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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, on behalf of itself, its staff, and its patients, *et al.*,

Plaintiffs,

v.

STATE OF FLORIDA, *et al.*,

Defendants.

Case No. 2022 CA 912
Judge Cooper

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR AN EMERGENCY TEMPORARY INJUNCTION AND/OR TEMPORARY INJUNCTION

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INTRODUCTION

Plaintiffs' Motion details decades of binding Florida Supreme Court precedent that establish the unconstitutionality of House Bill 5 ("HB 5" or "the Act"). *See* Plaintiffs' Motion for an Emergency Temporary Injunction and/or a Temporary Injunction (hereinafter "Pls.' T.I. Mot.") at 16–21. In response, Defendants say tellingly little about *In re T.W.*, *North Florida Women's Health & Counseling Services, Inc. v. State*, or *Gainesville Woman Care, LLC v. State*. That is because nothing Defendants could say could change the central holding of those decisions or their application to this case. These cases confirm both that pregnant people have a fundamental right under the Florida Constitution to decide for themselves, without government interference, whether to terminate a pregnancy before viability and that HB 5 violates that clear right.

Defendants concede that HB 5 is subject to strict scrutiny. State Defendants' Response to Plaintiffs' Motion for Emergency Temporary Injunction (hereinafter "State's Resp.") at 18. That means the Act is presumptively unconstitutional and invalid unless the State can meet its heavy burden to prove that the law advances a compelling interest through the least restrictive means. The State fails to satisfy that substantial burden. The State's two asserted interests merely repackage what the Florida Supreme Court has *already held* insufficient, as a matter of law, to justify a pre-viability abortion ban; and Defendants' witnesses' profound factual errors about

abortion safety and "fetal pain" only compound the deficiency of what the State offers here. The State's theory that the Act survives the "no set of circumstances" test as long as some people in Florida, to whom HB 5 does not apply, can still get an abortion defies common sense and decades of Florida Supreme Court precedent. Were Defendants correct, a ban on abortion even at *five* weeks of pregnancy would still be facially valid because some fraction of Floridians could exercise their fundamental right to privacy even under those narrow circumstances. Plainly, that is not the law.

Attempting to distract from the core constitutional question and the Florida Supreme Court's binding answer, Defendants march through a parade of arguments about irreparable harm, public interest, and adequate remedy at law. All are unsupported by case law and unavailing in the face of widespread and undeniable harm that will befall Plaintiffs' patients if HB 5 goes into effect, as well as Plaintiffs' evidence that HB 5 will (1) force them to shutter parts of their businesses, (2) irreparably harm their relationships with their patients, and (3) prevent them from fulfilling their professional and ethical obligations to provide necessary medical care within their training and capacity when their patient requests it. In any event, in a privacy challenge, the "single question" is whether the law is likely to fail strict scrutiny. Once a court determines the answer to that question is yes, then all other temporary injunction factors necessarily are satisfied, and the law must be

enjoined. *Green v. Alachua Cnty.*, 323 So. 3d 246, 254–55 (Fla. 1st DCA 2021) (citing *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263–64 (Fla. 2017)). Just so here.

As for third-party standing, Defendants concede that Plaintiffs and their patients have the requisite closeness. The other factors are likewise satisfied: Plaintiffs' injury-in-fact is readily established where, *inter alia*, they will be forced to give up part of their medical practices under threat of criminal prosecution and license forfeiture; and patients plainly face hindrance in bringing suit where, *inter alia*, litigating their right to an abortion after 15 weeks would mean racing against imminent mootness under threat of forced pregnancy and childbirth should they be unable to secure relief in time. The Florida Supreme Court has never questioned that abortion providers can assert their patients' constitutional rights, and the nature of this case makes third-party standing especially apt.

Finally, this Court should reject Defendants' request for an astronomical $1 million bond as the cost of entry to vindicate a fundamental constitutional right—a request that, if granted, would serve as a profound deterrent to litigation necessary to protect individual rights. The State's wholly speculative proposal, untethered from any good-faith measure of damages that could support a bond, instead turns on an article from self.com and Defendants' thumb-in-the-wind guess as to whether the Florida Supreme Court might one day overrule its precedent. This Court is bound by

the law as it stands today and has stood for decades. That law requires temporary injunctive relief here. A reasonable $5,000 bond is more than appropriate to encompass any hypothetical damages that Defendants might incur in the unlikely event any injunction entered by this Court is later overturned.

ARGUMENT

I. UNDER BINDING FLORIDA SUPREME COURT PRECEDENT, PLAINTIFFS HAVE ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

The State does not take serious issue with the fact that barring women from obtaining pre-viability abortions after 15 weeks LMP[1] violates decades of Florida Supreme Court precedent. Nor could it. As Plaintiffs' opening brief demonstrates, the Florida Constitution provides strong protections for the fundamental privacy right of each individual to decide whether or not to terminate a pregnancy, and the Court has held that the State lacks any interest sufficiently compelling to override that right before fetal viability. Pls.' T.I. Mot. at 20–23. HB 5 flies in the face of this well-settled law.

In its meager response to the merits of Plaintiffs' claims, which spans less than five pages, the State argues that this Court is free to break from this binding precedent and to green-light a ban on abortions beginning at 15 weeks of pregnancy based on two interests: *First*, "encourag[ing]" earlier abortions, allegedly for the

[1] As dated from the patient's last menstrual period ("LMP").

safety of the pregnant women; and *second*, "protecting" an early second-trimester fetus—or, in the State's medically inaccurate words, "a 15-week child"—from "suffering." State's Resp. at 20, 21. But the Florida Supreme Court has already held that neither an interest in protecting a pregnant woman's health, nor an interest in protecting the fetus, can justify eliminating the woman's ability to choose to end her pregnancy before the point at which the fetus is capable of sustained life outside the womb. *In re T.W.*, 551 So.2d 1186, 1193–94 (Fla. 1989). That point could only occur two months *after* HB 5's line in the sand at 15 weeks LMP. Expert Decl. of Shelly Hsiao-Ying Tien, M.D., M.P.H., Ex. 1 to Pls.' T.I. Mot. (hereinafter "Tien Decl.") ¶ 19. Even setting aside the overwhelming medical consensus that abortion after 15 weeks remains far safer than continued pregnancy and childbirth, and that a 15-week fetus is by no means "conscious and experienc[ing] pain" as the State contends, State's Resp. at 20, a pre-viability ban restyled as "encouragement" for earlier abortions is still a pre-viability ban, and thus unconstitutional.

Perhaps recognizing that these arguments are both unsupported by the facts and foreclosed by the law, the State resorts to arguing that Plaintiffs are not entitled to an injunction barring enforcement of HB 5 because most people who have abortions in Florida have them before 15 weeks—*i.e.*, before HB 5 applies—and therefore the Act must have constitutional applications. This argument both defies common sense and misperceives the applicable legal test. Indeed, if this were the

law, the State would have license to broadly curtail all our fundamental freedoms and prevent the courts from issuing anything but limited, piecemeal, and inadequate relief in return.

A. Neither of the State's Asserted Interests Satisfies Strict Scrutiny.

1. HB 5's Abortion Ban Does Not Advance, But Rather Undermines, Maternal Health.

The State argues that HB 5 is justified by a compelling interest in maternal health because the risk of abortion increases as pregnancy advances, *see* State's Resp. at 19–20, but this theory fails as a matter of both law and fact. *First*, the Florida Supreme Court has made clear that the State's interest in maternal health may sometimes justify a *regulation* of abortion that is the least restrictive means of advancing maternal health, but that interest cannot justify the wholesale prohibition of abortion at a pre-viability stage of pregnancy. *See* Pls.' T.I. Mot. at 22 (discussing *In re T.W.*, 551 So. 2d at 1193). This bright-line rule is not altered by the State's facile attempts to characterize the 15-week ban as a "regulation" of abortion rather than an outright ban. State's Resp. at 19–20. The State's speculation that HB 5 "simply" "encourage[s] women to schedule their abortions earlier," *id.*, cannot change the fact—as the State concedes—that not all patients will be able to obtain abortions before 15 weeks LMP, *see id.* at 16–17 (asserting that patients "will *in most cases* have the option to schedule their abortion earlier" (emphasis added)), and that for patients seeking care at or after 15 weeks LMP, it is categorically a ban. *See*

Isaacson v. Horne, 716 F.3d 1213, 1226–27 (9th Cir. 2013) ("The availability of abortions earlier in pregnancy does not, however, alter the nature of the burden that [the ban] imposes on a woman once her pregnancy is at or after [the gestational cut-off] but prior to viability," in which case "the pregnant woman 'lacks all choice in the matter' of whether to carry her pregnancy to term." (citation omitted)).

Indeed, it is indisputable that the Act will prevent pre-viability abortions, and thus force pregnancy and childbirth on unwilling Floridians. The evidence put forth by Dr. Tien in her declaration, to which she will testify at the hearing, demonstrates that patients already attempt to get an abortion as early as they can, but there are many reasons why patients who need abortions after 15 weeks could not have "simply" obtained an abortion earlier. These reasons include a lack of awareness before 15 weeks LMP that they are pregnant; poverty-related obstacles to obtaining timely care, compounded by other Florida regulations; health conditions that arise only in the second trimester; a diagnosis of a serious fetal condition that the patient receives after 15 weeks LMP; or intimate partner violence that requires the patient to navigate the immense hurdles of accessing abortion care without their abuser finding out. Pls.' T.I. Mot. at 5, 8–10 (citing Tien Decl. ¶¶ 33–39, 43–44, 46–48, 55–56).

The State's assertion that forbidding Floridians from ending a pregnancy at or after 15 weeks is an attempt to protect maternal health is shockingly disconnected from reality and the true consequences of the ban for maternal health. Patients unable

to obtain abortions in Florida after 15 weeks will be forced to continue to bear all the pains and risks of pregnancy against their will, to obtain abortions outside the medical system, or (if they are able) to attempt to travel hundreds, or even thousands, of miles outside the state to obtain care, causing further delay in accessing abortion. Tien Decl. ¶¶ 52, 54. The risks of abortion increase with gestational age, State's Resp. at 19, but those increases are small, and as Dr. Tien will explain at the hearing, the medical evidence is clear: Abortion is safe at *all* stages of pregnancy and is dramatically safer than carrying a pregnancy to term. Tien Decl. ¶¶ 22–27. By forcing patients to continue pregnancies to childbirth against their will, HB 5 endangers rather than advances maternal health. Moreover, the State's argument fails even on its own terms: Florida patients denied an abortion under HB 5 who seek care out of state will be even further delayed by the logistical burdens and expense of needing to travel long distances to obtain care, contrary to the State's purported goal of encouraging earlier abortions. Tien Decl. ¶¶ 52–53.

In stark contrast to the broad medical consensus on the safety of abortion to which Dr. Tien will testify, the opinions of Defendants' witness, Dr. Ingrid Skop, about the purported harm of abortions rely on speculation about abortion safety and widely discredited theories about alleged links between abortion and mental health harms. Every leading medical organization has uniformly rejected these theories, as

Dr. Tien and Plaintiffs' witness Dr. Antonia Biggs, Ph.D.,[2] will testify. In particular, contrary to Dr. Skop's claims, high-quality evidence uniformly concludes that abortion does *not* increase the risk of such harm and, in fact, being denied a wanted abortion can have long-term adverse consequences, including the potential to negatively impact mental health. *See* Expert Decl. of Dr. Antonia Biggs, Ph.D (hereinafter "Biggs Decl.") ¶ 9, 36–37.

Finally, the State complains that Plaintiffs offer no specific argument as to whether the 15-week ban is the least restrictive means to advance maternal health, but it is the *State's* burden "to prove both the existence of a compelling state interest *and* that the law serves that compelling state interest through the least restrictive means." *Gainesville*, 210 So. 3d at 1256 (emphasis added). Absent a compelling state interest, HB 5 cannot survive strict scrutiny and the Court need not reach the least-restrictive-means prong. But, in any event, the State's cavalier, conclusory, and unsupported assertion that the 15-week ban is "the only way to ensure women obtain abortions earlier," State's Resp. at 22, comes nowhere close to satisfying the State's heavy burden. If the State's goal were really to ensure that women who decided to have abortions were able to get them as early as possible, it could take any number

[2] Dr. Biggs is a social psychologist and associate professor at Advancing New Standards in Reproductive Health with the University of California, San Francisco. She has decades of research experience, including personally conducting research and publishing extensively on the topic of abortion and mental health. Biggs Decl. ¶ 1 & Ex. A.

of steps to facilitate access—for example, providing information or resources to make it easier for women to get the care they seek. Instead, the State has done everything possible—from prohibiting Medicaid and other insurance plans from covering the cost of abortion care, to requiring women to make an additional in-person trip to a health center before an abortion—to make it *more* difficult for a woman to get the care she seeks. *See* Fla. Stat. Ann. § 627.66996 (prohibiting insurance plans on the state health exchange from covering abortion except in rare cases); *id.* § 390.0111(15) (prohibiting Medicaid coverage of abortion); *id.* § 390.0111(3) (requiring patients to make two in-person trips to a health center at least 24 hours apart). And now, rather than take any measure to actually improve maternal health, the State has enacted a blatantly unconstitutional abortion ban that puts pregnant Floridians at risk.

2. The State's Asserted Interest in Fetal Pain is Both Legally Insufficient to Satisfy Strict Scrutiny and Unsupported by Evidence.

Like its purported interest in maternal health, the only other interest asserted by the State—"protecting" a pre-viability fetus from "conscious suffering," State's Resp. at 21—fails to satisfy strict scrutiny as both a legal and factual matter. *First*, this claimed interest cannot be separated from the State's asserted interest in "protecting" that fetus's "potentiality of life," which as a matter of law cannot constitutionally justify an abortion ban—or even an abortion restriction—until the

point of viability. *In re T.W.*, 551 So. 2d at 1193 & n.6 ("Restrictions to protect the state's interest in the potentiality of life . . . also may be imposed, but only after viability"); *accord Krischer v. Mclver*, 697 So. 2d 97, 102 (Fla. 1997) ("[S]tate's interest in prohibiting abortion is compelling after fetus reaches viability" (citing *In re T.W.*, 551 So. 2d at 1194)); *Burton v. State*, 49 So. 3d 263, 266 (Fla. 1st DCA 2010) (holding that "[o]nly after the threshold determination of viability has been made may the court weigh the state's compelling interest" in protecting the fetus against patient's constitutional rights).[3]

As the Florida Supreme Court explained, before the point of viability, the interests of the pregnant person and the fetus are "inextricably intertwined," because the fetus "is entirely dependent upon the mother for sustenance." *In re T.W.*, 551 So.2d at 1193. It is only *after* viability that "society becomes capable of sustaining the fetus, and its interest in preserving its potential for life thus becomes [sufficiently] compelling" to justify forcing a woman to remain pregnant against her wishes. *Id.* at 1193–94. Because the State's interest in protecting a fetus becomes

[3] Defendants' citations on this theory only hurt their cause. *See* State's Resp. at 20–21. As detailed *supra*, *Krischer v. Mclver* reaffirmed *In re T.W.*'s holding that the State cannot justify prohibiting abortion before the point of viability. *In re Dubreuil* found that an asserted state interest in preventing abandonment of children could *not* override a mother's privacy right to make her own medical decisions, including declining life-saving treatment, 629 So. 2d 819, 827–28 (Fla. 1993); and *In re Byrne* involved no potential harm to third parties, but rather permitted the Florida Dept of Health & Rehabilitative Services to infringe on the self-determination and privacy rights of elderly persons *only* in emergency situations where there was "a substantial risk of life-threatening physical harm or deterioration" to the impacted elderly person. 402 So. 2d 383, 385–86 (Fla. 1981).

compelling only at the point of viability, while HB 5's ban applies months before viability, the State's asserted interest fails as a matter of law.[4]

Second, the State's asserted interest fails as a factual matter, because the claim that a fetus at 15 weeks "is conscious and experiences pain," State's Resp. at 20, is factually incorrect: It is an outlier opinion that has been rejected both by the leading medical organizations and courts. As Dr. Tien will testify, *every* major medical organization in this field—including the Society for Maternal-Fetal Medicine, the American College of Obstetricians and Gynecologists, the Royal College of Obstetricians and Gynaecologists, and the U.S. Association for the Study of Pain—"concur[s] that a fetus cannot experience pain before 24 weeks of gestation." *See*

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[4] The State's claim that the Supreme Court's holding in *In re T.W.* is not binding precedent, *see* State's Resp. at 21–22, is plainly wrong. *See, e.g.*, *Krischer*, 697 So. 2d at 102 (describing *In re T.W.* as holding that "[the] state's interest in prohibiting abortion is compelling after fetus reaches viability"). Indeed, the Florida Supreme Court has already considered and rejected the precise argument the State recycles here. In *North Florida*, the Court explained that the majority opinion in *In re T.W.* garnered a total of four votes, and the sole difference between the three-justice opinion and the concurrence was on the precise definition of "viability," *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 636–37 (Fla. 2003)—a disagreement that is irrelevant here because either definition would still occur only long after HB 5's 15-week ban. "*[I]n all [other] respects*," the *North Florida* court held, "Justice Shaw's opinion in T.W. was the 'majority opinion' of the Court and is binding precedent." *Id.* at 636 (emphasis added). Indeed, as highlighted in Plaintiffs' opening brief, the *In re T.W.* Court was unanimous in concluding that the Privacy Clause protects abortion rights at least as robustly as the U.S. Supreme Court's decision in *Roe v. Wade*, which set viability as the crucial line before which the State could not ban abortions. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

The State is likewise incorrect that Florida voters rejected the core holdings of *In re T.W.* State's Resp. at 22. The Florida Supreme Court also considered and rejected a near-identical argument in *Gainesville*. There, the Court concluded that Article X, § 22 was "extremely limited" in scope and related "solely [to] the issue of parental notification," and that it did not "amend the right of privacy" or in any way "alter[]" prior Florida Supreme Court jurisprudence on abortion and privacy rights. *Gainesville*, 210 So. 3d at 1262.

Br. of Society for Maternal-Fetal Medicine, et al. as Amicus Curiae in Support of Respondents at 3–4 ("Soc'y for Maternal-Fetal Med. Br."), *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021), 2021 WL 4441335. Dr. Tien will explain that the medical community's consensus on this point is based on multiple scientific factors, including the fact that the ability to consciously experience pain requires a cortex and neural pathways capable of relaying messages from sensory nerve fibers to the cortex, and this neural circuitry does not develop until at least 24 weeks gestation. *See id.* at 11–12 n.28.[5] Other courts considering similar arguments, including arguments made in other cases by the State's expert Dr. Maureen L. Condic, have rejected them as representing a "fringe view" that is contrary to the consensus of the medical community. *See, e.g.*, *Whole Woman's Health All. v. Rokita*, 553 F. Supp. 3d 500, 550 (S.D. Ind. 2021) (permanently enjoining state-mandated patient disclosure that a fetus can feel pain at or before 20 weeks' gestation as clearly misleading in light of the evidence); *id.* at 581 (describing opinions on fetal pain offered by the State's expert Dr. Condic as a "'fringe view' within the medical community"); *EMW Women's Surgical Center v. Meier*, 373 F.

[5] Even if the State were correct that medical and scientific uncertainty exists on this issue, *see* State's Resp. at 20 n.12, the suggestion that this Court should "defer[] to the Legislature" is nonsensical and erroneous. The legislature made no express findings in support of HB 5, much less any findings regarding fetal pain, and even if it had, "the ordinary deference due legislation does not apply when a fundamental constitutional right, such as Florida's right to privacy, is implicated." *North Florida*, 866 So.2d at 643; *see also Estate of McCall v. United States*, 134 So. 3d 894, 906 (Fla. 2014).

Supp. 3d 807, 822–23 (W.D. Ky. 2019) (rejecting contention that fetal pain is possible before 24 weeks as contrary to consensus of medical community), *aff'd*, 960 F.3d 785 (6th Cir. 2020). Indeed, Dr. Condic herself admitted in another case that not a single article she cited in the declaration she submitted to the district court in that case reached the same conclusion that she did. Soc'y for Maternal-Fetal Med. Br. at 16.

Dr. Condic's outlier opinions run counter to the overwhelming scientific consensus that conscious pain perception is not possible prior to fetal viability, and are irrelevant under the Florida Supreme Court's binding precedent holding that the state's interest in protecting a fetus is not sufficiently compelling, before viability, to justify forcing continued pregnancy and childbirth. Accordingly, this Court should give no weight to the legally irrelevant and factually unfounded opinions concerning purported fetal pain offered by Dr. Condic. *Cf.* Order on Discovery at 3, *Jackson Women's Health v. Dobbs*, No. 18-cv-00171 (S.D. Miss. May 15, 2018), ECF No. 41 (entering order limiting discovery in case challenging Mississippi's 15-week ban, based on the court's determination that evidence regarding "things like pre-viability 'fetal pain'" would be irrelevant to question of whether the 15-week ban was constitutional).

Nor does the State meet its burden to prove HB 5 is the least restrictive means of serving a compelling state interest by making the single conclusory sentence that

HB 5 "is the only way to protect children in utero at that stage of development from being painfully destroyed." State's Resp. at 22. Notably, several other States, including Indiana and Kentucky, have asserted the very same interest in protecting a fetus from pain as a basis for restricting the abortion *method* used in the second trimester. *See, e.g.*, *Bernard v. Individual Members of Indiana Med. Licensing Bd.*, 392 F.Supp.3d 935, 942–45 (S.D. Ind. 2019); *EMW Women's Surgical Center*, 373 F. Supp. 3d at 812–13, 822–23. While Plaintiffs object to such interference with a physician's medical judgment, that is not what HB 5 does: the State of Florida instead chose to ban all abortions outright beginning at 15 weeks, revealing that the goal here is *not* preventing fetal pain but preventing *abortions*.

B. Plaintiffs are Entitled to a Facial Temporary Injunction Because There Is No Set of Circumstances in Which the State Can Constitutionally Deny Any Pregnant Person the Ability to Effectuate Her Decision to Have a Pre-Viability Abortion.

Unable to seriously dispute that HB 5 violates the right of privacy, the State argues that this Court should not enjoin the Act because Plaintiffs have not shown that it would violate the rights of every woman seeking an abortion, including those it does not target. *See* State's Resp. at 18. According to the State, the fact that most people who get abortions do so before 15 weeks proves that there are circumstances in which HB 5 will not affect the ability to obtain an abortion and, therefore, that Plaintiffs are not entitled to an injunction. State's Resp. at 16–18. Even assuming the

"no set of circumstances standard" applies,[6] Defendants' argument turns that test on its head.

Facial relief against a statute is warranted if "no set of circumstances exists in which the statute can be constitutionally *applied*." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) (emphasis added); *accord Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). The State acknowledges, as it must, that HB 5 does not apply to people seeking an abortion before 15 weeks of pregnancy. State's Resp. at 16 (distinguishing abortions for which HB 5 will have "no effect at all" from "the abortions to which HB 5 applies"). And yet, Defendants nonetheless attempt to rescue HB 5 by pointing to those very people who are able to obtain abortions *before* 15 weeks and who are, therefore, *not* subject to the ban. In so doing, Defendants misapprehend the relevant standard: Because HB 5 does not apply to patients who

[6] Plaintiffs dispute that the test applies in this case. While the First DCA applied this test at the summary judgment stage in *State v. Gainesville Woman Care, LLC*, 278 So. 3d 216, 223 (Fla. 1st DCA 2019), the Florida Supreme Court "has never applied the 'no-set-of-circumstances' test to a facial constitutional challenge in the termination of pregnancy context." *Gainesville*, 210 So. 3d at 1264. Rather, a finding that a challenged law "by its plain terms" restricted the fundamental right of privacy and that the State had not carried its burden under strict scrutiny is "sufficient to support an injunction barring the application of the law in its entirety." *Id.*; *see also Green*, 323 So. 3d at 254 ("the single question that the trial court must answer [in considering a motion for temporary injunction] is the likelihood that the [challenged law] would survive strict scrutiny"). Indeed, the Florida Supreme Court has routinely facially invalidated unconstitutional laws under the Privacy Clause without any mention of the no-set-of-circumstances test. *See Richardson v. Richardson*, 766 So. 2d 1036, 1038, 1043 (Fla. 2000) (affirming facial invalidation of child custody statute under Privacy Clause where state lacked a compelling interest without mention of the no-set-of-circumstances test); *Sullivan v. Sapp*, 866 So. 2d 28, 38 (Fla. 2004) (same in child visitation statute); *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996) ("[T]he State [is] unable to satisfy the compelling interest standard . . . . Consequently, [the challenged law] must be stricken as facially unconstitutional.").

have abortions before 15 weeks, those patients are no more relevant to the no-set-of-circumstances test than are pregnant women who do not seek an abortion at all, or women who are not even pregnant. Properly focused on the only relevant population—people who are at least 15 weeks pregnant and therefore subject to the Act's ban—the no-set-of-circumstances test is readily met. Because the State has not met its burden under strict scrutiny to justify this pre-viability abortion ban, *see supra* 6–16, the Act violates the Florida Constitution's right of privacy under all circumstances in which it applies and is facially invalid.[7] *Cf. Isaacson*, 716 F.3d at 1226–27.

Taken to its logical conclusion, Defendants' argument would radically expand the State's authority to infringe on fundamental rights. If the fact that *some* abortions occur before 15 weeks were sufficient to insulate H.B. 5 from facial relief, the same would be true of a ban at any gestational age (12 weeks, or 8 weeks, or 5 weeks). Indeed, under the State's theory, *no* abortion statute would be subject to facial challenge unless it prevented *every single* abortion in Florida.

Nor would this principle stop with abortion. Take, for example, a law restricting the purchase of guns that everyone agreed was unconstitutional. If the

[7] As explained in Plaintiffs' motion for temporary injunction, Plaintiffs have not challenged the pre-existing ban on abortions after viability. *See* Pls.' T.I. Mot. at 6. Accordingly, HB 5's only practical effect is to ban *pre-viability* abortions, in violation of Floridians' privacy rights.

State's argument were correct, unless the law prohibited each and every Floridian from purchasing a gun, it could not be facially enjoined.

The State's position is not only illogical; it is flatly inconsistent with precedent. Consider the Florida Supreme Court's decisions in *In re T.W.* and *North Florida*: it was certainly not the case that the parental consent and notification laws at issue in those cases would have prevented *every* minor or *every* Floridian from accessing an abortion. The majority of minors already sought abortion care with parental support, and the majority of abortion patients (who were adults) were entirely unaffected by the law. Yet the Court nonetheless held those statutes to be *facially* unconstitutional. *In re T.W.*, 551 So. 2d at 1193–95; *North Florida*, 866 So. 2d at 640.

Accordingly, even if the no-set-of-circumstances test applies, it is fully satisfied here.

II. PLAINTIFFS HAVE STANDING TO ASSERT THE PRIVACY RIGHTS OF THEIR PATIENTS.

Recognizing they cannot overcome the binding precedent that confirms HB 5 is unconstitutional, Defendants resort to arguing that Plaintiffs lack standing to sue. State's Resp. at 4–7. This argument, too, ignores how the Florida Supreme Court has handled abortion cases for decades: Time and again Florida abortion providers have gone to court to assert and protect the constitutional rights of their patients, and the Florida Supreme Court has routinely granted them relief based on those rights. *See*

generally Gainesville, 210 So. 3d 1243; *State v. Presidential Women's Ctr.*, 937 So. 2d 114 (Fla. 2006); *North Florida*, 866 So. 2d 612;[8] *accord Feminist Women's Health Ctr. v. Burgess*, 651 S.E.2d 36, 38-39 (Ga. 2007) ("Virtually every state court considering the issue has similarly held that abortion providers have standing to raise the constitutional rights of their patients," and collecting cases). Defendants' suggestion that this Court be the first to hold that health care providers cannot raise the rights of their patients in this context—and that therefore each of the Florida Supreme Court's decisions was improper—should be rejected out of hand. *See State v. N. Fla. Women's Health & Counseling Servs., Inc.*, 852 So. 2d 254, 259–60 (Fla. 1st DCA 2001) ("reject[ing] the state's contention that" physician lacked standing to raise the rights of pregnant minor patients), *rev'd on the merits by North Florida*, 866 So. 2d 612.

Defendants concede, State's Resp. at 5 n.6, that Plaintiffs satisfy the second element of the test for third-party standing—a close relation to the third party whose rights Plaintiffs seek to vindicate. *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941–43 (Fla. 2002) (citing federal case law for the standing test). Of

[8] The plaintiffs in *Gainesville Woman Care* were an abortion provider and abortion advocacy group. *See generally* 210 So. 3d 1243. The plaintiffs in *Presidential Women's Center* were two abortion clinics and a doctor who performs abortions. *See State v. Presidential Women's Ctr.*, 884 So. 2d 526, 529 (Fla. 4th DCA 2004), *rev'd on other grounds*, 93 7 So. 2d 114 (Fla. 2006). The plaintiffs in *North Florida* were "several women's clinics, women's rights groups, and physicians." 866 So. 2d at 615.

course they do: Plaintiffs all provide care to women seeking and obtaining abortions in Florida, and case after case holds this relationship is very close. *See, e.g.*, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2118 (2020) (plurality) (noting that the U.S. Supreme Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations," and collecting cases). Indeed, "[t]he closeness of the relationship [between abortion provider and pregnant person seeking abortion care] is patent . . . A woman cannot safely secure an abortion without the aid of a physician . . ." *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)[9]; *see also* Tien Decl. ¶¶ 31, 57, 61 (describing the patient-physician relationship).

Plaintiffs readily satisfy the other two elements of third-party standing as well. Plaintiffs have an injury-in-fact giving them a "sufficiently concrete interest" in the outcome of this suit. *See Alterra*, 827 So. 2d at 941 (quotation marks omitted).

[9] Defendants claim that the clinic Plaintiffs do not have standing to represent the interests of their staff who would be subject to HB 5's penalties if they provide abortions after 15 weeks LMP, because one First District decision held, without reasoning, that employee/employer relationships *generally* do not meet the test for third-party standing. State's Resp. at 5 n.6 (citing *N. Fla. Reg'l Hosp. Inc. v. Douglas*, 454 So. 2d 759, 760 (Fla. 1st DCA 1984)). In reviewing this decision in *Alterra*, the Florida Supreme Court was not as unequivocal: the Court held only that "nonpublic employers involved in requests for production of personnel records to assert their employees' privacy rights in those records" lacked third-party standing. 827 So. 2d at 944. Determining whether a relation is sufficiently close for third-party standing involves whether the interests of the plaintiff and the third party "are sufficiently aligned to ensure that [plaintiff] will properly frame the issues" in the dispute. *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1042 (11th Cir. 2008). The Plaintiff clinics and their staff who provide abortions have identical interests in this case, because HB 5 subjects them both to sanctions and consequences if they perform abortions after 15 weeks LMP.

Plaintiffs all provide abortion care after 15 weeks LMP and will continue to do so if HB 5 is enjoined. Compl. ¶¶ 12-19, 69. By contrast, if HB 5 is allowed to take effect, Plaintiffs will be forced either to stop providing abortions after 15 weeks LMP or to face severe penalties: Dr. Tien and other members of the clinic Plaintiffs' staff would face up to 5 years' imprisonment and up to a $5,000 criminal fine, revocation of their medical licenses, and administrative fines of up to $10,000 for violating HB 5's 15-week ban, and the clinic Plaintiffs would face the loss of their operating licenses. *Id.* ¶¶ 52–54. There can be no serious dispute that these injuries are sufficient: "A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries." *State v. Benitez*, 395 So. 2d 514, 517 (Fla. 1981); *accord Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("A physician has standing to challenge an abortion law that poses for him a threat of criminal prosecution."). When a law indirectly impairs a third party's constitutional rights by directly imposing "legal duties and disabilities" on someone else, the party subject to those duties and penalties is "the obvious claimant" and "the least awkward challenger." *June Med. Servs.*, 140 S. Ct. at 2119; *Craig v. Boren*, 429 U.S. 190, 196–97 (1976) (beer vendor had third-party standing to bring equal protection challenge on behalf of potential male customers to law that prohibited sale of beer to men under 21 and women under 18, because law subjected vendor to sanctions and license revocation for noncompliance); *see also June Med. Servs.*, 140 S. Ct. at 2119 (abortion providers

had third-party standing to challenge law that "threatened imposition of governmental sanctions" such as license revocation for noncompliance). Here, the "obvious claimant[s]" are Plaintiffs, who are subject to HB 5's penalties.

Defendants also contend, *see* State's Resp. at 6 n.7, that Plaintiffs cannot establish an injury because they will stop providing abortions after 15 weeks LMP, but this argument is circular nonsense. Absent an injunction against HB 5, Plaintiffs will stop providing abortions after 15 weeks LMP *to avoid imprisonment, fines, license revocation, and other penalties.* Thus, absent an injunction, Plaintiffs' compliance with HB 5 will be "coerced by the threat of enforcement" of the law—and that coerced restriction on Plaintiffs' activities is an injury in fact. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 508 (1972); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S 118, 119, 129 (2007) (standing exists even where plaintiffs intend to comply with a law where "the threat-eliminating behavior was effectively coerced" by the threat of prosecution).[10] A plaintiff who will be prosecuted if she continues a course of conduct that is prohibited by statute is "not … required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quotation marks

[10] Defendants' cited case from the Ninth Circuit is inapposite, as in that case, the plaintiffs "merely assert[ed] that they 'wish[ed] and intend[ed] to engage in' activities prohibited by" the law at issue. *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (internal quotation marks omitted). By contrast, Plaintiffs here currently provide abortion care post-15 weeks LMP and will continue to do so but for HB 5.

omitted); *accord MedImmune*, 549 U.S. at 128–29 ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced."). Tellingly, Defendants do not claim that they will not enforce HB 5's criminal and civil penalties against abortion providers who violate its ban; instead, they have mounted a forceful defense of HB 5's constitutionality in this suit. Plaintiffs thus have a very real fear of sanction under HB 5 that is "not imaginary or wholly speculative," and that gives them the right to sue. *See Babbitt*, 442 U.S. at 302.

Plaintiffs also easily satisfy the third element of the third-party standing test because there "exist[s] some hindrance to the [patients'] ability to protect [their] own interests." *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991); *accord Singleton*, 428 U.S. at 116–17. Both the U.S. Supreme Court and state courts around the country routinely have held that abortion providers can sue on behalf of their patients because patient lawsuits face numerous obstacles, including risks to the patient's privacy presented by the publicity of litigation and imminent mootness due to the timing of a pregnancy. *E.g.*, *Singleton*, 428 U.S. at 117; *Feminist Women's Health Ctr.*, 651 S.E.2d at 39; *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 847 (N.M. 1998); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 663-64, 665 (Miss. 1998). HB 5 heightens the prospect of mootness because patients who are affected

are, by definition, already 15 weeks into their pregnancy; to challenge the ban, they would have to quickly learn about the ban, hire a lawyer, file suit, and—if this case is any guide—retain experts, sit for depositions, and conduct a hearing, all before obtaining relief in the remaining weeks before the fetus becomes viable. That timing presents a real risk that the patient would effectively be required to carry the fetus to term—the very scenario, with long-term and irreparable consequences, that the patient is trying to prevent. *See* Tien Decl. ¶¶ 28–31 (discussing the deeply personal reasons women seek abortions). The mere fact that pregnant people in Florida have previously challenged other abortion restrictions on their own behalf, State's Resp. at 6–7, says nothing about the difficulties they would face in challenging HB 5. Notably, none of the cases Defendants cite involved a time-based ban on abortion.[11] *See In re T.W.*, 551 So. 2d 1186 (parental consent for minor abortion); *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036 (Fla. 2001) (exclusion of medically necessary abortions from Medicaid coverage); *Burton*, 49 So. 3d at 264 (non-abortion case involving involuntary confinement of a pregnant person).

[11] Defendants' reliance on *North Florida Regional Hospital v. Douglas*, 454 So. 2d 759 (Fla. 1st DCA 1984), is also misplaced. *See* State's Resp. at 6–7. The third parties at issue had moved to intervene in *Douglas*, 454 So. 2d at 761, and that has not happened here. *Cf. Alterra*, 827 So. 2d at 944 (noting that "the court in *Douglas* observed that the nurse employees had, in fact, moved to intervene in the litigation, lending credence to the conclusion that, *at least in that case*, there was no hindrance") (emphasis added).

For all these reasons, Plaintiffs have standing. Holding otherwise would require this Court to disregard a long and unbroken line of cases permitting abortion providers to challenge abortion restrictions. Defendants have offered no basis whatsoever to do so.

III. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM.

As an initial matter, when considering a motion for temporary injunction in a privacy challenge, the "single question" is whether the law is likely to fail strict scrutiny: once that is found, all other temporary injunction factors necessarily follow, and the law must be enjoined. *Green*, 323 So. 3d at 254–55 (citing *Gainesville*, 210 So. 3d at 1263–64). As set forth above, Plaintiffs have shown that HB 5 violates the Privacy Clause and thus is unconstitutional. This Court need not look any further to find irreparable harm and the inadequacy of any remedy at law.

In any event, Plaintiffs demonstrated in their opening brief both irreparable harm resulting from HB 5 and an inadequate remedy at law. Pls.' T.I. Mot. at 23–26. Defendants do not dispute that, under Florida and federal law, the threatened or actual loss of constitutional rights, even temporarily, is *per se* irreparable harm. *See* State's Resp. at 8; *see also, e.g.*, *Gainesville*, 210 So. 3d at 1263-64 ("presum[ing] irreparable harm when certain fundamental rights are violated," including right to privacy, and collecting cases); *Fla. Dep't of Health v. Florigrown, LLC*, 320 So. 3d 195, 200 (Fla. 1st DCA 2019) ("[T]he law recognizes that a continuing constitutional

violation, in and of itself, constitutes irreparable harm."), *quashed on other grounds*, 317 So. 3d 1101 (Fla. 2021); *Bd. of County Comm'rs, Santa Rosa Cnty. v. Home Builders Ass'n of W. Fla., Inc.*, 325 So.3d 981, 985 (Fla. 1st DCA 2021) (same). Nor do Defendants dispute that HB 5 will prevent many pregnant Floridians from obtaining essential abortion care, thereby forcing them to remain pregnant against their will and, in some instances, against the medical judgment of their physicians, among other harms. *See* State's Resp. at 16–18. And Defendants do not dispute that HB 5 will cause this deprivation by barring abortion providers like Plaintiffs from providing abortion care to their patients after 15 weeks in all but very narrow circumstances, interfering with the ability of care providers (including Plaintiffs) to act on their best judgment, ethical obligations, and patients' wishes and best interests. *See id.*

Instead, Defendants challenge irreparable harm on a basis that has no support in the case law and defies common sense. They contend that even if Plaintiffs have standing to sue and to raise their rights of their patients, Plaintiffs cannot establish irreparable harm by pointing to the harm those patients will experience if those rights are violated. State's Resp. at 8–10. Defendants offer no explanation as to why this counterintuitive proposition would be so, and none of the cases they cite hold this,

or even involve a claim to third-party standing at all.[12] Instead, the law is the opposite: where third-party standing is established, a litigant need not show irreparable harm to itself, so long as irreparable harm would occur for the third party whose rights are at issue. *See, e.g.*, *Gainesville*, 210 So. 3d at 1264 (temporary injunction warranted based on irreparable harm to "women seeking to terminate their pregnancies in Florida"); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 330, 332–34, 338 (5th Cir. 1981) (abortion providers could establish irreparable injury based on injury to potential patients seeking abortions); *Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1261–63, 1322 (E.D. Ark. 2019), *vacated as moot on other grounds* 984 F.3d 682 (8th Cir. 2021) (same); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1347 (N.D. Ga. 2019) (holding that "[b]y banning pre-viability abortions, [the statute] violates the constitutional right to privacy, which, in turn, inflicts *per se* irreparable harm on Plaintiffs."); *EMW Women's Surgical Ctr., P.S.C. v. Beshear,* No. 19-CV-178, 2019 WL 1233575, at *1 (W.D. Ky. Mar. 15, 2019) (entering temporary restraining order where plaintiffs "ha[d] laid out specific facts in their [complaint] showing that the rights of their patients would be immediately and irreparably harmed"); *Preterm-*

[12] In fact, one of Defendants' cases acknowledges that a plaintiff suing under the First Amendment *can* rely on irreparable harm to a third party if the plaintiff "alleges a chilling effect on constitutionally protected speech or expression." *3299 N. Fed. Highway, Inc. v. Bd. of Cnty. Comm'rs of Broward Cnty.*, 646 So. 2d 215, 220 (Fla. 4th DCA 1994) (ultimately concluding no irreparable harm was shown because the plaintiff alleged only economic injury).

Cleveland v. Yost, 394 F. Supp. 3d 796, 803 (S.D. Ohio 2019) (same on a preliminary injunction); *see also Washington v. Trump*, 847 F.3d 1151, 1168–69 (9th Cir. 2017) (states established irreparable harm based on injuries to state university employees and students). Indeed, in recent litigation over a South Carolina law banning abortions as early as 6 weeks, a federal district court held that the plaintiffs—a reproductive healthcare provider, abortion clinic, and physician—all had third-party standing to assert their patients' constitutional right to pre-viability abortions and could establish irreparable harm based on the law's deprivation of their patients' rights. *Planned Parenthood S. Atl. v. Wilson*, 527 F. Supp. 3d 801, 807–09, 810, 811–12 (D.S.C. 2021), *aff'd*, 26 F.4th 600 (4th Cir. 2022).

In any event, Plaintiffs *have* shown that they will themselves suffer irreparable harm. It is undisputed that HB 5 will force Plaintiffs to stop providing services that are currently part of their businesses, missions, and medical practice. *See* Tien Decl. ¶¶ 3, 8, 16[13]; *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795-96 (7th Cir. 2013) (abortion providers irreparably harmed by abortion restrictions that, absent preliminary injunction, would cause "disruption of the services" the clinics provide). This interference with Plaintiffs' professional services more than suffices to establish their firsthand irreparable harm. As Dr. Tien will testify, HB 5 will

[13] The parties 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."

prevent Dr. Tien from fulfilling her professional and ethical obligations to provide medical care to her patients according to her best medical judgment, medical standards of care, and her patients' autonomous decisions. *See* Tien Decl. ¶¶ 57, 61. This harm is not based on not vague conjecture, *contra* State's Resp. at 12, but is instead an undeniable consequence of HB 5's penalties for abortion providers who provide care after 15 weeks LMP. *Cf. Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 917 (9th Cir. 2004) ("Whether [an abortion provider] continues to perform abortions subject to the statute, desists from performing them to avoid the statute's penalties, or violates the statute so as to practice his profession in accord with his medical judgment, his liberty will be concretely affected.").

Lastly, Defendants argue that HB 5 will not cause Plaintiffs irreparable harm because filing this case a month *before* HB 5 is scheduled to take effect and begin to cause harm was, in Defendants' view, too late. *See* State's Resp. at 13–15. But the only cases that Defendants cite, *id.* at 14–15, are those in which the plaintiff sought to enjoin conduct or laws *after* they took effect or long after filing suit, or to enjoin conduct or laws mere *days* before they took effect.[14] Unlike those cases, Plaintiffs

[14] *See Barnett v. Bell*, 62 So. 210, 210 (Fla. 1913) (plaintiff moved to enjoin sale on "the eve of sale," despite having notice of it "for several weeks at least"); *Mora v. Karr*, 697 So. 2d 887, 888 (Fla. 4th DCA 1997) (plaintiff moved to enjoin construction 8 to 9 months after it commenced); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247, 1248–49 (11th Cir. 2016) (plaintiff moved for preliminary injunction 5 months after filing complaint); *AARP v. U.S. EEOC*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) (plaintiff moved to enjoin agency rule 5 months after rule's promulgation and 3 months after rule's effective date); *S. Ute Indian Tribe v. U.S. Dep't of the Interior*, No. 15-cv-01303, 2015 WL 3862534, at *1 (D. Colo. June 22, 2015) (plaintiff moved to enjoin agency rule

have acted diligently here to seek a temporary injunction *before* any irreparable harm occurs.

At bottom, Defendants have no true response on the irreparable harm and the inadequacy of legal remedies—because there is none. *See Gainesville*, 210 So. 3d at 1263–64; *Green*, 323 So. 3d at 254–55.

IV. A TEMPORARY INJUNCTION IS IN THE PUBLIC INTEREST.

Plaintiffs have also demonstrated that a temporary injunction will serve the public interest. It is always in the public interest to prevent violation of fundamental constitutional rights. *See* Pls.' T.I. Mot. at 27; *Gainesville*, 210 So. 3d at 1264 (enjoining a law that would "impose" upon Floridians' privacy rights "in violation of the Florida Constitution, would serve the public interest"); *Green*, 323 So. 3d at 254–55 (public interest factor satisfied when Plaintiffs demonstrate likelihood of law's unconstitutionality). And, as Defendants acknowledge, the widespread, irreparable harm that will befall patients if HB 5 goes into effect is an important factor in considering the public interest. *See* State's Resp. at 8 n.8.

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two days before its effective date despite knowing about rule for three months); *Tarek ibn Ziyad Acad. v. Islamic Relief USA*, 794 F. Supp. 2d 1044, 1059 (D. Minn. 2011) (plaintiff moved to enjoin law two weeks before its effective date, despite having known about the change for two years); *Hart Intercivic, Inc. v. Diebold, Inc.*, No. 09-678, 2009 WL 3245466, at *8 (D. Del. Sept. 30, 2009) (plaintiff moved to enjoin acquisition 3 weeks after it occurred); *Badillo v. Playboy Ent. Grp., Inc.*, No. 04-cv-591-T-30, 2004 WL 1013372, at *1–2 (M.D. Fla. Apr. 16, 2004) (plaintiff moved to enjoin sale of videos 9 months after discovering the videos).

In contrast, Defendants offer only a conclusory assertion that the law "promotes public health and welfare by protecting maternal health and children in utero." *Id.* at 23. But, as shown above, these asserted interests are legally insufficient and factually unsupported—far from advancing public health and welfare, HB 5 puts pregnant people at considerable risk. *See supra* 6–10, 24–29. The public interest tilts decisively in favor of a temporary injunction.

V. THE COURT SHOULD ENTER A STATEWIDE INJUNCTION.

Defendants ask the Court to limit any temporary injunction it enters to the parties in this case, because temporary injunctions are "procedural relief." State's Resp. at 23–24 (emphasis omitted). But "[a] temporary injunction is an equitable remedy," and as the Florida Supreme Court has explained, "a court of equity is a court of conscience; it should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience." *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So. 3d 918, 925 (Fla. 2017) (internal quotation marks omitted). Granting Defendants' request would permit the State to *enforce* HB 5 against everyone else in the State, even after having just found HB 5 likely to violate the constitutional rights of Floridians and to cause them irreparable harm. In "good conscience" and as a matter of basic principles of equity, this Court could not sanction a result that allows the State to deny countless pregnant Floridians a settled constitutional right based only on the happenstance of

whether the abortion provider from whom they seek care was involved in this litigation. Of course, that is why injunctions against prior abortion-related laws have been statewide, halting all enforcement no matter the plaintiff who filed the lawsuit. *See, e.g., Gainesville*, 210 So.3d at 1264–65 (affirming trial court temporary injunction of abortion restriction "barring the application of the law in its entirety" on "all Florida women"); *Little Rock Family Plan. Servs. v. Rutledge*, 984 F.3d 682, 687 (8th Cir. 2021) (affirming district court preliminary injunction of state defendants from enforcing abortion restrictions without limitation) *petition for cert. filed*, No. 20-1434 (U.S. Apr. 9, 2021); *Wilson*, 527 F. Supp. 3d at 817 (preliminary enjoining state defendants from "enforcing [abortion ban] statewide").

Moreover, a temporary injunction limited to the Plaintiffs would invite a serious waste of judicial resources: To avoid being subject to HB 5's penalties, every Florida abortion provider[15] that provides care past 15 weeks, including clinics and hospitals, would have to file their own suit on the exact same issue this case raises. If the Court elects to enter a temporary injunction in this case, necessity, fairness, and judicial economy all dictate that the injunction apply statewide.

[15] Or, as Defendants would have it, every individual pregnant person in need of an abortion after 15 weeks LMP. *See* State's Resp. at 4–7, 17–18.

VI. IF THE COURT ENTERS AN INJUNCTION, IT SHOULD GRANT A BOND OF NO MORE THAN $5,000.

Defendants request a $1 million bond, which they assert is an "abundantly reasonable" compromise from the "more than $874 million" in lost tax revenue they claim an injunction of HB 5 would cause Florida for every year it is in effect. State's Resp. at 25. This is not a serious request. Rather, it is one designed to chill people from using the courts to seek to vindicate their constitutional rights.[16] This Court should not sanction such a blatant attempt to close the courthouse doors.

Nor have Defendants come close to presenting the evidence or argument that would justify such an outlandish request. "[I]n the usual case," the amount of the bond must be based on *evidence* of the non-movant's anticipated damages from a wrongfully entered injunction. *AOT, Inc. v Hampshire Mgmt. Co.*, 653 So. 2d 476, 478 (Fla. 3d DCA 1995). Absent evidence, a bond determination may "initially" be based on the good-faith representations of counsel. *Id.* Defendants do not claim that their requested amount of bond rests on their counsel's "good-faith representations," and do not offer any evidence to show that a wrongfully-entered injunction would cause them to incur $1 million or anywhere close to it.

[16] The suggestion that a $1 million bond is necessary to issue a temporary injunction blocking the ban is even more outrageous given that the State also takes the position that individual women seeking abortions are the only proper plaintiffs to challenge the Act and that there are no barriers to them doing so. *See* State's Resp. at 6–7, 17–18.

Instead, Defendants suggest a $1 million bond would be reasonable by making broad, speculative assertions based entirely on an article published on Self.com about the amount of combined federal and state taxes that the average Floridian will pay over their lifetimes. State's Resp. at 25 n.15. Apparently, Defendants are contending that the harm the State would experience from a wrongfully-entered temporary injunction is lost tax revenue from fetuses who might be born in Florida and then remain in Florida and pay taxes for the entirety of their lives. *See id.* at 25–26. But Defendants offer no reason why lost tax revenues equate to damages, and of course they ignore the fact that taxes are paid so that the State of Florida can provide services to *Floridians*, not to benefit the State itself. Defendants' speculation about tax revenue and its supposed connection to a temporary injunction in this case cannot support a $1 million bond (or anywhere close to that amount). *See AOT, Inc.*, 653 So. 2d at 478-79 (reversing entry of $1 million bond because it was "not based upon either evidence or 'good faith representations' of counsel."). Setting a bond in this kind of "obviously speculative manner" would be "an abuse of discretion and error." *Andre Pirio Assocs., Inc. v. Parkmount Props., Inc., N.V.*, 453 So. 2d 1184, 1187 (Fla. 2d DCA 1984). Moreover, Defendants' theory regarding lost tax revenue is entirely at odds with their cavalier assertion elsewhere in their brief that the ban will result in patients obtaining earlier abortions—not being forced to bear children against their will.

Nor is there a requirement that Plaintiffs prove they cannot pay a $1 million bond before becoming entitled to a lower bond amount. *Contra* State's Resp. at 26. The bond inquiry turns on the reasonable damages that Defendants would incur from a wrongful injunction, not the economic status of the plaintiff. *AOT, Inc.*, 653 So. 2d at 478. Defendants have not shown $1 million in damages. Instead, their request for $1 million is designed to dissuade Plaintiffs (and any future plaintiffs) from seeking injunctions to bar the enforcement of unconstitutional statutes. Defendants cite no law for the idea that they are entitled to a bond amount that is so high that its effect would be to chill future Floridians from accessing the courts to vindicate their rights. *See* Pls.' T.I. Mot. at 28–29; *cf. Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980) ("As people seek to vindicate their constitutional rights, the courts have no alternative but to respond. . . . [and should not] close the doors to the courtrooms of this state to its citizens who assert cognizable constitutional rights.").

Lastly, Defendants speculate that, notwithstanding controlling Florida Supreme Court precedent that renders HB 5's 15-week ban unconstitutional, *see supra* 4–18, their chances of overturning an injunction are high because the Supreme Court might overrule this precedent, State's Resp. at 26–27. This Court is bound to follow the Florida Supreme Court's precedents as they currently exist, not as they might hypothetically exist in the future. *See, e.g.*, *Ellis v. State*, 703 So. 2d 1186, 1187 (Fla. 3d DCA 1997) ("[W]hen confronted with binding precedent, trial judges

are obliged to follow that precedent even if they might wish to decide the case differently."); *see also Scott v. Trotti*, 283 So. 3d 340, 343-45 (Fla. 1st DCA 2018) (finding reversible error in circuit court's entry of injunction based on disregard of "binding precedent . . . [it] was obligated to follow"); *cf. Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (lower courts should "leav[e] to this Court the prerogative of overruling its own decisions" even if directly controlling precedent "appears to rest on reasons rejected in some other line of decisions"). Accordingly, to evaluate Defendants' chances of success on appeal, this Court can consult only existing precedent—and under that precedent, Defendants have no chance of prevailing on an argument that HB 5's pre-viability abortion ban is constitutional. *See supra* at 4–18.

In sum, because Defendants have offered no evidence of what their anticipated damages from a wrongfully entered injunction in this case would actually be, this court should set the bond at Plaintiffs' proposed amount, $5,000. That amount properly accounts for Defendants' low odds of success on appeal, Defendants' lack of damages resulting from an injunction that preserves the status quo, and the important need to preserve the courts as an accessible forum for all Floridians to vindicate their constitutional rights.

CONCLUSION

For the foregoing reasons, as well as those set forth in their opening memorandum, Plaintiffs respectfully request that this Court promptly enter a temporary injunction that enjoins all remaining Defendants, and their officers, agents, servants, employees, appointees, or successors, as well as those in active concert or participation with any of them, from enforcing Section 4 of HB 5 and the related definitions in Section 3(6) and 3(7) of HB 5. Plaintiffs also respectfully ask this Court to impose a bond of no more than $5,000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the following persons on the E-filed date of this document by filing the document with service through the e-Service system (Fla. R. Jud. Admin. 2.516(b)(1)):

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