SC16-381

In the Supreme Court of Florida

GAINESVILLE WOMAN CARE, LLC, *ET AL.*,

Petitioners,

v.

STATE OF FLORIDA, *ET AL.*,

Respondents.

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
CASE NO.: 1D15-3048

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

As this 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 is 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)). This Court has upheld the Woman's Right to Know Act, rejecting claims that the law substantially burdens women's abortion rights. *Id.*

Last year, Florida joined the majority of states requiring abortion providers to offer women not only adequate information to guide their decision, but also adequate time to consider it. *See infra* note 14 (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 voluntary and informed. *See* Ch. 2015-118, Laws of Fla. (the "New Law").

The day after the law was signed, Petitioners (the "Abortion Providers") sued to enjoin the law's enforcement before its July 1, 2015, effective date. The Abortion Providers sought a temporary injunction based on privacy claims, arguing the New Law is facially unconstitutional as a violation of women's (but not Petitioners') rights under article I, section 23 of the Florida Constitution. After a one-hour emergency hearing without testimony, the trial court entered an order granting a temporary injunction prohibiting enforcement of the New Law. *State v. Gainesville Woman Care LLC*, 187 So. 3d 279, 281 (Fla. 1st DCA 2016). The State appealed the trial court's injunction order as failing to comply with the basic requirements of Florida Rule of Civil Procedure 1.610, and the First District reversed the order, noting that it was "deficient both factually and legally." *Id.*

On this inadequate record, Petitioners now ask this Court to enjoin this ordinary and reasonable duly enacted legislation.

Legal Background and Procedural History

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).

Petitioners 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 requires the physician's disclosure "at least 24 hours before the procedure." The New Law also includes an 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 § 1.(3)(a)1.c.

The Proceedings Below

Before the New Law's effective date, Petitioners sued to enjoin its enforcement. R. I at 7–25. [1] Petitioners—which include an abortion provider 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 impermissibly burden women's 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

[1] Citations to the record will appear as "R. [vol.] at [pg.]."

[2] The two Plaintiffs–Petitioners 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 assisting and providing abortions. R. I at 9–10.

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 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.

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.

After a brief hearing at which the parties presented argument but neither side offered testimony, the trial court entered an injunction 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." [3] R. III at 365. It further noted "[t]here was no legislative history or other evidence presented to this Court." R. III at 364. Nonetheless, despite the absence of evidence, the trial 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.*

On appeal, the First District agreed with the State that the trial court's order was "deficient both factually and legally." *Gainesville Woman Care LLC*, 187 So.

[3] The trial court considered one of Petitioners' proffered declarations and found that the others did not meet the minimum evidentiary requirements of Florida law. R. III at 362–64.

3d at 281. Although Rule 1.610 requires competent, substantial evidence supporting the necessary findings of fact, the trial court's order included no such findings: It included no specific findings of fact supporting the Petitioners' likelihood of success on the merits, no specific findings of irreparable harm, and no findings regarding the public interest. *Id.* To the contrary, the trial court "noted repeatedly the *lack* of evidence before it," reciting in its order that it had no evidence on the burden on the right of privacy, no witnesses at the hearing, and insufficient affidavits. *Id.*; *see also* R. III at 365.

The trial court's order also neglected to address the underlying privacy question—namely, whether in passing the Privacy Amendment in 1980, voters intended to preclude Florida and its citizens from enacting reasonable regulations of abortion. *Gainesville Woman Care*, 187 So. 3d at 282. While the Abortion Providers based their challenge exclusively on Privacy Amendment, they had put forth no showing on this critical merits issue. R. III at 364 ("there are no findings of fact or statements of legislative intent [regarding the privacy issue]"; "the Court has no evidence in front of it in which to make any factual determination [regarding any privacy implications]"). The trial court had no legislative history or other evidence before it regarding the Privacy Amendment or the many post-1980 regulations specific to abortion. *Gainesville Woman Care*, 187 So. 3d at 282. Without analyzing the Privacy Amendment, the First District simply held that the

trial court should have required competent, substantial evidence supporting the constitutional privacy question before issuing an injunction. *Id.*

Finally, the First District concluded that the trial court's order was deficient in failing to address whether the Abortion Providers met the legal requirements for a facial constitutional challenge. *Id.* at 282. The First District explained that the trial court had no basis to enjoin the law as facially unconstitutional when nothing in the record or the order reflected whether the trial court applied the correct legal standard to the facial challenge. *Id.* In short, because the trial court's order contained inadequate factual findings on required elements of the injunction and failed to set forth sufficient legal analysis, the First District reversed the injunction. *Id.* at 282–83.

Petitioners sought this Court's discretionary review on the basis that the First District "expressly construe[d] a provision of the Florida Constitution," Pet. Juris. Br. at 5. But the First District did not even cite a constitutional provision, much less construe one. Because the First District did not construe a constitutional provision, there is no basis for this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

Petitioners offered no basis upon which the Court could accept jurisdiction over this case. Nor did this Court cite a jurisdictional basis in its divided order accepting jurisdiction. *Gainesville Woman Care, LLC v. State*, 2016 WL 2824302,

at *1 (Fla. May 5, 2016). Indeed, there is no basis for this Court's jurisdiction. The First District's decision simply rests upon the plain requirements of Rule 1.610 and the trial court's glaring failure to satisfy them in its order. Reversing an injunction on procedural grounds does not constitute a basis for discretionary jurisdiction in this Court. *See* Art. V, § 3(b), Fla. Const.

This Court should exercise its discretion and discharge jurisdiction.

Regardless, the First District's decision reversing a faulty injunction is correct on the merits. The trial court's order did not meet the basic requirements for an injunction and was not supported by factfinding. Reversal was required by plain application of Rule 1.610.

In addition, as the First District explained, the trial court applied unclear legal standards without sufficient justification. In determining likelihood of success on the merits, the trial court never addressed the legal requirements for a facial constitutional challenge. Separately, the trial court failed to acknowledge this Court's articulations of the correct legal standard for laws potentially implicating privacy—i.e., it did not even correctly describe the legal test from this Court's precedent, much less make any findings regarding whether the law posed a significant restriction on the freedom to decide whether to terminate a pregnancy. Instead, the trial court automatically applied an unsubstantiated legal standard and presumed the law would fail strict scrutiny—without *any* findings regarding state

interests supporting the law. While the First District did not review the New Law on the merits, its decision correctly details why the trial court's merits analysis was inadequate.

All that aside, as a matter of law, Petitioners cannot succeed on the merits in a challenge to the New Law. The interest advanced by the New Law is compelling: protecting pregnant women from undergoing serious procedures without minimal private time to reflect on the risks and consequences just revealed to them, while maintaining the integrity of the medical profession. The means of protection is minimal: a brief 24-hour window after receiving critical information, away from potentially coercive circumstances.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DISCHARGE JURISDICTION WHERE THERE IS NONE.

A. The First District Simply Reversed an Injunction That Did Not Meet the Minimum Requirements of Rule 1.610.

The First District stated clearly that its decision was based entirely on the injunction's failure to meet the strict requirements of Rule 1.610: "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." *Gainesville Woman Care*, 187 So. 3d at 282–83; *see also id.* at 281 ("[T]he 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 . . . .”). The First District’s decision is based on no other grounds.

In jurisdictional briefing, however, Petitioners claimed that the decision below “expressly construes a provision of the Florida Constitution.” Pet. Juris. Br. at 5. Petitioners provided no citations to any express construction, and this Court was left to guess which provision and where exactly it was construed. When discretionary jurisdiction is sought under Article V, section 3(b)(3) of the Florida Constitution but the lower court has not *expressly* construed a constitutional provision in its ruling, this Court lacks jurisdiction and will not review the case. *Dykman v. State*, 294 So. 2d 633, 638 (Fla. 1973). This Court cannot accept an appeal from an implied or inherent construction of a constitutional provision. *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973).

Petitioners still are unable to cite to where the First District expressly construed a constitutional provision because the First District never did so. The First District did not cite the Privacy Clause anywhere in its decision. Lacking any express construction, Petitioners pointed to what they called “four novel interpretations of the state right of privacy.” Pet. Juris. Br. at 6. But even a cursory review reveals that the four constitutional “interpretations” Petitioners reference

are simply conclusions by the First District that the trial court's order was not supported by competent, substantial evidence on the element of substantial likelihood of success on the merits, as Rule 1.610 requires. *Compare* Pet. Juris. Br. at 7–10, *with Gainesville Woman Care*, 187 So. 3d at 282, *and* State Juris. Br. at 6–7.

In sum, the trial court's order reflected neither factfinding nor legal analysis as to Petitioners' likelihood of success on the merits. *See Gainesville Woman Care*, 187 So. 3d at 282 ("It is not clear from this limited record whether the trial court applied the correct legal standard to determine whether [Petitioners] adequately demonstrated a substantial likelihood of success on the merits."). This rendered the injunction invalid and did not involve any express construction of any constitutional provision.

B. The Proper Place for This Case Is in the Trial Court, for Development of a Factual Record.

To distract from the lack of jurisdiction or the real basis of the First District's decision, Petitioners have loaded their brief with allegations from their complaint, none of which is relevant to the question at hand. Petitioners brought a lawsuit claiming that a duly enacted law is facially unconstitutional. In order to obtain the extraordinary relief of enjoining a law as facially invalid, Petitioners must satisfy their heavy burden to put forth *in the trial court* competent, substantial

evidence establishing the elements necessary to sustain an injunction under Rule 1.610. They have not done so. Petitioners are attempting to bypass the requirements of Florida law and come to this Court seeking the same extraordinary relief: enjoining a law without any factual or legal showing (or jurisdiction).

Petitioners' disagreement with the First District's discussion of caselaw in the course of reversing an injunction for lack of competent, substantial evidence does not secure Petitioners jurisdiction in this Court. Petitioners' lawsuit should proceed through the proper channels determined by the Florida Constitution and Florida Rules of Procedure. Accordingly, this Court should exercise its discretion to discharge jurisdiction where review is inappropriate. *See Harris v. State*, 161 So. 3d 395, 395 (Fla. 2015) (discharging jurisdiction as improvidently granted); *Fla. Ins. Guar. Ass'n v. Whistler's Park*, 140 So. 3d 996, 996 (Fla. 2014) (discharging jurisdiction and dismissing review); *Levine v. Hirshon*, 980 So. 2d 1053, 1053 (Fla. 2008) (upon further consideration, discharging jurisdiction); *Madura v. Full Spectrum Lending, Inc.*, 972 So. 2d 169, 170 (Fla. 2007) (discharging jurisdiction upon further consideration, when review had been granted based on alleged express and direct conflict); *Jones v. State*, 889 So. 2d 806, 807 (Fla. 2004) (discharging jurisdiction initially accepted based on alleged express construction of a constitutional provision).

II. IF THIS COURT WERE TO RETAIN JURISDICTION, IT SHOULD APPROVE THE UNASSAILABLE DECISION OF THE FIRST DISTRICT REVERSING THE FLAWED INJUNCTION.

The First District's decision was compelled by the basic requirements of Rule 1.610. If this Court were to retain jurisdiction, it should approve the decision of the First District, which simply outlines the obvious defects in the fact-deficient injunction order.

Standard of Review

The standard of review for a lower court's interpretation of a procedural rule, such as Rule 1.610, is de novo. *Barco v. School Bd. of Pinellas Cnty.*, 975 So. 2d 1116, 1121 (Fla. 2008).

"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. *See Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 961 (Fla. 2002) ("To the extent it rests on purely legal matters, an order imposing an injunction is subject to full, or de novo, review on appeal.").

A. The Injunction Order Is Defective on Its Face Because It Contains No Specific Findings.

Regardless of whether the Abortion Providers could ever support the merits of their underlying claims with facts, 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) (citation omitted). When a temporary injunction order does not set forth factual findings supporting each of the four criteria, district courts must reverse. *Milin v. Nw. Fla. Land, L.C.*, 870 So. 2d 135, 137 (Fla. 1st DCA 2003). For an injunction to be subject to meaningful review, the order must contain sufficient "findings and reasons" justifying the order. *Naegele Outdoor Advert. Co. v. City of Jacksonville*, 659 So. 2d 1046, 1048 (Fla. 1995). Here, the trial court made no real findings, and the First District correctly reversed on that basis. *See Gainesville Woman Care*, 187 So. 3d at 281 (Because the order lacks "clear and sufficient factual findings, supported by record evidence, the order is defective and meaningful review is not possible.").

1. 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." R. III at 365. 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." *City of Jacksonville v. Naegele Outdoor Advert. Co*., 634 So. 2d 750, 754 (Fla. 1st DCA 1994). 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.[4] The order cannot make up for its

[4] Nor may Petitioners or their amici now attempt to introduce new extra-record evidence in this Court of final review to meet their burden on the extraordinary remedy of an injunction. *See Kelley v. Kelley*, 75 So. 2d 191, 193 (Fla. 1954) (review in this Court is confined to the facts in the record on appeal). "That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court." *Altchiler v. State, Dep't of Prof'l Regulation, Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983); *see also Dade Cnty. v. E. Air*

lack of factual findings by relying on "conclusory legal aphorisms." *Naegele Outdoor Advert. Co.*, 659 So. 2d at 1048. Because the order is unsupported by any findings of irreparable harm, the First District correctly reversed and this Court must approve.

2. The Trial Court Made No Findings Regarding the Public Interest.

The trial court's failure to make specific factfinding regarding the public interest offers an independent reason why the First District was correct to reverse the injunction. 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. III at 365. 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." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted); *Manatee Cnty. v. 1187 Upper James of Fla., LLC*, 104 So. 3d

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Lines, Inc., 212 So. 2d 7, 8 (Fla. 1968) (granting "well founded" motion to strike amicus curiae brief "on the ground that [amici] attempt to interject in these proceedings matters dehors the record herein").

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").

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. 124, 145 (2007). Moreover, the State has a strong interest in protecting pregnant women. 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 (citation omitted).

But, as the First District noted, the trial court made *no* specific findings regarding the public interest. *See Gainesville Woman Care*, 187 So. 3d at 281 ("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.").

B. The Trial Court Incorrectly Applied Strict Scrutiny in Addressing the Abortion Providers' Likelihood of Success on the Merits.

The trial court's errors did not end there. As the First District explained, the injunction order did not reflect "whether the trial court applied the correct legal standard" to the Abortion Providers' claims in determining whether they had a substantial likelihood of success on the merits.

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

The trial court made an additional misstep by 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, this Court's precedent teaches that strict scrutiny is reserved for laws that *significantly* burden the right to abortion.

In *T.W.*, this 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 this 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." *N. Fla. 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*, this 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?" *N. Fla. 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 requirements, there is no significant burden and no strict scrutiny. Therefore, in *State v. Presidential Women's Center*, this Court upheld the Woman's Right to Know Act—a pre-amendment version of the law

challenged here—without applying strict scrutiny or identifying any burden on the right of privacy.[5] 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 this 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 Ctr.*, 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.

[5] There have been interim amendments to the Woman's Right to Know Act. *See* Ch. 2014-137, Laws of Fla.; Ch. 2013-121, Laws of Fla.; Ch. 2011-224, Laws of Fla. None has been challenged as burdening privacy rights or subject to strict scrutiny.

In rejecting the Fourth District's conclusions, this 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*.[6] 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.*, for patients to consider.

[6] 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). Furthermore, 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.

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 other rule would be unworkable. For example, Florida's requirement that only physicians perform abortions would not be presumed unconstitutional, nor would the State bear the burden of proving the physician requirement is the least restrictive means of addressing a compelling governmental interest. Strict scrutiny would not apply to the abortion-specific regulation 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 obtaining 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. (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-9.023 (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-9.027(1) (requiring women to be "observed" post-procedure in "supervised and staffed" recovery rooms); 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 . . . ."). Nothing in this Court's precedent suggests that these should be subject to strict scrutiny. The same is true for the 24-hour waiting period.

In short, as the First District summarized, "The trial court's failure to make sufficient factually-supported findings about whether the law imposes a significant restriction . . . renders the trial court's sparse legal analysis and conclusions unsupportable and the injunction deficient." *Gainesville Woman Care*, 187 So. 3d at 282.

2. 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, 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). As the First District observed, the trial court "noted repeatedly the *lack* of evidence before it" and even stated in its order that it had no witnesses at the hearing, only legally and factually insufficient affidavits, and no evidence on the privacy burden. *Gainesville Woman Care*, 187 So. 3d at 281.

a. 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 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. v. Albaneze*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009); *accord City of Jacksonville v. Naegele Outdoor Advert. Co*., 634 So. 2d 750, 753 (Fla. 1st DCA 1994) ("It is not enough that a merely colorable claim is advanced."). This case 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." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (joint opinion).[7]

Because the New Law does not restrict the right to choose 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, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985). This Court found "a woman has a reasonable expectation of privacy in deciding whether to

[7] Petitioners rely on *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), to argue strict scrutiny must be applied and automatically renders the New Law unconstitutional. IB at 25–26. But the United States Supreme Court, in upholding a 24-hour abortion wait period, held that *City of Akron* was based on a *misapplication* of *Roe*. *Casey*, 505 U.S. at 870–71 (joint opinion). This Court has held that *Roe*—not a misapplication of *Roe*—is the operative framework under Florida law. *See N. Fla. Women's*, 866 So. 2d at 634–36.

continue her pregnancy," *N. Fla. Women's*, 866 So. 2d at 621; but that is not to recognize a right to have an abortion on demand 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*, 570 So. 2d at 260 (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 887 (joint opinion). In fact, the New Law can enhance a woman's privacy in deciding whether to continue her pregnancy. It is "calculated to inform the woman's free choice." *Id.* at 877 (joint opinion). Rather than facing a rushed decision in the presence of a provider standing ready to end 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); Fla. H.R. Subcomm. on Health Quality, recordings of proceedings (Mar. 12, 2015) (available at Fl. Dep't of State, Fla. State Archives, Tallahassee, Fla.) (hearing on H.B. 633).

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* 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.").

b. 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[8]—the Abortion Providers alleged various purported burdens on women's

[8] 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 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 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*

rights. The trial court made no findings regarding any of them, so none could sustain the 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 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, 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–

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) (upholding abortion law requiring 24-hour wait period 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 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 privacy challenge); *Mahaffey v. Att'y Gen.*, 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).

patient relationship, causing administrative demands on physicians, and exacerbating a shortage of abortion providers. R. II at 108. Even if true, none of these could amount to violations of the Privacy Amendment.

The Abortion Providers assert hypothetical 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 constitutional and valid. *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.*, *Casey*, 505 U.S. at 886–87 (joint opinion). Moreover, Petitioners have not even attempted to demonstrate through specific facts that a large fraction of women in Florida reside long distances from any of the approximately 80 abortion providers around the state.[9] 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.[10] § 390.0111(3)(a)1., Fla. Stat.

Next, several of the supposed burdens are belied by the New Law's plain

[9] Sheer geography would belie such a claim, as clinics are located throughout Florida. At the time it passed the New Law, the Legislature was aware there were 65 abortion clinics operating across the state. *See* Fla. H.R., recording of proceedings (Apr. 21, 2015), at 41:50–42:05, available at http://thefloridachannel.org/videos/42115-house-session/. This total did not include the additional Florida abortion providers operating out of hospitals or physician's offices. *See* AHCA: Hospital & Outpatient Services Unit – Abortion Clinics, http://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Hospital_Outpatient/abortion.shtml (last visited July 13, 2016).

[10] According to the Complaint, Petitioner 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 (Petitioners 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.

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 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 further psychological trauma if required to wait an additional day for an abortion. But the 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.

3. 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." *Id.* at 873. 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 Tex. 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, this Court has 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, this 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*, this Court again applied strict scrutiny to a privacy challenge and again rejected the claim. 477 So. 2d 544. 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*, this 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."); *cf. 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*, 550 U.S. at 159 (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.

Indeed, the State's interest—and authority to take action—in promoting thoughtful deliberation for important decisions is not unique to abortions. *See* § 63.082(4)(b), Fla. Stat. (48-hour wait period before birth mother may consent to giving up newborn for adoption); Rule 64F-7.007, Fla. Admin. Code (30-day wait period after informed consent before sterilization can be performed on Medicaid recipient); § 741.01, Fla. Stat. (3-day wait period to obtain marriage license); § 61.19, Fla. Stat. (20-day wait period before divorce may be granted); § 790.0655(1)(a) (3-day wait period when purchasing a handgun); § 872.03 (48-hour wait period before deceased individual's body may be cremated); *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). As these examples illustrate, the State's interest in promoting informed, considered decisions exists even in the

exercise of fundamental rights and particularly where, as with terminating a pregnancy, the decision is irreversible.

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 space for a woman's contemplation of such a significant decision. This both enhances the integrity of the medical profession and reinforces the important doctrine of informed consent. *See 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."[11] 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, this 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

[11] *See* FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, http://dos.elections.myflorida.com/initiatives/fulltext/pdf/10-10.pdf

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 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.

Lacking any contemporaneous evidence of voter intent from 1980, the Abortion Providers point to an unsuccessful 2012 amendment. IB at 7, n. 5. That amendment, if passed, would have prohibited the use of public funds for health-benefits programs that include abortion coverage. It also would have specified that the Florida Constitution creates no broader rights to abortion than the federal constitution. Voters rejected the ballot initiative,[12] but that vote says nothing about the issue presented here. This case has nothing to do with public funding of abortion, and the fact that the Florida Constitution affords broader privacy rights than does the federal constitution—a point the State does not contest—does not support the extraordinary position that voters sought to subject *all* abortion laws to strict scrutiny. On the contrary, after this Court struck down a parental-notification

[12] *See* FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, http://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2012&DATAMODE= (last visited July 18, 2016).

abortion law in *North Florida Women's Health & Counseling Services*, 866 So. 2d 612, Florida voters amended the Constitution to allow such laws, Art. X, § 23, Fla. Const., clarifying that voters did not intend the Privacy Amendment to require application of strict scrutiny to all abortion-specific laws.

Whatever the appropriate standard of review, the New Law satisfies it.[13] Regardless of whether rejected versions of the New Law approached the issue differently, *see* IB at 6, 21, the Legislature may use common sense in crafting the New Law, as the majority of states have done. *Cf. Delmonico v. State*, 155 So. 2d 368, 370 (Fla. 1963) (under strict scrutiny, "practical experience" can determine necessary means to achieve statutory objective); *State v. Bradford*, 787 So. 2d 811, 821 (Fla. 2001) (in cases applying strict scrutiny, restrictions may be "based solely on history, consensus and 'simple common sense'") (citation omitted). Indeed, Florida is among 28 states that have now adopted abortion waiting periods of at

[13] This 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. Puryear v. State*, 810 So. 2d 901, 904 (Fla. 2002) (statements not essential to holding are dicta). Likewise, in *Florida Board of Bar Examiners*, the 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.

least one day as sensible public policy.[14] Four of these states also have express rights of privacy in their state constitutions.[15]

The Abortion Providers argue that the New Law is not the least restrictive means because it requires in-person disclosure. But this assumes that in-person disclosure is unnecessary to serve the State's interest, an assumption unsupported by evidence and absent from the trial court's order. No fewer than thirteen other states also require that the informed-consent information be given in person, presumably because of the import of the information. Moreover, the Legislature has determined that ultrasounds must be performed before informed consent may be given—indeed, ultrasounds are instrumental in determining the gestational age of the fetus, diagnosing the risks and consequences of the procedure, and confirming whether medical or surgical abortion would be the method—and the

[14] *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).

[15] *See* Art. II, § 8, Ariz. Const.; Art. I, § 23, Fla. Const.; Art. I, § 5, La. Const.; Art. I, § 10, S.C. Const.

Abortion Providers do not challenge this. The ultrasound necessitates that the initial visit be in person.

Of course, the First District did not reach a scrutiny analysis because of the trial court's dispositive reversible errors and resulting inadequate record. As the First District summarized, "[i]t is not clear from this limited record whether the trial court applied the correct legal standard to determine whether [Petitioners] adequately demonstrated a substantial likelihood of success on the merits." *See Gainesville Woman Care*, 187 So. 3d at 282. But the trial court was wrong to hold, without looking to any evidence, that the State lacked sufficient interests to impose a 24-hour waiting period. *Id.* (addressing the trial court's failure to consider evidence of burden, state interests, or voter intent). Regardless, 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.

C. The Trial Court Did Not Apply the Correct Legal Standard for a Facial Challenge.

This is a facial challenge, and the trial 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 statute can be constitutionally applied." *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (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). Because this is not a First Amendment challenge, as a matter of Florida law, the no-set-of-circumstances standard applies.[16] *Id.* Even in the privacy context, this 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 cannot meet their heavy burden to maintain a facial challenge. The Abortion Providers base their allegations of harm on assumptions about unidentified women in hypothetical scenarios. But "in a facial challenge,

[16] 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*, 550 U.S. at 167–68. The Abortion Providers cannot satisfy even this standard.

[this Court] consider[s] only the text of the statute, not its specific application to a particular set of circumstances." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014). 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.

As the First District noted, the trial court did not even address the proper legal standard for a facial constitutional challenge. *Gainesville Woman Care*, 187 So. 3d at 282. The trial court also did not appear to apply the correct standard for facial challenges. *Id.* ("Neither the record nor the order reflects whether the trial court applied the appropriate facial challenge analysis."). The trial court offered no basis for enjoining the law as applied to, for example, women who reside near abortion providers, have ample financial resources, and work flexible hours.

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, and the First District properly reversed the unsupported injunction.

CONCLUSION

This Court does not have jurisdiction and should deny review.

If this Court were to retain jurisdiction, it should approve the decision of the First District reversing the trial court's injunction that was factually and legally deficient.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 20th day of July, 2016, to the following:

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