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

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

STATE OF FLORIDA, ET AL.,

Appellants,

v.

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Appellees.

APPELLANTS' REPLY BRIEF

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

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INTRODUCTION

Like the majority of states, Florida provides a 24-hour period before women may terminate their pregnancies. This sensible law gives pregnant women the reasonable opportunity to consider the difficult decision they face. According to the Abortion Providers, though, voters approving the 1980 Privacy Amendment intended to preclude such a provision. The voters, they insist, sought to ensure the highest form of scrutiny for *any* regulation touching on abortion, no matter how reasonable or commonly accepted that regulation is. Consistent with their extraordinary position, the Abortion Providers are unwilling even to acknowledge that Florida may require abortion providers to be licensed physicians, calling that a "complex question[]" that need not be addressed here. AB at 21 n.9. The voters, though, never intended such an extreme result, and no Florida Supreme Court decision suggests otherwise.

The Florida Supreme Court has interpreted Florida's Privacy Amendment to subject abortion laws to strict scrutiny only when those laws impose *significant* burdens. *See* IB 10-14. Because the trial court failed to make any fact findings to support its conclusion that the New Law significantly burdened the right of privacy—and because as a matter of law it does not—this Court should reverse.

ARGUMENT

I. THE ABORTION PROVIDERS' SPECULATION ABOUT VOTER INTENT IS UNSUPPORTED.

The parties agree that this case turns only on Florida's Privacy Amendment—the Abortion Providers acknowledge that the federal constitution affords them no claim. And the parties agree that the reach of Florida's Privacy Amendment turns on the voters' intent in adopting it. *See* AB at 10; *see also Williams v. Smith*, 360 So. 2d 417, 419 (Fla. 1978) ("In construing the Constitution, we first seek to ascertain the intent of the framers and voters, and to interpret the provision before us in the way that will best fulfill that intent."). The parties disagree, though, on what the voters intended. Without any evidence in support, the Abortion Providers suggest that voters sought the most restrictive rule possible in the specific context of abortion. They cite no contemporaneous voter materials, no media pieces, no committee reports—nothing at all to suggest that when voters approved a general "constitutional right of privacy," they meant to preclude all abortion restrictions that fail the highest level of judicial scrutiny. *Cf., e.g., Dep't of Envt'l Protection v. Millender*, 666 So. 2d 882, 886 (Fla. 1996) ("[W]e may look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent.") (quoting *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979)); *Williams*, 360 So. 2d at 419-20 (examining

legislative and historical record to determine intent behind amendment).

Lacking any contemporaneous evidence of voter intent from 1980, the Abortion Providers point to an unsuccessful 2012 amendment. AB at 12. That amendment, if passed, would have prohibited the use of public funds for health-benefits programs that include abortion coverage. It also would have specified that the Florida Constitution creates no broader rights to abortion than the federal constitution. Voters rejected the ballot initiative,[1] but that vote says nothing about the issue presented here. This case has nothing to do with public funding of abortion, and the fact that the Florida Constitution affords broader privacy rights than does the federal constitution—a point the State does not contest, *see* IB at 6—does not support the extraordinary position that voters sought to subject *all* abortion laws to strict scrutiny. On the contrary, after the Florida Supreme Court struck down a parental-notification abortion law in *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003), Florida voters amended the Constitution to allow such laws, Art. X, § 23, Fla. Const., rejecting the application of strict scrutiny.

Both before and after the Privacy Amendment, the State has lawfully

[1] *See* FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, http://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2012&DATAMODE= (last visited Nov. 10, 2015).

imposed abortion-specific regulations, ranging from a law allowing only licensed physicians to perform abortions, to abortion-clinic safety requirements, to statutes governing disposal of fetal remains. *See* IB at 15-16 (collecting Florida abortion laws and administrative rules). The Abortion Providers make no effort to square their position with the existence of these, other than to suggest that perhaps all these laws and rules are indeed unconstitutional. AB at 21 n.9. The better answer—the correct one—is that these numerous and reasonable regulations are constitutional because strict-scrutiny review applies only to laws that *significantly* burden the right of privacy.

II. THE NEW LAW IS NOT SUBJECT TO STRICT SCRUTINY BECAUSE IT DOES NOT SIGNIFICANTLY BURDEN THE RIGHT OF PRIVACY.

A. *Strict Scrutiny Applies Only to Significant Burdens on the Right of Privacy.*

When a law imposes only insignificant burdens, the right of privacy is not implicated, and strict scrutiny does not apply. *North Florida*, 866 So. 2d at 631-32 (strict scrutiny triggered if abortion law poses a *significant* restriction on the right of privacy; insignificant intrusions are permissible); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (State may advance health objectives through insignificant burdens, at any stage of pregnancy, without implicating constitutional rights). For this reason, the Florida Supreme Court has upheld abortion regulations—including

the pre-amendment version of the New Law—against privacy challenges, without applying strict scrutiny. *See Presidential Women's Ctr.*, 937 So. 2d 114, 118 (Fla. 2006) (statute requiring in-person disclosure of risks and consequences of undergoing abortion and discussion of fetal age did not "generate the need for an analysis on the issue of constitutional privacy"). Likewise, numerous laws regulating abortion providers and procedures are enforced in Florida, despite incidental effects of making abortion more costly or time-consuming, therefore "burdening" the right. *See* IB at 15-16.

As a corollary, only abortion restrictions that impose *significant* burdens are subject to strict scrutiny. *North Florida*, 866 So. 2d at 631 (conducting constitutional analysis only after determining statute requiring notice of abortion imposed a "significant restriction" on the right of privacy); *T.W.*, 551 So. 2d at 1194 (conducting constitutional analysis only after determining statute requiring parental consent for abortion was "substantial invasion" of privacy right).

The Abortion Providers largely ignore the Florida Supreme Court's repeated references to applying strict scrutiny to "significant restrictions." They do not argue that the Court's language was dicta; nor do they argue that the Court was repeatedly mistaken. Instead, they attack a straw man, suggesting that the State argued "that only laws that *prevent* a woman from accessing abortion care

'significantly burden[]' her right to privacy." AB at 24. But the State's argument—supported by Florida Supreme Court decisions on abortion regulations—is that significant restrictions are subject to strict scrutiny, whether they foreclose the option of abortion or not. Neither *T.W.* nor *North Florida* involved laws that outright prevented abortion, but both involved laws that the Court found to impose significant burdens. Here, the "burden" is a one-day consent period that is nothing like the parental-permission requirement in *T.W.* or parental-notification requirement in *North Florida*.

Furthermore, if the Abortion Providers were correct that abortion laws are subject to strict-scrutiny review even when they impose no significant burdens, then the Florida Supreme Court would have applied strict scrutiny in *Presidential Women's Center*. Yet in that case, the Court did not apply strict scrutiny to a law regulating abortion—even though the abortion-provider plaintiffs had argued (and the District Court had concluded) that the abortion law violated the right of privacy. Without mentioning strict scrutiny, the Florida Supreme Court upheld the abortion informed-consent law (the pre-amendment version of the New Law) as constitutional. 937 So. 2d at 115-21.

The Abortion Providers do not deal with *Presidential Women's Center*'s holding, other than to say that the law there "did not disadvantageously target

abortion." AB at 21. But the law in fact specifically required women seeking abortions to comply with mandatory conditions imposed on abortions only. To the extent the law in *Presidential Women's Center* did not "disadvantageously target abortion" because it imposed no significant burdens, the same is true of the 24-hour requirement at issue here.

B. *A 24-Hour Informed-Consent Period Imposes No Significant Burden on the Right of Privacy, and the Trial Court Made No Fact-Finding on This Threshold Issue.*

Although the Abortion Providers insist that a 24-hour informed-consent period imposes significant burdens, the trial court made no such factual finding. The trial court instead leapt past the fact-finding step and *presumed* a significant restriction, based solely on the fact that the New Law is specific to abortion. R. 401. Florida law requires the opposite presumption, in favor of constitutionality. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005) ("[W]e are obligated to accord legislative acts a presumption of constitutionality.") (citation omitted). Furthermore, as *Presidential Women's Center* demonstrates, not all abortion-specific laws warrant strict scrutiny. The trial court nonetheless presumed a significant restriction unsupported by evidence, shifted the burden onto the State, and projected—without evidence—that the New Law would fail strict scrutiny. *See* R. 400-01 ("[T]he Court has no evidence in front of it in which to

make any factual determination that a 24-hour waiting period with the accompanying second trip necessitated by the same is not an additional burden on a woman's right of privacy."). In short, the trial court determined Abortion Providers were likely to succeed on the merits, without any findings of fact.

The Abortion Providers offer nothing to excuse this fatal deficiency in the Order. They just argue that the New Law inherently poses a burden on women. But neither the Abortion Providers nor a court may satisfy a key element of the case—whether the law actually imposes a significant burden—with argument or assumptions. The Abortion Providers did not prove that the reasonable 24-hour requirement actually imposes any significant burden. The New Law's simple requirement does not impose the types of significant burdens found in *T.W.* and *North Florida*. Without any contrary fact-finding, the Order cannot stand.

At bottom, the Abortion Providers object to the mere idea of informed consent, insisting that "[e]ach woman can already take all the time she feels she needs to decide whether to have an abortion"—before receiving the critical informed-consent information. AB at 21. Under this logic, the Abortion Providers would resist even the pre-existing law as an intrusion on a woman's "pre-fixed" decision. But both the pre-existing law and the New Law are constitutional—even if strict scrutiny applied.

C. *Even if There Were a Significant Burden, the Trial Court Should Have Found That the New Law Survives Strict Scrutiny.*

Even putting aside the trial court's failure to satisfy the threshold step of finding a significant burden, the Order was wrong because the New Law satisfies even the highest level of scrutiny. The interest advanced by the New Law is compelling: protecting pregnant women from undergoing serious procedures without minimal private time to reflect on the risks and consequences just revealed to them, while maintaining the integrity of the medical profession.[2] The means of protection is minimally restrictive: a brief 24-hour window after receiving critical information, away from potentially coercive circumstances. Regardless of whether rejected versions of the New Law approached the issue differently, *see* AB at 35-37, the Legislature may conclude those versions did not adequately address the problem, and the Legislature may use common sense in crafting the New Law, as a majority of states have done. *Cf. Delmonico v. State*, 155 So. 2d 368, 370 (Fla. 1963) (under strict scrutiny, "practical experience" can determine necessary means

[2] The Abortion Providers argue that the State cannot advance integrity of the medical profession as a compelling interest because that point was not specifically articulated below. The State argued below that the State had compelling interests, which was enough to preserve the point for appeal, even if the point is better developed on appeal than in the emergency trial proceedings below. *Cf. State v. Wynn*, 948 So. 2d 945, 947-48 (Fla. 5th DCA 2007) (issue preserved despite failure to cite cases on point, where correct legal argument was generally made). Regardless, the integrity of the medical profession is just one of the state interests, any one of which is sufficient to uphold the New Law.

to achieve statutory objective); *State v. Bradford*, 787 So. 2d 811, 821 (Fla. 2001) (in cases applying strict scrutiny, restrictions may be "based solely on history, consensus and 'simple common sense'") (citation omitted).

The Abortion Providers argue that the New Law is not the least restrictive means because it requires in-person disclosure. This assumes that in-person disclosure is unnecessary to serve the State's interest, an assumption unsupported by evidence and absent from the trial court's Order. No fewer than thirteen other states also require that the informed-consent information be given in person, presumably because of the import of the information. Moreover, the Legislature has determined that ultrasounds must be performed before informed consent may be given; the ultrasound necessitates that the initial visit be in person. But even if the in-person requirement created constitutional problems, the remedy is not to strike the 24-hour requirement altogether. *See Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999) (severability doctrine requires courts "to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions").

III. THE ABORTION PROVIDERS CANNOT MEET THE HEAVY BURDEN TO MAINTAIN A FACIAL CHALLENGE.

Except in the First Amendment context, Florida applies a no-set-of-circumstances test to evaluate facial challenges. *Cashatt v. State*, 873 So. 2d 430,

434 (Fla. 1st DCA 2004) ("Except in a First Amendment challenge, the fact that the act might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face; such a challenge must fail unless no set of circumstances exists in which the statute can be constitutionally applied.").[3] The Abortion Providers argue that the widely held standard for facial challenges should be ignored in the privacy context. AB at 41. But in privacy cases, the Florida Supreme Court has not allowed the possibility of unconstitutional applications to facially invalidate a law. *See B.B. v. State*, 659 So. 2d 256, 260 (Fla. 1995) ("[W]e do not hold that section 794.05 is facially unconstitutional but only that it is unconstitutional as applied."); *J.A.S. v. State*, 705 So. 2d 1381, 1387 (Fla. 1998) (considering as-applied privacy challenge and noting that "[i]f we blinded ourselves to the unique facts of each case, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general").[4]

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[3] The Abortion Providers correctly note that the Initial Brief attributed this citation to *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012), when it actually appears in *Cashatt* (which was cited on the same page). *See* IB at 35. Nonetheless, as *Cashatt* and subsequent cases have held, the controlling Florida law is that the no-set-of-circumstances test applies to all facial constitutional challenges except First Amendment claims. *See, e.g.*, *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) (repeating rule from *Cashatt*).

[4] The fact that the Florida Supreme Court did not address the no-set-of-circumstances test when deciding *North Florida* and *T.W.* does not, as the Abortion

Unable to identify any applicable legal exception, the Abortion Providers argue that requiring as-applied challenges would be "senseless" and "implausib[le]" because it would require courts to consider facts on a case-by-case basis. AB at 42. But that is precisely what as-applied challenges require, and courts routinely engage in such case-specific inquiries. Indeed, in the privacy cases the Abortion Providers cite, the Florida Supreme Court did just that. *See* AB at 41 & n. 17 (citing *B.B.* and *J.A.S.*); *see also Accelerated Benefits Corp. v. Dep't of Ins.*, 813 So. 2d 117, 120 (Fla. 1st DCA 2002) ("in 'as applied' challenge, the court is to consider the facts of the case at hand"). The rule is clear: "a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." *City of Gainesville*, 918 So. 2d at 256. Because the Abortion Providers base their allegations of harm on assumptions about hypothetical women in hypothetical scenarios, they do not meet the burden of showing that the New Law is unconstitutional as applied to any particular woman, much less every woman.

The whole point of the no-set-of-circumstances requirement is to ensure that legislative acts do not fail in their entirety because of the possibility that in some

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Providers suggest, alter the precedent regarding the standard for facial challenges. "It is axiomatic that no decision is authority on any question not raised and considered." *State ex rel. Helseth v. Du Bose*, 128 So. 4, 6 (Fla. 1930); *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 304 (Fla. 4th DCA 1995) (same).

circumstance the law may be unconstitutionally applied. "[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008). Even if the Abortion Providers were correct that the New Law might operate unconstitutionally in some circumstance, courts should not prevent its operation in other circumstances.

Because this Court cannot create a new exception to binding Florida Supreme Court precedent setting forth a no-set-of-circumstances rule,[5] that rule applies to this facial constitutional challenge and renders it a failure.

IV. THE ORDER FAILS ON ITS FACE BECAUSE IT LACKS THE REQUIRED FACT-FINDING.

Finally, even putting aside the merits of the underlying claim, the injunction must be reversed because the Order does not include findings of fact on the four elements required by Florida Rule of Civil Procedure 1.610. *See St. Johns Inv.*

[5] As the Initial Brief explains, although the United States Supreme Court has not decided whether facial challenges to abortion laws must satisfy the no-set-of-circumstances test, it has held that plaintiffs bringing such challenges bear "a heavy burden" of showing that, at a minimum, the law is unconstitutional in "a large fraction" of cases. *Gonzalez v. Carhart*, 550 U.S. 127, 168 (2007) (sustaining abortion law against a broad, facial constitutional attack). The Abortion Providers have not come close to showing a fraction of unconstitutional applications. Regardless, the Abortion Providers have disclaimed any federal challenge, and the no-set-of-circumstances rule is settled as a matter of Florida law.

Mgmt. Co. v. Albaneze, 22 So. 3d 728, 731 (Fla. 1st DCA 2009) (party seeking a temporary injunction bears the burden of providing substantial, competent evidence on each element required by Rule 1.610). Here, the trial court explicitly stated that it did not rely on evidence relating to these required elements. R. 401 ("[T]he only evidence before the Court is that 'Florida law does not require a twenty-four-hour waiting period for any other gynecological procedures with comparable risk, or any other procedure I perform in my practice.'") (quoting declaration). When a temporary injunction order does not set forth facts supporting each of the four criteria, the Court must reverse. *Milin v. Nw. Fla. Land, L.C.*, 870 So. 2d 135, 137 (Fla. 1st DCA 2003).

The Abortion Providers downplay the trial court's failure as a "technical matter," but they cite no authority suggesting that this Court could affirm an injunction lacking the required findings. AB at 38. The Order cannot survive this failure. *See Jouvence Ctr. For Advanced Health, LLC v. Jouvence Rejuvenation Ctrs., LLC*, 14 So. 3d 1097, 1099 (Fla. 4th DCA 2009) (reversing injunction when "trial court neglected to make specific findings of fact regarding the four elements," which was a "clear abuse of discretion"); *Angelino v. Santa Barbara Enters., LLC*, 2 So. 3d 1100, 1103-04 (Fla. 3d DCA 2009) (reversing injunction as abuse of discretion when trial court failed to make specific findings to support each

required element); *Spradley v. Old Harmony Baptist Church*, 721 So. 2d 735, 737 (Fla. 1st DCA 1998) (order "fatally deficient" because it did not contain factual findings in support of the injunction).

CONCLUSION

Because the Abortion Providers failed to satisfy the high burden of showing "a prima facie, clear legal right to the relief requested," *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 753 (Fla. 1st DCA 1994), the trial court erred in granting injunctive relief. This Court should reverse.

Respectfully Submitted,

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I certify that a true and correct copy of this brief was served by electronic mail on the individuals listed below, this 12th day of November, 2015.

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CERTIFICATE OF COMPLIANCE

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

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