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

GAINESVILLE WOMAN CARE LLC d/b/a BREAD AND ROSES WOMEN'S HEALTH CENTER, on behalf of itself, its doctor, and its patients; and MEDICAL STUDENTS FOR CHOICE, on behalf of its members and their patients,

Plaintiffs,

v.

STATE OF FLORIDA; FLORIDA DEPARTMENT OF HEALTH; JOHN H. ARMSTRONG, M.D., in his official capacity as Secretary of Health for the State of Florida; FLORIDA BOARD OF MEDICINE; JAMES ORR, M.D., in his official capacity as Chair of the Florida Board of Medicine; FLORIDA BOARD OF OSTEOPATHIC MEDICINE; ANNA HAYDEN, D.O., in her official capacity as Chair of the Florida Board of Osteopathic Medicine; FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION; and ELIZABETH DUDEK, in her official capacity as Secretary of the Florida Agency for Health Care Administration,

Defendants.

Case No. _____

PLAINTIFFS' MOTION FOR AN EMERGENCY TEMPORARY INJUNCTION AND/OR A TEMPORARY INJUNCTION

Pursuant to Florida Rule of Civil Procedure 1.610, Plaintiffs GAINESVILLE WOMAN CARE LLC d/b/a BREAD AND ROSES WOMEN'S HEALTH CENTER ("Bread and Roses") and MEDICAL STUDENTS FOR CHOICE ("MSFC") move the Court for a temporary injunction enjoining Defendants STATE OF FLORIDA, FLORIDA DEPARTMENT OF HEALTH, JOHN H. ARMSTRONG, M.D, FLORIDA BOARD OF MEDICINE, JAMES ORR,

M.D., FLORIDA BOARD OF OSTEOPATHIC MEDICINE, ANNA HAYDEN, D.O., FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, and ELIZABETH DUDEK ("Defendants" or "the state") from enforcing House Bill 633, before that Act's effective date of July 1. In support of their motion, Plaintiffs state as follows:

INTRODUCTION

Absent injunctive relief from this Court, a sweeping restriction on Florida women's ability to access abortion services, unprecedented in this state, will take effect on July 1, 2015. Section one of Florida House Bill 633, signed by Governor Scott last night (June 10, 2015) would require a woman seeking an abortion to make an additional, unnecessary trip to her health care provider at least twenty-four hours before obtaining an abortion, in order to receive the same information she may currently receive on the day of the procedure. *See* Ch. 2015-1__, § 1, Laws of Fla. ("H.B. 633" or "the Act") (amending § 390.0111, Fla. Stat). The Act's unnecessary and burdensome requirements are imposed regardless of the distance a woman must travel to reach her provider, her own medical needs, her judgment, her doctor's judgment, or her individual life circumstances. By subjecting all women seeking abortion care to both a mandatory twenty-four-hour delay and an additional-trip requirement—a burden placed on patients seeking no other medical procedure in Florida, much less a medical procedure protected by the state Constitution as a fundamental right—the Act can only serve to deter women from seeking abortions, and to punish and discriminate against those who do.

By impeding a woman's access to abortion, the Act violates her right to privacy as guaranteed under article I, section 23 of the Florida Constitution. Because Plaintiffs are likely to succeed on the merits of their claims and they, along with their patients and all Florida women seeking abortions, will suffer irreparable harm if the Act is not enjoined, and because an

injunction will serve the public interest, this Court should issue immediate temporary injunctive relief against enforcement of the Act.

STATEMENT OF THE CASE

A. Current Florida Informed Consent Laws

"Informed consent" refers to the ethical obligations of doctors and other health care professionals to ensure that a patient is informed about a procedure, has the capacity to consent to a procedure, and does in fact consent to a procedure. Decl. of Kenneth W. Goodman, attached hereto as Ex. B-4, ("Goodman Decl.") ¶ 7. Florida has a general informed consent statute that applies to all medical procedures, providing that informed consent is valid where a doctor or other health professional conforms to accepted standards of medical practice such that "a reasonable individual, from the information provided by the [doctor], under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures." § 766.103, Fla. Stat. This statutory standard reflects best medical practices. Goodman Decl. ¶¶ 7-8. No waiting period or additional trip is required under Florida law for any other procedure. § 766.103, Fla. Stat.; Goodman Decl. ¶ 13.

Prior to H.B. 633's enactment, Florida law had a specific informed consent statute for abortion, which provided that a "termination of pregnancy" may not be performed or induced "except with the voluntary and informed written consent of the pregnant woman." § 390.0111(3), Fla. Stat. Such consent is "voluntary and informed" if the "physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, informed the woman" of certain information, including "the nature and risks of . . . [the] procedure," "the probable gestational age of the fetus," and the "risks to the woman and the fetus of carrying the pregnancy to term." *Id.* Pursuant to the Florida Supreme Court's decision in *State v.*

Presidential Women's Center, 937 So. 2d 114 (Fla. 2006), the abortion-specific informed consent statute requires physicians to obtain informed consent in the same manner as is required under the general informed consent statute, and the information to be disclosed to patients—the risks of the procedure and the alternatives—is analogous.

B. Provisions of the Act

H.B. 633, which is effective July 1, adds two provisions to Section 390.0111(3), Florida Statutes. First, it requires that the information be provided in person twenty-four hours prior to the procedure. This forces the woman to make a separate, additional visit to a provider's office, at least twenty-four hours before her appointment to obtain the abortion care she seeks. H.B. 633 § 1. Second, the Act provides a narrow exception to the mandatory delay and additional-trip requirements for a woman who, when she "schedules or arrives for her appointment . . . presents to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking." *Id*.

The only other exception to the mandatory delay and additional-trip requirements is the exception in the current version of the informed consent law for "a medical emergency." § 390.0111(3), Fla. Stat. The statute does not define "medical emergency," but provides that in a medical emergency, "a physician may terminate a pregnancy" after "obtain[ing] at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman." § 390.0111(3)(b), Fla. Stat. (allowing physician to proceed absent corroborating opinion only if a second physician is not available). There is no exception for threats to a woman's life that are not "medical emergencies," and no exception for threats of any kind to a woman's health.

C. The Effect of the Act on Women Seeking Abortion Care in Florida

The Act harms all Florida women seeking abortions: Today, a woman in Florida can obtain an abortion once she and her doctor believe it is appropriate—which means that she may do so upon her first visit to a clinic, just as patients in Florida may do when seeking all other comparable medical procedures. *See* Decl. of Christine L. Curry, attached hereto as Ex. B-3, ("Curry Decl.") ¶¶ 9, 14; Goodman Decl. ¶ 13. If the Act were allowed to go into effect, that woman would have to make an additional, unnecessary trip to the clinic, and wait at least twenty-four hours before obtaining the abortion care she seeks. This in itself is a burden. Further, the mandatory delay and additional-trip requirements will force women to expend more time and money, including an additional day's absence from work, home, and/or school. They will require paying for additional travel costs and child-care; involve lost wages for many women; and require an overnight stay away from home for some women. Decl. of Kristin Davy, attached hereto as Ex. B-2, ("Davy Decl.") ¶ 5; Decl. of Sheila Katz, attached hereto as Ex. B-5, ("Katz Decl.") ¶ 18.

The Act will also require that a physician be at the health center to provide the required information on the patient's first visit. For Plaintiff Bread and Roses, this requirement will lead to delays far greater than 24 hours for patients, because its sole physician works no more than two days per week. Davy Decl. ¶ 16. Moreover, because it is likely not possible to staff a physician at every facility offering abortions each single day of the week, and because many women will not be able to take time away from their existing obligations to travel on two consecutive days, the Act will inevitably force many women to delay their abortion procedures by a significantly longer period of time than twenty-four hours. Curry Decl. ¶¶ 15, 20; Davy Decl. ¶¶ 16. That will in turn impose medical harm on women: While abortion is an extremely safe procedure, the later an abortion takes place in pregnancy, the greater the medical risks for

the woman, and the greater the cost as well. Curry Decl. ¶¶ 13, 15; Davy Decl. ¶ 18. The additional-trip requirement also poses a very real threat to a woman's confidentiality and privacy by increasing the risk that partners, family members, employers, co-workers, or others will discover that she is having an abortion. Davy Decl. ¶ 20; Katz Decl. ¶ 17. For some women, the mandatory delay and additional-trip requirements will prevent them from obtaining a medication abortion, which is an early method of ending a pregnancy involving drugs rather than surgery. Curry Decl. ¶¶ 10, 15. Medication abortion is medically indicated for physiological or mental health reasons for some women and is strongly preferred over surgical abortion by others for personal reasons. *Id*. ¶¶ 10-12; Davy Decl. ¶¶ 7, 17.

The mandatory delay and additional-trip requirements will also pose particular harms to especially vulnerable groups of Florida women, including low-income women; women who are victims of intimate partner violence; those whose pregnancy is the result of rape or other forms of abuse; those with wanted pregnancies that involve a severe fetal anomaly, and those with medical complications of pregnancy that are not immediately life-threatening. For these women, the mandatory delay and additional-trip requirements may inflict psychological harm, increase significantly costs and burdens, threaten their safety, threaten their health and even their lives, or prevent them from obtaining an abortion altogether. Davy Decl. ¶¶ 14, 19; Katz Decl. ¶¶ 15-23; Decl. of Lenore Walker, attached hereto as Ex. B-6, ("Walker Decl.") ¶¶ 16-25; Curry Decl. ¶¶ 15-19.

Low-income women will have the greatest difficulty in rearranging inflexible work schedules at low-wage jobs; arranging and paying for childcare; paying for the travel costs for an additional trip to the clinic; foregoing lost wages for missed work; and paying any additional costs associated with a later procedure. Katz Decl. ¶¶ 15-22; Davy Decl. ¶¶ 13-15. A significant

number of women seeking abortions have incomes that are at, or below, the federal poverty level. Nationally, in 2008, 42% of women having abortions had incomes below the federal poverty level, and another 27% had incomes below 200% of the federal poverty level, which is often considered a better measure of who is low-income. Katz Decl. ¶¶ 10, 14-15. Florida has a higher poverty rate than the United States, and a higher proportion of people living below 200% of the poverty line; thus, it is likely a large majority of women seeking abortions in Florida are low-income. *Id*. ¶¶ 8, 10, 15. Low-income women will find it more difficult to pay these increased costs without foregoing other necessities. *Id*. ¶ 22. The need to find and save money to pay for additional costs resulting from the Act will likely delay low-income women in seeking abortions, causing the harms associated with delay discussed *supra.*

For a woman with an abusive partner who is seeking an abortion without detection, the need for privacy—and thus the threat posed by the Act—is particularly acute. Walker Decl. ¶ 17. Women in abusive relationships often are carefully monitored and have limited unaccounted-for time. *Id*. ¶¶ 11, 18, 21. Forcing these women to make a medically unnecessary trip is not only cruel, but could also subject them to further violence. *Id*. ¶¶ 17-21.

Similarly, forcing women whose pregnancies are the result of rape or other violent crimes to comply with the Act's requirements may cause them further trauma and psychological harm. *Id*. ¶¶ 22-24. While the Act does contain a purported "exception" for these circumstances, a woman who has survived these crimes cannot avail herself of it unless she first reports the crime to authorities. That makes the "exception" meaningless: Most victims of these forms of violence and abuse do not report the abuse to authorities in the first instance, and they too will be forced to wait before terminating pregnancies that result from this violence. *Id*. ¶¶ 26-29.

Those women with wanted pregnancies who seek abortions to protect their medical well-being or because they have received a diagnosis of a severe fetal anomaly will also face grave harms. While the Act incorporates a limited exception for medical emergencies that immediately threaten a woman's life, there is no exception for non-emergency threats to a woman's life, and no exception for *any* threat to a woman's health.[1] The Act will thus impose serious medical risks on women facing one of the numerous complications of pregnancy that threaten a woman's life or health outside the dangerously narrow confines of the Act's exception for life-threatening medical emergencies. Curry Decl. ¶¶ 18-19. The Act also contains no exception for women whose pregnancies involve grave or even lethal fetal anomalies, on whom the Act may impose psychological harm. Curry Decl. ¶ 16.

Finally, by imposing a waiting period on abortion—a waiting period the Legislature does not impose on any other medical procedure—the Act stigmatizes women seeking abortions and sends the message that they are incompetent decision-makers. This waiting period reflects and perpetuates the gender stereotype that women do not understand the nature of the abortion procedure, have not thought carefully about their decision to have an abortion, or are less capable of making an informed decision about their health care than men.

D. The Effect of the Act on Abortion Providers in Florida

The Act is enforced through penalties against doctors who provide abortions, who face both monetary fines of up to $10,000 for each violation and disciplinary sanctions up to and

[1] The underlying statute provides that a physician's "reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any action brought under this paragraph." § 390.0111(3)(c), Fla. Stat. This affirmative defense to disciplinary action in limited cases, which a physician must prove to the medical board before she can avail herself of it, does not constitute an adequate health exception, nor provide any protection to licensed abortion clinics for potential violations of the Act.

including revocation of their licenses to practice medicine. § 390.0111(3)(c), Fla. Stat.; *see also* §§ 458.331, 459.015, 456.072(2), Fla. Stat. Abortion clinics, which must be licensed by the Florida Agency for Healthcare Administration, may be prevented from renewing their clinic licenses for violations of the Act. Fla. Admin. Code R. 59A-9.020.

ARGUMENT

A. Standard for Granting a Motion for Injunctive Relief

The "obvious purpose" of a temporary injunction is to maintain the status quo pending the determination of a case. *Smith v. Hous. Auth.*, 3 So. 2d 880, 881 (Fla. 1941) (en banc). Plaintiffs are entitled to a temporary injunction if they "satisfy a four-part test under Florida law: 'a substantial likelihood of success on the merits; lack of an adequate remedy at law; irreparable harm absent the entry of an injunction; and that injunctive relief will serve the public interest.'" *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So. 3d 183, 186 n.7 (Fla. 2009) (quoting *Reform Party of Fla. v. Black*, 885 So. 2d 303, 305 (Fla. 2004)); *see also St. John's Inv. Mgmt. Co. v. Albaneze*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009). As set forth below, Plaintiffs easily satisfy these four requirements, and granting a temporary injunction will preserve the status quo, allowing Florida women to continue making informed decisions about their own medical care without burdensome, unnecessary, and unconstitutional intrusion by the state.

B. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claim that the Act Violates the Right to Privacy

Plaintiffs have a substantial likelihood of success on the merits of their claim that the Act violates a woman's fundamental right to privacy as guaranteed by article I, section 23 of the Florida Constitution, by infringing on her right to access abortion services. As discussed below, the Florida Supreme Court has repeatedly held that laws infringing on a woman's privacy right

to determine whether or not to continue a pregnancy are subject to strict scrutiny. The Act unquestionably infringes on that right and cannot survive such scrutiny.

1. The Florida Constitution Requires Strict Scrutiny of All Incursions on the Fundamental Right to Privacy, Including a Woman's Right to Decide to End a Pregnancy

The Florida Constitution begins with a Declaration of Rights. "No other broad formulation of legal principles, whether state or federal, provides more protection from government overreaching or a richer environment for self-reliance and individualism than does this 'stalwart set of basic principles.'" *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992) (quoting *State ex rel. Davis v. City of Stuart*, 120 So. 335, 347 (Fla. 1929)). Unlike the Federal Constitution, the Florida Constitution's Declaration of Rights contains "an express, freestanding Right of Privacy Clause," added to the Constitution directly by Florida citizens in a 1980 general election. *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 619 (Fla. 2003) ("*North Florida*"). Florida's explicit constitutional guarantee of the right to privacy provides in relevant part:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.

Art. I, § 23, Fla. Const.

As recognized by Florida courts, this *explicit* state right to privacy affords greater protections from governmental intrusion and is "a broader, more protective right" than the *implicit* right to privacy recognized under the Federal Constitution. *North Florida*, 866 So. 2d at 619; *id.* at 634 ("While the United States Supreme Court has read into the federal constitution an *implicit* right of privacy, that particular right is a weak version of our *explicit* freestanding state right" (internal footnote omitted)); *see also In re T.W.*, 551 So. 2d 1186, 1191-92 (Fla. 1989) (Florida's "amendment embraces more privacy interests, and extends more protection to the

individual in those interests, than does the federal Constitution."). As the Florida Supreme Court has explained at length:

> Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985); *see also Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998) ("The state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart.").

Under Florida law, an infringement upon the fundamental right to privacy warrants judicial review under the strict scrutiny standard, and is "presumptively unconstitutional unless proved valid by the State." *North Florida*, 866 So. 2d at 626. The state bears the evidentiary "burden of proof to . . . justify an intrusion on privacy," and in order to meet this burden, the state must demonstrate "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *In re T.W.*, 551 So. 2d at 1192 (quoting *Winfield*, 477 So. 2d at 547). This standard is a "highly stringent" one. *North Florida*, 866 So. 2d at 620-21 (quoting *In re T.W.*, 551 So. 2d at 1192). Indeed, "no government intrusion in the personal decisionmaking cases . . . has survived" such scrutiny. *Id.*

The Florida Supreme Court has repeatedly held that the state constitutional right to privacy "is clearly implicated in a woman's decision of whether or not to continue her pregnancy." *In re T.W.*, 551 So. 2d at 1192; *see also North Florida*, 866 So. 2d at 620-22, 632; *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001). The

constitutional right to privacy "embodies the principle that [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental." *In re T.W.*, 551 So. 2d at 1193 (internal quotations and citations omitted).

In *In re T.W.*, the Florida Supreme Court held that strict scrutiny applied to restrictions on abortion that implicated the right to privacy. *Id.* In assessing whether the state had shown a compelling state interest, the court looked to the original trimester framework of *Roe v. Wade*, 410 U.S. 113 (1973). The *In Re T.W.* court held that "the state's interest in maternal health" does not "become[] compelling" until "the end of the first trimester;"[2] the state's interest in embryonic or fetal life only "becomes compelling upon viability." *In re T.W.*, 551 So. 2d at 1193. The state is thus foreclosed from asserting a compelling interest in maternal health before the end of the first trimester, or a compelling interest in potential life before viability. "[P]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother." *In re T.W.*, 551 So. 2d at 1193; *see also North Florida*, 866 So. 2d at 639-40 (reaffirming *In re T.W.*).

Since *In re T.W.*, Florida courts have consistently applied strict scrutiny to statutes that impose state-created burdens on a woman's right to decide whether or not to continue a

[2] As the Florida Supreme Court recognized in *In re T.W.*, 551 So. 2d at 1193, the reason that *Roe* had identified the end of the first trimester as meaningful for women's health restrictions is that in 1973, abortion beyond the first trimester was considered more dangerous than carrying to term. *Roe*, 410 U.S. at 163. With advances in medical technology, the evidence no longer supports this assumption. *See In re T.W.*, 551 So. 2d at 1197 (Ehrlich, J., concurring).

pregnancy.[3] In 2003, the Florida Supreme Court held a newly enacted parental notification law unconstitutional under the strict scrutiny standard. *See North Florida,* 866 So. 2d 612. The law required a minor to notify a parent of her decision to have an abortion, or to convince a court that she was mature enough to make that decision on her own or that an abortion was in her best interests. *Id.* at 615. In *North Florida*, the court once again underscored the strength of the Florida Constitution's protection of the right to privacy, especially as compared to federal protections. The court expressly rejected the state's arguments that it should apply the lower, undue burden standard the U.S. Supreme Court articulated in *Planned Parenthood v. Casey,* rather than strict scrutiny,[4] in determining whether a state law impermissibly infringes on the right to decide to end a pregnancy:

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[3] In *Renee B.,* the Florida Supreme Court determined that the exclusion of medically necessary abortions from Medicaid coverage did not implicate the privacy right: "the right of privacy does not create an entitlement to the financial resources to avail herself of this choice." *Renee B. v. Fla. Agency for Health Care Admin*., 790 So. 2d 1036, 1041 (Fla. 2001). That is, while the state cannot itself impose particular burdens on abortion without satisfying strict scrutiny, in *Renee B.*, "the State ha[d] imposed no restriction on access to abortions that was not already present." *Id.* However, the *Renee B.* court emphasized that if the right to privacy were implicated, as is clearly the case here, strict scrutiny would apply. *Id*. at 1040.

[4] In *Casey*, the United States Supreme Court upheld a twenty-four-hour waiting period, but only under this lesser, undue burden standard. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992). Unlike the strict scrutiny standard Florida applies, the lesser undue burden standard does not require that a law serve a compelling state interest through the least restrictive means, but instead required that the law not impose an undue burden on a woman's right to choose while serving an "important" interest, which could include an interest in protecting potential life. *See generally Casey*, 505 U.S. 833; *In re T.W.*, 551 So. 2d at 1193. As discussed further *infra*, the Florida Supreme Court and the Florida people have emphatically rejected attempts to lessen Florida's constitutional protection of the right to privacy. *See North Florida*, 866 So. 2d at 635-36; *Initiative Information: Prohibition on Public Funding of Abortions; Construction of Abortion Rights*, Fla. Dep't of St., Division of Elections, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82 (last visited June 6, 2015) (proposed amendment defeated with fifty-five percent of Florida voters in opposition).

> Florida courts consistently have applied the "strict" scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity. The "undue burden" standard, on the other hand, is an inherently ambiguous standard and has no basis in Florida's Right of Privacy Clause.

North Florida, 866 So. 2d at 635 (internal footnote omitted). The court stated that adopting the federal standard would require "abandon[ing] an extensive body of clear and settled Florida precedent in favor of an ambiguous federal standard," and most important, it would require the court "to forsake the will of the people":

> If Floridians had been satisfied with the degree of protection afforded by the federal right of privacy, they never would have adopted their own freestanding Right of Privacy Clause. In adopting the privacy amendment, Floridians deliberately opted for substantially more protection than the federal charter provides.

Id. at 635-36. Indeed, Florida voters reasserted their will in 2012, when they defeated a ballot initiative that would have rolled back the independent state constitutional protection of abortion in favor of the lower federal constitutional standard. *See Initiative Information: Prohibition on Public Funding of Abortions; Construction of Abortion Rights*, Fla. Dep't of St., Division of Elections, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82 (last visited June 5, 2015).[5] There can thus be no question that the Right of Privacy Clause protects the right to choose abortion and subjects laws that burden that right to strict scrutiny.

2. Unlike the Prior Version of the Informed Consent Law as Construed, the Act Singles Out Abortion for a State-Imposed Burden and Is Therefore Subject to Strict Scrutiny

Under the Florida Supreme Court's interpretation of the state constitution's strong privacy clause, strict scrutiny is required whenever the Legislature singles out abortion in

[5] Earlier, in 2004, Florida voters did ratify a separate ballot initiative that authorized the Legislature to enact a parental notification requirement for abortion. *See* Article X, § 22, Fla. Const.

imposing a burden on access to health care. The Act is just such a burden, as illustrated by the history and holding of *State v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006).

The challenged Act is an amendment to the Women's Right to Know Act, originally passed in 1998, and challenged in *Presidential Women's Center*, *see id.* at 115. That statute was upheld only after the state accepted a limiting construction to bring it in line with informed consent laws for other medical procedures. *See id.* at 120-21. Prior to that limiting construction, the Right to Know Act imposed unique burdens on abortion and the Court of Appeals had accordingly applied strict scrutiny and held the statute was unconstitutional. The intermediate court noted that unlike the informed consent requirements for other medical procedures, the challenged law would "not allow a physician to tailor the information to the woman's circumstances, [and] infringe[d] on the woman's ability to receive her physician's opinion as to what is best for her, considering her circumstances." *State v. Presidential Women's Ctr.*, 707 So. 2d 1145, 1150 (Fla. 4th DCA 1998).

On appeal before the Florida Supreme Court, the state, for the first time, offered a limiting construction permitting physicians to provide information tailored to each individual patient, rather than information that would be considered material by an abstract "reasonable patient." *Presidential Women's Ctr.*, 937 So. 2d at 119. The state also conceded that the mandated informed consent information only contemplated medical risks, not social, economic, or other risks. *Id.* Accordingly, the Supreme Court upheld the statute, *so construed*, as "comparable to [the informed consent requirements] of the common law and other Florida informed consent statutes implementing the common law." *Id.* at 118.

In contrast to the requirement ultimately upheld as construed in *Presidential Woman's Center*, the Act challenged in the instant case goes far beyond common law and other Florida

informed consent statutory requirements: It singles out women seeking abortion care and will require them, alone among patients, to receive state-mandated information in person at least twenty-four hours before their medical procedure. As the proponents of the Act themselves admitted, the Florida Legislature has never imposed a mandatory waiting period for any other medical procedure.[6] *See* Fla. H.R., recording of proceedings (Apr. 22, 2015), *available at* http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015041243&TermID=86, 1:27:55 - 1:28:04, (Representative Sullivan Closing on H.B. 633). The Act imposes a unique burden on women seeking abortion care. It burdens their right to privacy and is thus subject to strict scrutiny under the Florida Constitution.

3. The Act Cannot Survive Strict Scrutiny

As detailed above, under Florida law, a statutory requirement that infringes upon a woman's right to privacy in choosing abortion is presumptively unconstitutional unless the state can prove that it "serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Winfield*, 477 So. 2d at 547; *see also In re T.W.*, 551 So. 2d at 1192 (applying this standard to abortion restriction); *North Florida*, 866 So. 2d at 620 (same). The Act will neither serve a compelling state interest, nor employ the least intrusive means to serve any such hypothetical interest.

a. The Act Will Not Serve a Compelling State Interest

The Florida Supreme Court has recognized only two compelling state interests that can justify restrictions on abortion: the promotion of maternal health and potential life. *In re T.W.*,

[6] The only patients who must observe a waiting period in Florida do so pursuant to *federally* mandated guidelines, not state law, and those are patients who qualify for Medicaid and seek financial coverage for sterilization procedures. *See* Fla. Admin. Code R. 64F-7.007(2) (citing statute codifying federal Medicaid requirement of 30-day waiting period for Medicaid-reimbursed sterilization, with exceptions).

551 So. 2d at 1193-94. However, both are significantly limited: the state's interest in maternal health becomes compelling no earlier than the beginning of the second trimester and its interest in potential life becomes compelling only after viability. *Id.*; *see also Presidential Women's Ctr.*, 707 So. 2d at 1149. Thus, "[u]nder Florida law, prior to the end of the first trimester, the abortion decision must be left to the woman *and may not be significantly restricted by the state*." *In re T.W.*, 551 So.2d at 1193.

Here, the Act will serve no compelling state interests recognized by the Florida Supreme Court. There is no compelling interest in protecting potential life before viability; there is no compelling interest in protecting maternal health before the second trimester. But by its terms, the Act will apply throughout a woman's pregnancy.[7] For this reason alone, the state is unable to demonstrate that the Act will further a compelling state interest and it must be struck down.

b. The Act Would Not Serve a Compelling Interest in Maternal Health Even if It Were Limited to Second-Trimester Abortions

Even if the Act were limited to the second trimester of pregnancy (which it is not), the state could not demonstrate it would serve a compelling state interest in protecting women's health, for two reasons.

First, the Florida Supreme Court has held that where the state claims it has a compelling interest in burdening abortion, the state's failure to impose parallel burdens on comparable medical procedures requires the conclusion that the state interest is not, in fact, compelling. In *In re T.W.*, the state claimed a compelling interest in protecting minors, but the state required parental consent only when a minor sought an abortion, and not for any other pregnancy-related medical procedure. "In light of this wide authority that the state grants [to minors,] we are

[7] Florida generally bans post-viability abortions, with certain limited exceptions to protect a woman's health or life. § 390.01112, Fla. Stat.

unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned." 551 So. 2d at 1195.

Hence, because the Florida Legislature has not imposed a mandatory delay and additional-trip requirement on any other medical procedure, including those that pose greater risks than abortion, there cannot be a genuine "compelling interest" in protecting women's health that will be furthered by the Act. Curry Decl. ¶ 14; Goodman Decl. ¶¶ 13-14. Most medical procedures performed in the state of Florida are governed by the general informed consent statute, which, as the Supreme Court noted in *Presidential Women's Center*, imposes obligations that are comparable to the *current* abortion-specific informed consent statute. *See* § 766.103, Fla. Stat.; *Presidential Women's Center*, 937 So. 2d at 120; Goodman Decl. ¶ 13. That general informed consent statute does not require a patient to make a separate visit at least twenty-four hours before receiving medical services in order to hear, in person, information that could be provided on the day of the service. *See* § 766.103, Fla. Stat. Nor has the Florida Legislature deemed it necessary to require a patient to make a separate trip to a health center or hospital in order to fulfill informed consent requirements for any other pregnancy-related treatment, or for *any other* medical procedure, including procedures that are riskier than a first- or second-trimester abortion procedure.[8] Curry Decl. ¶ 14; Goodman Decl. ¶ 14. In fact, the Legislature soundly rejected an amendment to the Act that would have imposed a similar twenty-four-hour waiting period for a vasectomy, a surgical sterilization procedure for men with comparable risks.

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

See Compl., Ex. A-2, at 2; *H.B. 633 – Informed Patient Consent*, Fla. H.R., http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=53704& (last visited June 5, 2015) [hereinafter *H.B. 633 Legislative History*]; *see also Women's Med. Ctr. of Providence, Inc. v. Cannon*, 463 F. Supp. 531, 537 (D.R.I. 1978) (vasectomy comparably risky to, or potentially more risky than, abortions). Because the Act targets only abortion and not comparable or riskier medical procedures, any state claim that a "compelling" interest in women's health animates the Act must be rejected.

Second, the Act will not only fail to further, but will actually harm, any interest the state could possibly assert in maternal health. As explained in more detail *supra*, the Act's requirements in practice will cause some women to delay their procedures far longer than a day, thus increasing their medical risk. *See supra* pp. 5-6. While abortion is an extremely safe medical procedure, delaying a woman in obtaining care increases the risk she faces. Curry Decl. ¶¶ 13, 15. Moreover, as the Act includes no exception for abortions necessary to protect a woman's health, the Act will force a physician to wait even where delay unquestionably imposes additional medical risk on a patient whose health is already threatened by continued pregnancy. *See* § 390.0111(3)(a), Fla. Stat. Indeed, under the Federal Constitution as well as the Florida State Constitution, the lack of any exception to the mandatory waiting period when necessary to preserve a woman's health is a fatal flaw. The United States Supreme Court in *Casey*, for example, held that it "would be required to invalidate the restrictive operation of" a twenty-four-hour mandatory delay if "it foreclose[d] the possibility of an *immediate* abortion despite some significant health risks. . . . [F]or the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her *health*." 505 U.S. at 880 (emphases added). But that is exactly what the

Act will do: It forecloses the possibility of an immediate abortion despite threats to a woman's health, by allowing an immediate abortion only in life-threatening medical emergencies. Therefore, rather than serving a state interest in maternal health, the Act will do the opposite, and must certainly fall under Florida's Declaration of Rights.

c. The Act Does Not Use the Least Intrusive Means to Address Any Interest the State Might Assert

Even if there were a compelling state interest underlying the Act—which there is not, *see supra* Parts 3.a-b—"the state may impose significant restrictions only in the least intrusive manner designed to" serve those interests. *In re T.W.*, 551 So. 2d at 1193. "Any inquiry under this prong must consider procedural safeguards relative to the intrusion." *Id.* at 1195-96. The state cannot meet its burden of demonstrating that the Act is the least intrusive means of serving any interest it may assert.

First, as discussed above, the state is already using less intrusive means to ensure that a woman's decision to have an abortion is well informed. Under current law, women are already advised of exactly the information the Act will require, § 390.0111(3)(a), Fla. Stat., and indeed have been receiving safe and legal abortion care in Florida for forty years with no need for a mandatory delay to ensure their decisions are informed. A less intrusive means of ensuring that women's decisions are informed is thus the current law; the Act will add only stigma, burden, and delay.

Second, even if the Florida Legislature had evidence that the current law were somehow inadequate, which it does not, it could easily have strengthened the law's requirements in a less intrusive way, as demonstrated by the numerous proposed Amendments to the Act that the Legislature rejected. Several of these would have made the Act less intrusive for all women:

- Amendment 213635 would have permitted a woman to waive the Act's requirements and have the procedure on the same day as receiving the required information. *See* Compl. Ex. A-3. This would have allowed women who wanted a day or more to consider the information they had received to do so, without imposing such delay on all women. That amendment was rejected. *See H.B. 633 Legislative History.*
- Amendments 853480 and 231828 would have allowed a woman to receive the required information in advance of the procedure over the phone, via mail, or by viewing a web site. *See* Compl. Ex. A-5, A-6. Women would still meet with their physicians to confirm their receipt and understanding of the information and to discuss any questions or concerns. Those amendments were rejected. *See H.B. 633 Legislative History*; *S.B. 724 – Termination of Pregnancies*, Fla. H.R., http://myfloridahouse.gov/sections/Bills/billsdetail.aspx?BillId=53671 (last visited June 5, 2015) [hereinafter *S.B. 724 Legislative History*].
- Amendments 930638 and 711443 would have allowed doctors to delegate provision of the required information to a registered nurse or a physician assistant, mitigating difficulties clinics may have scheduling a doctor to be present on multiple days and the resulting delay to women. *See* Compl. Ex. A-7, A-8. Those amendments were rejected. *See H.B. 633 Legislative History.*

Other rejected amendments would have alleviated the intrusion the Act will impose on specific groups of women:

- Amendments 591932 and 113284 would have incorporated an exception for women with health conditions that do not rise to the level of a threat to the woman's life. *See* Compl. Ex. A-11, A-12; *H.B. 633 Legislative History*; *S.B. 724 Legislative History.*

- Amendment 449942 would have allowed a woman who lives more than 100 miles away from the nearest abortion provider to waive the mandatory delay and additional-trip requirement. *See* Compl. Ex. A-4; *H.B. 633 Legislative History*.
- Amendments making a meaningful exception for victims of certain crimes were also introduced. As explained in Part C, *supra*, a woman qualifies for the Act's exception only if she has "documentation" that she is "a victim of rape, incest, domestic violence, or human trafficking." H.B. 633. This punitively narrow exception is meaningless for the majority of sexual assault and domestic violence victims who do not report their assaults to the authorities. Several amendments would have dispensed with the Act's demeaning and unnecessary "proof" requirements. *See* Compl. Ex. A-9, A-10, A-11; *H.B. 633 Legislative History*; *S.B. 724 Legislative History*.
- Amendments 591932 and 113284 would have added an exception to the Act's requirements in the event that a woman receives a diagnosis of a severe fetal anomaly. *See* Comp., Ex. A-11, A-12; *H.B. 633 Legislative History*; *S.B. 724 Legislative History*.

Many of the amendments the Florida Legislature rejected reflect the current practices of other states' abortion-specific mandated information and waiting period requirements,[9] further

[9] *See, e.g.*, Ga. Code Ann. § 31-9A-3(1) (state-mandated information can be given "by telephone" and by "a qualified agent"); Idaho Code § 18-609(3)(c), (4) (physician's agent can certify patient's receipt of state-mandated information); Ky. Rev. Stat. § 311.725(1)(a) (mandated information can be provided verbally by telephone, and by other professionals, including social workers); Mich. Comp. Laws § 333.17015(3) (mandated information can be provided by a "qualified person" in addition to doctor); Minn. Stat. § 145.4242(a)(1) (mandatory information can be provided by telephone); N.D. Cent. Code § 14-02.1-03 (mandatory information can be provided by telephone and designated agent of physician); Neb. Rev. Stat. § 28-327-(2) (mandatory information can be provided by telephone and by certain agents of physician); S.C. Code § 44-41-330(C), (D) (mandatory information can be mailed by health

demonstrating that the Florida Legislature did not utilize the least intrusive means available. *See North Florida*, 866 So. 2d at 642 (Anstead, C.J., concurring) (legislation at issue is not the least intrusive means, as other states have "less intrusive schemes that serve the same purpose"). Whatever interests it may assert, the state could have pursued those interests through means less intrusive than forcing every patient seeking an abortion to make an additional trip to her doctor at least 24 hours prior to the procedure.

* * *

The Act cannot survive judicial review under strict scrutiny: the state lacks a compelling interest, and the Act is not narrowly tailored to serve any interest the state may assert, compelling or no. It is thus no surprise that the vast majority of courts to consider mandatory delays under strict scrutiny have struck them down.[10] Plaintiffs are likely to succeed on the merits of their argument that the Act should meet the same fate.

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worker); V.A. Code § 18.2-76(B) (mandatory information can be provided by trained professional; waiting period reduced to two hours for patients who travel at least 100 miles); Wis. Stat. § 253.10(3)(c)(2) (mandatory information can be provided by qualified person); W. Va. Code § 16-2I-2(a) (mandatory information can be provided by telephone and by health professional).

[10] *See, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 449-51 (1983), *overruled on other grounds by Casey*, 505 U.S. 833; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1535-39 (7th Cir. 1985), *aff'd*, 484 U.S. 171 (1987); *Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft*, 655 F.2d 848, 866 (8th Cir.), *supplemented* 664 F.2d 687 (8th Cir. 1981), *rev'd on other grounds* 462 U.S. 476 (1983); *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1014-16 (1st Cir. 1981); *Charles v. Carey*, 627 F.2d 772, 785-87 (7th Cir. 1980); *Wynn v. Carey*, 599 F.2d 193, 196 n.6 (7th Cir. 1979); *Eubanks v. Brown*, 604 F. Supp. 141, 145-47 (W.D. Ky. 1984); *Margaret S. v. Edwards*, 488 F. Supp. 181, 212-13 (E.D. La. 1980); *Women's Cmty. Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 550-52 (D. Me. 1979); *Leigh v. Olson*, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980); *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 552 F. Supp. 791, 797-99 (E.D. Pa. 1982); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1145-47 (D.R.I. 1982); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 22-25 (Tenn. 2000); *Mahaffey v. Attorney Gen. of Michigan*, No. 94-406793 AZ, 1994 WL 394970, at *6-7 (Mich.

C. Plaintiffs Lack an Adequate Remedy at Law and Will Suffer Irreparable Harm if an Injunction Is not Issued

Plaintiffs must also prove "two interrelated requirements" necessary to establish their right to injunctive relief: that the injury they allege cannot be adequately remedied at law and irreparable harm will occur if an injunction is not issued. *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735, 738 (Fla. 3d DCA 1982).

Plaintiffs lack an adequate remedy at law where damages are unavailable or are "so speculative as not to be susceptible of proof." *So. Colonization Co. v. Derfler*, 75 So. 790, 794 (Fla. 1917); *see also Thompson v. Planning Comm'n*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985) (where calculation of damages is speculative, legal remedy is inadequate). Money damages are ordinarily not available for violations of Florida state constitutional privacy rights. *See Resha v. Tucker*, 670 So. 2d 56, 59 (Fla. 1996) (Grimes, C.J., concurring); *see also Tucker v. Resha*, 634 So. 2d 756, 757 (Fla. 1st DCA 1994); *Stephens v. Geoghegan*, 702 So. 2d 517, 521 n.1 (Fla. 2d DCA 1997) ("[v]iolation of privacy provisions of the Florida Constitution does not give rise to a cause of action for money damages" (citation omitted)); *cf. Garcia v. Reyes*, 697 So. 2d 549, 551 (Fla. 4th DCA 1997) ("there is 'no support for the availability of an action for money damages, based [] on . . . violation of the right of due process, as guaranteed by the Florida Constitution'" (emphasis and citation omitted)); *Fernez v. Calabrese*, 760 So. 2d 1144, 1146 (Fla. 5th DCA 2000) (relying on *Garcia*, 697 So. 2d at 651).

Alternatively, Plaintiffs satisfy their burden of showing irreparable harm where they demonstrate injury that cannot be adequately compensated by money damages. *See Liza Danielle*, 408 So. 2d at 738 ("'[i]rreparable injury is an injury of such a nature that it cannot be

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Cir. Ct. July 15, 1994), *rev'd on other grounds sub nom. Mahaffey v. Attorney Gen.*, 564 N.W.2d 104 (Mich. App. Ct. 1997).

redressed in a court of law"; "the injury must be of a peculiar nature, so that compensation in money cannot atone for it'" (quoting 29 Fla. Jur. 2d, Injunctions § 22 at 674-75)). The threatened or actual loss of constitutional rights, even for a minimal period of time, constitutes *per se* irreparable harm. *See, e.g., Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("on-going violation[s]" of the right to privacy "constitute[] irreparable injury"); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fl. 2014) (enjoining Florida constitutional provision and statutes banning same-sex marriage because "the ongoing unconstitutional denial of a fundamental right almost always constitutes irreparable harm."); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that loss of constitutional "freedoms . . . unquestionably constitutes irreparable injury"). Here, the deprivation of a woman's fundamental right to privacy, guaranteed by article I, section 23 of the Florida Constitution, *see supra* Part B.2, will result in irreparable harm.

Thus, an injunction is appropriate and necessary in this case to protect against the violations of women's constitutional rights. *Cf. Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981) (explaining that a threatened violation of women's constitutional right to abortion mandates a finding of irreparable injury because "once an infringement has occurred it cannot be undone by monetary relief"). In previous abortion cases asserting violations of the right to privacy under the Florida Constitution, Florida courts have found injunctions to be the proper remedy. *See, e.g*, *North Florida*, 866 So. 2d at 640 (Fla. 2003) (permanently enjoining the state from enforcing parental notification statute, based in part on violation of right to privacy); *Presidential Women's Ctr.*, 707 So. 2d 1145 (upholding trial court's decision temporarily enjoining state from enforcing informed consent statute, based in part on alleged violation of right to privacy). Because the Act will undermine women's health

and deprive them of their rights under the Florida Constitution, the Act threatens irreparable harm for which there is no adequate remedy at law.

D. Considerations of Public Interest Support Issuance of an Injunction

Finally, the issuance of an injunction will serve the public interest. No public interest is served by enforcing unconstitutional laws, while the public has a significant interest in ensuring that constitutional rights are not violated, and that citizens can access needed reproductive health care without unwarranted hardship. *See, e.g.*, *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1159 (S.D. Fla. 1998) (finding that "the public interest is well served when the Court protects the constitutional rights of the public; in this case, the constitutionally protected right of women to have abortions"); *see also Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) ("the public interest [] requires obedience to the Constitution"); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 630 (D. Neb. 1988) (holding that public interest is served by preventing violations of an individual's constitutional rights). A temporary injunction will preserve the status quo by allowing Plaintiff Bread and Roses and other abortion providers in the state to continue providing and the Florida members of Medical Students for Choice to continue assisting in providing and their patients to continue receiving safe and informed reproductive health care services until this case can be resolved on the merits.

CONCLUSION

Because Plaintiffs have shown a substantial likelihood of success on the merits, that irreparable harm will result if the Act is not enjoined, that they lack an adequate remedy at law, and that the relief requested will serve the public interest, this Court should issue a temporary injunction against enforcement of the Act before it goes into effect on July 1.

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Respectfully submitted,

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