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

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

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STATE OF FLORIDA, ET AL.,

Appellants,

v.

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Appellees.

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# APPELLEES' ANSWER BRIEF

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

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## INTRODUCTION

For more than forty years, Florida women have been able to obtain an abortion when they and their physicians deem it medically appropriate without interference from the state. On June 10, 2015, in violation of Florida's stringent privacy protections, the state enacted House Bill 633, codified at § 390.0111, Fla. Stat. ("the Act"), which requires a woman seeking an abortion to make an additional, medically unnecessary trip to her health care provider, and to delay her procedure at least twenty-four hours. Appellees Gainesville Woman Care, LLC d/b/a Bread and Roses Women's Health Center and Medical Students for Choice ("Plaintiffs") brought this case to vindicate women's fundamental rights under the Florida Constitution and sought an emergency temporary injunction in order to preserve the status quo. After a hearing on Plaintiffs' motion for a temporary injunction—where Appellants[1] (collectively, "the State") neither disputed Plaintiffs' evidence nor presented any of its own—the trial court temporarily

[1] 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.

enjoined the Act pending the litigation. In opposing the temporary injunction below, and now on appeal, the State insists that because the Act might pass federal constitutional muster, and because states without independent privacy protections have imposed such restrictions, the Act cannot offend the Florida Constitution.

The State's argument is without merit, and its effort to conflate the federal standard and the more stringent Florida standard fails. Faithfully following Florida Supreme Court precedent, the trial court applied the strict scrutiny standard of review, held that the Act was unlikely to meet this standard, determined that Plaintiffs had met the other temporary injunction factors, and issued a temporary injunction. The State is thus unable to point to any abuse of discretion, and this Court should affirm to preserve the status quo pending the full litigation of Plaintiffs' constitutional claims.

## STATEMENT OF THE CASE AND FACTS

For a patient to give valid, informed consent for any medical treatment under Florida's general informed consent law, the health professional must conform to an "accepted standard of medical practice among members of the medical profession" and provide information conveying three things: 1) "a general understanding of," *i.e.*, the nature of, "the procedure," 2) "the medically acceptable alternative[s]," and 3) "the substantial risks . . . inherent in the . . . procedure[]."

§ 766.103(3)(a)(1)-(2), Fla. Stat. The general informed consent statute does not mandate an additional visit to a patient's medical provider or a delay. *Id*.

In addition, Florida already has an informed consent statute specific to abortion that largely mirrors the general informed consent statute. Corresponding to the general informed consent statute's requirement to ensure the patient understands the nature of, alternatives to, and risks of the treatment, the abortion-specific law requires the physician to inform the patient of "the nature and risks of undergoing or not undergoing the proposed procedure," "the probable gestational age of the fetus, verified by an ultrasound," and "the medical risks to the woman and fetus of carrying the pregnancy to term." § 390.0111(3)(a)(1)(a)-(c), Fla. Stat. The Florida Supreme Court found that the abortion-specific law was "comparable to the common law and to informed consent statutes implementing the common law that exist for other types of medical procedures," including the general informed consent statute. *State v. Presidential Women's Ctr.* ("*Presidential II*"), 937 So. 2d 114, 120 (Fla. 2006).

The Act amends the existing abortion-specific law to require that a woman receive all the same information described above, but during a separate, additional medical visit, after which she must delay at least 24 hours before effectuating her decision to end her pregnancy. It also contains two narrow exceptions to the additional-trip and delay mandates. The first is for a woman who can "present[] to

the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking." § 390.0111(3)(a)(1)(c), Fla. Stat. Conditioning the sexual assault exception on a woman reporting her assault to authorities renders the exception useless to many patients. The second exception, which is a holdover from the existing abortion-specific law, is for a woman in "a medical emergency," § 390.0111(3)(a), Fla. Stat. The statute does not define "medical emergency" but allows the woman to obtain care without delay only if her physician can "obtain[] at least one corroborative medical opinion attesting . . . to the fact that . . . continuation of the pregnancy would threaten the *life* of the pregnant woman." § 390.0111(3)(b) (emphasis added). This exception does not protect a woman with a pregnancy-related condition that threatens her health, but not necessarily her life. *See* R. II at 107-08 ¶ 18 (enumerating conditions that pose an immediate threat to a woman's health and threaten her life if untreated, but do not always occur in the context of a medical emergency).

The Act's additional-trip and delay mandates will impose practical burdens on all women. Making a separate, additional visit to her physician requires a woman to miss more school and/or work, to pay for or arrange additional childcare, and to pay for additional transportation and/or hotel rooms. *See id.* at 96

¶ 14. The increased overall costs may force a woman to delay her procedure even further. *See id.* at 97 ¶ 16. The Act's logistical burdens also threaten a woman's ability to maintain her confidentiality and privacy. *See id.* at 99 ¶ 20.

Because it is not possible to staff a physician at every clinic, every day, and because many women will be unable to abandon their existing obligations on two consecutive days, the Act may, in effect, impose delays significantly longer than 24 hours. *See, e.g., id.* at 94 ¶ 6, 97 ¶ 16. Further, such unnecessary delays will impose medical harm on women. *See id.* at 97 ¶ 18, 106 ¶ 15. Although abortion is an extremely safe procedure, the later an abortion takes place in pregnancy, the greater the medical risks for the woman, and the greater the cost, as well. *See id.* at 97-98 ¶ 18, 106 ¶ 15.

Finally, Florida's most vulnerable women—low-income women, victims of intimate partner violence, women who are pregnant as the result of rape or other sexual assault, women whose wanted pregnancies involve a severe fetal anomaly, and women with serious medical complications that are not immediately life-threatening—will suffer further harm. The additional-trip and delay mandates can inflict psychological harm on these women; threaten their safety, health, or even lives; or prevent them from obtaining abortion care altogether. *See id.* at 98 ¶ 19, 106 ¶ 15, 107 ¶¶ 17-18.

## Procedural History

The day after Governor Scott signed the Act into law, on June 11, 2015, Plaintiffs filed this lawsuit alleging that the Act violates the Florida Constitution's Privacy and Equal Protection Clauses. They also filed an emergency motion for temporary injunction on their privacy claim, pursuant to Florida Rule of Civil Procedure 1.610. Plaintiffs attached to their motion several declarations: Kristin Davy, the owner and director of Plaintiff Gainesville Woman Care LLC d/b/a Bread and Roses Woman Care ("Bread and Roses"), attested to the harms the Act will impose on all her patients, especially those who are low-income. *See* R. II at 92-99. Christine Curry, M.D., Ph.D., a board-certified obstetrician-gynecologist and an Assistant Professor at the University of Miami Hospitals and at Jackson Memorial Hospital, attested to the ways the Act will harm her patients' health physically and psychologically, will cause some women to delay their procedures, and may prevent other women from obtaining abortions altogether. *See id.* at 101-117. Dr. Curry also attested to the inadequacies of the Act's narrow medical emergency exception. *See id.* Kenneth Goodman, Ph.D., the founder and director of the University of Miami Miller School of Medicine's Institute for Bioethics and Health Policy and co-director of the university's Ethics Programs, attested to the ways in which the Act is medically and ethically unjustified, contrary to the principles undergirding the informed consent process, and will undermine the

doctor-patient relationship.[2] *See id.* at 119-184. Plaintiffs also submitted a rebuttal declaration from Ms. Davy with their reply in support of their motion for a temporary injunction.[3] *See* R. III at 333-337.

In its response to Plaintiffs' motion, the State disputed none of Plaintiffs' evidence; submitted no declarations or evidence; and did not challenge the legal sufficiency of any of Plaintiffs' declarations. *See id.* at 399-400. At the June 24 hearing on Plaintiffs' motion, neither party presented live witnesses, and instead relied on the written pleadings and Plaintiffs' declarations.

On June 30, the trial court issued its order temporarily enjoining the Act, explaining, "'Florida law does not require a twenty-four-hour waiting period for other gynecological procedures with comparable risk, or any other procedure [ob-gyns] perform.'" R. III at 401 (quoting R. II at 104 ¶ 9). The court explained that the State had "failed . . . to provide . . . any evidence that there is a compelling state

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[2] The trial court excluded the declarations of Kristin Davy and Kenneth Goodman, Ph.D., because they were not in conformance with § 95.525(2), Fla. Stat., which requires all declarations to be made "[u]nder penalties of perjury." *See* R. III at 399-400. However, the Davy and Goodman declarations *do* contain this language, and the trial court excluded them in error. *See* R. II at 99, 122, 337.

[3] Plaintiffs also submitted the declarations of Sheila Katz, Ph.D., who attested to the Act's effects on low-income women, *see* R. II at 186-208, and Lenore Walker, Ph.D., who attested to the Act's effects on victims of intimate partner violence, *see id.* at 210-250. The trial court did not consider these declarations because they were not made "under penalty of perjury" as required by § 95.525(2), Fla. Stat. *See* R. III at 399.

interest to be protected in enhancing the informed consent already required of women." *Id.* at 401.

The state filed its notice of appeal, triggering an automatic stay of the injunction. *See* Fla. R. App. P. 9.310(b)(2). On Plaintiffs' motion and after a July 2 telephonic hearing, the trial court lifted the automatic stay, explaining, "[t]his court cannot find Defendants are likely to successfully overturn the injunction on appeal." R. III at 404.

## SUMMARY OF ARGUMENT

The trial court entered a temporary injunction to maintain the status quo and temporarily enjoin enforcement of an unprecedented and onerous violation of Florida women's constitutional right to privacy. The State disputed none of Plaintiffs' evidence, submitted none of its own, and all but conceded in the trial court that the Act cannot survive strict scrutiny. Instead, the State argued that because other courts have upheld similar mandates under federal law, the Act here is valid under Florida law. In light of the undisputed evidence that Florida has targeted abortion patients alone for disadvantageous treatment, and the unrebutted legal argument that the Act fails strict scrutiny, the trial court properly held that Plaintiffs were likely to succeed on the merits of their privacy claim.

Having so held, the trial court properly made two further conclusions: First, that Plaintiffs and their patients would suffer irreparable harm absent an injunction

and second, that enjoining an unconstitutional law would necessarily serve the public interest. For all these reasons, the temporary injunction order is proper and should be affirmed.

## ARGUMENT

"One critical purpose of temporary injunctions is to prevent injury so that a party will not be forced to seek redress for damages after they have occurred. The granting of a temporary injunction rests in the trial court's sound judicial discretion . . . ." *Bailey v. Christo*, 453 So. 2d 1134, 1136 (Fla. 1st DCA 1984) (citing *Lewis v. Peters*, 66 So. 2d 489 (Fla. 1953); *Decumbe v. Smith*, 196 So. 595 (Fla. 1940)). Trial courts are thus entrusted with "wide judicial discretion . . . in granting or dissolving temporary injunctions, and an appellate court will not interfere where no abuse of discretion appears." *Alachua Cnty. v. Lewis Oil Co., Inc.*, 516 So. 2d 1033, 1035 (Fla. 1st DCA 1987). On appellate review of a temporary injunction, "a presumption exists as to the correctness of the trial court's ruling, with the burden on the appellant to prove such abuse." *Bailey*, 453 So. 2d at 1136; *see also Cunningham v. Dozer*, 159 So. 2d 105, 106 (Fla. 3d DCA 1963) (in reviewing a temporary injunction, appellate courts do not "substitute their judgment for that of a" trial court, but rather ask only "whether or not, under the circumstances by the record on appeal, the [trial court] committed an *abuse* of discretion . . . ."

(emphasis in original)). The State has failed to demonstrate that the trial court abused its discretion and this Court should affirm.

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

Florida is one of only five states with an explicit privacy provision in its constitution, which guarantees each person the right "to be let alone and free from government intrusion into [his or her] private life." Art. I, § 23, FLA. CONST; *see also* ALASKA CONST. art. 1, § 22; CAL. CONST. art. 1, § 1; HAW. CONST. art. 1, § 6; MONT. CONST. art. 2, § 10. The citizens of Florida added this provision to the constitution directly by general election in 1980. As the Florida Supreme Court has observed: "Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' *in order to make the privacy right as strong as possible.*" *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (emphasis added). The Florida Supreme Court has elaborated that the Florida Constitution "embodies the principle that few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision whether to end her pregnancy. A woman's right to make that choice freely is fundamental." *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) (internal quotation marks and citation omitted). Thus, as

the trial court recognized, the Florida Constitution "'embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.'" R. III at 396 (quoting *In re T.W.*, 551 So. 2d at 1192); *see also Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) ("The right to access [the courts] is specifically mentioned in Florida's constitution. Therefore, it deserves more protection than those rights found only by implication." (internal citation omitted)).

Florida's protection for a woman's right to reproductive privacy is consistent with the protection provided under *Roe v. Wade*, 410 U.S. 113 (1973). Under Florida law, as under *Roe*, abortion regulations are subject to strict scrutiny. *See In re T.W.*, 551 So.2d at 1193. After the U.S. Supreme Court lowered protection for abortion under the federal Constitution to the "undue burden" test laid out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the state asked the Florida Supreme Court to follow suit. The Florida Supreme Court pointedly refused to "abandon an extensive body of clear and settled Florida precedent in favor of an ambiguous federal standard" or to "forsake the will of the people": "If Floridians had been satisfied with the degree of protection afforded by the federal right of privacy, they never would have adopted their own freestanding Right of Privacy Clause. In adopting the privacy amendment, Floridians deliberately opted for substantially more protection than the federal charter

provides." *North Florida Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 635-36 (Fla. 2003).

In 2012, the Legislature referred to the voters a constitutional amendment that would have substituted the federal undue burden standard for the strict scrutiny standard, but the voters rejected the Legislature's invitation. *See* Initiative Information: Prohibition on Public Funding of Abortions; Construction of Abortion Rights, Fla. Dep't of St., Div. of Elections, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82. At the time of this amendment, several states had enacted mandatory delays, which had been upheld under *Casey*'s undue burden standard. Accordingly, had the Florida voters intended to authorize mandatory delays like the Act under the state privacy amendment, they could have done so by adopting the 2012 ballot referendum. They did not. Thus, with the enactment of the original privacy amendment and the rejection of the 2012 ballot initiative, Florida voters have repeatedly made clear their intent to strictly protect the right to abortion and to prohibit state interference with that decision. The Act must thus pass the strict scrutiny test to withstand constitutional scrutiny.

The State nonetheless urges this Court to ignore clear Florida Supreme Court precedent by applying the less protective federal undue burden test. This is not surprising. *Every* court to apply strict scrutiny has invalidated mandatory delay

laws such as the Act.[4] Of the four other states with an explicit state constitutional privacy right—Alaska, California, Hawaii, and Montana—none has a mandatory delay. *See* Guttmacher Institute, *State Polices in Brief: Counseling and Waiting Periods for Abortion* (June 1, 2015), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. And when Montana enacted a 24-hour mandatory delay, the state courts held it unconstitutional under the state's privacy clause. *See Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *9 (Mont. Dist. Ct. Mar. 12, 1999) (attached as Ex. A).

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

It is thus irrelevant that, as the State insists, other courts have upheld other mandatory delay laws, *see* Appellants' Initial Brief at 22 n.6 [hereinafter "Appellants' Br."], for every case it cites applied the undue burden standard.[5] As the trial court explained, "our Supreme Court has clearly stated that federal law has no bearing on Florida's more extensive right of privacy." R. III at 402. That is why the Florida Supreme Court, applying strict scrutiny, has invalidated abortion restrictions that courts in other states, applying the undue burden standard, have upheld. For example, 38 states currently require minors to involve their parents in

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[5] *See* Appellants' Br. at 22 n.6. All of the federal cases the State cites post-date *Casey* and therefore applied the undue burden standard. *Casey*, 505 U.S. at 855-56; *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 369 (6th Cir. 2006); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 692-93 (7th Cir. 2002); *Karlin v. Foust*, 188 F.3d 446, 479 (7th Cir. 1999); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 530 (8th Cir. 1994); *Barnes v. Moore*, 970 F.2d 12, 15 (5th Cir. 1992) (per curiam); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091, 1105 (D. Ariz. 2009); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 453 (W.D. Ky. 2000); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1490-91 (D. Utah 1994), *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, 1420-21 (D.S.D. 1994).

The state cases the State cites likewise apply the lesser undue burden standard. *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 691-92 (Mo. 2006) (en banc) (per curiam) (applying *Casey*'s undue burden standard); *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 987-88 (Ind. 2005) (same); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 655 (Miss. 1998) (same); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 578 (Ohio Ct. App. 10th Dist. 1993) (same); *Mahaffey v. Attorney Gen.*, 564 N.W.2d 104, 111, 113 (Mich. Ct. App. 1997) (applying rational basis review under Michigan Constitution).

their abortion decision or to obtain a judicial bypass. Guttmacher Institute, Parental Involvement in Minors' Abortions (Oct. 1, 2015), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf. These laws fail under Florida's Constitution, even though the "United States Supreme Court has approved [them] under the federal constitution." *North Florida*, 866 So. 2d at 634 (invalidating parental notification law under Florida Constitution);[6] *see also In re T.W.*, 551 So. 2d 1186 (invalidating parental consent law under Florida Constitution).

Further, the State errs in arguing that the Act aligns Florida with the majority of other states. *See* Appellants' Br. at 7-8. Putting aside that the 27 states with a mandatory delay do not strictly protect the right to privacy as Florida does, only thirteen of those states mandate a delay *and* require the woman to make a separate, medically unnecessary, additional visit to her health care provider.[7] All the other

[6] In 2004 Florida voters approved a legislatively referred constitutional amendment that allowed a parental notification law for minors, but did not otherwise alter Florida's strict privacy protection for a woman's abortion decision. *See* Article X, Section 22, Fla. Const.

[7] States requiring an additional trip: Ariz. Rev. Stat. § 36-2153; Ark. Code. Ann. § 20-16-1503(b)(1)(2015); Ind. Code § 16-34-2-1.1; La. Rev. Stat. § 40:1299.35.6(B)(3); Miss. Code § 41-41-33; Mo. Stat. § 188.027; Ohio Rev. Code § 2317.56(B)(1); S.D. Codified Laws § 34-23A.10.1; 2015 Tenn. Pub. Acts. ch. 473, § 1; Tex. Health & Safety Code § 171.012(a)(4); Utah Code § 76-7-305(2)(a); Va. Code § 18.2-76(B); Wis. Code § 253.10(3)(c).

states—including Florida's neighbors Georgia and Alabama—allow a woman to receive the mandated information by mail, telephone, or online, thus alleviating the burdens associated with making an additional visit to the health care facility.

In sum, the Florida Supreme Court and Florida voters have repeatedly made clear that the Florida Constitution strictly protects the right to abortion, condemning the Act as impermissible.

## II. BECAUSE THE ACT INFRINGES ON A FUNDAMENTAL RIGHT, THE TRIAL COURT PROPERLY APPLIED STRICT SCRUTINY.

Because privacy is an explicit, fundamental constitutional right in Florida, "the applicable standard of review requires that the statute survive the highest level of scrutiny." *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998); *see also State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004) ("When a statute or ordinance . . . impairs the exercise of a fundamental right, then the law must pass strict scrutiny.").

The State attempts to avoid this stringent standard by arguing that the Act does not infringe on the right to abortion—and is therefore not subject to strict scrutiny—because it does not "significantly restrict" the right to abortion, which the State asserts on the basis that the Act is not an "undue burden" that would violate federal law. *See* Appellants' Br. at 17-27. This is wrong: *All* infringements on the right to privacy are subject to strict scrutiny, even if they do not impose an undue burden under federal law. *See In re T.W.*, 551 So.2d at 1195 ("[T]he Florida Constitution requires a 'compelling' state interest in all cases where the right to

privacy is implicated."); *North Florida*, 866 So. 2d at 635 ("Legislation intruding on a fundamental right is presumptively invalid . . ."); *J.P.*, 907 So. 2d at 1109 (laws that "impair" the exercise of a fundamental right are subject to strict scrutiny); *Chiles v. State Empls. Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999) (same); *see also North Florida*, 866 So. 2d at 634 (applying strict scrutiny to abortion restriction even though the "United States Supreme Court ha[d] approved" such laws "under the federal constitution"). The State's argument is nonsensical. If it were correct, then only laws that are unconstitutional under federal law (because they impose an undue burden) would be subject to strict scrutiny under Florida law. In other words, the State argues that the Florida Constitution provides no more protection than its federal counterpart. That is not the law.

Properly applying Florida law, it is clear that the Act infringes upon the fundamental right to privacy in three ways, each of which independently requires application of strict scrutiny. First, as the trial court found, the Act targets abortion for disadvantageous treatment. Second, the Act requires all women to make an additional trip and prevents them from obtaining an abortion when they and their physicians think it medically appropriate. Finally, the Act's practical effect will be to impede the ability of Florida women—particularly the most vulnerable

women—to obtain abortion care. For each of these reasons, the Act infringes on a fundamental right and is subject to strict scrutiny.

### A. The Act targets abortion for disadvantageous treatment.

As the trial court properly found, "'Florida law does not require a twenty-four-hour waiting period for other gynecological procedures with comparable risk, or any other procedure [ob-gyns] perform.'" R. III at 401 (quoting R. II at 104 ¶ 9). The State ignores this reality. *See* R. III at 401-02 ("This is a major issue in the case that the Defendants fail to address. Defendants simply state that thirteen other states have a waiting period and the United States Supreme Court has ruled it is not unconstitutional under federal law.").[8] Florida's fundamental right to privacy guards against this precise "unwarranted governmental interference." *Von Eiff*, 720 So. 2d at 516. Rather than respond to this undisputed finding, the State instead mischaracterizes the Florida Supreme Court in *In re T.W.* as stating that because abortion is "different" from other medical procedures, state interference with a woman's abortion decision is justified. Appellants' Br. at 1, 14 n.5 (quoting *In re T.W.*'s observation that the abortion decision is "fraught with specific physical

[8] The State is correct that Plaintiffs put forth no evidence that "as a practical matter" women can obtain other nonemergency gynecological services the day of their consultation. *See* Appellants' Br. at 14 n.5. But Plaintiffs produced no such evidence because that factual question is irrelevant to the legal question of whether the *Legislature* can affirmatively prevent a woman from obtaining an abortion on the day of her appointment.

[and] psychological . . . implications of a uniquely personal nature," 551 So. 2d at 1193). The State misunderstand Florida's privacy clause: It is precisely because a woman's abortion decision is so "uniquely personal," *In re T.W.*, 551 So.2d at 1193, in nature that state interference with her decision is "presumptively unconstitutional," *North Florida*, 866 So. 2d at 626, unless the state can show that its interference satisfies strict scrutiny.

The State also argues that strict scrutiny should not apply because the Florida Supreme Court did not apply strict scrutiny to the abortion-specific informed consent law in *State v. Presidential Women's Center*. *See* Appellants' Br. at 12-14. However, a key distinction is that, unlike the Act, the existing abortion-specific law—as construed by the state on appeal in *Presidential*—did not target abortion for disadvantageous treatment.

As explained *supra* 2-3, prior to the abortion-specific law challenged in *Presidential*, abortion providers obtained informed consent pursuant to the Florida Medical Consent Law, § 766.103, Fla. Stat. The abortion-specific law required abortion providers to describe "the nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy." § 390.0111(3)(a)(1)(a), Fla. Stat. In contrasting that law with the general informed consent law, the District Court of Appeals ("DCA") observed

that the abortion-specific law "remove[d] the discretion accorded physicians in all circumstances other than abortion . . . to tailor the information to the woman's circumstances," and thus "infringe[d] on the woman's ability to receive her physician's opinion as to what is best for her, considering her circumstances." *State v. Presidential Women's Center*, 707 So. 2d 1145, 1150 (Fla. 4th DCA 1998) ("*Presidential I*"). In light of these differences, the DCA applied strict scrutiny. *Id.* at 1150.

On appeal, "as [the case] developed, and during oral argument," the state "agreed and conceded" to two limiting constructions that brought the abortion-specific law in line with the general informed consent law. *Presidential II*, 937 So. 2d at 119. First, the state agreed that a "reasonable patient" means "a reasonable patient under the patient's circumstances," and conceded that a physician could exercise his or her medical judgment and tailor the requisite information to the patient's circumstances, rather than provide standardized information. *Id.* at 119-20. Second, the state agreed that an abortion provider was required to discuss "solely and exclusively medical risks," rather than "social, economic, or any other risks." *Id.* With these two concessions, the abortion-specific law "constitute[d] a neutral informed consent statute that is comparable to the common law and to informed consent statutes implementing the common law that exist for other types

of medical procedures. . . ." *Id.* at 120. It therefore did not disadvantageously target abortion, and the Florida Supreme Court did not apply strict scrutiny.

Here, by contrast, the State has made no similar concession that would bring the Act in line with other neutral informed consent laws, nor could it. The Act's additional-trip and delay mandates are not "comparable to those of the common law and other Florida informed consent statutes implementing the common law," and therefore the Act *does* "generate the need for an analysis on the issue of constitutional privacy." *Id.* at 118.[9]

### B. The Act requires a woman to make an additional trip and delay effectuating her abortion decision for at least 24 hours.

Second, the Act infringes a woman's fundamental right to abortion by preventing her from obtaining an abortion when she and her physician deem it medically appropriate and requiring her to make an additional visit to her physician. Each woman can already take all the time she feels she needs to decide whether to have an abortion. By mandating an additional visit and delay for all women—including those who have already rendered a thoughtful and considered decision—the Act by its very terms infringes the fundamental right to abortion.

[9] The complex questions of whether other laws—such as Florida's physician-only law and operational regulations for abortion clinics—would be subject to and/or satisfy strict scrutiny are not before this Court, and could not be resolved by the Court's decision in this case. *See* Appellant's Br. at 15-16 (implying the contrary).

The State trivializes the Act's effects, describing the mandatory delay as only a "brief period for deliberation." Appellants' Br. at 21. This misapprehends the nature of the infringement. Under a mandatory delay law,

> regardless of a woman's frame of mind, despite her doctor's contrary medical judgment, regardless of whether she previously had an abortion, and notwithstanding her possible medical sophistication, a woman seeking an abortion must, after giving her informed consent . . ., wait at least twenty-four hours before having the operation.

*Women's Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1145-46 (D.R.I. 1982). Indeed, "[i]t is difficult to argue that such an intrusion by the state does not unconstitutionally burden the abortion decision. *Id*. at 1146; *see also Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1014 (1st Cir. 1981) (the mandatory delay "temporarily forecloses the availability of an abortion altogether" and therefore "constitutes a state-created obstacle and direct state interference" (internal quotations and citation omitted)); *Margaret S. v. Edwards*, 488 F. Supp. 181, 213 (E.D. La. 1980) (the mandatory delay requirement is a "direct obstacle" to having an abortion and "means that, even after a decision to have an abortion has been made, irrespective of how carefully and thoughtfully, the woman must wait for twenty-four hours. That is a burden." (internal quotations and citation omitted)); *Women's Cmty. Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 550 (D. Me. 1979) ("a woman who has chosen to have an abortion would be prevented, at least temporarily from effectuating that decision."); *Planned*

*Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *9 (a mandatory delay "tell[s] a woman that she cannot exercise a fundamental constitutional right for a 24-hour period. . . . [I]t is a restriction on a woman's right . . . not supported by a compelling reason.").

The assertion that women considering abortion need the state to impose a "period for deliberation," *see* Appellants' Br. at 21, is an affront to women's dignity and autonomy. Florida women are fully capable of making autonomous decisions about their health and wellbeing, in the best interests of themselves and their families. *See Planned Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *13 ("[T]he Court will not presume that a Montana woman who chooses to have an abortion . . . is somehow incapable of making that decision on her own."). As the U.S. Supreme Court explained in evaluating a 24-hour mandatory delay under *Roe*'s strict scrutiny standard, "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 450 (1983).[10] The same is true under Florida law.

[10] Because Florida evaluates abortion restrictions under the strict scrutiny standard, U.S. Supreme Court decisions that pre-date *Casey* and apply *Roe*'s strict scrutiny standard are persuasive.

The State argues that only laws that *prevent* a woman from accessing abortion care "significantly burden[]" her right to privacy. *See* Appellants' Br. at 18. This is not the law. The Florida Constitution protects against harms well short of outright prevention. For example, in *In re T.W.* and *North Florida*, the parental involvement provisions did not generally prevent minor women from obtaining abortion care, nor did the Court suggest such a finding was necessary to the application of strict scrutiny. *See In re T.W.*, 551 So. 2d 1186; *North Florida*, 866 So. 2d 612; *see also J.P.*, 907 So. 2d 1101 (under strict scrutiny, striking down juvenile curfew ordinances as violation of right to privacy, although ordinances did not wholly prevent juveniles from being outside during evening hours); *Mitchell*, 786 So. 2d at 527 ("to find that a right has been violated it is not necessary for the statute to produce a procedural hurdle which is absolutely impossible to surmount" (emphasis omitted)). Indeed, even under the undue burden standard, abortion restrictions that do not outright *prevent* a woman from ending her pregnancy may nonetheless fail constitutional review. *See, e.g.*, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 917 (9th Cir. 2014) (concluding that "the burden . . . is undue even if some women" subject to the law "will nonetheless obtain an abortion. . . ." and that a burden need not "be absolute to be undue"), *cert denied*, 135 S. Ct. 870 (2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (even "slight" burdens can be "undue" if the law's

medical justifications are "feeble[]"), *cert denied*, 134 S. Ct. 2841 (2014); *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 3d 1272 (M.D. Ala. 2014) (same). It would turn Florida's strict scrutiny standard on its head to require a Florida challenger to show more than she would have to show under the less protective undue burden standard.

Likewise, the State is wrong that only laws that would disclose a woman's abortion decision trigger strict scrutiny. *See* Appellants' Br. at 20. First, Plaintiffs offered undisputed evidence that the Act could result in the disclosure of a woman's abortion decision. R. II at 99 ¶ 20. Second, Florida's privacy right encompasses far more than "the right to control the disclosure of information about oneself." *In re Guardianship of Browning*, 568 So. 2d 4, 9 (Fla. 1990). "'Privacy' has been used interchangeably with the common understanding of the notion of 'liberty,' and both imply a fundamental right of self-determination." *Id.* The right to determine one's medical treatment free from government interference or coercion is an "integral component" of Florida's constitutional right to privacy. *Id. at* 10. Thus, even if the Act did not threaten the confidentiality of a woman's abortion decision (which the State did not dispute it does), it still implicates Florida's strong privacy rights.

### C. If permitted to go into effect, the Act will impede Florida women's ability to access abortion care.

The State disputes Plaintiffs' factual claims that the Act will impede access to abortion, particularly for women who are poor, who are victims of intimate partner violence, or whose health is threatened by a pregnancy. *See* Appellants' Br. at 22-27. The State's arguments are unavailing on appeal because it did not offer any rebuttal evidence to dispute that the additional trip requirement could force women to miss more work or school, and to pay for more travel, childcare, or lost wages, making it harder for low-income women to access abortion.[11] *See* R. II at 96 ¶ 14. Nor did the State dispute that the Act could delay a woman by more than 24 hours, given women's limited flexibility and physician schedules. *See* R. II at 94 ¶ 6, 97 ¶ 16. Nor did the State dispute that a woman whose health—but not

[11] The State argues that a woman may avoid the additional trip to her provider by receiving the mandated information from a "referring physician." *See* Appellants' Br. at 25. This argument fails for two reasons: First, abortion providers may not be able to verify that a referring physician complied with the Act's requirements, putting themselves at risk of significant penalties from a mistake. Second, the Act requires a woman to obtain an ultrasound from the abortion provider or someone "working in conjunction with" him or her, 24 hours before her procedure. *See* § 390.0111(3)(a)(1)(b)(i) , Fla. Stat. This suggests that only physicians who are already "working in conjunction" with the abortion provider may obtain the woman's informed consent, drastically limiting the number of "referring physicians" a woman may visit. *See* R. III at 336 ¶ 10.

life—is threatened by a pregnancy would be further harmed by being forced to delay ending a pregnancy to protect her health. *See* R. II at 107 ¶ 18.[12]

Instead, in the trial court and again on appeal, the State argues that as a legal matter, "[n]one of these [burdens] amount to violations of the privacy amendment," citing cases from other jurisdictions upholding similar laws under the undue burden standard. *See* Appellants' Br. at 24; *see also id.* at 22 n.6. The State's failure to rebut any of the Act's practical burdens cannot be saved by a legal argument relying on cases applying the wrong legal standard.

The State also argues that the Act's two exceptions alleviate its burdens on women who are victims of sexual abuse or whose health is threatened by a pregnancy. *See* Appellants' Br. at 26. As explained *supra* 3-4, both exceptions are so narrow as to be meaningless. Most women who are victims of sexual abuse—particularly the most vulnerable of victims—do not formally report their abuse to the authorities. *Cf. Casey*, 505 U.S. at 891, 889-90 (quoting American Medical Association, "true incidence of partner violence is probably double the [reported]

[12] Unlike the exclusion of abortion from Medicaid programs, which both the U. S. Supreme Court and the Florida Supreme Court have held imposed no government-created burdens on the right to abortion, the Act is the sole source of these additional burdens. *See Harris v. McRae*, 448 U.S. 313, 316-17 (1980); *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1040-41 (Fla. 2001); *see also Planned Parenthood League of Mass.*, 641 F.2d at 1015 ("Unlike the laws at issue in *Harris* and *Maher*, the [mandatory delay] statute before us is not neutral with respect to those burdens; to the contrary, it is their direct source.").

estimates"; "A battered woman . . . is highly unlikely to disclose the violence against her . . . . [e]ven when confronted directly by medical personnel or other helping professionals."). These women will be unable to invoke the exception and will be forced to delay at least 24 hours and make an additional visit to the clinic before they can end a pregnancy that has resulted from sexual abuse.

Further, the Act's exceedingly narrow exception for medical emergencies is so restrictive that it fails even the undue burden standard. *Casey*, 505 U.S. at 880. In order to qualify for this exception, a woman's physician and a concurring physician must both determine "to a reasonable degree of medical certainty [that] continuation of the pregnancy would threaten [her] life[.]" § 390.0111(3)(b), Fla. Stat.[13] There is no exception for a woman whose health, but not life, is threatened by continuing her pregnancy. *See* R. II at 107 ¶ 18 (enumerating such conditions). That the Act would impose delays on such women is stunning and callous. Even

[13] The State also relies on an affirmative defense that a physician may raise in a disciplinary action, requiring her to prove that she had a "reasonable belief that complying with the" mandatory delay "would threaten the life or health of the patient." § 390.0111(c), Fla. Stat. *See* Appellants' Br. at 27. In so arguing, the State only highlights the medical peril in which the Act places Florida women: A Florida doctor must choose between complying with the Act and denying her patient medically necessary care, or providing such care and risk losing her medical license and being dragged before the Board of Medicine to prove the reasonableness of her actions. This does not adequately protect women's health. Indeed, the Legislature rejected amendments that would have provided an actual exception to allow physicians to provide immediate medical care to protect their patients' health. *See infra* 36.

under the federal standard articulated in *Casey*, a medical emergency exception that does not permit an "*immediate* abortion *despite some significant health risks*" is unconstitutional, "for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure *if continuing her pregnancy would constitute a threat to her health*." 505 U.S. at 880 (emphases added). Because the Act's narrow emergency exception allows for immediate care only when two physicians agree the pregnancy threatens a woman's *life*, the Act fails even the undue burden test that the State urges this Court to apply.

In sum, the Act is subject to strict scrutiny for three independent reasons—because the Act targets abortion for disadvantageous treatment, because the Act forces all women to make an additional visit and delay effectuating their decision, and because the Act will impede Florida women's ability to access abortion. In finding that the Act targets abortion for disadvantageous treatment, the trial court properly applied strict scrutiny.

## III. THE TRIAL COURT PROPERLY HELD THAT THE STATE WOULD BE UNABLE TO SHOW THAT THE ACT SATISFIES STRICT SCRUTINY.

As detailed in *supra* Part II, a law that infringes upon Florida's fundamental privacy right is "presumptively unconstitutional unless proved valid by the State." *North Florida*, 866 So. 2d at 626. The state bears the evidentiary "burden of proof to . . . justify an intrusion on privacy" by

demonstrating "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *In re T.W.*, 551 So. 2d at 1192 (quoting *Winfield*, 477 So. 2d at 547). The trial court properly held that the State is unlikely to meet this "highly stringent standard," *North Florida*, 866 So. 2d at 620-21 (quoting *In re T.W.*, 551 So. 2d at 1192).

### A. The State did not and cannot show that the Act furthers a compelling state interest.

The trial court properly held that the Act does not further a compelling state interest, *see* R. II at 346-47, and the State's arguments to the contrary fail. The Florida Supreme Court has recognized only two compelling state interests in the abortion context: maternal health, which becomes compelling no earlier than the beginning of the second trimester, and potential life, which becomes compelling only upon viability. *In re T.W.*, 551 So. 2d at 1193; *see also Presidential I*, 707 So. 2d at 1149. Thus, "[u]nder Florida law, prior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state." *In re T.W.*, 551 So. 2d at 1193. Here, the Act will serve no compelling state interests recognized by the Florida Supreme Court in the abortion context and must fall for that reason alone. The State offers two interests, neither of which is a compelling interest justifying the Act's intrusions.

First, the State argues that it has an "unassailable" interest in ensuring a woman's decision to have an abortion is informed. *See* Appellants' Br. at 30-31.

Even if the Act did apply only after the first trimester when the state's interest in maternal health becomes compelling, the State would still be unable to demonstrate that the Act *actually furthers* this interest. *See North Florida*, 866 So. 2d at 652 ("Regardless of the State's interest in protecting maternal health, the State has not met its heavy burden of proving that the Act *furthers* or *serves* those interests in any substantial or meaningful way.") (Pariente, J., concurring) (emphasis in original); *In re T.W.*, 551 So. 2d at 1195 (determining that the state failed to meet its burden to demonstrate that statute actually furthered compelling state interest). At the outset, the Florida Legislature made no findings as to how the Act's mandates would protect maternal health or improve a woman's decision-making process. "Where legislation is intended to serve some compelling interest, the government must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation *will in fact* alleviate these harms *in a direct and material way*." *J.P.*, 907 So. 2d at 1116-17 (emphases added) (internal quotations and citations omitted).

The State's unsupported contention that the Act enhances the informed consent process, *see* Appellants' Br. at 18, 20-21, is insulting and demeaning to women, and is belied by the undisputed record evidence. Dr. Goodman testified that the Act "subverts" any "interest in protecting the health of a woman seeking

abortion care," R. II at 119 ¶ 6, "erodes and undermines the [physician-patient] relationship[,] and . . . prevents the physician from delivering [the] care . . . she or he believes best protects patient interests and wellbeing," *id.* at 121 ¶ 12. Having produced no evidence to support their assertion in the trial court, the State now, for the first time on appeal, refers to the anecdotal legislative testimony of women who wished they had taken more time to consider their abortion decision (which they could have chosen to do). *See* Appellants' Br. at 21. Since the trial court never had the opportunity to consider the probative value of this anecdotal testimony, it is not in the record and may not be considered on appeal. *Forney v. Crews*, 112 So. 3d 741, 743-44 (Fla. 1st DCA 2013) (explaining that DCA's review is limited to matters contained in the record on appeal); *Brayton v. Brayton*, 46 So. 3d. 142, 143 (Fla. 5th DCA 2010) (same).

Thus, the trial court found that "Defendants have failed … to provide … any evidence that there is a compelling state interest to be protected in enhancing the informed consent already required of women and approved by the Supreme Court of Florida in *Presidential Women's Center*." R. III at 400-01. Indeed, the undisputed record evidence demonstrates that, rather than "facilitate[] the wise exercise of that [abortion] right," Appellants' Br. at 20-21, the Act harms women's health. R. II at 108 ¶ 19; *see supra* 4-5, 28-29. The State cannot remedy this defect by referring to new evidence not in the record. *See* Appellants' Br. at

21 (citing legislative history of the Act not in the record); *see also Altchiler v. State, Dep't of Prof'l Regulation, Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) ("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.").

Moreover, the State's failure to impose parallel burdens on comparable medical procedures is fatal to its claim. *See North Florida*, 866 So. 2d at 650-51 ("The fact that the Legislature has not chosen to require parental notification relating to other pregnancy-related conditions that are more dangerous than abortion" indicates that purpose of parental notification law is not to further compelling interest in protecting minors' health but is "instead, . . . to infringe on the minor's right to choose an abortion."); *In re T.W.*, 551 So. 2d at 1195 (same). Here, the trial court found, and the State cannot dispute, that Florida law does not impose a mandatory delay on any other medical procedure. R. III at 401.[14] Thus,

[14] *Presidential II* cites to three informed consent statutes that apply to specific medical procedures: breast cancer treatment, electroconvulsive and psychosurgical procedures, and, for inmates, psychiatric treatment. *See* 937 So. 2d at 118 (citing §§ 458.324, 458.325, 945.48, Fla. Stat. (2005)). These three statutes, both at the time of *Presidential II* and now, require the physician to give the patient information—but do not require him or her to do so in person and hours or days prior to the procedure, and thus do not impose a separate trip and delay.

as a matter of Florida law, the state cannot have a genuine compelling interest in women's health furthered by the Act.

Second, the State argues for the first time on appeal that it has a compelling interest in "maintaining the integrity of the medical profession." Appellants' Br. at 31. Because the State did not assert this in the trial court, this Court may not consider it. *See W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 13 (Fla. 2012) (citing *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) ("As a general matter, a reviewing court will not consider points raised for the first time on appeal.")). Further, Florida law has never recognized a compelling state interest in "maintaining the integrity of the medical profession" in the abortion context. And finally, the Legislature did not make any findings regarding the need to protect the medical profession's integrity in the abortion context, or how the Act would actually do so. *J.P.*, 907 So. 2d at 1116-17.[15] Thus, the State cannot justify the Act as furthering an interest that has not been found compelling, was not argued to the trial court, and was not identified by the Legislature when considering the Act.

[15] The State's citation to an assisted suicide case where the Florida Supreme Court found a compelling state interest in maintaining the integrity of the medical profession, is misleading and irrelevant. *See* Appellants' Br. at 31. Unlike the right to abortion, assisted suicide is not protected as a fundamental right under the Florida Constitution. *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997).

### B. The State did not and cannot show that the Act employs the least intrusive means.

Even if the State could establish that the Act furthers a compelling state interest—and it cannot, *see supra* Part III.A— the Act fails to further any state interest "through . . . the least intrusive means." *In re T.W.*, 551 So. 2d at 1192 (quoting *Winfield*, 477 So. 2d at 547). The State does not address this prong of the strict scrutiny analysis. Instead, it argues that the Act is a "reasonable and minimally intrusive means of ensuring that informed consent to abortion is knowing and voluntary." Appellants' Br. at 31. This assertion—even were it supported by record evidence—is inadequate.

First, Florida is already using less intrusive means through the current abortion-specific law. *See supra* 3. The Act does not provide Florida women any additional information about abortion. It adds only stigma, burden, and delay.

Second, even if the Florida Legislature had found that the current law was inadequate—which it did not—it could easily have amended the law to be less intrusive for all women by adopting, rather than rejecting, any of the numerous proposed amendments:

- Amendment 213635 would have permitted a woman to waive the Act's requirements and have the procedure on the same day as receiving the required information. *See* R. I at 36-38; *See H.B. 633 – Informed Patient*

*Consent*, Fla. H.R., http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=53704& (last visited Oct. 2, 2015) [hereinafter "*H.B. 633 Legislative History*"].

- Amendments 853480 and 231828 would have eliminated the additional trip and permitted a woman to receive the required information over the phone, via mail, or by viewing a web site. *See* R. I at 42-47; *H.B. 633 Legislative History*; *S.B. 724 – Termination of Pregnancies*, Fla. H.R., http://myfloridahouse.gov/sections/Bills/billsdetail.aspx?BillId=53671 (last visited Oct. 2, 2015) [hereinafter *S.B. 724 Legislative History*].
- Amendments 930638 and 711443 would have allowed non-physicians, such as a registered nurse, to provide the required information, mitigating scheduling burdens. *See* R. I at 48-53; *H.B. 633 Legislative History.*

Other rejected amendments would have rendered the Act less intrusive for specific groups of women:

- Amendments 591932 and 113284 would have created a meaningful health exception. *See* R. I at 60-63; *H.B. 633 Legislative History*; *S.B. 724 Legislative History.*
- Amendment 449942 would have allowed a woman who lives more than 100 miles away from the nearest abortion provider to waive the Act's requirements. *See* R. I at 39-41; *H.B. 633 Legislative History.*

- Amendments 874120, 888882, and 113284 would have created a meaningful exception for victims of sexual assault. *See* R. I at 54-61; *H.B. 633 Legislative History*; *S.B. 724 Legislative History*.
- Amendments 591932 and 113284 would have created an exception for women who receive a diagnosis of a severe fetal anomaly. *See* R. I at 60-63; *H.B. 633 Legislative History*; *S.B. 724 Legislative History*.

Indeed, many of the rejected amendments reflect the current practices of other states' mandatory delay laws,[16] further demonstrating that the Act does not utilize the least intrusive means. *See North Florida*, 866 So. 2d at 642 (Anstead, C.J., concurring) (explaining that challenged law was not the least intrusive means because other states have "less intrusive schemes that serve the same purpose").

[16] Laws permitting mandated information to be provided either without an additional visit or by someone other than the abortion provider: Ga. Code Ann. § 31-9A-3(1) ("by telephone" and by a "qualified agent"); Idaho Code § 18-609(3)(c), (4) (by a physician's agent); Ky. Rev. Stat. § 311.725(1)(a) (by telephone, and by other professionals, including social workers); Mich. Comp. Laws § 333.17015(3) (by a "qualified person"); Minn. Stat. § 145.4242(a)(1) (by telephone); Neb. Rev. Stat. § 28-327-(2) (by telephone and by physician's agent); N.D. Cent. Code §§ 14-02.1-02 (by telephone and by physician's agent); S.C. Ann. Code § 44-41-330 (D) (by mail); Va. Code § 18.2-76(B) (by trained professional; for patients who travel at least 100 miles, mandatory delay reduced to two hours); W. Va. Code § 16-2I-2(a) (by telephone and by health professional); Wis. Stat. § 253.10(3)(c)(2) (by qualified person).

In sum, the Act does not further a compelling interest, and even if it did, it does not employ the least intrusive means. Thus, the trial court properly held that the Act fails strict scrutiny and that Plaintiffs were likely to succeed on the merits of their privacy claim.

## IV. THE TRIAL COURT PROPERLY HELD THAT PLAINTIFFS SATISFIED THE OTHER REQUIREMENTS FOR A TEMPORARY INJUNCTION AND MADE SUFFICIENT FACTUAL FINDINGS.

The State does not even argue that the trial court committed an abuse of discretion in holding that a temporary injunction would prevent irreparable harm and serve the public interest, nor could it. Instead, it argues that the trial court failed, as a technical matter, to make specific factual findings as to these two requirements. *See* Appellants' Br. at 36-39. The State's argument is without merit.

Importantly, the trial court explained that its "decision on whether Plaintiffs have carried their burden to show" a likelihood of success on the merits of their privacy claim "will provide the answers to whether there is irreparable harm and determine the public interest issue." R. III at 394-95. The violation of one's constitutional rights necessarily causes irreparable harm, and an injunction to prevent such a violation necessarily serves the public interest. Accordingly, the trial court's findings as to the constitutional question were dispositive of the two other requirements.

The trial court made two key, undisputed factual findings that pertain to the Act's constitutionality—(1) that the Act targets abortion for differential treatment that the Legislature does not impose on any other medical procedure, and (2) that the Act does not further a compelling state interest. These undisputed findings demonstrate that the Act is unconstitutional and therefore establish that the temporary injunction will prevent irreparable harm and will protect the public interest.

The State does not—because it cannot—dispute that the threatened or actual loss of constitutional rights, even for a minimal period of time, constitutes per se irreparable harm. *See, e.g.*, *Coal. to Reduce Class Size v. Harris*, No. 02-CA-1490, 2002 WL 1809005, at *2 (Fla. Cir. Ct. July 17, 2002) (holding that plaintiffs would suffer irreparable injury in light of "the time constraints involved" and the "significant impact on the[ir] state and federal constitutional rights"), *aff'd sub nom. Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959 (Fla. 2002); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (stating that a loss of constitutional "freedoms . . . unquestionably constitutes irreparable injury"); *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (same); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014) (same). Further, after conceding in the trial court that Plaintiffs lack an adequate remedy at law, the State cannot dispute that a temporary injunction would

prevent irreparable harm. *See Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735, 738 (Fla. 3d DCA 1982) (explaining that whether a temporary injunction will prevent irreparable harm is "interrelated" with the question of whether the movant has an adequate remedy at law).

Likewise, the State does not—because it cannot—dispute that a temporary injunction that will prevent constitutional violations is per se in the public interest. *Coal. to Reduce Class Size*, 2002 WL 189005, at *2 (holding that injunction would serve public interest by vindicating constitutional provisions); *see also Strawser v. Strange*, 44 F. Supp. 3d 1206, 1210 (S.D. Ala. 2015) ("It is always in the public interest to protect constitutional rights." (internal citation omitted)); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1159 (S.D. Fla. 1998) (same).

Thus, the trial court correctly held that the temporary injunction would prevent irreparable harm and serve the public interest, and made sufficient findings to support its legal conclusions.

## V. THE TRIAL COURT PROPERLY ENJOINED THE ACT ON ITS FACE.

The trial court properly enjoined the Act in all its applications. The State argues that this was improper absent a finding that there is "no set of circumstances" in which the Act could apply constitutionally. *See* Appellants' Br. at 34-36. The State is wrong.

First, not only is there no precedent for applying this test in the Florida privacy context, but the Florida Supreme Court has facially invalidated abortion restrictions without so much as mentioning the question of whether they could apply constitutionally in some circumstances. *See, e.g.*, *North Florida*, 866 So. 2d at 626; *In re T.W.* 551 So. 2d at 1192-93. It is thus unsurprising that the State did not cite a single privacy challenge, much less an abortion case, applying this test.[17]

Second, enjoining the Act as to only certain groups of women as the State urges, *see* Appellants' Br. at 36, would have required rewriting it, in violation of legislative intent. *See supra* 35-37 (listing numerous rejected amendments demonstrating intent that the Act apply to all women, with extremely limited exceptions). It also would have required drastic judicial re-drafting. *Cf. Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) (finding it "impossible to preserve the constitutionality of the [] ordinance without effectively rewriting it, and []

[17] The cases the State cites are inapposite. The State wrongly attributes this standard to *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012); however, the quoted language actually appears in *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). *See* Appellants' Br. at 34-35. *Cashatt* concerned challenges under the federal Constitution, not the state privacy clause. 873 So. 2d at 434-36. *Franklin v. State*, 887 So. 2d 1063 (Fla. 2004), concerned the state's single subject clause and makes no mention of the "no set of circumstances" standard. Likewise, the right to privacy was not at issue in *Florida Department of Revenue v. City of Gainesville*, 918 So. 2d 250 (Fla. 2005). The two privacy cases cited by the State—*B.B. v. State*, 659 So. 2d 256 (Fla. 1995), and *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998)—are equally immaterial, as those cases concerned only as-applied challenges. *See* Appellants' Br. at 35.

declin[ing] to 'legislate' in that fashion."). For example, the State complains that the trial court should not have enjoined the Act as to women "who reside near providers and have ample financial resources, flexible work hours, and supportive family." Appellants' Br. at 36. This senseless argument—which ignores the implausibility of a court delineating how near, how ample, how flexible, and how supportive—only highlights the appropriateness of facial relief.

Third, when considering facial challenges to abortion restrictions under the undue burden test, federal courts focus on the individuals "*for whom the law is a restriction*," and do not deny facial relief on the ground that the law might constitutionally apply to other women. *Casey*, 505 U.S. at 894 (emphasis added); *see also City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451 (2015) (same as to challenge to statute authorizing warrantless searches). It would undermine Florida's *stronger* protection of a woman's privacy rights to provide those challenging an abortion restriction under the Florida Constitution *narrower* relief than is available under the federal Constitution.

Finally, even if the "no set of circumstances" test did apply here, which it does not, facial invalidation would still be proper. The trial court concluded that the Act targets abortion for disadvantageous treatment and that it fails the strict scrutiny test applicable to laws that do so. *See* R. III at 400-01; *supra* Parts II.A, III. Thus, the Act has no constitutional applications: there are no circumstances in

which it does not target the abortion decision and does not fail strict scrutiny. *See DIRECTV, Inc. v. State*, --- So.3d ---, 2015 WL 3622354, at *2-3 (Fla. 1st DCA June 11, 2015) (party can "argu[e] that there is no set of circumstances where [a statute] could apply constitutionally because of its discriminatory purpose or . . . effect" or because it poses a "total and fatal conflict with applicable constitutional standards.'" (second quotation from *Cashatt v. State,* 873 So. 2d 430, 434 (Fla. 1st DCA 2004))). The trial court's facial invalidation of the Act was thus proper.

## CONCLUSION

For the foregoing reasons, the trial court's temporary injunction should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2015, a copy of the foregoing was filed electronically with the Clerk of the Court through the Florida Courts eFiling Portal, and thereby was served via email on counsel of record.

/s/ Jennifer Lee
Jennifer Lee

## CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS

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

/s/ Jennifer Lee
Jennifer Lee

# Exhibit A

# Planned Parenthood v. State

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

**March 12, 1999**, Decided

Cause No. **BDV 95-722**

**Reporter**
1999 Mont. Dist. LEXIS 1117

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

## Core Terms

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

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

**Opinion by:** JEFFREY M. SHERLOCK

## Opinion

ORDER ON MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

I. Standard of Review

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

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

II. Right to Privacy

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

"The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

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

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

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

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

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

**[*9]** a. 24-Hour Waiting Period

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

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

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

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

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

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

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

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

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

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

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

b. Physician-Only Provision of Information

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

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

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

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

c. Mandatory Information

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

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

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

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

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

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

3. Equal Protection

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

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

4. Vagueness of Some Required Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JEFFREY M. SHERLOCK

***District*** Court Judge