IN THE SUPREME COURT OF FLORIDA

Case No. SC16-381
Lower Case No. 1D15-3048

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

Discretionary Proceeding to Review the Decision of the
First District Court of Appeal

PLAINTIFFS-PETITIONERS' REPLY BRIEF

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INTRODUCTION

The State's brief boils down to two arguments: (1) the Mandatory Delay Law is not subject to strict scrutiny because the State believes it is "reasonable"—a legal theory that would eviscerate Florida's constitutional protections against government overreach; and (2) the Act must be upheld under the Florida Constitution because it might pass federal constitutional muster—a legal theory that is squarely foreclosed by this Court's decision in *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 636 (Fla. 2003) ("*North Florida*"). Indeed, finding little foothold in this Court's abortion jurisprudence, the State cites to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *fourteen* times in its merits brief. Resp'ts' Answer Br. ("Answer Br.") 26, 28–30, 32–35. But Florida's exceptionally strong privacy right does not yield to lesser federal standards, or to a legislative majority's notion of "common sense." The State has not shown that the circuit court erred in finding that the Act is subject to, and will likely fail, strict scrutiny.

Having so found, the circuit court properly reasoned that enforcing this unconstitutional law would cause irreparable injury, and that enjoining it serves the public interest. Because there was no legal error in these conclusions, this Court should reverse the First District Court of Appeal's Order ("DCA Order") and reinstate the temporary injunction ("TI Order") for the pendency of this litigation.

ARGUMENT

I. THIS COURT WAS CORRECT TO GRANT JURISDICTION.

The State's merits brief rehashes jurisdictional arguments already rejected by this Court. Answer Br. 9–12. Those arguments remain unavailing.

The DCA Order instructs circuit courts in the judicial district most likely to review future privacy challenges to apply the wrong constitutional standard. First, although strict scrutiny applies "in all cases where the right to privacy is implicated," *North Florida*, 866 So. 2d at 622, and this Court regularly concludes that a law implicates the privacy right without specific fact-finding on the extent of the burdens it poses, *see* Pls.-Pet'rs' Initial Br. on the Merits ("Initial Br.") 18–19, the DCA holds that such fact-finding is *always* required before strict scrutiny can be applied to an abortion restriction, S. Ct. R. at 5–6.[1] Second, it holds that "evolutions in federal law," *id.* at 5, are relevant in construing Florida's privacy clause, even though this Court held precisely the opposite in *North Florida*, 866 So. 2d at 634–36. Third, defying this Court's precedent, the DCA holds that a vast array of state interests, inexplicably including an interest in "protecting the viability of a duly-enacted state law," may be sufficiently compelling to justify an intrusion on the privacy right—and that "failure to make sufficient factually-

[1] Citations to the circuit court record appear as "R. [vol.] at [pg.]." Citations to the DCA record appear as "S. Ct. R. at [pg]."

supported findings" on these interests renders a TI Order defective. S. Ct. R. at 5–6. That the DCA did not expressly cite to Article I, section 23, of the Florida Constitution, *see* Answer Br. 10, while issuing these sweeping declarations of what that provision requires does not insulate its decision from this Court's review. This Court has the authority to correct erroneous constitutional constructions, even if they are clothed in the language of procedure. Jurisdiction is proper.

II. THE MANDATORY DELAY LAW, BY ITS PLAIN TERMS, IMPLICATES THE RIGHT TO PRIVACY AND IS THEREFORE SUBJECT TO STRICT SCRUTINY AS A MATTER OF LAW.

A. The State Cannot Refute That The Florida Constitution Protects Abortion As A Fundamental Right.

This Court's quarter-century of privacy jurisprudence establishes two bedrock principles: First, Florida's explicit right to privacy is "as strong as possible." *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (citation omitted); *accord North Florida*, 866 So. 2d at 620. Second, this right "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; *accord North Florida*, 866 So. 2d at 621. Indeed, "[a] woman's right to make that choice freely is fundamental." *In re T.W.*, 551 So. 2d at 1193 (citation omitted).

The State now argues that the voters never intended the Privacy Clause to protect against what the State deems "reasonable" restrictions on abortion. Answer Br. 6, 19, 40–41. This attempt to unravel decades of precedent must fail. "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." *North Florida*, 866 So. 2d at 620 (citation omitted). The State cannot by fiat decide that a governmental intrusion is "reasonable" and therefore exempt from Florida's strong privacy protections.

B. The Act Triggers Strict Scrutiny As A Matter Of Law.

"[T]he Florida Constitution requires a compelling state interest in all cases where the right to privacy is implicated," including significant restrictions on the right to abortion. *North Florida*, 866 So. 2d at 622; *accord In re T.W.*, 551 So. 2d at 1195. This Court has often concluded that a law implicates the right to privacy without specific fact-finding on the burdens it imposes. *See* Initial Br. 18–19. The DCA erred in holding that the circuit court could not do the same here.[2]

While it will not always be evident from the face of a law that it implicates the right to privacy, it is plainly apparent here. The Act affirmatively prevents a woman from exercising her right to abortion for at least 24 hours. If this does not even *implicate* Florida's "right to be let alone and free from governmental

[2] While Plaintiffs' evidence that the Act burdens women seeking abortions, *see, e.g.*, R. II at 105–08, was not necessary to show that it is a significant restriction demanding strict scrutiny, Plaintiffs note that the State introduced no facts or legislative findings in the circuit court to rebut this evidence. Its argument on appeal that such harm may not rise to the level of a *federal* constitutional violation, Answer Br. 30–34, is of no moment.

intrusion," Art. I, § 23, Fla. Const., then almost nothing will. *See, e.g.*, *Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, *9–10 (Mont. Dist. Ct. Mar. 12, 1999) (striking down 24-hour abortion delay law under Montana's explicit privacy right because "telling a woman that she cannot exercise a fundamental constitutional right for a 24-hour period" clearly "infringe[s] on a woman's right to privacy").[3]

C. The State's Attempt To Conflate Florida's "Significant Restriction" Threshold With The Federal Undue Burden Test Is Unsuccessful.

The State did not produce any evidence or legislative findings undermining the circuit court's determination that Plaintiffs met their burden to show that this is a significant intrusion. *See* R. III at 401–02. Rather, the State argued both in the trial court and on appeal that this threshold question is analogous to the federal undue burden test articulated in *Casey*, under which abortion restrictions are valid unless they pose a "substantial obstacle" to a woman seeking an abortion. *See,*

[3] No mandatory abortion delay law has ever been upheld in a state with an explicit privacy right even approaching Florida's in scope. The State's observation that three states with constitutional privacy clauses impose such laws, Answer Br. 43 & n.15, is irrelevant: unlike the Florida Constitution, those state privacy clauses (1) preclude only "unreasonable" or "[un]authori[zed]" invasions, and (2) have not been interpreted to encompass the right to abortion. *See* Ariz. Const. art. II, § 8 ("No person shall be disturbed in his private affairs . . . without authority of law"); La. Const. art. I, § 5 ("Every person shall be secure . . . against unreasonable searches, seizures, or invasions of privacy."); S.C. Const., art. I, § 10 ("The right of the people to be secure . . . against . . . unreasonable invasions of privacy shall not be violated").

e.g., Answer Br. 30 (arguing strict scrutiny does not apply here because "federal decisions [have] reject[ed] the argument that a waiting period imposes a substantial burden"); *id.* at 26, 29, 32–34. But this Court already refused to adopt the federal undue burden test for restrictions on abortion, as doing so would "forsake the will of the people," who "deliberately opted for substantially more protection than the federal charter provides." *North Florida*, 866 So. 2d at 634–36. A decade later, the people asserted their will again, rejecting a ballot initiative that would have reduced Florida's constitutional standard to the federal undue burden test.[4] The circuit court thus properly denied the State's attempt to equate Florida's threshold inquiry with the federal standard. R. III at 401–02. To the contrary, because the Florida Constitution is more protective than the federal Constitution, a "significant restriction" requiring *strict scrutiny* under Florida law must be a far lower bar than a "substantial obstacle" requiring *invalidation* under federal law.

[4] *See Initiative Information: Prohibition on Public Funding of Abortions; Construction of Abortion Rights*, Fla. Dep't of State, Division of Elections, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82 (last visited Aug. 1, 2016). Rather than demonstrating voter intent to undo this Court's careful abortion jurisprudence, *see* S. Ct. R. at 5, the 2004 constitutional amendment allowing a parental notification law shows that Florida voters are fully capable of carving out exceptions to Florida's stringent privacy protections as they deem appropriate. They have never done so for any other aspect of the abortion right, and in 2012—after mandatory delay laws had been upheld under the federal undue burden test—refused to adopt that less protective federal standard.

D. *Presidential* Did Not Alter This Court's Jurisprudence On "Significant" And "Insignificant" Restrictions.

Contrary to the State's assertions, *see* Answer Br. 28, this Court's decision upholding Florida's pre-existing consent law for abortion, *State v. Presidential Women's Ctr.*, 937 So. 2d 114 (Fla. 2006), does not mean that the 24-hour mandatory delay and additional-trip requirement are constitutionally sound. As the circuit court correctly found, *Presidential* did not reflect a departure from this Court's abortion jurisprudence. R. III at 401. Rather, *Presidential* teaches that an abortion regulation (1) that furthers a "well recognized" state interest, and (2) that is "comparable" and "analogous" to laws regulating other medical care, where (3) "[n]o legitimate reason has been advanced" to exempt abortion from that general requirement, is no restriction at all and thus does not "generate the need for an analysis on the issue of constitutional privacy." 937 So. 2d at 116, 118. Here, by contrast, there is no analogue in Florida law.[5] Florida law requires no patient other than a woman seeking an abortion to delay her medical care and make an additional trip to the doctor. *Presidential* is therefore inapposite.[6]

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[5] *See infra* at 11–12 (distinguishing laws imposing non-medical waiting periods).

[6] Similarly, the State asserts that strict scrutiny is inappropriate because other Florida laws regulating abortion have not been subject to that standard. Answer Br. 22–23. This argument fails for two reasons: First, the constitutionality of those laws has never been determined because they have never been challenged. Second, many of those laws likely would not necessitate a privacy analysis, *see*

The State's suggestion that the Act is at most an "insignificant" restriction on abortion, *see* Answer Br. 42 & n.13, is also unsupported by this Court's jurisprudence. A law that affirmatively prevents a woman from exercising a fundamental right for at least 24 hours is not a "minor" restriction that merely "touch[es] on" the right to privacy. *See In re T.W.*, 551 So. 2d at 1197 (Ehrlich, C.J., concurring); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 430 (1983).[7] Unlike the administrative laws highlighted as examples of "insignificant" restrictions—written consent and record-keeping requirements, *see In re T.W.*, 551 So. 2d at 1197 (Ehrlich, C.J., concurring)—the Act forces a woman

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Presidential, 937 So. 2d at 118, because they are comparable to other medical regulations. *Compare, e.g.*, Fla. Admin. Code R. 59A-9.023(5)(a) (requiring training of abortion clinic staff in infection control, sanitation, and hygiene), *with id.* at 64B8-9.009(2)(i) (requiring staff training manuals for office-based surgery practices to include "cleaning, sterilization and infection control"); *compare id.* at 59A-9.030 ("Fetal remains shall be disposed of in a sanitary and appropriate manner . . . ."), *with id.* at 59A-1.005(2)(a) (human waste from organ procurement organizations must be disposed of in manner designed "to minimize any hazard" and using "[d]ignified and proper disposal procedures . . . ."). Regardless, the constitutionality of these regulations is irrelevant as they are not before this Court.

[7] *Akron*, which invalidated a 24-hour mandatory abortion delay law, is instructive because this Court relied on it in defining Florida's constitutional standards. *In re T.W.*, 551 So. 2d at 1193 (citing *Akron*, 462 U.S. at 429); *see also id.* at 1197 (Ehrlich, C.J., concurring) (citing *Akron*, 462 U.S. at 416, 428–30). The State's argument that *Akron* is not persuasive because it applies the strict scrutiny standard that *Casey* would later replace is without merit. Answer Br. 26 n.7. This Court has expressly refused to replace Florida's strict scrutiny standard with *Casey*'s undue burden test; therefore, it is *Akron* and the strict scrutiny line of federal cases that provide persuasive authority in Florida, not *Casey* and its progeny.

to remain pregnant for at least 24 hours longer than she would otherwise choose. This interference with the "profound and intimate" decision of "whether, *when*, and how one's body is to become the vehicle for another human being's creation," *id.* at 1192 (emphasis added) (citation omitted), cannot be deemed insignificant. The court was thus correct to answer the question of whether "Plaintiffs have sufficiently shown that the requirements of [the Act] impose a 'significant burden,' as opposed to [an] insignificant burden, on a woman's right to an abortion," R. III at 395, in the affirmative, *id.* at 399–402. But even if it were "insignificant," the Act is still invalid unless "the State me[ets] its burden of demonstrating that the[] regulations further[] important health-related State concerns." *Akron*, 462 U.S. at 430; *accord In re T.W.*, 551 So. 2d at 1193. The State has not and cannot do so here. *See* R. III at 400–02 (noting that the State presented no evidence).

Because the Act, by its plain terms, meaningfully intrudes upon the profoundly personal decision of whether and when to end a pregnancy, it implicates the right to privacy *as a matter of law* and is subject to strict scrutiny.

III. THE ACT FAILS STRICT SCRUTINY.

The State "failed . . . to provide . . . any evidence that there is a compelling state interest to be protected in enhancing the informed consent already required of

women . . . ." R. III at 400–01.[8] Nevertheless, the State asks this Court to assume that the informed consent that women seeking abortions have been giving for decades—the same informed consent the State deems sufficient in *all other medical contexts*—is suddenly no longer "adequate." Answer Br. 1, 26–27.[9] Without a shred of record evidence or legislative findings, the State asks this Court to agree that these women, alone among patients, are incapable of determining for themselves how much time they need to make a decision about their medical care, *see id.* at 9, 37, and that abortion providers, alone among health care professionals, pressure patients to immediately undergo a medical procedure, *id.* at 9, 28–29. These unfounded assertions are insufficient to establish that the Act furthers a compelling interest, much less through the least restrictive means possible.

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[8] The State refers for the first time on appeal to the anecdotal legislative testimony of women who wished they had exercised the option—fully available to them under pre-existing law—of taking more time to consider their abortion decision. *See* Answer Br. 29. Whatever the probative value of this testimony, it was not before the circuit court, is not in the evidentiary record, and may not be considered on appeal. *See W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 13 (Fla. 2012).

[9] Amici cite a comment from a British urology journal to support the broad proposition that 24-hour waiting periods are the "standard of care for non-emergency surgery." Brief for American College of Pediatricians & American Association of Pro-Life Obstetricians & Gynecologists as Amici Curiae Supporting Respondents ("Pro-Life Doctors Br.") 6. That opinion piece, however, focuses narrowly on the benefit of consent procedures for urologists seeking to avoid malpractice claims. It never states that mandatory delays are "the standard of care" for urological surgery, let alone other non-emergency procedures. *See* Roger Kirby et al., *Increasing Importance of Truly Informed Consent: The Role of Written Patient Information*, 112 Brit. J. Urology Inter'l 715–16 (2013).

The State's failure to impose parallel burdens on comparable medical procedures is also fatal to its defense. The State suggests that it is "protecting pregnant women from undergoing serious procedures without minimal private time," *id.* at 9, 37, yet does not impose a mandatory delay for any other, far riskier, procedures, *see* R. III at 401.[10] "[T]he selective approach employed by the legislature evidences the limited nature of the interest being furthered by" the Act. *In re T.W.*, 551 So. 2d at 1195 (citation omitted).

The State points to several other waiting period requirements under Florida law (as well as a *federal* delay law for patients seeking Medicaid coverage for sterilization) to support its assertion of a compelling interest in women's health.

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[10] Amici claim that abortion carries serious health risks, *see* Pro-Life Doctors Br. 7; Religious Bioethicists Br. 5, 10, relying on the work of sham "experts" like Vincent Rue and Priscilla Coleman, whose research has been widely discredited as "devoid of [] analytical force and scientific rigor." *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1333–34 (E.D. Pa. 1990) (finding Rue's testimony on psychological effects of abortion lacking in credibility and colored by bias), *aff'd in part, rev'd in part on other grounds*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); *see also Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 922 (7th Cir. 2015) (criticizing Coleman's use of flawed methodology in abortion-related study), *cert. denied* (June 28, 2016); *Planned Parenthood of the Great Nw. v. Streur*, No. 3AN-14-04 711, 2015 WL 9898581, at *3 (Alaska Super. Ct. Aug. 27, 2015) (describing Coleman as an "anti-abortion activist involved in honing the movement's message"). In reality, "[a]bortion is one of the safest medical procedures performed in the United States." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) (Ginsburg, J., concurring) (quoting Brief for American College of Obstetricians & Gynecologists et al. as Amici Curiae Supporting Petitioners, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (June 27, 2016) (No. 15-274), at 6-10).

Answer Br. 38. To the extent that any of these laws implicate Florida's explicit privacy right, they, too, would be subject to strict scrutiny if challenged. Unlike the Mandatory Delay Law, however, these laws provide for generous exceptions and might therefore be the least intrusive means of furthering a compelling interest.[11] *See, e.g.*, § 741.04(3), Fla. Stat. (waiver from three-day waiting period for marriage "must be granted to non-Florida residents" and "individuals asserting hardship" and is available to state residents "for good cause"); § 63.082(4)(b), Fla. Stat. (birth mother can place newborn for adoption as soon as doctor affirms she is fit to be released from hospital); § 61.19, Fla. Stat. (court can enter divorce order immediately if "injustice would result from" 20-day delay).

The State identifies two other interests that the Act purportedly advances, but the first is not compelling and the second is not actually advanced by the law. First, the State asserts an interest in "preserving and promoting fetal life," Answer Br. 17—but this Court has long held that this interest does not become compelling until viability, *In re T.W.*, 551 So. 2d at 1193–94, and the Act applies throughout

[11] The State's attempts to portray the Act's meager exceptions as sufficient are unpersuasive. Most sexual abuse survivors do not formally report their abuse and thus will be unable to invoke the exception, *see* Brief for Experts & Organizations Supporting Survivors of Violence as Amici Curiae Supporting Petitioners 16–20, and the exceedingly narrow exception for medical emergencies that "threaten the life" of a pregnant woman, § 390.0111(3)(b), Fla. Stat., is not rendered adequate because a physician, when dragged before the Board of Medicine to defend her medical license, can raise the patient's *health* condition as an affirmative defense.

pregnancy. Second, the State asserts (for the first time on appeal) an interest in "maintaining the integrity of the medical profession," Answer Br. 39—but the Act *undermines*, rather than enhances, the patient-physician relationship, *see* Brief for Bioethicists of Florida as Amici Curiae Supporting Petitioners 4, 9–11.[12]

Finally, the State has utterly failed to show that the Mandatory Delay Law serves any interest through the least intrusive means, claiming only that "the Legislature may use common sense in crafting" its laws. Answer Br. 42. A law is not immune from constitutional scrutiny because a legislative majority believes it reflects "common sense." This argument is just another attempt to exempt the Act from Florida's privacy protections, and this Court should reject it.

IV. THE TEMPORARY INJUNCTION ORDER WAS PROPER.

According to the State, the circuit court's conclusion that Plaintiffs are likely to succeed on the merits is deficient because the court "automatically" applied strict scrutiny. Answer Br. 8. This characterization cannot be squared with the eleven-page TI Order analyzing and rejecting the State's arguments that *Presidential* departed from this Court's precedent, and that Florida's constitutional

[12] Notably, under pre-existing law, a woman seeking an abortion already received the exact same information from her physician "orally, in person." § 390.0111(3), Fla. Stat. Amici's contention that forcing her to make a second trip at least 24 hours later will somehow "bolster" the physician-patient relationship is groundless. *See* Brief for Pellegrino Center for Clinical Bioethics et al. as Amicus Curiae Supporting Respondents ("Religious Bioethicists Br.") 17–20.

test is analogous to the federal undue burden standard. R. III at 396–402. Nor can the State's accusation that the circuit court "presumed" the Act would fail strict scrutiny, Answer Br. 8, be harmonized with the court's explicit finding that the State failed to meet its evidentiary burden or to explain why this law is necessary to ensure informed consent for abortion but no other medical care, R. III at 400–02.

The State next claims that the TI Order is deficient because the court was presented with no "affidavits or verified statements or declarations." Answer Br. 5–6, 15, 25. Here, the State repeats the DCA's mistake. The TI Order expressly relied on the sworn, verified declaration of Dr. Christine Curry about the Act's harm to her patients. *See* R. III at 401. Thus, when the court "noted repeatedly the lack of evidence before it," S. Ct. R. at 4, it was referring to *the State's* failure to submit any evidence that the Act satisfies strict scrutiny, *see* R. III at 401–02.

The State also argues that the circuit court did not adequately explain, or make sufficient factual findings to support, the irreparable harm and public interest prongs of the TI test. Answer Br. 14–17. But there is no error in concluding that constitutional injury constitutes irreparable harm, and that it is in the public interest to prevent such injury. Initial Br. 33–36. Nor does the State dispute that the same factual findings can support multiple prongs of the TI test. *See id.* at 35.

Finally, the State's argument that the circuit court erred in facially enjoining the Act is meritless. Answer Br. 44–6. The State cannot cite any case law

applying the "no-set-of-circumstances" test in a privacy challenge. To the contrary, this Court struck down parental consent and notification laws for abortion without so much as mentioning the majority of young women who will involve a parent in their abortion decision whether or not the law requires it. *See generally In re T.W.*, 551 So. 2d 1186; *North Florida*, 866 So. 2d 612. The State's assertion that, "[e]ven in the privacy context, this Court has not allowed the possibility of unconstitutional applications to facially invalidate a law," Answer Br. 45, is simply wrong. The circuit court did not err by granting the same facial relief this Court has afforded when confronted with other unconstitutional restrictions on abortion.

CONCLUSION

"[A] woman has a reasonable expectation of privacy in deciding whether to continue her pregnancy, more so than in virtually any other decision . . . ." *North Florida*, 866 So. 2d at 621. Plaintiffs met their burden of showing that a law affirmatively preventing a woman from effectuating that decision for a set amount of time implicates Florida's right to privacy *by its plain terms*. Because the Mandatory Delay Law is subject to strict scrutiny as a matter of law and the State did not meet its evidentiary burden under that stringent standard, the circuit court correctly found that Plaintiffs were likely to succeed on the merits. Enjoining this unconstitutional law was the only appropriate relief. This Court should reverse the DCA Order and reinstate the TI Order while this litigation proceeds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served by electronic mail on the individual listed below, this 8th of August, 2016.

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CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS

I hereby certify that this brief, prepared in Times New Roman 14-point font, complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). I further certify that this brief complies with the 15-page limit stated in Florida Rule of Appellate Procedure 9.210(a)(5)(B).

/s/ Julia Kaye

Julia Kaye