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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, *et al.*,

Plaintiffs,

v.

Case No. 2022-CA-912
Judge Cooper

STATE OF FLORIDA, *et al.*,

Defendants.
_____/

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR EMERGENCY TEMPORARY INJUNCTION

House Bill 5 (HB 5) prohibits abortions after fifteen weeks[1] unless certain exceptions are met. *See* § 390.0111, Fla. Stat.[2] Plaintiffs, several abortion clinics and one abortion doctor, bring this facial challenge under the Florida Constitution and seek a temporary injunction preventing HB 5 from taking effect. This Court should not grant that "extraordinary" relief. *Byrd v. Black Voters Matter Capacity Building Inst.*, No. 1D22-1470, 2022 WL 1698353, at *3 (Fla. 1st DCA May 27, 2022).

[1] Fifteen weeks refers to the time since the mother's last menstrual period (LMP). *See* Ch. 2022-69, Laws of Fla., http://laws.flrules.org/2022/69. Gestational age is also measured from fertilization, which is roughly two weeks later. All references are to LMP unless otherwise stated.

[2] The State Defendants cite specific provisions of HB 5 by citing the Florida Statutes as amended by HB 5. *See* Ch. 2022-69, Laws of Fla.

Plaintiffs' failure to demonstrate that HB 5 "violates the rights of *all* women in *all* circumstances" dooms their facial challenge. *State v. Gainesville Woman Care* (*Gainesville Woman Care III*), 278 So. 3d 216, 222 (Fla. 1st DCA 2019) (emphasis added). As they admit, "most abortions in Florida, and most abortions provided by Plaintiffs, occur prior to 15 weeks." Mot. For Temp. Inj. at 5. Whether HB 5 is unconstitutional in a specific application where it might prohibit an abortion should be addressed through as applied challenges, "the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quotations omitted).

Merits aside, Plaintiffs have not made the necessary showing to assert the privacy rights of third parties and have not demonstrated that they will suffer irreparable harm absent injunctive relief. At a minimum, Plaintiffs are not entitled to a statewide temporary injunction, but only one that "preserve[s] the relative position of *the parties*" by enjoining enforcement against the Plaintiffs "until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added), *quoted in Byrd*, 2022 WL 1698353, at *3.

For these reasons, and those that follow, the motion should be denied.

BACKGROUND

On March 4, 2022, the Florida Legislature enacted HB 5, and on April 15, the Governor signed it into law. Effective July 1, HB 5 prohibits abortions "if the

physician determines the gestational age of the fetus is more than 15 weeks," subject to exceptions to "save the pregnant woman's life," to save her from a "serious risk of substantial and irreversible physical impairment of a major bodily function," or where "the fetus has a fatal fetal abnormality." § 390.0111(1), Fla. Stat.

On June 2, Plaintiffs filed this suit, and served with the Complaint a Motion for Temporary Injunction. Plaintiffs assert only one claim—that HB 5 facially violates the right to privacy in article I, section 23 of the Florida Constitution. Compl. ¶¶ 70–71.[3]

The State Defendants plan to submit expert declarations in the coming days, to depose Plaintiffs' witnesses, and to offer evidence at the evidentiary hearing. This evidence will provide further background for the Court.[4]

[3] Plaintiffs claim to bring an as applied challenge "in the alternative." Compl. ¶ 71. But HB 5 has not gone into effect, much less been applied, and Plaintiffs identify no specific potential application of the law that they seek to enjoin. *See M&H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 76 (Fla. 1st DCA 2009) (explaining that as applied challenges require that the "governmental action in question must have been 'applied'" (quoting Ronald L. Weaver, *1997 Update on the Bert Harris Private Property Protection Act*, 17 Fla. Bar J. 70, 72 (Oct. 1997))); *accord Benezet Consulting LLC v. Sec'y, Commonwealth of Pa.*, 26 F.4th 580, 585 (3d Cir. 2022) ("Unlike facial relief, as-applied relief must contest a specific application of a law.").

[4] Plaintiffs have withdrawn the declarations of Stephanie Fraim and Kelly Flynn. The parties have stipulated as follows: "All Plaintiff facilities perform abortions after 15 weeks. If any Plaintiff facility performed such an abortion with HB 5 in effect, the facility and/or its employees would be subject to enforcement as provided in Florida law."

LEGAL STANDARD

"To obtain a temporary injunction, the movant must establish (1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest." *State v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 472 (Fla. 1st DCA 2018). "If the party seeking the temporary injunction fails to prove one of the requirements, the motion for injunction must be denied." *Id.* "Prior to issuing a temporary injunction, a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested." *See City of Jacksonville v. Naegele Outdoor Advertising Co.*, 634 So. 2d 750, 753 (Fla. 1st DCA 1994) (quotations omitted), *approved* 659 So. 2d 1046 (Fla. 1995). A movant that lacks standing is not entitled to a temporary injunction. *See DeSantis v. Fla. Ed. Ass'n*, 306 So. 3d 1202, 1213 (Fla. 1st DCA 2020).

ARGUMENT

I. PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE HB 5.

As a general rule, only individuals whose privacy rights are implicated by a law have standing to challenge it on right to privacy grounds. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (explaining that Florida's right to privacy "is a personal one" and belongs "solely to individuals"). Here,

Plaintiffs are several abortion clinics and one abortion doctor, but none of them assert a personal right to privacy.[5] Plaintiffs instead seek to vindicate the privacy rights of their patients. *See* Compl. ¶¶ 12–19.

To overcome the general bar on third-party standing and assert the constitutional rights of another, a litigant must show (1) injury in fact, (2) a close relation to the third party, and (3) that the third party cannot protect his or her own interests. *Alterra Healthcare*, 827 So. 2d at 941. The Complaint does not even mention these elements, and it plainly fails to establish the first and third elements.[6]

As to the first element, Plaintiffs have not established injury in fact stemming from HB 5. Plaintiffs point to "their patients' needs and wishes" and the effects of HB 5 on people in Florida, Compl. ¶ 69, but Plaintiffs must still prove injury to *themselves* to have third-party standing to assert the rights of another. *See Alterra Healthcare*, 827 So. 2d at 941 (discussing the injury in fact element and explaining

[5] Plaintiff Dr. Tien asserts her own rights in addition to those of her patients. Compl. ¶ 19. But Dr. Tien does not allege that she is pregnant or likely to become pregnant and therefore cannot assert her own privacy rights. *See State v. Alice P.*, 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979).

[6] The State Defendants agree that a doctor-patient relationship is sufficiently close to satisfy the second element as to Plaintiffs' patients. To the extent Plaintiffs seek to assert their employees' rights, however, Compl. ¶¶ 12–19, "[an] employee/employer relationship is not the kind of special relationship necessary for third-party standing." *N. Fla. Reg'l Hosp. Inc. v. Douglas*, 454 So. 2d 759, 760 (Fla. 1st DCA 1984); *see also Alterra Health Care Corp. v. Shelley*, 779 So. 2d 635, 636 (Fla. 1st DCA 2001), *approved*, 827 So. 2d 936.

that the "litigant" asserting a third party's rights must have a "sufficiently concrete interest in the outcome of the issue in dispute").

Plaintiffs also point to the "penalties" associated with violation of HB 5, Compl. ¶ 69, but they admit that they will not face these penalties because they plan to "stop providing . . . abortions after 15 weeks" if HB 5 goes into effect. *Id.* Penalties that will never be applied to Plaintiffs cannot establish injury in fact. *See San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir. 1996) (finding no injury in fact where plaintiffs had "not articulated concrete plans to violate" the challenged law); *accord Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998) (requiring "a credible threat of prosecution" (quotations omitted)).[7] Because the Complaint contains no other allegations of injury in fact to Plaintiffs, they fail to establish this element.

As to the third element, Plaintiffs nowhere allege that their patients cannot "protect [their] own interests," nor do they allege facts from which this element could plausibly be inferred. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *see also N. Fla. Reg'l Hosp. Inc. v. Douglas*, 454 So. 2d 759, 761 (Fla. 1st DCA 1984)

[7] This does not mean that Plaintiffs must violate the law to establish injury in fact. It simply means that, absent an allegation that Plaintiffs will engage in prohibited behavior, they must allege that cessation of that behavior injures them. For example, Plaintiffs do not allege that they will earn less money when they stop performing abortions after 15 weeks. And Plaintiffs cannot claim that HB 5 "deters the exercise of [their] constitutional rights," *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), because, as discussed, the implicated right does not belong to them.

(finding a litigant failed this element because the third party possessing the privacy right had an opportunity to intervene in the suit). Indeed, women in Florida routinely challenge abortion restrictions on their own behalf. *E.g.*, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989); *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036 (Fla. 2001); *Burton v. State*, 49 So. 3d 263, 264 (Fla. 1st DCA 2010).

Plaintiffs possess no implicated privacy rights themselves, and they fail to adequately allege two of the three required elements to assert the rights of others. As such, they lack standing.

II. PLAINTIFFS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF OR LACK AN ADEQUATE REMEDY AT LAW.

Plaintiffs assert three theories of irreparable harm: (1) the "threatened or actual loss of constitutional rights," Mot. For Temp. Inj. at 24; (2) discipline and penalties as a result of HB 5, *id.* at 26; and (3) "undermin[ing] of the doctor-patient relationship," *id.* None qualifies as irreparable harm sufficient to support entry of a temporary injunction here, and, in any event, Plaintiffs have not presented "clearly, definitely and unequivocally sufficient factual allegations to support" a finding of irreparable harm. *Naegele*, 634 So. 2d at 754 (quotation omitted). Further, Plaintiffs' unexplained delay in seeking injunctive relief militates against a finding of irreparable harm.

A. Plaintiffs' third-party irreparable harm theory fails.

As discussed, Plaintiffs' constitutional rights are not at issue in this case, only their patients' rights are. A third party's loss of constitutional rights does not qualify as irreparable harm because, "to be entitled to a temporary injunction, the *moving party* must establish that *it* will suffer irreparable harm because there is no adequate remedy at law." *Curvey v. Avante Grp., LLC*, 327 So. 3d 401, 403 (Fla. 5th DCA 2021) (emphasis added); *accord S. Fla. Limousines, Inc. v. Broward Cnty. Aviation Dep't*, 512 So. 2d 1059, 1061 (Fla. 4th DCA 1987). As a result, "injuries to third parties are not a basis to find irreparable harm." *Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 326 (D.D.C. 2018); *accord 3299 N. Fed. Highway, Inc. v. Bd. of Cnty. Comm'rs of Broward Cnty.*, 646 So. 2d 215, 220 (Fla. 4th DCA 1994). This makes good sense, since the purpose of a temporary injunction is to "preserve the relative positions of *the parties* until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395 (emphasis added), *quoted in Byrd*, 2022 WL 1698353, at *3; *accord Church v. Biden*, No. 21-2815, 2021 WL 5179215, at *17 (D.D.C. Nov. 8, 2021) (holding that harm to third parties "does not satisfy the irreparable harm requirement," which must "be connected specifically to the parties before the Court.").[8]

[8] Third-party harm is relevant to the public interest, but it does not go to irreparable harm. *See Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 213 (D.D.C. 2012).

In arguing otherwise, Plaintiffs appear to assume that, if they can establish third-party standing, they can rely on the irreparable harm of third parties. But that argument misunderstands the third-party standing doctrine. The doctrine allows a litigant to assert *the rights* of another. It does not allow a litigant to assert *the injuries* of another. *See Alterra Healthcare*, 827 So. 2d at 941 (discussing when a litigant may "raise[] the rights of third parties" (quotations omitted)); *Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344, 351 (1st Cir. 2004) (requiring a party asserting third-party standing to rely on his own injuries).

An example illustrates this distinction. Suppose an employee is subject to a false arrest on the way to work, injured in the process, and forced to miss work. Suppose also that his employer loses business as a result. If the employer could satisfy third-party standing, he could assert the Fourth Amendment rights of the employee, which would otherwise not be his to assert. But third-party standing would not give him the power to sue for the employee's bodily injuries. Any suit by the employer would be based on his harm—namely, the lost business.

Put differently, third-party standing goes to "the claims or defenses a party may raise" on the merits. C. Bradley & E. Young, *Unpacking Third-Party Standing*, 131 Yale L.J. 1, 21 (2021). In fact, a distinct theory of third-party standing exists where the litigant may assert the injuries of a third party. It applies, for example, to parents suing on behalf of their children or organizations suing on behalf of their

members. *Id.* at 6, 60. The existence of that theory, and its inapplicability here, further indicates that Plaintiffs cannot assert the irreparable harm of their patients. *See Guggenheimer Health & Rehab. Ctr. v. Cary*, No. 6:17-cv-79, 2018 WL 1830736, at *4 (W.D. Va. Apr. 17, 2018) (collecting authorities holding that a "patient" is not a member for purposes of establishing "organizational standing").

Gainesville Woman Care v. State (*Gainesville Woman Care II*), 210 So. 3d 1243 (Fla. 2017), does not hold otherwise. There, in a case brought by an abortion clinic and an abortion-advocacy organization, the Court found irreparable harm based on a likely violation of constitutional rights. *Id.* at 1263–64. The State, however, conceded the unavailability of an adequate remedy in that case, *id.* at 1263, and the Court did not discuss the third-party standing doctrine at all, much less its interaction with the irreparable harm requirement. Because the Court did not pass on the argument the State Defendants advance here, its decision has no bearing on it. *See Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))).

B. Plaintiffs have not shown irreparable harm based on the threat of criminal enforcement or other penalties.

Plaintiffs' penalty-related theory of irreparable harm fails for two reasons. First, as discussed, Plaintiffs admit that they will not face those penalties because they plan to "stop providing . . . abortions after 15 weeks." Compl. ¶ 69; *see Bayfront HMA Med. Ctr.*, 236 So. 3d at 475 ("Irreparable injury will never be found where the injury complained of is 'doubtful, eventual or contingent.'" (quoting *Jacksonville Elec. Auth. v. Beemik Builders & Constructors, Inc.*, 487 So. 2d 372, 373 (Fla. 1st DCA 1986))).

Second, "[p]otential criminal prosecution does not constitute irreparable harm" because "[a] party has an adequate remedy at law by establishing as a defense that the ordinance on which the prosecution is based is invalid." *Palenzuela v. Dade Cnty.*, 486 So. 2d 12, 13 (Fla. 3d DCA 1986) (citing *Louisville & N.R. Co. v. R.R. Comm'rs*, 58 So. 543, 547 (Fla. 1912)); *accord Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828–29 (Fla. 1st DCA 2018); *3299 N. Fed. Highway*, 646 So. 2d at 220–21.

C. Plaintiffs have not shown irreparable harm based on the doctor-patient relationship.

Plaintiffs' final theory of irreparable harm is that HB 5 "will undermine the doctor-patient relationship." Mot. For Temp. Inj. at 26. The only relevant evidence Plaintiffs cite, however, is Dr. Tien's declaration, where she says that HB 5 "would

prevent doctors from exercising their best medical judgment to care for patients, which damages both the doctor-patient relationship and physicians' ability to fulfill our ethical obligations and professional mission." Tien Dec. ¶ 57. That conclusory statement does not demonstrate irreparable harm. *See Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) ("A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store."); *Fla. Dep't of Health v. Florigrown, LLC*, 320 So. 3d 195, 200 (Fla. 1st DCA 2019) ("To obtain a temporary injunction, a party must provide *specific facts* establishing . . . the likelihood of irreparable harm . . . ." (emphasis added)), *quashed on other grounds by* 317 So. 3d 1101 (Fla. 2021).

To the extent that interference with a doctor-patient relationship might qualify as irreparable harm to a doctor at all, a movant must at least demonstrate "harm to [the doctor]" and not only "to patients." *See Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706–07 (8th Cir. 2011). The First District has found irreparable harm, for example, where a business dispute between doctors prevented a doctor from complying with ethical obligations, such as "informing her patients about available cancer-related treatments and provider options." *Tarantola v. Henghold*, 233 So. 3d 508, 510 (Fla. 1st DCA 2017). HB 5, however, cannot prevent a doctor from complying with ethical obligations because medical ethics are the province of

the State Legislature and governed by state law. *See Gassman v. United States*, 768 F.2d 1263, 1265 n.3 (11th Cir. 1985) (explaining that state law sets the standard of care); *Boedy v. Dep't of Pro. Regul.*, 463 So. 2d 215, 218 (Fla. 1985) (discussing the State's "compelling interest in the regulation of the practice of medicine within its boundaries"). In other words, doctors are not irreparably harmed simply because they cannot perform a procedure prohibited by state law. Were Plaintiffs' theory correct, a doctor could show irreparable harm from *any and every medical regulation* on the ground that it "prevent[s] doctors from exercising their best medical judgment." Tien Dec. ¶ 57.

D. Plaintiffs' delay in seeking injunctive relief militates against a finding of irreparable harm.

On March 4, 2022, the Florida Legislature enacted HB 5 and the Governor immediately indicated that he would sign it.[9] The Governor signed the bill on April 15. Ch. 2022-69, Laws of Fla. Plaintiffs filed suit on June 2 and served the State Defendants with their Motion for Temporary Injunction on June 7. Compl.; Pls.' Status of Process Service (June 7, 2022). Plaintiffs took more than 13 weeks from when the bill was passed, and more than 7 weeks since it was signed, to seek

[9] CS/HB 5: Reducing Fetal and Infant Mortality, Fla. Senate https://www.flsenate.gov/Session/Bill/2022/5; Renzo Downey, Gov. DeSantis says he'll sign 'warranted' 15-week abortion ban, Fla. Politics (Mar. 4, 2022), https://floridapolitics.com/archives/504230-gov-desantis-says-hell-sign-warranted-15-week-abortion-ban/.

emergency relief, all while demanding a ruling before the July 1 effective date, or a mere 23 days after serving the State Defendants.

Plaintiffs' delay "militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (noting that a delay of "even only a few months" can negate irreparable harm); *accord Barnett v. Bell*, 62 So. 210, 210 (Fla. 1913) (denying emergency relief based on a plaintiff's delay); *Mora v. Karr*, 697 So. 2d 887, 888 (Fla. 4th DCA 1997) (similar). Irreparable harm sufficient to support a temporary injunction "must be so imminent and probable as reasonably to demand preventive action by the court," *City of Coral Springs v. Fla. Nat'l Props., Inc.*, 340 So. 2d 1271, 1272 (Fla. 4th DCA 1976), and a plaintiff's failure to act quickly suggests that "extraordinary" relief is not necessary, *Byrd*, 2022 WL 1698353, at *3. *See also Badillo v. Playboy Ent. Grp.*, 8:04–cv–591, 2004 WL 1013372, at *2 (M.D. Fla. Apr. 16, 2004) ("[D]elay, or too much of it, indicates that a suit or request for injunctive relief is more about gaining an advantage . . . than protecting a party from irreparable harm." (quotations omitted)).

Plaintiffs appear to assume that the time between when HB 5 was enacted and when it goes into effect was an invitation to wait until the eleventh hour. But delay is measured from when a party is on notice, not when a law or policy goes into effect. *See S. Ute Indian Tribe v. U.S. Dep't of Interior*, No. 15–cv–01303, 2015 WL 3862534, at *1 (D. Colo. June 22, 2015) (measuring delay from when the plaintiff

was on notice of the challenged policy, rather than its effective date); *Tarek Ibn Ziyad Acad. v. Islamic Relief USA*, 794 F. Supp. 2d 1044, 1059 (D. Minn. 2011) (same); *AARP v. EEOC*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) (same); *Hart Intercivic, Inc. v. Diebold, Inc.*, No. 09–678, 2009 WL 3245466, at *8 (D. Del. Sept. 30, 2009) (same). Because they have known about HB 5's effective date for months and chose not to act until now, the imminence of Plaintiffs' alleged harm is of their own making.

* * *

Plaintiffs' theories of irreparable harm lack legal and factual support and their substantial delay in seeking emergency relief further militates against a finding of irreparable harm.

III. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

Florida has general police power to protect the health and safety of its people. *See Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 782 (Fla. 2004). This power extends to regulating abortion, as States have "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Roe v. Wade*, 410 U.S. 113, 154 (1973). For the reasons described below, HB 5 is not facially unconstitutional.

A. Plaintiffs cannot satisfy the facial challenge standard.

"To succeed on a facial challenge" to an abortion restriction, "the challenger must demonstrate that *no set of circumstances* exists in which the statute can be constitutionally valid." *Gainesville Woman Care III*, 278 So. 3d at 222–23 (quoting *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018)). This standard is more demanding than the "large fraction of relevant cases" test that has been applied by the U.S. Supreme Court, *see id.* at 222 n.*, and requires Plaintiffs to show that HB 5 "violates the rights of all women in all circumstances," *id.* at 222.

As Plaintiffs admit, "most abortions in Florida, and most abortions provided by Plaintiffs, occur prior to 15 weeks." Mot. For Temp. Inj. at 5. In 2021, 79,817 abortions were performed in the State of Florida. Ex. A at 3. Of those, 74,967 were performed in the first trimester, or within the first 13 weeks since the last menstrual period. *Id.*[10] In other words, for most women seeking an abortion, HB 5 will have no effect at all, much less cause a "significant restriction." *See N. Fla. Women's Health & Counseling Servs. Inc. v. State*, 866 So. 2d 612, 631 (Fla. 2003). And even as to the abortions to which HB 5 applies, women will in most cases have the option to

[10] The Agency for Health Care Administration's publicly available data shows abortions in Florida by trimester. Ex. A. The Centers for Disease Control and Prevention's publicly available data is more specific in terms of gestational age but is only available through 2019. Ex. C at 27.

schedule their abortion earlier, leading to a less dangerous procedure with a lower complication rate.

Plaintiffs ask this Court to focus on women who "do not realize they are pregnant," "have inflexible work schedules," and who have health issues that "significantly worsen after 15 weeks." Mot. For Temp. Inj. at 8–9. But just as the facial constitutionality of Florida's 24-hour waiting period was not based on its application to "women who have sophisticated medical knowledge," who "live far from a clinic," or who "may have suffered violence," *Gainesville Woman Care III*, 278 So. 3d at 222, the facial constitutionality of HB 5 is not based on its application to women in these special circumstances. In fact, the plaintiff in *Gainesville Woman Care* (who is a Plaintiff here) could at least argue there that the waiting period law applies to the vast majority of abortions, *see* § 390.0111(3)(a), Fla. Stat., but HB 5 applies only to the small fraction of women seeking abortions after 15 weeks.[11]

In short, "[w]omen claiming particular harms from" HB 5 "based on their specific circumstances may challenge the law's application to them." *Gainesville Woman Care III*, 278 So. 3d at 22; *see Gonzales*, 550 U.S at 168 (explaining that as

[11] Plaintiffs claim that the health exception—which applies to "save the pregnant woman's life" or to save her from a "serious risk of substantial and irreversible physical impairment of a major bodily function," § 390.0111(1), Fla. Stat.—is too narrow. Mot. For Temp. Inj. at 9. But this argument is not relevant to Plaintiffs' facial challenge. In any event, only one percent of second trimester abortions in Florida in 2021—after 13 weeks LMP—are for "[p]hysical [h]ealth of [the] [m]other than is not [l]ife [e]ndangering." Ex. A at 3 (reporting 71 of 4,850 second trimester abortions).

applied challenges are "the basic building blocks of constitutional adjudication"). But Plaintiffs have not shown that HB 5 is unconstitutional as applied to all women in all circumstances and therefore cannot succeed on the merits of their facial challenge, which seeks wholesale invalidation of HB 5.

B. The Florida Supreme Court's right to privacy case law.

Given Plaintiffs' failure to satisfy the facial challenge standard, this Court need not further analyze the Florida Supreme Court's abortion precedent. Should it do so, the State Defendants recognize that HB 5 would likely be subject to strict scrutiny under current precedent. *See Gainesville Woman Care II*, 210 So. 3d at 1260–62. The State Defendants acknowledge that this Court must apply this precedent. They preserve for further review, however, the arguments that strict scrutiny is the wrong standard and that, as a matter of original public meaning, the right to privacy does not include the right to obtain an abortion.

C. HB 5 advances compelling interests through the least restrictive means.

HB 5 protects maternal health by ensuring abortions occur earlier and it protects children in utero who, by 15 weeks, are conscious and can feel pain. Both interests are compelling and advanced through the least restrictive means. And because Plaintiffs bring a facial challenge, the question is whether HB 5 ever satisfies these requirements, not whether it always does. *Compare Gainesville Woman Care III*, 278 So. 3d at 222 (discussing the facial challenge standard), *with*

J.A.S. v. State, 705 So. 2d 1381, 1387 (Fla. 1998) (discussing whether, "as applied in the circumstances presented," the law "furthers the State's compelling interest . . . through the least restrictive means").

As to maternal health, "the state's interest" at a minimum "becomes compelling . . . [at] the end of the first trimester," which is before the 15-week mark at issue here. *In re T.W.*, 551 So. 2d at 1193 (three justice opinion). And countless courts have recognized the State's "compelling interest in the regulation of the practice of medicine within its boundaries in order to protect the health, safety and welfare of its citizens." *Boedy*, 463 So. 2d at 218; *accord Caddy v. State*, 764 So. 2d 625, 629 (Fla. 1st DCA 2000) ("Clearly, the State has a compelling interest in protecting the mental health of its citizens . . . .").

The State Defendants' expert declarations, which will be submitted in the coming days, will demonstrate the risks associated with abortions after fifteen weeks and the maternal health benefits of HB 5. Even Plaintiff Dr. Tien admitted in another case that "the risk of a serious complication increases with weeks' gestation." Ex. B at 10.

Plaintiffs appear to agree that maternal health is a compelling interest, *see* Mot. For Temp. Inj. at 22, but they argue that the State may only regulate "the manner in which abortions are performed" not prohibit abortion outright, *id.* The State, however, has not sought to prohibit abortion wholesale. HB 5 simply requires

women to obtain an abortion before 15 weeks. At a minimum, the State's interest is compelling in situations where the effect of HB 5 is to encourage women to schedule their abortions earlier and results in a less dangerous medical procedure. *See Gainesville Woman Care III*, 278 So. 3d at 222 (explaining that Plaintiffs must show that HB 5 "violates the rights of all women in all circumstances").

As to protecting children in utero, the State Defendants' expert declarations will show that a 15-week-old child is a distinct living being who is conscious and experiences pain.[12] The "state has an unqualified interest in the preservation of life," especially in preventing the "affirmative destructi[on]" of a human life. *Krischer v. McIver*, 697 So. 2d 97, 108 (Fla. 1997); *accord In re Byrne*, 402 So. 2d 383, 385 (Fla. 1981) ("The state . . . must fulfill its obligation to preserve life whenever it can."); *see also Gonzales*, 550 U.S. at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). Moreover, the State's interest in preserving life is even stronger when the privacy rights of one person implicate the safety and well-being of an innocent third party. *Krischer*, 697 So. 2d at 102; *In re Dubreuil*, 629 So. 2d 819, 826 & n.10 (Fla. 1993);

[12] To the extent there is medical and scientific uncertainty as to this issue, such uncertainty counsels towards deference to the Legislature. *See Gonzales*, 550 U.S. at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *Marshall v. United States*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad . . . .").

cf. Gonzales, 550 U.S at 157 (discussing "the effects on the medical community and on its reputation caused by the practice of partial-birth abortion").[13] At a minimum, if the State is prevented from giving the unborn the full protections of personhood, the State has a compelling interest in ensuring that abortions occur in a manner that avoids the conscious suffering of a living being. *See State ex rel. O'Sullivan v. Heart Ministries, Inc.*, 607 P.2d 1102, 1112 (Kan. 1980) (recognizing a compelling interest in the "protection of . . . children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms"); *cf. United States v. Stevens*, 559 U.S. 460, 491 (2010) (Alito, J., dissenting) (noting that "[a]ll 50 States and the District of Columbia" have enacted "statutes prohibiting animal cruelty").

Plaintiffs contend that the State's interest "in protecting potential life" only "becomes compelling 'upon viability.'" Mot. For Temp. Inj. at 20 (quoting *In re T.W.*, 551 So. 2d at 1193 (three justice opinion)). The State, however, is not asserting an interest in potential life, but in protecting a living being from suffering. And it is asserting this interest based on evidence that—to the State Defendants' knowledge—has never been presented to the Florida Supreme Court. Moreover, the quoted language, which appears in a non-binding three-Justice opinion, is dictum. No

[13] In recognition of the third-party rights of the unborn, the International Covenant on Civil and Political Rights, to which virtually every country is a party, prohibits a "[s]entence of death . . . on pregnant women." International Covenant on Civil and Political Rights art. 6(5), Dec. 16, 1996.

subsequent Florida precedent of which the State Defendants are aware has repeated it—and, indeed, the people of Florida in 2004 explicitly disapproved of *In re T.W.*'s result, *see* Art. X, § 22, Fla. Const. (requiring a parent or guardian to be notified before a minor has an abortion); *In re T.W.*, 551 So. 2d at 1194 (holding that parental-notification laws unlawfully "intrude[] on the privacy of the pregnant minor *from conception to birth*" (emphasis added)). Although subsequent decisions have reaffirmed the "core holding" of *In re T.W.* (and related precedents)—namely that "laws that implicate the right of privacy are subject to strict scrutiny," *Gainesville Woman Care II*, 210 So. 3d at 1262, the Florida Supreme Court has not adopted any bright line viability rule that forecloses the State Defendants' argument.

Finally, as to the least restrictive means,[14] Plaintiffs offer no specific argument on this issue. *See* Mot. For Temp. Inj. at 23. But plainly there are circumstances in which HB 5 is narrowly tailored to advance the two identified interests. Prohibiting abortion after fifteen weeks is the only way to ensure women obtain abortions earlier, and it is the only way to protect children in utero at that stage of development from being painfully destroyed.

[14] The First District's opinion in *Gainesville Woman Care III* suggests that, to the extent the State must satisfy the least restrictive means test at all, it is not a difficult showing once a compelling interest is established. *See* 278 So. 3d at 217–23 (reversing summary judgment for the plaintiffs without analyzing whether the law satisfied the least restrictive means test).

IV. A TEMPORARY INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST.

The public interest would be greatly harmed if this Court enters a temporary injunction. As explained above, the law promotes public health and welfare by protecting maternal health and children in utero. *See 3299 N. Fed. Highway, Inc.*, 646 So. 2d at 227 (recognizing that continued enforcement of an ordinance aimed at protecting public health and welfare weighed against granting of injunction); *accord State Dep't of Env'l Reg. v. Kaszyk*, 590 So. 2d 1010, 1012 (Fla. 3d DCA 1991). Further, any injunction preventing enforcement of a duly enacted law irreparably harms the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); s*ee Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."). A temporary injunction would not serve the public interest.

V. ANY TEMPORARY RELIEF SHOULD BE LIMITED TO THE PARTIES.

In the event this Court grants a temporary injunction, the State Defendants should only be enjoined from enforcing HB 5 against the named Plaintiffs. A temporary injunction, issued pursuant to the constitutional writ of injunction, is a form of "*procedural* relief." *Byrd*, 2022 WL 1698353, at *3. Its limited purpose "is to preserve the relative positions of *the parties* until a trial on the merits can be held."

Camenisch, 451 U.S. at 395 (emphasis added), *quoted in Byrd*, 2022 WL 1698353, at *5.

Even assuming the ultimate remedy in a declaratory judgment case is statewide invalidation of the challenged law, implementing that remedy through a temporary injunction would go beyond what is necessary to preserve the status quo. It would therefore be a form of "determining a matter in controversy" and "granting a remedy," which is improper. *Byrd*, 2022 WL 1698353, at *6.

Here, Plaintiffs ask for a declaratory judgment and permanent injunctive relief restraining the enforcement of HB 5 for all Floridians. *See* Compl. at 17. But Plaintiffs are injured, if at all, only by enforcement of HB 5 against them. Compl. ¶¶ 12–19. The status quo of this controversy, therefore, is nonenforcement of HB 5 against the named Plaintiffs. Any temporary injunction should be so limited.

VI. IF THE COURT ENTERS A TEMPORARY INJUNCTION, PLAINTIFFS MUST POST A BOND.

Under Florida Rule of Civil Procedure 1.610(b), "[n]o temporary injunction shall be entered unless a bond is given by the movant" to cover "the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined." A court has no discretion to waive the bond requirement or to require only a nominal bond. *See Bellach v. Huggs of Naples, Inc.*, 704 So.2d 679, 680 (Fla. 2d DCA 1997) (holding that a court may not waive the requirement); *Aaoep USA, Inc.*

v. Pex German OE Parts, LLC, 202 So. 3d 470, 472 (Fla. 1st DCA 2016) (holding that a court may not set a nominal bond of $100); *Pendergraft v. C.H.*, 225 So. 3d 420, 421 (Fla. 5th DCA 2017) (explaining that setting a bond is a ministerial act of the court and cannot be waived by the non-moving party). If this Court issues a temporary injunction, therefore, it must determine "the foreseeable damages of a wrongful injunction." *Lotenfoe v. Pahk*, 747 So. 2d 422, 425 (Fla. 2d DCA 1999).

Human life cannot be assigned an economic value. But according to one estimate, a resident in Florida will pay $180,222 in taxes to the State during their lifetime, not including federal income tax.[15] In 2021, there were 4,850 abortions in the second or third trimester in Florida. Ex. A at 3. If—as Plaintiffs argue—HB 5 would prevent these abortions and prematurely end the lives of Floridians, that would mean that a statewide injunction could cost the State more than $874 million for every year it is in effect.[16]

The State Defendants do not seek a bond of that magnitude. They discuss these numbers, however, to demonstrate the gravity of the injunctive relief Plaintiffs are seeking. A bond of $1 million seems abundantly reasonable. Planned Parenthood of

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[15] Life of Tax: What Americans Will Pay in Taxes Over a Lifetime, Self. (Mar. 2022), https://www.self.inc/info/life-of-tax/#:~:text=The%20average%20American%20will%20pay, lifetime%20earnings%20spent%20on%20taxes.

[16] The State Defendants recognize that many second trimester abortions occur before 15 weeks (the first trimester is through 13 weeks). The numbers are intended to illustrate a general point.

Southwest and Central Florida—just one of the eight Plaintiffs in this case—earned almost $23.4 million in revenue in the last reported year.[17]

Plaintiffs disagree, arguing that any bond should be less than $5,000. Mot. For Temp. Inj. at 28. Their arguments for such a miniscule bond are flawed. Plaintiffs argue that a larger bond would be "a barrier to Floridians accessing the courts to vindicate and enforce their constitutional rights." *Id.* at 29. But Plaintiffs have not shown that a larger bond would prevent relief because they have not shown an inability to pay such a bond. And, in any event, a larger bond would not prevent Plaintiffs from asserting their constitutional rights because they seek to vindicate the rights of third parties, not their own rights.

Plaintiffs also argue that "the chances of Defendants overturning the injunction are low." *Id.* at 28. But as the State Defendants have explained throughout, Plaintiffs' case has several fatal flaws. Moreover, Plaintiffs acknowledge that the U.S. Supreme Court may very well "overturn *Roe v. Wade*," *id.* at 11 n.12, and their motion utterly fails to address the possibility that the Florida Supreme Court may also revisit its precedent. Such a result is particularly plausible in light of the Florida Supreme Court's discussion of stare decisis in *State v. Poole*, 297 So. 3d 487 (Fla.

[17] Planned Parenthood of Southwest and Central Florida. Inc., Return of Organization Exempt From Income Tax (2019), https://www.plannedparenthood.org/uploads/filer_public/82/25/822516ac-de42-4411-8292-afbe61a894e0/ppswcf_99006_30_20_public_disclosure_copy.pdf.

2020). There, the court rejected the stare decisis test applied in *North Florida Women's Health*, 866 So. 2d 612, and explained that clearly erroneous precedent should generally be revisited absent significant reliance interests. *See Poole*, 297 So. 3d at 506–07. And *North Florida Women's Health* is the very case where the Florida Supreme Court, invoking stare decisis, refused to follow the U.S. Supreme Court in rejecting the strict scrutiny standard from *Roe v. Wade* in favor of the undue burden standard in *Planned Parenthood v. Casey*. *See N. Fla. Women's Health*, 866 So. 2d at 634, 637. These developments call into question the continuing viability of Florida's abortion precedents or at a minimum highlight the State Defendants' likelihood of prevailing on their argument that the right to privacy cases should be revisited.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Temporary Injunction. At a minimum, relief should be limited to the named Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of June, 2022, a copy of the foregoing was filed electronically with the Clerk of the Court through the Florida Courts eFiling Portal, and was served via e-mail on counsel of record.

/s/ *James H. Percival*
James H. Percival