about the "right" to have an abortion immediately upon arriving at a provider. "Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand." *Casey*, 505 U.S. at 887 (joint opinion). And even the broadest reading of *In re T.W.* has not suggested that the Florida Constitution authorizes abortion on demand any more than *Roe* does. *Cf. In re T.W.*, 551 So. 2d at 1190 (adopting *Roe* framework and noting State has important interests in protecting a mother's well-being and the potential life of a fetus, and a compelling interest in preserving viable fetus).

Rather than burden the right of privacy in "a woman's decision of whether or not to continue her pregnancy," *id.* at 1192, the New Law actually "facilitates

the wise exercise of that right," *Casey*, 505 U.S. at 888. In fact, the New Law can enhance a woman's privacy in deciding whether to continue her pregnancy. Rather than facing a rushed decision in the presence of a provider standing ready to abort the pregnancy immediately after delivering critical disclosures and explaining live ultrasound images, a woman has an opportunity to consider her decision in private, away from the potentially coercive environment of a clinic. These concerns are not hypothetical. Before passing the New Law, the Legislature heard testimony from women who had come to regret that they had not taken more time to consider their decisions to undergo abortions. *See* Fla. S. Comm. on Fiscal Policy, recordings of proceedings (Apr. 20, 2015) (available at Fl. Dep't of State, Fla. State Archives, Tallahassee, Fla.) (hearing on S.B. 724); Fla. S. Comm. on Health Policy, recordings of proceedings (Mar. 31, 2015) (available at Fl. Dep't of State, Fla. State Archives, Tallahassee, Fla.) (hearing on S.B. 724).

As noted in *Casey*—and as common sense teaches—"[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection [is not] unreasonable." 505 U.S. at 885 (joint opinion). This is particularly true "where the statute directs that important information become part of the background of the decision." *Id.* By providing a brief period for deliberation on the critical information, the New Law does nothing to prevent women from

making free choices. If anything, a deliberate, considered decision will more fully amount to a woman's confident election of her chosen course. *See Pro-Choice Mississippi*, 716 So. 2d at 656 (24-hour period "ensures that a woman has given thoughtful consideration in deciding whether to obtain an abortion"); *see also* Yael Schenker & Alan Meisel, *Informed Consent in Clinical Care: Practical Considerations in the Effort to Achieve Ethical Goals*, 305 J. AM. MED. ASS'N, 1130, 1131 (2011) ("If patients are expected to engage in informed consent . . . , they must be given time for contemplation before having to decide.").

2. *None of the Abortion Providers' allegations of burden can sustain their challenge*.

In the face of all of this—and in the face of numerous state and federal decisions rejecting the argument that a waiting period imposes a substantial burden,[6] the Abortion Providers alleged various purported burdens on women's

[6] Time and again, courts have upheld brief abortion waiting periods, concluding that they do not improperly burden a woman's abortion rights. *Casey*, 505 U.S. at 855-56 (24-hour wait period for abortion is constitutional and not undue burden); *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (in-person requirement and 24-hour waiting period are not facially unconstitutional, even if "some small percentage of the women actually affected by the restriction were unable to obtain an abortion"); *A Woman's Choice–E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002) (reversing district court's injunction and upholding 18-hour waiting period); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999) (upholding 24-hour waiting period and explaining that any resulting hardships do not amount to unconstitutional burden); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 456 (W.D. Ky. 2000) ("[T]he twenty-four hour informed consent period makes

rights. The trial court made no findings regarding any of them, so none can sustain the temporary injunction. But regardless, none could justify invalidating the Law.

Specifically, the Abortion Providers allege the New Law would create the following burdens on some women: additional travel and childcare costs, logistical

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abortions marginally more difficult to obtain, but . . . does not fundamentally alter any of the significant preexisting burdens facing poor women who are distant from abortion providers."); *Utah Women's Clinic v. Leavitt*, 844 F. Supp. 1482, 1494 (D. Utah 1994) (holding 24-four hour waiting period that required two trips to abortion facility not an undue burden on right to abortion), *rev'd in part on other grounds and dismissing appeal in part*, 75 F.3d 564 (10th Cir. 1995); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409, 1420 (D.S.D. 1994) (increased costs caused by in-person requirement and 24-hour waiting period for informed consent "were not a substantial obstacle" to abortion); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994) (24-hour waiting period not an undue burden, even if delay "expos[es] the woman to dual harassment, stalking, and contact at home in the intervening period"); *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (holding abortion law requiring 24-hour wait period is constitutional and vacating trial court order preliminarily enjoining enforcement); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091, 1105 (D. Ariz. 2009) (denying temporary injunction because plaintiffs cannot show that 24-hour wait provision will create a substantial obstacle to a significant number of women); *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973 (Ind. 2005) (upholding 18-hour waiting period against facial constitutional challenge); *Planned Parenthood of St. Louis Reg. v. Nixon*, 185 S.W.3d 685, 691 (Mo. 2006) (en banc) (upholding 24-hour waiting period against constitutional privacy challenge); *Mahaffey v. Attorney General*, 564 N.W.2d 104 (Mich. Ct. App. 1997) (per curiam) (reversing trial court's conclusion that 24-hour wait was unconstitutional), *leave to appeal den'd*, 616 N.W.2d 168 (Mich. 1998); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 655 (Miss. 1998) (24-hour waiting period is not a substantial obstacle to a woman seeking abortion of a nonviable fetus); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993) (reversing trial court's "erroneous conclusion" that statute requiring 24-hour abortion waiting period was unconstitutional). *See also supra* Section I.B.1.

difficulties in missing school or work, lost wages, further harassment by anti-abortion activists outside the clinic, increased risk of pregnancy being discovered by others, being forced to carry an unwanted pregnancy to term, serious medical risks for women with pregnancy complications, increased risk of abuse or homicide for women in domestic violence, and psychological trauma and emotional distress. *See* R. I at 15-19. The Abortion Providers allege the New Law would create other burdens on abortion providers: undermining the doctor-patient relationship, causing extra administrative demands on physicians, and exacerbating a shortage of abortion providers. R. II at 108. None of these amount to violations of the Privacy Amendment.

The Abortion Providers assert hypothetical additional costs stemming from the 24-hour waiting period, specifically arguing that many women seeking abortions lack financial resources. R. I at 18. But "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Harris v. McRae*, 448 U.S. 297, 314-17 (1980) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)); *see also Karlin*, 188 F.3d at 486 (upholding statute as constitutional, where although "mandatory waiting period would likely make abortions more expensive and difficult for some

. . . women to obtain, . . . plaintiffs have failed to show that the effect of the waiting period would be to prevent a significant number of women from obtaining abortions"). Indeed, "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure," and such regulations are nevertheless valid and constitutional. *Casey*, 505 U.S. at 874 (joint opinion).

The same reasoning undermines the Abortion Providers' argument that the New Law is unconstitutional because some women may have to travel long distances to reach an abortion clinic and then repeat the trip. R. I at 16. Courts considering this objection to a 24-hour waiting period have rejected it. *See, e.g., id.* at 886-87 (joint opinion); *Karlin*, 188 F.3d at 481-82. Regardless, the New Law does not require two trips to an abortion clinic; pregnant women may receive the pertinent information from their referring physicians instead of the abortion providers. § 390.0111(3)(a)1., Fla. Stat.

Similarly, the Abortion Providers' argument that a 24-hour delay may cause some women to undergo an unwanted surgical abortion rather than medication abortion, or to be forced to carry an unwanted pregnancy to term, is completely unsubstantiated. Although the Abortion Providers assert that a 24-hour waiting period may cause women to miss the gestational cutoff for a medication or surgical

abortion, thereby burdening women with unwanted surgery or childbirth, this alleged "burden" is an illusion. Under valid preexisting law, women may not obtain abortions if they are not within the particular gestational time frames specified by law. A 24-hour shift in these time frames, in the interest of bolstering informed consent to the abortion procedure, does not significantly burden the right to choose abortion.[7]

Next, several of the supposed burdens are belied by the New Law's plain text. For example, the Abortion Providers asserted that some women in abusive relationships may face increased physical or verbal abuse (or even homicide) if they must wait a day or more to return to the clinic. R. II at 69, 216-17. But the New Law excepts from the 24-hour waiting period any woman facing domestic violence who presents appropriate documentation. § 390.0111(3)(a), Fla. Stat. The Abortion Providers also argue that victims of rape will suffer additional psychological trauma if required to wait an additional day for an abortion. But the

[7] According to the Complaint, Appellee Bread and Roses chooses to offer physician services only two days per week, making it more difficult for women to secure abortions. *See* R. I at 16; R. II at 68; *but see* R. I at 16 (plaintiffs alleging that "delays in performing an abortion increase the risk to a woman's health and well-being" and that "even a short delay will be sufficient to . . . significantly increas[e] the inconvenience and risk . . . and/or requir[e] travel to a more distant health care provider"). The Abortion Providers do not suggest that the State prevents Bread and Roses, or any abortion clinic, from providing longer clinic hours or additional days for abortion services.

New Law also includes an exception for victims of rape, incest, or human trafficking. *Id.* And although the Abortion Providers allege that the New Law burdens women's health, it contains an express exception for medical emergencies. *Id.*; *see also id*. § 390.0111(3)(c) (providing physicians with defense against discipline for performing abortion without informed consent (and 24-hour waiting period) if the physician reasonably believed the abortion was necessary to preserve a woman's life or health). The New Law creates no health burden.

The very "burdens" the Abortion Providers assert were considered in *Casey* and rejected. 505 U.S. at 886-87 (joint opinion). Although a 24–hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid. *Id.* at 874. As the Supreme Court has explained—specifically in the context of abortion—"not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Id.* at 873.

II. THE NEW LAW SATISFIES ANY LEVEL OF SCRUTINY.

Although the right of privacy protects a woman's right to choose abortion, that does not mean Florida may not "enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Casey*, 505 U.S. at 873 (joint opinion). This is true even if strict scrutiny applied; the New Law would survive any level of review.

"Strict scrutiny must not be 'strict in theory but fatal in fact,'" *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2421 (2013) (quoting *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 237 (1995)), and where the State has sufficient interests (as it does here), courts uphold statutes even when heightened scrutiny applies. In fact, Florida courts have repeatedly upheld laws against strict scrutiny challenges, particularly in the right-of-privacy context.

In *Florida Board of Bar Examiners Re: Applicant*, one of the first cases to interpret the Privacy Amendment, the Florida Supreme Court upheld a requirement that bar applicants disclose certain private information about mental health. 443 So. 2d 71, 74 (Fla. 1983). The Court recognized that the requirement implicated the right of privacy, but held that the requirement "meets even the highest standard of the compelling state interest test." *Id.* at 74. Hardly "fatal in fact," the strict scrutiny test allowed the requirement. Without any discussion of record evidence, the Court recognized the State's compelling interest in regulating the legal profession. *Id.* at 75. It rejected the argument that the requirement was not narrowly tailored, noting without expansive discussion that "[t]he means employed by the Board cannot be narrowed without impinging on the Board's effectiveness in carrying out its important responsibilities." *Id.* at 76.

Later, in *Winfield v. Division of Pari-Mutuel Wagering*, the Court again applied strict scrutiny to a privacy challenge and again rejected the claim. 477 So. 2d 544 (Fla. 1985). The Court recognized that although strict scrutiny applied, "[t]he right of privacy does not confer a complete immunity from governmental regulation." *Id.* at 547. Notwithstanding "an individual's legitimate expectation of privacy in financial institution records," the Court found a state agency's subpoena of those records (without notice) constitutional because of the compelling state interest in effectively investigating the pari-mutuel industry and because "the least intrusive means was employed to achieve that interest." *Id.* at 548.

Similarly, in *Jones v. State*, the Court rejected privacy challenges to Florida's statutory-rape laws. 640 So. 2d 1084 (Fla. 1994). Three men, aged eighteen, nineteen, and twenty, were convicted of having sexual intercourse with underage girls. *Id.* at 1085. They argued that the criminal law violated the privacy rights of the teenage girls who consented to sex and did not wish to prosecute. *Id.* More specifically, the men argued "that the statute is unconstitutional as applied because the girls in this case have not been harmed; they wanted to have the personal relationships they entered into with these men; and, they do not want the 'protections' advanced by the State." *Id.* at 1086. The Court rejected the claims, concluding that the law validly protected the best interests of minors. Rather than

look to record evidence of harm or consider narrower protections, the Court observed that it was "of the opinion" that minor's sexual activity "opens the door to sexual exploitation, physical harm, and sometimes psychological damage." *Id.* The State, the Court concluded, "unquestionably has a very compelling interest in preventing such conduct." *Id.* (quoting *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991)); *accord J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998) ("[W]e conclude that section 800.04, as applied herein, furthers the compelling interest of the State in the health and welfare of its children, through the least intrusive means, by prohibiting such conduct and attaching reasonable sanctions through the rehabilitative juvenile justice system."); *Reyes v. State*, 854 So. 2d 816, 818 (Fla. 4th DCA 2003) ("[T]he stated and patent public purpose of the Act is a sufficiently compelling state interest justifying such an intrusion on privacy.").

Here, the State's compelling interests are equally apparent. The New Law justifiably protects pregnant women from undergoing serious procedures without some minimal private time to reflect on the risks and consequences of the abortion. "[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (citations omitted). The Abortion Providers have not disputed this critical point, and the State

has an unassailable interest in addressing this reality. The abortion decision involves deeply personal considerations, and a brief reflection period is a reasonable and minimally intrusive means of ensuring that informed consent to abortion is knowing and voluntary.[8]

Separately, "the state also has a compelling interest in maintaining the integrity of the medical profession." *Krischer v. McIver*, 697 So. 2d 97, 103 (Fla. 1997). The New Law protects against physician encroachment on the private decisions of pregnant women in ways that could undermine informed consent. *See* Schenker & Meisel, 305 J. AM. MED. ASS'N, at 1131 ("Patients may feel pressure to sign the consent form because the clinician is waiting and feel hesitant to ask questions because a delay may disrupt the flow of a busy clinic or operating suite."). Providers have an obligation to afford breathing space for a woman's

[8] The State's interest in promoting thoughtful deliberation for important decisions is not unique to the abortion context. *See* § 63.082(4)(b), Fla. Stat. (48-hour waiting period before birth mother may consent to giving up newborn for adoption); Rule 64F-7.007, Fla. Admin. Code (30-day waiting period after informed consent before sterilization can be performed on Medicaid recipient); § 741.01, Fla. Stat. (3-day waiting period to obtain marriage license, unless both persons are Florida residents and have completed a State-sanctioned marriage preparation course within the previous 12 months); § 61.19, Fla. Stat. (20-day waiting period before divorce may be granted); *cf.* § 718.503(1)(a)1., Fla. Stat. (15-day rescission period for purchase of condominium from developer); § 718.503(2)(c)2., Fla. Stat. (3-day rescission period for purchase of condominium from non-developer); § 721.10(1), Fla. Stat. (10-day rescission period for purchase of timeshare).

contemplation of such a significant decision. This both enhances the integrity of the medical profession and reinforces the important doctrine of informed consent. *Cf. Presidential Women's Ctr.*, 937 So. 2d at 116 ("The doctrine of informed consent is well recognized, has a long history, and is grounded in the concepts of bodily integrity and patient autonomy.").

Finally, whether State interests justify the New Law ultimately turns on the voters' intent. The voters, after all, adopted the Privacy Amendment, and "the polestar of constitutional construction is voter intent." *Benjamin v. Tandem Healthcare, Inc*., 998 So. 2d 566, 570 (Fla. 2008); *accord In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 599 (Fla. 2012) ("When interpreting constitutional provisions, this Court endeavors to ascertain the will of the people in passing the amendment."); *City of St. Petersburg v. Briley, Wild & Assocs., Inc*., 239 So. 2d 817, 822 (Fla. 1970) ("We are obligated to give effect to [the] language [of a Constitutional amendment] according to its meaning and what the people must have understood it to mean when they approved it.").

If a purpose of the Privacy Amendment was to preclude this type of reasonable regulation, the ballot summary never apprised voters of it. The ballot summary simply told voters that the amendment proposed "the creation of Section 23 of Article I of the State Constitution establishing a constitutional right of

privacy." *See* Secretary of State website, available at http://dos.elections.myflorida.com/initiatives/fulltext/pdf/10-10.pdf. The ballot summary "is indicative of voter intent," *Graham v. Haridopolos*, 108 So. 3d 597, 605 (Fla. 2013); and, here, nothing in the ballot summary supports the trial court's expansive reading of the Privacy Amendment, *cf. id*. ("Nowhere in the ballot title or ballot summary does it indicate that the voters or framers intended for the Board of Governors to have authority over the setting of and appropriating for the expenditure of tuition and fees.").

In other contexts, the Florida Supreme Court has rejected expansive views of the Privacy Amendment to encompass "rights" the voters never intended. In *Stall v. State*, for example, the Court rejected the argument that the Privacy Amendment invalidated an obscenity statute. 570 So. 2d at 259. The Court found "no indication that the drafters of article I, section 23 meant to broaden the right of privacy as it relates to obscene materials." *Id.* at 262. Similarly, neither the trial court nor the Abortion Providers has pointed to any evidence that the voters in 1980 intended to preclude the same reasonable 24-hour abortion waiting period that a majority of other states have enacted. "Indeed, had the public been aware of such an application, we seriously doubt that the amendment would have been adopted." *Stall*, 570 So. 2d at 262.

Whatever the appropriate standard of review, the New Law satisfies it.[9] The trial court was wrong to hold that the State lacked sufficient interests to impose a 24-hour waiting period. But even if there were some conceivable set of circumstances in which the New Law could operate unconstitutionally, the trial court was wrong to enjoin the law's enforcement in all circumstances.

III. EVEN IF THE LAW WERE UNCONSTITUTIONAL AS APPLIED TO SOME, ENJOINING ALL ENFORCEMENT WAS ERROR.

This is a facial challenge, and the court provided facial relief—precluding enforcement of the New Law in any circumstance. R. I at 9. "Except in a First Amendment challenge, the fact that the act might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face; such a challenge must fail unless no set of circumstances exists in which the

[9] The Florida Supreme Court has never decided the appropriate level of scrutiny for laws regulating abortions that do not impose substantial burdens. In *In re T.W.*, the Court stated that "[i]nsignificant burdens during either period"—that is, before or after the end of the first trimester—are allowed when they "substantially further important state interests." 551 So. 2d at 1193. Because the Court found the burden in *T.W.* to be significant, its discussion about standards for insignificant burdens was dicta. *Cf. Wood v. Harry Harmon Insulation*, 511 So. 2d 690, 693 n.3 (Fla. 1st DCA 1987) (statements not essential to holding are dicta). Likewise, in *Florida Board of Bar Examiners*, the Florida Supreme Court declined to set a standard, explaining, "We need not make that decision in the present case since we find that the Board's action meets even the highest standard of the compelling state interest test." 443 So. 2d at 74. Regardless, under any level of scrutiny, the State interests here outweigh any hypothetical and insubstantial burdens the Abortion Providers have advanced.

statute can be constitutionally applied." *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012) (citations omitted); *accord Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005); *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004). This is not a First Amendment challenge, so as a matter of Florida law, the no-set-of-circumstances standard applies.[10] *Id.* Even in the privacy context, the Florida Supreme Court has not allowed the possibility of unconstitutional applications to facially invalidate a law. *See B.B. v. State*, 659 So. 2d 256, 260 (Fla. 1995) ("[W]e do not hold that section 794.05 [statutory rape law] is facially unconstitutional but only that it is unconstitutional as applied . . . ."); *see also J.A.S. v. State*, 705 So. 2d 1381, 1387 (Fla. 1998) (considering as-applied privacy challenge and noting that "[i]f we blinded ourselves to the unique facts of each case, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general").

The Abortion Providers base their allegations of harm on assumptions about unidentified women in hypothetical scenarios. But "[a] facial challenge considers only the text of the statute, not its application to a particular set of circumstances."

[10] The United States Supreme Court has not decided whether the no-set-of-circumstances test applies in federal abortion challenges. It has held, though, that at the least, a facial challenge fails when plaintiffs "have not demonstrated that the act would be unconstitutional in a large fraction of relevant cases." *Gonzales v. Carhart*, 550 U.S. at 167-68. The Abortion Providers cannot satisfy even this standard.

Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). Even if the law were unconstitutional as applied to a hypothetical woman facing the hypothetical circumstances the Abortion Providers present (and it would not be), that would not make it unconstitutional as applied to everyone. The trial court offered no basis for enjoining the law as applied to, for example, women who reside near providers and have ample financial resources, flexible work hours, and supportive family.

Because the Abortion Providers could not prove a significant burden in all cases—or even in most cases—the trial court erred in granting facial relief.

IV. THE ORDER IS DEFECTIVE ON ITS FACE BECAUSE IT MADE NO SPECIFIC FINDINGS.

The Abortion Providers cannot succeed on the merits because the New Law is constitutional as a matter of law. This ends the inquiry, because failure to establish a substantial likelihood of success on the merits precludes any temporary injunction. *See St. Johns Inv. Mgmt. Co*, 22 So. 3d at 731; *accord Naegele Outdoor Adver. Co*., 634 So. 2d at 753 ("It is not enough that a merely colorable claim is advanced."). But even putting aside the merits of the Abortion Providers' underlying claims, the trial court's order is defective. "Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a temporary injunction." *Weltman v. Riggs*, 141 So. 3d 729, 730 (Fla. 1st DCA 2014) (citations omitted). When a temporary injunction

order does not set forth factual findings supporting each of the four criteria, the Court must reverse. *Milin v. Nw. Fla. Land, L.C.*, 870 So. 2d 135, 137 (Fla. 1st DCA 2003). Here, the trial court made no real findings.

A. *The Trial Court Made No Findings Regarding Irreparable Harm*.

The trial court offered the conclusory statement that "Plaintiffs have shown . . . that irreparable harm will result if the [New Law] is not enjoined." A1 at 11. But it never explained what that harm was. It is not enough to "parrot each line of the four-prong test. Facts must be found." *Naegele Outdoor Advertising Co.*, 634 So. 2d at 754. Rather than find facts, as it was required to do, *id.*, the trial court lamented its ability to consider any evidence: "No witnesses were presented at the scheduled hearing, and no affidavits or verified statements of declarations were offered into evidence"; "There was no legislative history or other evidence presented to [the] Court," R. III at 348. Given the Abortion Providers' burden to establish all four factors, the lack of evidence should have led the trial court to deny relief. Instead, the court appeared to justify its injunction based on the *lack* of evidence: "[T]he Court has no evidence in front of it in which to make any factual determination that a 24-hour waiting period with the accompanying second trip necessitated by the same is not an additional burden on a woman's right of privacy under the Florida's [sic] Right of Privacy Clause." *Id.*

There is no factual finding to support the Abortion Providers' argument the New Law will irreparably harm women's rights. The Order cannot make up for its lack of factual findings by relying on "conclusory legal aphorisms." *Naegele Outdoor Advertising Co*., 634 So. 2d at 753. Because the Order is unsupported by any findings of irreparable harm, this Court should reverse.

B. *The Trial Court Made No Findings Regarding the Public Interest.*

The trial court's failure to make specific factual findings regarding the public interest offers an independent reason to reverse. As with the irreparable harm prong, the trial court relied on a single conclusory statement that "the relief requested will serve the public interest." R. II at 348. It never explained how, it never expressly considered any competing interests, and it never found any facts one way or the other. Its failure is fatal.

Had the court considered the public interest, it would have found a strong state interest against injunctive relief. First, the State has a significant interest in enforcing its democratically enacted legislation, which represents the will of Florida's voters. "[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland v. King*, 133 S. Ct. 1, 2

(2012) (Roberts, C.J., in chambers); *Manatee Cnty. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012) (in the context of an injunction, the "government's inability to enforce a duly enacted ordinance" is presumed harm to the public interest and a "disservice to the public").

More specifically, the State has a strong interest in protecting pregnant women. There is no dispute that, as the United States Supreme Court has made clear, "the government has a legitimate and substantial interest in preserving and promoting fetal life." *Gonzales v. Carhart*, 550 U.S. at 145.

In addition, a robust informed-consent law advances the public interest by protecting citizens' rights of bodily integrity and ensuring that citizens are free to make well-informed and uncoerced decisions regarding medical treatment. *Public Health Trust of Dade Cnty. v. Wons*, 541 So. 2d 96, 101 (Fla. 1989) (concluding that patients' right to informed consent must be accorded respect and outweighs the interests of the medical profession). Because "[w]hether to have an abortion requires a difficult and painful moral decision . . . [, t]he State has an interest in ensuring so grave a choice is well informed." *Gonzales*, 550 U.S. at 159 (citing *Casey*, 505 U.S. at 852-53).

CONCLUSION

Because the Abortion Providers failed to satisfy the high burden of demonstrating "a prima facie, clear legal right to the relief requested," *Naegele Outdoor Adver. Co.*, 659 So. 2d at 1048 (citation omitted), the trial court erred in granting injunctive relief. This Court should reverse.

Respectfully Submitted,

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