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

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

STATE OF FLORIDA, ET AL.,

Appellants,

v.

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Appellees.

APPELLANT'S INITIAL BRIEF

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

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STATEMENT OF THE CASE AND FACTS

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

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

The Preexisting Law

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

The plaintiffs challenge none of these provisions.

The 2015 Amendment

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

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

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

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

The Litigation and Procedural History

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

This Court should reverse.

ARGUMENT

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

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

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

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

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

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

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

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

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

Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE NEW LAW SATISFIES ANY LEVEL OF SCRUTINY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served by electronic mail on the individuals listed below, this 14th day of August, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210.

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