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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

PLAINTIFFS-PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

For more than forty years, Florida women have been able to obtain an abortion when they and their physicians deem it medically appropriate without interference from the state. Chapter 2015-118, § 1, Laws of Florida, codified at § 390.0111(3) ("the Mandatory Delay Law" or "the Act"), upends this status quo by requiring a woman seeking an abortion to delay her procedure by at least 24 hours and make an additional, medically unnecessary trip to her health care provider. The Act does not mandate that she receive any new information beyond what she currently receives under Florida law. It only imposes greater burden, stigma, and delay—and communicates the State's condescending message that a woman seeking an abortion, alone among patients, is unable to decide for herself when she is ready to make an informed decision about her medical care.

Plaintiffs-Petitioners Gainesville Woman Care, LLC, d/b/a Bread and Roses Women's Health Center ("Bread & Roses") and Medical Students for Choice (collectively, "Plaintiffs") brought this case to vindicate Florida women's fundamental rights under the Florida Constitution and sought an emergency temporary injunction. After a hearing at which Defendants-Respondents[1]

[1] Defendants-Respondents 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

(collectively, "the State") neither disputed Plaintiffs' evidence nor presented any of its own, the circuit court granted the temporary injunction. Faithfully applying this Court's precedent that all laws implicating the right to privacy, including significant restrictions on the right to abortion, are subject to strict scrutiny, the circuit court concluded that the Mandatory Delay Law is subject to and unlikely to satisfy that searching judicial review. The court further reasoned that enforcing this unconstitutional law would necessarily cause irreparable harm, and that enjoining such enforcement would necessarily serve the public interest. None of these conclusions was in error.

The Mandatory Delay Law affirmatively prevents a woman in Florida from exercising one of the "mo[st] personal [and] private decisions concerning one's body that one can make in the course of a lifetime," for a set period of time—at least 24 hours. *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989). No mandatory abortion delay law in this country has *ever* survived strict scrutiny, and the circuit court correctly concluded that the Florida Constitution's explicit right to privacy does not tolerate a different result. In reversing the temporary injunction, the First District Court of Appeal ("DCA") misconstrued this Court's binding precedent and

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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.

discounted the Florida Constitution's strong protection against governmental interference with private decisions. This Court should reverse that erroneous decision and reinstate the temporary injunction for the pendency of Plaintiffs' constitutional challenge.

STATEMENT OF THE CASE AND FACTS

Pre-Existing Informed Consent Laws in Florida

For a patient to give valid, informed consent to any medical treatment in Florida, the health professional must conform to an "accepted standard of medical practice among members of the medical profession" and provide information conveying three things: 1) the nature of the procedure, 2) the medically acceptable alternatives to the procedure, and 3) the procedure's substantial risks. § 766.103(3)(a)(1)-(2), Fla. Stat. This general informed consent law—which applies to all medical care in Florida, such as a colonoscopy, a vasectomy, a Botox injection, or a "dilation and curettage" procedure to complete a miscarriage—does not mandate that a patient delay his or her medical care after receiving the required information or make an additional visit to the doctor. *See id.*

In addition, Florida has an informed consent statute specific to abortion that largely mirrors this general informed consent statute. The abortion-specific law requires the physician to inform the patient of "[t]he nature and risks of undergoing or not undergoing" the abortion procedure, "[t]he probable gestational age of the

fetus, verified by an ultrasound,"[2] and "[t]he medical risks to the woman and fetus of carrying the pregnancy to term." § 390.0111(3)(a)(1)(a)-(c), Fla. Stat. This Court has found that the abortion-specific law is "comparable to the common law and to informed consent statutes implementing" it, including Florida's general informed consent statute. *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 120 (Fla. 2006).

The Mandatory Delay Law

The Mandatory Delay Law amends Florida's pre-existing abortion-specific law to require that a woman receive all the same information described above, but during a separate, medically unnecessary visit, and that she delay effectuating her decision to end her pregnancy for at least 24 hours. It does not require her to receive any new information beyond what pre-existing law already requires.

The Act contains two narrow exceptions. The first is for a woman who can "present[] 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

[2] Gestational age is necessary to explain the "procedure's substantial risks," as required under the general informed consent statute, § 766.103(3)(a)(1)-(2), Fla. Stat., because the risks associated with abortion increase as pregnancy advances, *see, e.g., N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 652 (Fla. 2003) ("*North Florida*") (Pariente, J., concurring).

trafficking." Chapter 2015-118, § 1, Laws of Florida, codified at § 390.0111(3)(a)(1)(c), Fla. Stat. This exception does not protect a woman who did not immediately report her assault to the authorities, whether because of fear, shame, trauma, or stigma. The second exception, which is a holdover from the existing abortion-specific law, is for a woman in a "medical emergency." § 390.0111(3)(a), Fla. Stat. The statute does not define "medical emergency," but specifies that a woman may obtain care without delay only if "continuation of the pregnancy would threaten [her] *life*." § 390.0111(3)(b), Fla. Stat. (emphasis added). This exception does not protect a woman with a pregnancy-related condition that threatens her health, but not necessarily her life. *See* Decl. of Christine L. Curry, M.D., Ph.D. ("Curry Decl."), attached hereto as App. A,[3] 7-8 (enumerating conditions that 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).

In passing the Mandatory Delay Law, the Legislature made no findings that the Act is necessary to ensure that women seeking abortions in Florida are adequately informed, or that the mandatory delay and additional-trip requirement

[3] Because the DCA Clerk has not yet filed the record in this Court (and is not required to do so until July 5, 2016), Plaintiffs cite instead to the Appendix filed concurrently with this brief. Plaintiffs confirmed this approach with several staff members in this Court's Clerk's Office.

will in fact enhance a woman's ability to make this private decision. *See* Temp. Inj. Order ("TI Order"), attached hereto as App. B, 10-11. Indeed, the Legislature made no findings at all. *See generally* § 390.0111, Fla. Stat. The Legislature also rejected numerous amendments that would have made the Act less intrusive, including by:

- allowing a woman to waive the Act's requirements and have the procedure on the same day that she receives the required information, thus creating an exception for a woman who is already informed about and certain of her decision to have an abortion (Amendment 213635);

- allowing a woman to receive the information over the phone or by viewing a web site, thus eliminating the need to make an additional, medically unnecessary trip to the physician (Amendments 853480 and 231828);

- creating an exception for a woman whose health, but not necessarily life, is threatened by continuing the pregnancy (Amendments 591932 and 113284);

- creating an exception for a woman who lives 100 miles or more away from the nearest abortion provider (Amendment 449942);

- creating an exception for a woman who receives a diagnosis of a severe fetal anomaly (Amendments 591932 and 113284);

- creating a broader exception for a victim of sexual assault (Amendments 874120, 888882, and 113284).

See H.B. 633—Informed Patient Consent, Fla. House of Representatives, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=53704& (last visited May 24, 2016) ("*H.B. 633 Legislative History*"); *S.B. 724—Termination of Pregnancies*, Fla. House of Representatives, http://myfloridahouse.gov/sections/Bills/billsdetail.aspx?BillId=53671 (last visited May 24, 2016) ("*S.B. 724 Legislative History*").

Procedural History

On June 10, 2015, Governor Rick Scott signed the Act into law with an effective date of July 1, 2015. The following day, on June 11, 2015, Plaintiffs filed this lawsuit alleging that the Mandatory Delay Law violates the Florida Constitution's Privacy and Equal Protection Clauses, and sought an emergency temporary injunction on their privacy claim pursuant to Florida Rule of Civil Procedure 1.610. Plaintiffs attached to their motion a declaration from Christine L. Curry, M.D., Ph.D., a board-certified obstetrician-gynecologist and an Assistant Professor at the University of Miami Hospitals and at Jackson Memorial Hospital, who attested to the ways the Act will harm her patients' physical and psychological health, will cause delays of longer than 24 hours for many women, and may prevent some women from obtaining an abortion altogether. *See generally* Curry Decl., App. A. Dr. Curry also attested to the inadequacies of the Act's narrow medical emergency exception. *See id.*[4] In its response to Plaintiffs' motion, the

[4] Plaintiffs also submitted the declarations of Kristin Davy, the owner and director of Bread & Roses, who attested to the harms the Mandatory Delay Law will impose on all of the clinic's patients, especially those who are low-income; Kenneth W. Goodman, Ph.D., the founder and director of the University of Miami Miller School of Medicine's Institute for Bioethics and Health Policy and co-director of the university's Ethics Programs, who attested to the ways in which the Act is contrary to the principles undergirding the informed consent process and undermines the doctor-patient relationship; Sheila Katz, Ph.D., who attested to the particular burdens the Act imposes on low-income women; and Lenore Walker, Ed.D., who attested to the Mandatory Delay Law's harmful effects on victims of

State neither disputed any of Plaintiffs' evidence nor submitted any declarations or evidence of its own. *See* TI Order, App. B at 8-9. Instead, the State argued that because the Act might pass federal constitutional muster, and because some states without independent constitutional privacy protections have imposed such restrictions, the Act cannot offend the Florida Constitution. At the June 24 hearing on Plaintiffs' motion, the parties presented no live witnesses, instead relying on the written pleadings and Plaintiffs' declarations.

On June 30, the circuit court issued its order temporarily enjoining the Mandatory Delay Law. The court identified the central legal question as whether strict scrutiny applies to the Act, as Plaintiffs contended, or whether the federal "undue burden" standard applies to the Act, as the State insisted. TI Order, App. B at 3-4. Finding that this Court has not "receded in any way from its rulings in *In re T.W.* or *North Florida Women's Health Counseling Services, Inc.*," and "has clearly stated that federal law has no bearing on Florida's more extensive right of privacy," the circuit court rejected the State's argument that "undue burden" is the appropriate test. *Id.* at 10-11. The circuit court noted that "Florida courts

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intimate partner violence and sexual assault. Although the State did not challenge the legal sufficiency of any of Plaintiffs' declarations, the trial court excluded these declarations *sua sponte* because they were not in conformance with § 92.525(2), Fla. Stat., which requires all declarations to be made "[u]nder penalties of perjury" and prohibits declarations made "to the best of [the declarant's] knowledge and belief" except where expressly permitted by law.

consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity," *id.* at 7 (quoting *North Florida*, 866 So. 2d at 635), and that the constitutional right to privacy is implicated—thus triggering strict scrutiny—by "significant" restrictions on the right to abortion, *id.* at 4, 8. Against that backdrop, the court applied strict scrutiny to the Mandatory Delay Law. *Id.* at 10-11. Finding that Plaintiffs were likely to succeed under this standard and that the other three elements of the temporary injunction test had also been met, the circuit court granted Plaintiffs' motion. *Id.* at 3-4, 9-11.

The state immediately filed a notice of appeal, triggering an automatic stay of the injunction. *See* Fla. R. App. P. 9.310(b)(2). On Plaintiffs' motion and after a July 2 telephonic hearing, the circuit court lifted the automatic stay. The State did not appeal the vacatur of the stay.

The DCA held oral argument on the State's appeal of the TI Order on February 9, 2016. On February 26, the DCA reversed the TI Order and also reversed, *sua sponte*, the circuit court's vacatur of the automatic stay, putting the Mandatory Delay Law into effect "immediately upon release of th[e] opinion." *See* DCA Order, attached hereto as App. C, 7. Later that same day, Plaintiffs filed in the DCA a notice to invoke this Court's discretionary jurisdiction pursuant to Art. V, § 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure

9.030(a)(2)(A)(ii), because the DCA Order expressly construes the Privacy Clause of the Florida Constitution. Plaintiffs also filed an emergency motion pursuant to Florida Rule of Appellate Procedure 9.310 asking the DCA to stay its order pending this Court's review. Plaintiffs attached a declaration from Kristin Davy, the owner and administrator of Bread & Roses, recounting the massive disruption and harm experienced by the 13 women scheduled for procedures at the clinic the day the DCA Order issued. The DCA denied that motion on March 14.

Plaintiffs filed their jurisdictional brief in this Court on March 7. On March 14, Plaintiffs filed an emergency motion asking this Court to review and reverse the DCA's denial of stay. Plaintiffs argued that the Mandatory Delay Law was causing a constellation of harms, including: (1) significantly impinging the constitutional rights of Plaintiffs' patients; (2) jeopardizing women's health by delaying the abortion procedure, often by far longer than 24 hours and sometimes past the point in pregnancy at which a woman can obtain a medication abortion (involving drugs rather than a surgical procedure); (3) forcing delays even on women who seek abortions to protect their medical well-being, or because they have received a diagnosis of a severe fetal anomaly; (4) increasing the risk that a woman's partner, family member, employer, co-workers or others will discover that she is having an abortion; and (5) substantially increasing the costs and logistical

burdens of accessing abortion, which is particularly harmful to women already struggling to make ends meet.

On April 22, 2016, this Court granted Plaintiffs' motion for a stay of the DCA Order, thus reinstating the temporary injunction pending this Court's decision whether to accept jurisdiction. On May 5, 2016, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Mandatory Delay Law affirmatively prevents a woman in Florida from exercising her right to abortion for a set period of time. Florida law subjects no patient other than a woman seeking an abortion to such governmental interference.

The circuit court properly entered a temporary injunction to maintain the status quo that has existed in Florida for over 40 years and to prevent this unprecedented violation of Florida women's constitutional rights. The court was correct to conclude that this intrusion into a woman's private decision-making around pregnancy implicates the right to privacy, and that the Act is therefore subject to strict scrutiny.

No mandatory abortion delay law in this country has ever survived strict scrutiny. Even if the State had submitted any evidence, introduced any legislative findings, or attempted to dispute any of Plaintiffs' evidence, the circuit court would still have been correct to conclude that the Florida Constitution's *explicit* right to privacy does not allow for lesser protection than courts have consistently found

under the federal Constitution's *implicit* right to privacy. But the State did none of those things. Its sole defense—that some other courts have upheld similar mandates under federal law—fails as a matter of law; as this Court has already made clear, "Floridians deliberately opted for substantially more protection than the federal charter provides." *North Florida*, 866 So. 2d at 636. In light of the State's concession that Plaintiffs would have no adequate remedy at law if the Act were enforced and then found to be unconstitutional, and having already found that the Mandatory Delay Law is likely unconstitutional, the circuit court made no legal error in concluding that its enforcement would cause irreparable harm, and that enjoining such enforcement would serve the public interest.

In reversing the circuit court's decision, the DCA raised the bar for when strict scrutiny applies to a law infringing upon the right to abortion, flouted this Court's holding that "evolutions in federal law," DCA Order, App. C at 5, are irrelevant to the Florida Constitution's explicit right to privacy, and dramatically expanded the list of state interests that could be considered sufficiently compelling to justify an intrusion on the right to privacy. This Court should reject the DCA's flawed analysis and reinstate the temporary injunction for the remainder of the litigation.

ARGUMENT

I. STANDARD OF REVIEW

"One critical purpose of [a] temporary injunction[] is to prevent injury so that a party will not be forced to seek redress for damages after they have occurred. The granting of a temporary injunction rests in the trial court's sound judicial discretion . . . ." *Bailey v. Christo*, 453 So. 2d 1134, 1137 (Fla. 1st DCA 1984) (citing *Lewis v. Peters*, 66 So. 2d 489 (Fla. 1953) and *Decumbe v. Smith*, 196 So. 595 (Fla. 1940)). "[T]rial court orders are clothed with a presumption of correctness" and should "remain undisturbed unless the [challenging] party can show reversible error." *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 961 (Fla. 2002), *superseded by constitutional amendment on other grounds as stated in Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053 (Fla. 2010); *see also Bailey*, 453 So. 2d at 1136. To the extent it rests on factual matters, a temporary injunction order "lies within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion." *Coal. to Reduce Class Size*, 827 So. 2d at 961 (quoting *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d 664, 670 (Fla. 1993)); *see also Alachua Cty. v. Lewis Oil Co.*, 516 So. 2d 1033, 1035 (Fla. 1st DCA 1987). Purely legal determinations are reviewed de novo. *Coal. to Reduce Class Size*, 827 So. 2d at 961.

II. FLORIDA'S EXPLICIT RIGHT TO PRIVACY IS BROADER THAN THE FEDERAL RIGHT TO PRIVACY AND STRICTLY PROTECTS THE FUNDAMENTAL RIGHT TO ABORTION.

Florida is one of only five states with an explicit privacy provision in its constitution, which guarantees each person the right "to be let alone and free from governmental intrusion into [his or her] private life." Art. I, § 23, FLA. CONST.; *see also* ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; HAW. CONST. art. I, § 6; MONT. CONST. art. II, § 10. This amendment, which was added to the Constitution directly by Florida citizens in a 1980 general election, *North Florida*, 866 So. 2d at 619, "was intentionally phrased in strong terms . . . . in order to make the privacy right as strong as possible," *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985).

This explicit privacy right includes the right to decide whether to continue a pregnancy or have an abortion. Indeed, the Florida Constitution "embodies the principle that '[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental.'" *In re T.W.*, 551 So. 2d at 1193 (alterations in original) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986)).

Because the Florida Constitution so strongly protects the right to privacy, including the right to abortion, "[l]egislation intruding on [that] fundamental right is presumptively invalid and . . . must meet the 'strict' scrutiny standard." *North Florida*, 866 So. 2d at 639 (footnote omitted); *see also Winfield*, 477 So. 2d at 547 ("The right of privacy is a fundamental right which we believe demands the compelling state interest standard."). Strict scrutiny applies "whenever the Right of Privacy Clause [is] implicated, regardless of the nature of the activity." *North Florida*, 866 So. 2d at 635; *see also State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004) (same); *Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999) (same); *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998) (same).

Significantly, the Florida Constitution protects a woman's right to reproductive privacy more robustly than does the federal Constitution. Because Florida's Constitution contains an explicit right to privacy, this Court has long held that it "embraces more privacy interests, and extends more protection . . . than does the Federal Constitution," which contains only an implicit right to privacy. *In re T.W.*, 551 So. 2d at 1192; *see also North Florida*, 866 So. 2d at 619, 634 ("While the United States Supreme Court has read into the federal constitution an *implicit* right of privacy, that particular right is a weak version of our *explicit* freestanding state right." (footnote omitted)). Thus, laws intruding upon a woman's abortion decision are scrutinized more stringently under Florida law than under the

prevailing federal "undue burden" standard announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See North Florida*, 866 So. 2d at 635-36.

The standards of review under the federal Constitution and the Florida Constitution did not always so diverge. Prior to the U.S. Supreme Court's decision in *Casey*, for nearly two decades, the federal Constitution and the Florida Constitution both required strict scrutiny of laws interfering with a woman's decision to end her pregnancy. *Compare Roe v. Wade*, 410 U.S. 113, 155 (1973), *with In re T.W.*, 551 So. 2d at 1192. After the U.S. Supreme Court lowered the federal constitutional standard to permit any law that does not pose an "undue burden" on the right to abortion, the State asked this Court to follow suit. This Court expressly declined, refusing to "abandon an extensive body of clear and settled Florida precedent in favor of an ambiguous federal standard," or to "forsake the will of the people." *North Florida*, 866 So. 2d at 635-36. This Court underscored that the Florida Constitution's protections of a woman's reproductive privacy must be greater than those under the federal Constitution, for while "*there is no express federal right of privacy clause*[,] Florida is one of only a handful of states wherein the state constitution includes an independent, freestanding Right of Privacy Clause." *Id.* at 634 (footnote omitted) (emphasis in original). Indeed, "[i]n adopting the privacy amendment, Floridians deliberately opted for substantially

more protection than the federal charter provides." *Id.* at 636.[5] Accordingly, this Court has continued to apply strict scrutiny to laws that infringe upon a woman's fundamental right to abortion. *See id.* at 631.

III. THE ACT IS SUBJECT TO STRICT SCRUTINY AS A MATTER OF LAW AND NOT, AS THE DCA ERRONEOUSLY HELD, ONLY UPON FACTUAL FINDINGS OF BURDEN.

This Court has identified two questions relevant to determining whether a law regulating abortion violates the Florida Constitution. First, a court must determine whether the "legislative act imposes a significant restriction on a woman's (or minor's) right to seek an abortion." *Id.* at 621. Second, if the law imposes a significant restriction, then strict scrutiny applies and the State bears the burden of demonstrating that the law "further[s] a compelling State interest through the least intrusive means." *Id.* at 621; *see also id.* at 631. While the case law does not define "significant," Florida courts, including this Court, "consistently have applied the 'strict' scrutiny standard whenever the Right of

[5] Florida voters reasserted their will in 2012, when they defeated a ballot initiative that would have rolled back the independent state constitutional protection of abortion in favor of the lower federal constitutional standard. *See Initiative Information: Prohibition on Public Funding of Abortions; Construction of Abortion Rights*, Fla. Dep't of State, Division of Elections, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82 (last visited May 24, 2016). By contrast, in 2004, Florida voters did ratify a separate ballot initiative that authorized the Legislature to enact a parental notification requirement for minors seeking an abortion. *See* Art. X, § 22, FLA. CONST.

Privacy Clause was *implicated*, regardless of the nature of the activity." *Id.* at 635 (emphasis added); *see also In re T.W.*, 551 So. 2d at 1195 ("[T]he Florida Constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated."). In other words, a "significant" restriction subject to strict scrutiny is one that "implicates" the right to privacy.[6]

Under Florida law, if it is apparent from a law's plain terms that it meaningfully intrudes upon a person's reasonable expectation of privacy, a court need not consider the burden the law imposes on affected persons in order to conclude that it implicates the right to privacy.[7] Indeed, this Court has repeatedly applied strict scrutiny to laws that intrude upon an individual's reasonable expectation of privacy without first assessing the extent of the burden imposed by the law. *See, e.g.*, *T.M. v. State*, 784 So. 2d 442, 444 (Fla. 2001) (agreeing with the parties that strict scrutiny applies to juvenile curfew ordinances, without any

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[6] By contrast, an insignificant restriction on abortion is a "minor regulation" that merely "touch[es] on" the fundamental right. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 430 (1983), *overruled on other grounds by Casey*, 505 U.S. 833. Insignificant restrictions on abortion are also prohibited by the Privacy Clause unless they "substantially further important state interests." *In re T.W.*, 551 So. 2d at 1193 (citing *City of Akron*, 462 U.S. at 430).

[7] Evidence of burden can, of course, provide an alternative route to the same conclusion, *see, e.g.*, *North Florida*, 866 So. 2d at 632 (relying on circuit court's evidentiary findings), but the question presented here is only whether a court can *require* specific evidence of burden as a prerequisite to determining whether a law regulating abortion implicates the right to privacy.

discussion of the percentage of juveniles who would be exempt from the curfew or whether those juveniles who were subject to the curfew would in fact be harmed by six- or seven-hour restrictions on travel); *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996) ("Certainly the imposition, by the State, of grandparental visitation rights implicates the privacy rights of the Florida Constitution.");[8] *Winfield*, 477 So. 2d at 548 (applying strict scrutiny to administrative subpoena of financial records without any discussion of the potential burden posed by their release, because subpoenaing the records intruded upon an individual's legitimate expectation of privacy as a matter of law).[9]

This Court's abortion jurisprudence, including *State v. Presidential Women's Center*, adheres to precisely this framework. This Court framed the issue in *Presidential* as whether it would be reasonable to *exempt* abortion from an informed consent requirement. *See* 937 So. 2d at 118. Finding "[n]o legitimate reason" that abortion providers "should not have an obligation to notify their

[8] In *Beagle*, the parties also conceded that "a privacy analysis under our constitutional provision is required." 678 So. 2d at 1275. This Court in no way suggested, however, that factual findings on burden would have been a prerequisite to the constitutional privacy analysis if not for that concession. To the contrary, this Court's language indicates that the intrusion into the privacy right was self-evident.

[9] *Cf., e.g.*, *State v. Catalano*, 104 So. 3d 1069, 1079 (Fla. 2012) (applying strict scrutiny to content-based speech restriction as a matter of law); *Simmons v. State*, 944 So. 2d 317, 328-29 (Fla. 2006) (same).

patients of the risks and alternatives to the procedures," or that abortion patients would be "less concerned than patients having other medical treatments with regard to the risks and alternatives of that medical procedure," this Court answered that question in the negative. *Id.* Under the limiting construction adopted by the State "[a]s [the] case . . . developed, and during oral argument," *id.* at 119, this Court concluded that the abortion-specific informed consent law was "comparable to the common law and to informed consent statutes implementing the common law that exist for other types of medical procedures." *Id.* at 120. In other words, the abortion-specific informed consent law, as eventually construed by the State on appeal, was not a restriction on abortion at all, and thus did not "generate the need for an analysis on the issue of constitutional privacy." *Id.* at 118.

It is apparent from the Mandatory Delay Law's plain terms that it implicates the right to privacy. The Act prevents a woman who has made the decision to have an abortion from effectuating her decision for a minimum period of 24 hours, even after she has given what in all other medical contexts the State would accept as informed consent. In other words, it "tell[s] a woman that she cannot exercise a fundamental constitutional right for a 24-hour period." *Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *9 (Mont. Dist. Ct. Mar. 12, 1999) (striking down a 24-hour abortion delay mandate under Montana's explicit constitutional privacy clause), attached hereto as App. D. This

mandate applies "regardless of a woman's frame of mind, despite her doctor's contrary medical judgment, regardless of whether she previously had an abortion, and notwithstanding her possible medical sophistication." *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1145-46 (D.R.I. 1982). "It is difficult to argue that such an intrusion by the state does not unconstitutionally burden the abortion decision." *Id.* at 1146. Moreover, the Mandatory Delay Law forces a woman to make an additional, medically unnecessary trip to her health care provider—a condition that even many other states with mandatory delay laws, such as Florida's neighbors Alabama, Georgia, and South Carolina, do not impose.[10]

Accordingly, courts using the same analytical framework that this Court applies have uniformly held that mandatory delay laws implicate the fundamental right to privacy and must therefore survive strict scrutiny. *See, e.g.*, *City of Akron*, 462 U.S. at 450-51 ("[I]f a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision."); *Planned Parenthood*

[10] Laws permitting mandatory abortion information to be provided without an additional doctor's visit: Ala. Code § 26-23A-4(a) (by mail); Ga. Code Ann. § 31-9A-3(1) (by telephone); Ky. Rev. Stat. Ann. § 311.725(1)(a) (by telephone); Minn. Stat. § 145.4242(a)(1) (by telephone); Neb. Rev. Stat. § 28-327(2) (by telephone); N.D. Cent. Code § 14-02.1-02(11) (by telephone); S.C. Code Ann. § 44-41-330(D) (by mail); W. Va. Code § 16-2I-2(a) (by telephone).

League of Mass. v. Bellotti, 641 F.2d 1006, 1014 (1st Cir. 1981) (the mandatory delay "temporarily forecloses the availability of an abortion altogether" and therefore "constitutes a 'state-created obstacle' and 'direct state interference.'" (quoting *Maher v. Roe*, 432 U.S. 464, 473-75 (1977)); *Margaret S. v. Edwards*, 488 F. Supp. 181, 213 (E.D. La. 1980) (the mandatory delay requirement is a "direct obstacle" to having an abortion and "means that, even after a decision to have an abortion has been made, irrespective of how carefully and thoughtfully, the woman must wait for (twenty-four) hours. . . . That is a burden." (alteration in original) (internal quotation marks omitted)); *Women's Cmty. Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 550 (D. Me. 1979) ("[A] woman who has chosen to have an abortion would be prevented, at least temporarily from effectuating that decision."). Indeed, *no* court applying strict scrutiny has found that such requirements are so insignificant as not to implicate the right to privacy and trigger strict scrutiny.

When Montana, one of only four states besides Florida with an explicit constitutional privacy clause, attempted to impose a 24-hour mandatory delay for abortions, the state court found that it was subject to, and failed, strict scrutiny based on the law's plain terms. The Montana court explained:

> The question then arises, does this 24-hour waiting period infringe on a woman's right to privacy? The Court holds that it does. . . . 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 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.

Planned Parenthood of Missoula, 1999 Mont. Dist. LEXIS 1117, at *9-10, App. D at 3; *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985) (relying on case law, rather than evidence, to find that a 24-hour mandatory delay law "places a direct and substantial burden on women who seek to obtain an abortion"), *aff'd*, 484 U.S. 171 (1987).

The DCA erred in holding that the circuit court could not apply strict scrutiny without first making factual findings on the burden the Mandatory Delay Law would impose. Were the DCA's interpretation correct, even a law that affirmatively prevents a woman from effectuating her decision to have an abortion for two weeks, or that bans abortion outright, would not be subject to strict scrutiny unless and until a circuit court issues factual findings on the harms that such a law would impose. A mandatory delay of a minimum of 24 hours, while briefer, is no less patent an infringement of a woman's fundamental right to privacy. *See, e.g.*, *Eubanks v. Brown*, 604 F. Supp. 141, 145-46 (W.D. Ky. 1984) (invalidating two-hour mandatory delay law for abortion).

Because the Mandatory Delay Law on its face implicates the right "to be let alone and free from governmental intrusion into [his or her] private life," Art. I, § 23, FLA. CONST, the circuit court correctly found that it is subject to strict scrutiny.

IV. THE CIRCUIT COURT PROPERLY HELD THAT THE STATE WAS AND WOULD BE UNABLE TO SHOW THAT THE ACT SATISFIES STRICT SCRUTINY.

Because the Mandatory Delay Law intrudes upon the fundamental right to abortion, it is "presumptively unconstitutional unless proved valid by the State." *North Florida*, 866 So. 2d at 626. The State bears the evidentiary "burden of proof to . . . justify an intrusion on privacy," and in order to meet this burden, the State must demonstrate "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *In re T.W.*, 551 So. 2d at 1192 (quoting *Winfield*, 477 So. 2d at 547). As a matter of law, the State did not and cannot meet this "highly stringent standard." *North Florida*, 866 So. 2d at 620 (quoting *In re T.W.*, 551 So. 2d at 1192).

No mandatory abortion delay law in this country has *ever* survived strict scrutiny.[11] Indeed, mandatory delays of as little as two hours have been invalidated

[11] *See, e.g.*, *City of Akron*, 462 U.S. at 449-51; *Zbaraz*, 763 F.2d at 1535-39; *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *supplemented by* 664 F.2d 687 (8th Cir. 1981), *rev'd on other grounds*, 462 U.S. 476 (1983); *Bellotti*, 641 F.2d at 1014-16; *Charles v. Carey*, 627

under the same constitutional framework that Florida courts apply. *Eubanks*, 604 F. Supp. at 145-46. Courts across the country have consistently held that mandatory delays—particularly those that require a woman to make an additional, medically unnecessary visit to her physician—infringe upon the right to abortion and do not further a compelling state interest using the least intrusive means.

Florida's explicit constitutional right to privacy will not allow a different result here. In *City of Akron*—on which this Court relied in articulating the state constitutional standard of review for restrictions on abortion, *In re T.W.*, 551 So. 2d at 1193 (quoting *City of Akron*, 462 U.S. at 429-30)—the U.S. Supreme Court struck down a 24-hour mandatory delay for abortions. It cannot be the case that a 24-hour mandatory delay law would be invalid under *Roe v. Wade*, and yet lawful

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F.2d 772, 785-86 (7th Cir. 1980); *Wynn v. Carey*, 599 F.2d 193, 196 n.6 (7th Cir. 1979); *Eubanks*, 604 F. Supp. at 145-46; *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 552 F. Supp. 791, 797-98 (E.D. Pa. 1982); *Women's Med. Ctr. of Providence, Inc.*, 530 F. Supp. at 1145-47; *Margaret S.*, 488 F. Supp. at 212-13; *Leigh v. Olson*, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980); *Women's Cmty. Health Ctr., Inc.*, 477 F. Supp. at 550-51; *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 22-24 (Tenn. 2000); *Mahaffey v. Attorney Gen. of Mich.*, No. 94-406793, 1994 WL 394970, at *6-7 (Mich. Cir. Ct. July 15, 1994), *rev'd on other grounds sub nom. Mahaffey v. Attorney Gen.*, 564 N.W.2d 104 (Mich. Ct. App. 1997). The very few decisions upholding a mandatory delay law under strict scrutiny were either reversed on appeal or overruled by a later decision of the same court. *Wolfe v. Schroering*, 541 F.2d 523, 526 (6th Cir. 1976), *effectively overruled by Akron Ctr. for Repro. Health, Inc. v. City of Akron*, 651 F.2d 1198, 1208 (6th Cir. 1981); *Akron Ctr. for Repro. Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1205 (N.D. Ohio 1979), *reversed in relevant part by same*.

under the Florida Constitution's *explicit* right to privacy. *See North Florida*, 866 So. 2d at 634 (rejecting the "undue burden" standard later established by the U.S. Supreme Court in *Planned Parenthood v. Casey* and continuing to apply *Roe*'s strict scrutiny standard to laws that infringe on a woman's fundamental right to abortion).

A. The State Did Not and Cannot Show That the Act Furthers a Compelling State Interest, and the DCA's Expanded List of Potentially Compelling Interests Defies This Court's Precedent.

The circuit court made two key factual findings in support of its conclusion that the State cannot satisfy the compelling interest standard: First, the court found that the State "failed . . . to provide . . . 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* [sic] *Center*." TI Order, App. B at 10-11. The circuit court also noted the absence of any legislative findings that the Mandatory Delay Law is necessary to ensure that women seeking abortions in Florida are adequately informed, or that requiring a woman who has already decided to have an abortion to delay her procedure and make an additional trip to her physician would in fact enhance her ability to make this private decision. *Id.*; *see generally* § 390.0111, Fla. Stat. Indeed, under Florida's pre-existing informed consent law for abortion, a woman can already take all the time she needs to decide whether to have an abortion, both before she

arrives at the clinic and after she receives the required counseling information. The State presented no evidence whatsoever to show that this pre-existing informed consent regime is inadequate.

If the DCA is correct that the circuit court's finding on this point is legally insufficient to support a temporary injunction, *see* DCA Order, App. C at 5-6—i.e., if a circuit court can only make factual findings based on the evidence before it, not based on the failure to introduce any such evidence—then the State could *always* defeat a motion for a temporary injunction by withholding any evidence as to whether a challenged statute advances a compelling interest. That cannot be the law.

Second, the circuit court found that the State does not impose parallel restrictions on comparable medical procedures. TI Order, App. B at 10 (citing Curry Decl., App. A at 4). For instance, a patient who needs a dilation and curettage ("D&C") procedure to complete a miscarriage is not subject to a mandatory delay, but a patient who needs a nearly identical D&C procedure for purposes of an abortion must delay her care. *See* Curry Decl., App. A at 4. Nor is a man seeking a vasectomy (a surgical sterilization procedure) subject to a similar 24-hour delay under Florida law; the Legislature rejected an amendment that would have imposed such a requirement. *See H.B. 633 Legislative History*. Indeed, *no* other medical care, regardless of the danger it poses to a patient's life or health,

is subject to such interference under Florida law. *See* § 766.103(3)(a)(1)-(2), Fla. Stat.; *Fla. House of Representatives* (recording of proceedings Apr. 22, 2015), *available at* http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015041243&TermID=86, 1:27:55-1:28:04 (Bill Sponsor Rep. Sullivan conceding that no other health care is subject to a mandatory delay under Florida law).

The State failed to offer evidence of a compelling state interest in treating a woman seeking an abortion, *unlike any other patient*, as unable to determine for herself when she is ready to make an informed decision about her medical care. *See* TI Order, App. B at 10. This differential treatment undermines any purported state interest in ensuring that women are adequately informed and is fatal to the State's claim. *See North Florida*, 866 So. 2d at 650-51 ("[T]he fact that the Legislature has not chosen to require parental notification relating to other pregnancy-related conditions that are more dangerous than abortion" indicates that the purpose of the parental notification law is not to further a compelling interest in protecting minors' health but is "instead, . . . to infringe on the minor's right to choose an abortion."); *In re T.W.*, 551 So. 2d at 1195 (same). As with the laws at issue in *North Florida* and *In re T.W.*, the lack of any similar requirements for other, far more dangerous medical services strongly suggests that the true purpose of the Act is not to protect the health of Florida women, but to interfere with

Florida women's constitutionally protected right to decide to end a pregnancy. *Cf.* Curry Decl., App. A at 3 (explaining that abortion is "one of the safest medical procedures in the United States and is substantially safer than childbirth").

Finally, the DCA Order defies this Court's precedent on what constitutes a compelling state interest. This Court has recognized only two compelling state interests in the abortion context: the promotion of maternal health,[12] which becomes compelling no earlier than the beginning of the second trimester; and potential life, which becomes compelling only upon viability. *In re T.W.*, 551 So. 2d at 1193. By contrast, the DCA held that a circuit court applying strict scrutiny to an abortion restriction—even a restriction that applies in the first trimester of pregnancy—must consider whether the State has a compelling interest, *inter alia*, "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." DCA Order, App. C at 6. Under this Court's precedent, none of these purported interests can support a significant restriction on a woman's

[12] The Mandatory Delay Law cannot possibly further an interest in maternal health, as it forces a woman to delay her abortion even when doing so will *jeopardize* her health. § 390.0111(3)(b), Fla. Stat. Indeed, the Legislature rejected two amendments that would have incorporated an exception for a woman whose health, though not necessarily life, was threatened by continuing the pregnancy. *See H.B. 633 Legislative History; S.B. 724 Legislative History*.

decision to have a pre-viability abortion. *In re T.W.*, 551 So. 2d at 1193-94. Indeed, the DCA's suggestion that the State might have a compelling interest in "protecting the viability of a duly-enacted state law"—and the DCA's holding that the circuit court erred in failing to issue findings on such an interest—would render the highest level of judicial review toothless in almost all cases.

The circuit court's factual findings on the compelling interest test were clearly sufficient to support its conclusion that Plaintiffs are likely to succeed in proving that the Mandatory Delay Law is unconstitutional.

B. The State Did Not and Cannot Show That the Act Employs the Least Intrusive Means.

Even if the State could establish that the Act furthers a compelling state interest—which it cannot—it cannot show that the Act furthers any such interest using "the least intrusive means." *In re T.W.*, 551 So. 2d at 1192. Under strict scrutiny, there must be a "nexus between the asserted interests and the means chosen" and the court must examine whether the challenged law employs "the least restrictive alternative to achieve the goals." *J.P.*, 907 So. 2d at 1117. Thus, the State bears the burden of proving that less intrusive alternatives would be less effective than a mandatory delay and additional-trip requirement in furthering a compelling interest. *See Winfield*, 477 So. 2d at 548. The State did not, and cannot, meet this test.

The Florida Legislature could easily have added to the pre-existing informed consent law's requirements in a less intrusive way, as evidenced by the numerous amendments it rejected. For example, Amendment 213635 would have allowed a woman to waive the Act's requirements if she were already certain of her decision. *H.B. 633 Legislative History*. Amendments 853480 and 231828 would have allowed a woman to receive the required information in advance of the procedure over the phone or by viewing a web site, thus eliminating the need for an additional, medically unnecessary visit to her physician. *Id.*; *S.B. 724 Legislative History*.

Other rejected amendments would have alleviated the intrusion the Act will impose on specific groups of women, including by creating exceptions for: a woman whose health, but not necessarily life, is jeopardized by continuing a pregnancy (Amendments 591932 and 113284), a woman who lives more than 100 miles away from the nearest abortion provider (Amendment 449942), or a woman who receives a diagnosis of a severe fetal anomaly (Amendments 591932 and 113284). *H.B. 633 Legislative History*; *S.B. 724 Legislative History*. Several rejected amendments would have created broader and more meaningful exceptions for victims of sexual assault (Amendments 874120, 888882, and 113284). *H.B. 633 Legislative History*; *S.B. 724 Legislative History*.

Indeed, many of the rejected amendments reflect the current practices under other states' mandatory delay laws, further demonstrating that the Act does not utilize the least intrusive means.[13] *See North Florida*, 866 So. 2d at 642 (Anstead, C.J., concurring) (explaining that challenged law was not the least intrusive means because other states have "less intrusive schemes that serve the same purpose"). The Legislature's rejection of these exceptions highlights the Act's over-breadth. *See Bellotti*, 641 F.2d at 1016 (finding mandatory delay not to be narrowly tailored because, *inter alia*, "[n]o . . . exception is made . . . for the many women who have in fact known all the information imparted by the form long in advance of visiting an abortion clinic"); *J.P.*, 907 So. 2d at 1117 (holding that Florida juvenile curfew did not use least intrusive means where, *inter alia*, "the curfews apply throughout the cities without any showing of a city-wide need or problem").

In sum, the Mandatory Delay Law does not further a compelling interest, and even if it did, it does not employ the least intrusive means. Thus, the circuit court correctly found that the Act fails strict scrutiny and that Plaintiffs are likely to succeed on the merits of their privacy claim.

[13] *See supra* note 9.

V. THE CIRCUIT COURT PROPERLY HELD THAT PLAINTIFFS SATISFIED THE OTHER REQUIREMENTS FOR A TEMPORARY INJUNCTION.

The circuit court explained at the outset of its TI Order that the State had "concede[d] the unavailability of an adequate remedy at law if the law goes into effect and is found to be unconstitutional." TI Order, App. B at 3. Having so established, the court explained that its "decision on whether Plaintiffs ha[d] carried their burden to show" a likelihood of success on the merits—i.e., proved that the Mandatory Delay Law is likely to be found unconstitutional—"will provide the answers to whether there is irreparable harm and determine the public interest issue." *Id.* at 3-4. The court's findings on the constitutional question would thus dispose of the other two contested requirements. While the circuit court had sufficient evidence before it on which to make additional findings of harm, there was no error in its conclusion that the imminent threat of constitutional injury alone was sufficient to warrant a temporary injunction.

As the State conceded, there is no adequate remedy for the harm caused by enforcing an unconstitutional law. *See, e.g.*, *Coal. to Reduce Class Size v. Harris*, No. 02-CA-1490, 2002 WL1809005, at *2 (Fla. Cir. Ct. July 17, 2002) (holding that plaintiffs would suffer irreparable injury in light of "the time constraints involved" and the "significant impact on the[ir] state and federal constitutional rights"), *aff'd sub nom. Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959 (Fla.

2002); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (a loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (the "right of privacy" is an "area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury"); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014) (loss of constitutional rights constitutes irreparable injury). Nor is the injury to Plaintiffs flowing from the direct interference with the physician-patient relationship remediable: even if that injury could be quantified, which it cannot, Plaintiffs cannot seek damages from the State. *Stephens v. Geoghegan*, 702 So. 2d 517, 521 n.1 (Fla. 2d DCA 1997) ("[A] [v]iolation of privacy provisions of the Florida Constitution does not give rise to a cause of action for money damages" (citation omitted)); *Tucker v. Resha*, 634 So. 2d 756, 759 (Fla. 1st DCA 1994) (finding no legislative waiver of sovereign immunity as to the privacy provision of the Florida Constitution, and therefore concluding that money damages are not available for violations of that right), *aff'd on other grounds*, 670 So. 2d 56 (Fla. 1996); *Thompson v. Planning Comm'n of Jacksonville*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985) (where calculation of damages is speculative, legal remedy is inadequate).

The DCA Order disregarded this precedent by demanding a finding of harm separate and apart from the constitutional injury. Under First DCA precedent, a court entering a temporary injunction must set forth sufficient factual findings to support each of the four prongs of the temporary injunction test: (1) substantial likelihood of success on the merits, (2) lack of adequate legal remedy, (3) likelihood of irreparable harm, and (4) that the public interest supports the injunction. DCA Order, App. C at 3. However, there is no requirement under Florida law that the four prongs of this test each be supported by a *unique* factual finding. Indeed, Florida courts often rely on the same facts to support multiple prongs of the temporary injunction test. *See, e.g.*, *NRD Invs., Inc. v. Velasquez*, 976 So. 2d 1, 3-5 (Fla. 3d DCA 2007) (fact that new construction would interfere with plaintiff's medical practice supported both irreparable harm and public interest prongs of TI test); *East v. Aqua Gaming, Inc.*, 805 So.2d 932, 934 (Fla. 2d DCA 2001) (fact that defendant intended to use trade secrets to compete with former employer supported irreparable injury, lack of adequate remedy, and public interest prongs of TI test); *Vargas v. Vargas*, 771 So. 2d 594, 595-96 (Fla. 3d DCA 2000) (fact of plaintiffs' ownership interest in subject assets supported irreparable harm, lack of adequate remedy, and likelihood of success prongs of TI test). That is precisely what the circuit court did here: The factual findings supporting its conclusion that the State could not satisfy the compelling interest test also

supported its conclusion that enforcing the Mandatory Delay Law would likely cause irreparable constitutional harm, and that enjoining such enforcement would serve the public interest.

VI. THE CIRCUIT COURT PROPERLY GRANTED A FACIAL INJUNCTION.

Finally, the DCA held that the circuit court erred in failing to specify whether or not it applied the "no set of circumstances" test before providing facial injunctive relief, as the State contended that it should. This specification was unnecessary, however, because even if Plaintiffs were required to satisfy the "no set of circumstances" test—which, as explained *infra*, they are not—facial relief was proper.

Remedy is dictated by the scope of the violation that Plaintiffs have proven. *Cf. City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2458 (2015) (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting) ("[T]he effect of a given case is a function . . . [of] the narrowness or breadth of the ground that the Court relies upon in disposing of it."). As such, where a law poses a "total and fatal conflict with applicable constitutional standards," it is facially unconstitutional and must be struck down in its entirety. *DIRECTV, Inc. v. State*, 2015 WL 3622354, at *2-3 (Fla. 1st DCA June 11, 2015) (quoting *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004)). Because Plaintiffs showed that the Act has no constitutional applications—it is a significant intrusion into the private decision-making of *all*

Florida women seeking abortions and is likely to fail strict scrutiny in *all* circumstances—the circuit court properly granted facial injunctive relief.[14]

Regardless, Plaintiffs are not required to demonstrate that the "no set of circumstances" test is satisfied in order to obtain facial relief: Not only is there no precedent for applying this test in the context of the Florida constitutional right to privacy, but this Court has facially invalidated abortion restrictions without so much as mentioning the question of whether they may be constitutional under some circumstances. *See, e.g.*, *North Florida*, 866 So. 2d at 626; *In re T.W.*, 551 So. 2d at 1192-93; *see also Von Eiff v. Azicri*, 720 So. 2d 510 (holding a statute concerning grandparent visitation to be facially unconstitutional after applying strict scrutiny, with no mention of the "no set of circumstances" test). Plaintiffs are unaware of any case, nor has the State cited one in any of its briefing, applying this "no set of circumstances" test to a challenge under the Florida Constitution's Privacy Clause.[15]

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[14] Indeed, striking down the Act as to only certain groups of women would require the circuit court to rewrite the statute, in violation of the Florida Legislature's clear intent that the law apply to all Florida women with extremely limited exceptions. *See supra* page 6 (listing numerous rejected amendments); *cf. Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) (concluding it was "impossible to preserve the constitutionality of the [] ordinance without effectively rewriting it, and [] declin[ing] to 'legislate' in that fashion").

[15] The cases the State cited in its appellate briefing are inapposite. The majority of those cases do not concern the right to privacy and therefore have no bearing here.

The circuit court was correct to conclude that the Mandatory Delay Law should be facially enjoined pending this litigation because it is likely to be found facially unconstitutional. This Court facially invalidated parental consent and notification requirements for all minors seeking an abortion rather than limiting relief to only those minors for whom the laws were likely to cause actual harm or delay. *See North Florida*, 866 So. 2d at 640; *In re T.W.*, 551 So. 2d at 1188, 1196. It was proper for the circuit court to follow this Court's lead and afford the same preliminary relief here.

CONCLUSION

The Florida Constitution demands that courts subject laws interfering with private decisions to the most searching judicial review. The circuit court properly scrutinized the Mandatory Delay Law—which interferes with one of the "mo[st] personal [and] private decisions concerning one's body that one can make in the course of a lifetime," *In re T.W.*, 551 So. 2d at 1192—under this stringent standard and found that it was likely unconstitutional. Enjoining this unconstitutional law was the only appropriate relief.

The two privacy cases cited by the State—*B.B. v. State*, 659 So. 2d 256 (Fla. 1995), and *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998)—are equally immaterial, as those cases concerned only as-applied challenges. *See* State's Initial Br., attached hereto as App. E, 35.

The DCA Order flouts this Court's precedent and undermines the strong constitutional privacy protections adopted by the citizens of Florida. This Court should reverse the DCA Order and uphold the temporary injunction of the Mandatory Delay Law while this litigation proceeds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served by electronic mail on the individual listed below, this 25th of May, 2016.

/s/ Julia Kaye

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CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS

I hereby certify that this brief, prepared in Times New Roman 14-point font, complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). I further certify that this brief complies with the 50-page limit stated in Florida Rule of Appellate Procedure 9.210(a)(5)(B).

/s/ Julia Kaye

Julia Kaye