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

GAINESVILLE WOMAN CARE, LLC, et al.,

Plaintiffs,

Case No. 2015 CA 001323

v.

STATE OF FLORIDA, et al.,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

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Pursuant to Florida Rule of Civil Procedure 1.510, Plaintiffs Gainesville Woman Care, LLC, and Medical Students for Choice (collectively, "Plaintiffs"), move for summary judgment on their challenge to House Bill 633, codified at § 390.0111, Fla. Stat. (2015) ("the Mandatory Delay Law" or "the Act") under the Privacy Clause of the Florida Constitution. In support of this motion, Plaintiffs state as follows:

INTRODUCTION

As a matter of law, the Florida Supreme Court's decision in this case is fatal to the State's defense.[1] The Supreme Court not only held that the Mandatory Delay Law "clearly imped[es] the exercise of [a woman's] constitutional right[]" to end her pregnancy and is therefore subject to strict scrutiny, *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258-59 (Fla. 2017)—it also methodically rejected every argument the State could make to try to overcome this stringent standard. No mandatory abortion delay law in this country has *ever* survived strict scrutiny, and Florida's explicit right to privacy—which is "as strong as possible," *In re T.W.*,

[1] Defendants are the State of Florida; the Florida Department of Health; Celeste Philip, M.D., M.P.H., in her official capacity as Secretary of Health for the State of Florida; the Florida Board of Medicine; Magdalena Averhoff, M.D., in her official capacity as Chair of the Florida Board of Medicine; the Florida Board of Osteopathic Medicine; Michelle Mendez, D.O., in her official capacity as Chair of the Florida Board of Osteopathic Medicine; the Florida Agency for Health Care Administration; and Justin Senior, J.D., in his official capacity as Secretary of the Florida Agency for Health Care Administration (collectively, "the State").

551 So. 2d 1186, 1191 (Fla. 1989)—will not tolerate a different result. Summary judgment is proper because there is no evidence the State can introduce that would rescue the Act.

The Mandatory Delay Law "prohibit[s] a woman from effectuating her decision to terminate her pregnancy until at least twenty-four hours after she is provided the information required by law." *Gainesville Woman Care*, 210 So. 3d at 1258-59. It therefore necessitates that she make an additional, medically unnecessary trip to her physician. *Id.* at 1261. The Supreme Court flatly dismissed each of the State's attempted justifications for these mandates. Far from "enhanc[ing] the informed-consent provisions" under preexisting law, as the State insisted, Resps.' Answer Br. at 26, *Gainesville Woman Care*, 210 So. 3d 1243 (Fla. 2017) (No. SC16-381) [hereinafter "State's S. Ct. Br."], the Mandatory Delay Law "turns informed consent on its head," *Gainesville Woman Care*, 210 So. 3d at 1258. Nor can the State plausibly claim that the Act's true purpose is "protecting pregnant women from undergoing serious procedures without minimal time to reflect on the risks and consequences just revealed to them," State's S. Ct. Br. at 9; *accord id.* at 37, when "[n]o other medical procedure, even those with greater health consequences, requires a twenty-four hour waiting period in the informed consent process," *Gainesville Woman Care*, 210 So. 3d. at 1261. As for the State's interests in the "unique potentiality of human life, and . . . the integrity of the

medical profession," the Supreme Court held that "[s]uch social and moral concerns have no place in the concept of informed consent" and therefore fail as a matter of law. *Id.* at 1262. In short, there is no compelling interest the State can present, with or without additional evidence, that would be consistent with Supreme Court precedent. And, even if there were, the Act fails the "least restrictive means" prong of strict scrutiny *as a matter of law* in light of the Florida Legislature's rejection of numerous amendments that would have made these mandates less intrusive.

Finally, the Act lacks an essential constitutional safeguard: it restricts access to abortion even when a woman's health, though not her life, is endangered by continuing the pregnancy. Under no circumstances may the State interfere with a woman's ability to obtain an abortion when continuing the pregnancy would threaten her health. The Act does just this, and is therefore unconstitutional as a matter of law.

Because the State cannot create a dispute of fact that would possibly be material to the outcome of this case, summary judgment is warranted.

STATEMENT OF THE CASE AND UNDISPUTED FACTS

I. Pre-Existing Informed Consent Laws in Florida

For a patient to give valid, informed consent to any medical treatment in Florida, the health professional must conform to an "accepted standard of medical

practice among members of the medical profession" and provide the patient with information conveying three things: 1) the nature of the procedure, 2) the medically acceptable alternatives to the procedure, and 3) the procedure's substantial risks. § 766.103(3)(a)(1)-(2), Fla. Stat. (2016). This general informed consent law—which applies to all medical care in Florida, such as a colonoscopy, a vasectomy, or a "dilation and curettage" procedure to complete a miscarriage (a procedure similar to surgical abortion)—does not mandate that a patient delay his or her medical care after receiving the required information or make an additional visit to the doctor. *See id.* Patients may receive this informed consent counseling at any time before their procedure, including on the same day as their scheduled procedure.

In addition, Florida has an informed consent law specific to abortion that largely mirrors this general informed consent statute. The abortion-specific law requires the physician to inform the patient of "[t]he nature and risks of undergoing or not undergoing" the abortion procedure; "[t]he probable gestational age of the fetus, verified by an ultrasound"[2]; and "[t]he medical risks to the woman and fetus of carrying the pregnancy to term." § 390.0111(3)(a)(1)(a)-(c),

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[2] Gestational age is necessary to explain the "procedure's substantial risks," as required under the general informed consent statute, § 766.103(3)(a)(1)-(2), Fla. Stat., because the risks associated with abortion increase as pregnancy advances, *see, e.g., N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 652 (Fla. 2003) [hereinafter "*North Florida*"] (Pariente, J., concurring).

Fla. Stat. The Supreme Court has found that this abortion-specific law is "comparable to the common law and to informed consent statutes implementing" it, including Florida's general informed consent law. *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 120 (Fla. 2006); *accord Gainesville Woman Care*, 210 So. 3d at 1257 (citing *Presidential Women's Ctr.*, 937 So. 2d at 121 (Pariente, J., concurring)).

Under preexisting Florida law, a woman could receive this required information at any point before her abortion, including on the day of her procedure, just as she could for any other medical care. § 390.0111(3)(a)(1), Fla. Stat.

II. The Mandatory Delay Law

The Mandatory Delay Law amends this pre-existing, abortion-specific informed consent law to require that a woman receive exactly the same information described above, but during a separate, medically unnecessary visit to her physician, and then delay her abortion by at least twenty-four hours. § 390.0111(3)(a)(1), Fla. Stat.; *see also Gainesville Woman Care*, 210 So. 3d at 1261 ("[T]he law, in fact, requires women to make a second trip to their health care provider at least twenty-four hours after their first visit."). The Act does not require that a woman seeking abortion care receive any new information beyond that which pre-existing Florida law already requires. Moreover, as the Supreme Court explained, "[t]he Mandatory Delay Law impacts only those women who have

already made the choice to end their pregnancies"—i.e., those women who are ready to proceed without delay after hearing the State-mandated information—because "[u]nder Florida's *pre-existing* informed consent law, a woman can already take all of the time she needs to decide whether to terminate her pregnancy, both before she arrives at the clinic and after she receives the required counseling information." *Gainesville Woman Care*, 210 So. 3d at 1261 (emphasis added); *accord id.* at 1247.

The Act contains two narrow exceptions. The first is for a woman who can "present[] 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." § 390.0111(3)(a)(1)(c), Fla. Stat. This exception does not protect a woman who did not immediately report her assault to the authorities, whether because of fear, shame, trauma, or stigma. The second exception, which is a holdover from the existing abortion-specific law, is for a woman in a "medical emergency." § 390.0111(3)(a), Fla. Stat. The statute does not define "medical emergency," but specifies that a woman may obtain care without delay only if "continuation of the pregnancy would threaten [her] *life*." § 390.0111(3)(b), Fla. Stat. (emphasis added). This exception does not protect a woman with a pregnancy-related condition that threatens her health, but not necessarily her life.

"The Mandatory Delay Law does not differentiate between stages of pregnancy in its application. Instead, it broadly operates any time that a woman is intending to terminate a pregnancy after conception." *Gainesville Woman Care*, 210 So. 3d at 1262. But "the requirements of the Mandatory Delay Law, generally, will only apply to first- and second-trimester abortions," because abortion is lawful in Florida during a woman's third trimester only under extremely narrow circumstances, some of which (namely, life endangerment) would exempt her from the Mandatory Delay Law. *See id.* at 1248 n.3 (citing § 390.0111(1), Fla. Stat.).

Florida is not the only state that has enacted a mandatory abortion delay law, but the Act is one of the most extreme. Only fourteen states, including Florida, require a woman both to delay her abortion procedure *and* make an additional, medically unnecessary trip to her physician.[3] The majority of states

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[3] *See* Ariz. Rev. Stat. § 36-2153; Ark. Code Ann. § 20-16-1503(b)(1); Iowa S.F. 471, § 1 (2017) (to be codified at Iowa Code § 146A.1(1)) (under challenge, Planned Parenthood of the Heartland v. Branstad, No. 17-0708, Polk Cnty. No. EQCE081503 (Iowa, filed May 3, 2017) (enforcement stayed pending hearing); Ind. Code § 16-34-2-1.1; La. Rev. Stat. § 40:1299.35.6(B)(3) (under challenge, June Medical Servs. v. Gee, No. 3:16-cv-444-BAJ-RLB (M.D. La. Filed July 1, 2016) (non-enforcement agreement in place)); Miss. Code § 41-41-33; Mo. Stat. § 188.027; Ohio Rev. Code § 2317.56(B)(1); S.D. Codified Laws § 34-23A.10.1; Tenn. Code. Ann. § 39-15-202(d)(1) (under challenge, Adams & Boyle v. Slatery, No. 3:15-cv-00705 (M.D. Tenn., filed June 25, 2015)); Tex. Health & Safety Code § 171.012(a)(4); Utah Code § 76-7-305(2)(a); Va. Code § 18.2-76(B); Wis. Code § 253.10(3)(c). Florida courts may take judicial notice of the statutes of other states.

with mandatory delay laws, including Florida's neighbors Alabama, Georgia, and South Carolina, permit some or all women to receive the state-mandated information over the phone, via mail, or online—or reduce the length of the delay for women who live a certain distance from the clinic—rather than forcing her to make an additional trip to her physician; many states also allow the information to be provided by someone other than the physician, which eases scheduling.[4]

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§ 90.202, Fla. Stat. (2017); *see also Peterson v. Paoli*, 44 So. 2d 639, 640 (Fla. 1950).

[4] *See* Ala. Code § 26-23A-4 (by mail and by "qualified person"); Alaska Stat. Ann. § 18.16.060(c)-(d) (by telephone, email, mail, or fax, and by "member of the physician's staff who is a licensed health care provider"); Ga. Code Ann. § 31-9A-3(1) (by telephone and by "qualified agent"); Idaho Code § 18-609(5) (by telephone and by "physician's agent"); Kan. Stat. Ann. § 65-6709(a)-(b) ("informed in writing"); Ky. Rev. Stat. §§ 311.724, 311.725(1)(a) (by "real-time visual telehealth services," and by other professionals, including social workers); Mich. Comp. Laws § 333.17015(3) (by "qualified person," including social workers); Minn. Stat. § 145.4242(a)(1) (by telephone); Neb. Rev. Stat. § 28-327-(2) (by telephone and by "physician's agent"); N.C. Gen. Stat. § 90-21.82(1)-(2) (by telephone and by "qualified professional"); N.D. Cent. Code §§ 14-02.1-02 (same); Okla. Stat. tit. 63 § 1-738.2(B)(a) (by telephone and by "agent of either physician [or referring physician]"); 18 Pa. Stat. & Cons. Stat. Ann. § 3205(a)(1) ("orally informed"); S.C. Ann. Code § 44-41-330 (D) (by mail); Tex. Health & Safety Code § 171.012(a)(4) (by telephone for patients who live at least 100 miles from the nearest abortion provider); Utah Code. Ann. § 76-7-305(2)(a) (by other professionals, including registered nurses); Va. Code § 18.2-76(B) (by "qualified medical professional trained in sonography," and for patients who travel at least 100 miles, mandatory delay reduced to two hours); W. Va. Code § 16-2I-2(a) (by telephone and by "health care professional to whom the responsibility has been delegated by the physician"); Wis. Stat. § 253.10(3)(c)(2) (by "qualified person assisting the physician," including social workers).

This was no oversight. The Legislature rejected numerous amendments that would have made the Act less intrusive and less of an outlier, such as by:

- allowing a woman to receive the information over the phone or by viewing a web site, thus eliminating the need to make an additional, medically unnecessary trip to the physician (Amendments 853480 and 231828);

- allowing a woman to waive the Act's requirements and have the procedure on the same day that she receives the required information, thus creating an exception for a woman who is already informed about and certain of her decision to have an abortion (Amendment 213635);

- creating an exception for a woman whose health, but not necessarily life, is threatened by continuing the pregnancy (Amendments 591932 and 113284);

- creating an exception for a woman who lives 100 miles or more from the nearest abortion provider (Amendment 449942);

- creating an exception for a woman who has received a diagnosis of a severe fetal anomaly (Amendments 591932 and 113284);

- creating a broader exception for a victim of sexual assault or incest (Amendments 874120, 888882, and 113284).

See H.B. 633—Informed Patient Consent, Fla. House of Representatives, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=53704& (last visited June 1, 2017) [hereinafter *H.B. 633 Legislative History*]; *S.B. 724—Termination of Pregnancies*, Fla. House of Representatives, http://myfloridahouse.gov/sections/Bills/billsdetail.aspx?BillId=53671 (last visited June 1, 2017) [hereinafter *S.B. 724 Legislative History*]; Compl. Exs. A-3–12.

Florida law does not require *any* patient other than a woman seeking an abortion to delay a medical procedure for twenty-four hours and make an additional visit to the physician before receiving medical care. § 766.103(3)(a)(1)-(2), Fla. Stat.; *accord Gainesville Woman Care*, 210 So. 3d at 1261. And the Legislature made no findings that the Act is necessary to ensure that women seeking abortions—alone among patients—are adequately informed. Nor did the Legislature make any findings that the mandatory delay and additional-trip requirements will in fact enhance a woman's ability to make this decision. Indeed, the Legislature made no findings at all. *See generally* § 390.0111, Fla. Stat.

III. Procedural History

On June 10, 2015, Governor Scott signed the Act into law with an effective date of July 1, 2015. The following day, on June 11, 2015, Plaintiffs filed this lawsuit alleging that the Mandatory Delay Law violates the Florida Constitution's Privacy and Equal Protection Clauses, and sought an emergency temporary injunction ("TI") on their privacy claim. This Court (Francis, J.) granted Plaintiffs' motion on June 30, 2015, temporarily enjoining Defendants from enforcing the Act. The State filed a notice of appeal, triggering an automatic stay of the TI. On Plaintiffs' motion and after a July 2 telephonic hearing, this Court lifted the automatic stay, reinstating the TI.

Following briefing and oral argument, on February 26, 2016, the First District Court of Appeal ("DCA") reversed the TI order and also reversed, *sua sponte*, the circuit court's vacatur of the automatic stay, putting the Act into effect.

Plaintiffs immediately filed a notice to invoke the Supreme Court's discretionary jurisdiction and an emergency motion asking the DCA to stay its order pending Supreme Court review. The DCA denied that motion on March 14, 2016. Later the same day, Plaintiffs filed an emergency motion asking the Supreme Court to review and reverse the DCA's denial of stay. Plaintiffs argued that the Mandatory Delay Law was causing a constellation of harms, including: (1) significantly impinging the constitutional rights of Plaintiffs' patients; (2) jeopardizing women's health by delaying the abortion procedure, often by far longer than twenty-four hours and sometimes past the point in pregnancy at which a woman can obtain a medication abortion (involving drugs rather than a surgical procedure); (3) forcing delays even on women who seek abortions to protect their medical well-being, or because they have received a diagnosis of a severe fetal anomaly; (4) increasing the risk that a woman's partner, family member, employer, co-workers or others will discover that she is having an abortion; and (5) substantially increasing the costs and burdens of accessing abortion, which is particularly harmful to women already struggling to make ends meet. The Supreme Court granted Plaintiffs' stay motion on April 22, 2016, thus restoring the TI.

On May 5, 2016, the Supreme Court accepted jurisdiction on the ground that, *inter alia*, the DCA's Order "misinterpreted and misconstrued [the Court's] precedent concerning the right of privacy by requiring, on remand, that the trial court consider a list of speculative state interests, none of which t[he] Court has ever recognized as compelling." *Gainesville Woman Care*, 210 So. 3d at 1246. On February 22, 2017, following briefing and oral argument, the Supreme Court issued a decision quashing the DCA's Order and reinstating the TI for the pendency of the litigation. The Supreme Court affirmed this Court's conclusion that "there is a substantial likelihood that the Mandatory Delay Law is unconstitutional as a violation of Florida's fundamental right of privacy" in all applications, and concluded that Plaintiffs' likelihood of success on the merits was sufficient to support the TI, notwithstanding the absence of independent factual findings on irreparable harm or public interest. *Id.* at 1262–65.

On April 4, 2017, the DCA remanded this matter to this Court "for further proceedings as directed by the supreme court." DCA Remand Order 3 (No. 1D15-3048) (Apr. 20, 2017). The mandate issued on April 20, 2017. At a May 8 telephonic status conference, Plaintiffs notified the Court of their intention to file a motion for summary judgment on their privacy claim.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper under Florida Rule of Civil Procedure 1.510 "where the basic facts of a cause of action are clear and undisputed, there being only a question of law to be determined . . . ." *Duprey v. United Servs. Auto. Ass'n*, 254 So. 2d 57, 58 (Fla. 1st DCA 1971) (citing *Richmond v. Fla. Power & Light Co.*, 58 So. 2d 687 (Fla. 1952)); *accord Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565, 573 (Fla. 1st DCA 2010). Once Plaintiffs have met the initial burden of demonstrating the nonexistence of any "genuine issue of material fact . . . . the burden shift[s]," *Cassady v. Moore*, 737 So. 2d 1174, 1178 (Fla. 1st DCA 1999), and "it is incumbent upon [Defendants] to demonstrate . . . the existence of an issue of material fact in order to avoid having a summary judgment rendered against [them]," *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164, 1167 (Fla. 2014). A disputed fact is not material unless it is "*essential to the result* and placed in issue by the pleadings"—i.e., unless it could alter the outcome of the case. *Connell v. Guardianship of Connell*, 476 So. 2d 1381, 1382 (Fla. 1st DCA 1985) (emphasis added).

Constitutional questions are often particularly well-suited for resolution on summary judgment. *See, e.g.*, *Dep't of Rev. v. Fla. Home Builders Ass'n*, 564 So. 2d 173, 175 (Fla. 1st DCA 1990), *rev. den.* 576 So. 3d 286 (Fla. 1991) ("The question of the constitutionality of a statute is a question of law for the court,"

particularly in a facial challenge); *State v. Presidential Women's Ctr.*, 884 So. 2d 526, 530 (Fla. 4th DCA 2004), *rev'd on other grounds*, 937 So. 2d 114 (Fla. 2006). Where the "constitutional infirmity appears as a matter of law on the face of the Act itself and requires no additional evidence to demonstrate its existence," discovery is not necessary and summary judgment is appropriate. *Schiavo v. Bush*, No. 03–008212–CI–20, 2004 WL 980028, at *3 (Fla. 6th Cir. Ct. May 5, 2004), *aff'd*, 885 So. 2d 321 (Fla. 2004); *see also, e.g.*, *Advent Oil & Operating, Inc. v. S & E Enters., LLC*, 48 So. 3d 70, 72-73 (Fla. 1st DCA 2010) (summary judgment proper where "[f]urther discovery would not have created disputed issues of material fact"); *Estate of Herrera v. Berlo Indus., Inc.*, 840 So. 2d 272, 273 (Fla. 3d DCA 2003) (same); *Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281, 289 (Fla. 3d DCA 2007) ("[A] trial court has the discretion to deny a continuance of a summary judgment hearing where the outstanding discovery items are immaterial to the dispositive issues in the case." (citing *Crespo v. Fla. Entm't Direct Support Org.*, 674 So. 2d 154, 155 (Fla. 3d DCA 1996)).

ARGUMENT

The Florida Supreme Court has already held that the Mandatory Delay Law "impermissibly interferes with women's fundamental right of privacy" and is therefore "presumptively unconstitutional." *Gainesville Woman Care*, 210 So. 3d at 1247, 1260. Under any circumstances, strict scrutiny is a heavy burden to meet.

Under the unique circumstances presented here—where the Supreme Court has already rejected *every plausible justification* for the Act as legally insufficient, and there is an extensive body of case law *uniformly* invalidating identical laws under strict scrutiny—it is impossible, and summary judgment is therefore warranted.

There is no material evidence the State could put forward to show that the Act serves a compelling interest, because each of the State's asserted interests is legally insufficient to justify differential and discriminatory treatment of abortion. The State's central argument—that the Act enhances the informed consent process—cannot withstand scrutiny. As the Supreme Court observed, "such a waiting period is not required of any other medical procedure including those gynecological procedures that are far more risky than termination of pregnancy." *Id.* at 1246; *accord id.* at 1261. This alone is fatal to the State's compelling interest defense: "the selective approach employed by the legislature" in singling out abortion "evidences the limited nature of the . . . interest being furthered by these provisions." *In re T.W.*, 551 So. 2d at 1195 (internal quotation marks and citation omitted); *accord Gainesville Woman Care*, 210 So.3d at 1260. Moreover, the Supreme Court found that the Mandatory Delay Law cannot be reconciled with the principles underlying informed consent. Indeed, the Act "turns informed consent on its head, placing the State squarely between a woman who has already made her decision to terminate her pregnancy and her doctor who has decided that the

procedure is appropriate for his or her patient." *Gainesville Woman Care*, 210 So. 3d at 1258. The State's interests in protecting the "potentiality of human life" or the "integrity of the medical profession" are equally unavailing; the Supreme Court held that such interests "have no place in the concept of informed consent" and therefore fail as a matter of law. *Id.* at 1262. Given this precedent, the State cannot prove that the Act serves any compelling interest.

Even if the Act did advance a compelling interest—which it does not—it certainly does not do so through the least intrusive means, as evidenced by the Legislature's rejection of numerous amendments that Florida's neighbors have adopted to make mandatory delay laws less burdensome. In addition, the Act is plainly unconstitutional because it prevents a woman from immediately obtaining an abortion even where the delay threatens her health. Plaintiffs are therefore entitled to summary judgment on their privacy claim.

I. The Act Is Subject to Strict Scrutiny.

The Florida Supreme Court has long recognized that the State Constitution's explicit right to privacy not only encompasses the right to abortion—it "embodies the principle that 'few 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 (quoting *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)).

Consistent with these robust constitutional protections, the Supreme Court resoundingly affirmed that "the Mandatory Delay Law implicates the Florida Constitution's express right of privacy" and is "subject to strict scrutiny and, therefore, presumptively unconstitutional." *Gainesville Woman Care*, 210 So. 3d at 1245. Indeed, the Court found that the Act so "clearly imped[es] the exercise of [a woman's] constitutional rights" that it is properly subject to strict scrutiny based on its plain terms alone, even without additional factual findings. *Id.* at 1245, 1255-60. Thus, "the burden in this case shift[s] to the State to prove that the law further[s] a compelling state interest in the least restrictive way." *Id.* at 1260. As a matter of law, the State cannot meet this "highly stringent standard." *North Florida*, 866 So. 2d at 620-21 (quoting *In re T.W.*, 551 So. 2d at 1192).

II. No Mandatory Abortion Delay Law Has Ever Survived Strict Scrutiny.

No mandatory abortion delay law in this country has *ever* survived strict scrutiny.[5] Even mandatory delays of as little as two hours have been struck down

[5] *See, e.g., City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 449-51 (1983), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reducing standard of review for restrictions on abortion from "strict scrutiny" to "undue burden"); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1535-39 (7th Cir. 1985);

under strict scrutiny. *Eubanks*, 604 F. Supp. at 145-46. Courts across the country have consistently held that mandatory delays—particularly those that require a woman to make an additional, medically unnecessary visit to her physician—do not further a compelling state interest using the least intrusive means, and have invalidated such laws on motions for summary judgment. *See, e.g.*, *Zbaraz*, 763 F.2d at 1538 (affirming summary judgment because, "[i]n view of the case law," the twenty-four hour mandatory delay for minors seeking abortions "is

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Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft, 655 F.2d 848, 866 (8th Cir. 1981), *supplemented by* 664 F.2d 687 (8th Cir. 1981), *rev'd on other grounds*, 462 U.S. 476 (1983); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1014-16 (1st Cir. 1981); *Charles v. Carey*, 627 F.2d 772, 785-86 (7th Cir. 1980); *Wynn v. Carey*, 599 F.2d 193, 196 n.6 (7th Cir. 1979); *Eubanks v. Brown*, 604 F. Supp. 141, 145-46 (W.D. Ky. 1984); *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 552 F. Supp. 791, 797-98 (E.D. Pa. 1982); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1145-47 (D.R.I. 1982); *Margaret S. v. Edwards*, 488 F. Supp. 181, 212-13 (E.D. La. 1980); *Leigh v. Olson*, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980); *Women's Cmty. Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 550-51 (D. Me. 1979); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 22-24 (Tenn. 2000); *Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117 (Mont. Dist. Ct. Mar. 12, 1999); *Mahaffey v. Attorney Gen. of Mich.*, No. 94-406793, 1994 WL 394970, at *6-7 (Mich. Cir. Ct. July 15, 1994), *rev'd on other grounds sub nom. Mahaffey v. Attorney Gen.*, 564 N.W.2d 104 (Mich. Ct. App. 1997). The very few decisions upholding a mandatory delay law under strict scrutiny were either reversed on appeal or overruled by a later decision of the same court. *Wolfe v. Schroering*, 541 F.2d 523, 526 (6th Cir. 1976), *effectively overruled by Akron Ctr. for Repro. Health, Inc. v. City of Akron*, 651 F.2d 1198, 1208 (6th Cir. 1981); *Akron Ctr. for Repro. Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1205 (N.D. Ohio 1979), *reversed in relevant part by Akron Ctr.*, 651 F.2d at 1208.

unconstitutional" under strict scrutiny); *Planned Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *9 (affirming summary judgment because "the infringement is not supported by a compelling reason" and "the Court will not presume that a Montana woman who chooses to have an abortion . . . is somehow incapable of making that decision on her own").

Florida's explicit constitutional right to privacy, which was intentionally drafted to be "as strong as possible," will not allow a different result here. *In re T.W.*, 551 So. 2d at 1191; *accord North Florida*, 866 So. 2d at 620. Indeed, in establishing strict scrutiny as the standard of review for restrictions on abortion under the Florida right to privacy, the Florida Supreme Court quoted from *City of Akron v. Akron Center for Reproductive Health*—a U.S. Supreme Court decision *striking down a 24-hour mandatory abortion delay law*. *In re T.W.*, 551 So. 2d at 1193 (quoting 462 U.S. at 429-30). When the U.S. Supreme Court later modified its standard of review for restrictions on abortion, replacing strict scrutiny with the less protective "undue burden" test, *Casey*, 505 U.S. at 876-77, the State asked the Florida Supreme Court to follow suit, *see North Florida*, 866 So. 2d at 634. But the Court refused, reasoning that the protections of Florida's *explicit* right of privacy must be greater than the protections of the Federal Constitution's *implicit* right of privacy, and refusing to "forsake the will of the people." *Id.* at 634-36; *accord Gainesville Woman Care*, 210 So. 3d at 1254 (reiterating that the Court has

rejected the "undue burden" standard "in light of Florida's more encompassing, explicit constitutional right of privacy"). It cannot be the case that a 24-hour mandatory delay law, justified on the same grounds—ensuring informed consent, *Akron Ctr.*, 479 F. Supp. at 1205—would fail strict scrutiny under the Federal Constitution's *implicit* right to privacy but survive judicial review under the Florida Constitution's *explicit* right to privacy.

III. As a Matter of Law, The Act Does Not Further a Compelling Interest.

The central question before this Court—whether the Act furthers a compelling interest—does not arrive on a blank slate. On three occasions, the Florida Supreme Court has identified both the universe of interests sufficiently compelling to justify a law infringing on a woman's right to reproductive privacy, as well as those interests that *do not* justify a restriction on abortion. *See Gainesville Woman Care*, 210 So. 3d at 1260-62; *North Florida*, 866 So. 2d at 632-34; *In re T.W.*, 551 So. 2d at 1193-95. Indeed, the Supreme Court reversed the DCA's decision *in this case* in part because the DCA "misinterpreted and misconstrued our precedent concerning the right of privacy by requiring, on remand, that the trial court consider a list of speculative state interests, none of which this Court has ever recognized as compelling." *Gainesville Woman Care*, 210 So. 3d at 1246. This Court is bound to consider only those interests that are

both asserted by the State and recognized as compelling by the Supreme Court. This is a very short list.

The Supreme Court has held that only two interests are sufficiently compelling to justify an abortion restriction, and even then, only at certain stages of pregnancy: (1) the promotion of maternal health, which becomes compelling no earlier than the beginning of the second trimester, and (2) the promotion of potential life, which becomes compelling only upon viability. *In re T.W.*, 551 So. 2d at 1193. In addition, though never identifying it as compelling, the Court has acknowledged a general state interest in ensuring that all Florida patients give informed consent to medical care. *Gainesville Woman Care*, 210 So. 3d at 1256–58 (citing *Presidential Women's Center*, 937 So. 2d at 116-21). But the Court has strictly cabined this state interest, "reject[ing] as unfounded any interpretation of *Presidential Women's Center* to stand for a broader proposition that the State may impose additional burdens over the existing medically centered, patient-specific, informed consent law before allowing a patient to undergo a procedure to terminate her pregnancy." *Id.* at 1258. In particular, the Court has emphasized that "social and moral concerns have *no* place in the concept of informed consent." *Id.* at 1262 (emphasis added). Finally, the Court has repeatedly rejected "[t]he State's 'abortion is different' argument," holding that a state interest is not compelling if it has not been proven as such "through comprehensive and consistent legislative

treatment." *North Florida*, 866 So. 2d at 633–34; *see also In re T.W.*, 551 So. 2d at 1195. Against this backdrop, any justification the State proffers for the Mandatory Delay Law must fail as a matter of law.

There are only three kinds of interests the State can claim the Act advances: (1) an interest relating to the *pregnant woman* (e.g., ensuring informed consent or protecting mental health); (2) an interest relating to the *embryo or fetus* (e.g., protecting "the unique potentiality of human life"); and/or (3) an interest relating to some other *social or moral concern* (e.g., "maintaining the integrity of the medical profession by making th[e] [patient's] post-informed reflective time free from influence by a physician or clinic personnel"). *Gainesville Woman Care*, 210 So. 3d at 1262 (emphasis added). None can succeed here; each is foreclosed by Supreme Court precedent.

1. Interests Relating to the Pregnant Woman

From the start of this case, the State's principal argument has been that the Mandatory Delay Law is necessary to "protect[] pregnant women from undergoing serious procedures without minimal time to reflect on the risks and consequences just revealed to them." State's S. Ct. Br. at 9; *accord id.* at 37. The State asserted that "a brief reflection period is a reasonable and minimally intrusive means of ensuring that informed consent to abortion is knowing and voluntary." *Id.* at 38. Relatedly, the State argued that the Act "protects against physician encroachment

on the private decisions of pregnant women in ways that could undermine informed consent." *Id.* at 39. No fact-finding is necessary on these assertions, because the Supreme Court has already rejected this argument as a matter of law.

As an initial matter, the Supreme Court explained that a mandatory delay is fundamentally inconsistent with the principles underlying informed consent. The Act does not merely fail to enhance informed consent—it "turns informed consent on its head, placing the State squarely between a woman who has already made her decision to terminate her pregnancy and her doctor who has decided that the procedure is appropriate for his or her patient." *Gainesville Woman Care*, 210 So. 3d at 1258. While the informed consent doctrine is "a patient-driven doctrine [that] finds its roots in the concepts of bodily integrity and patient autonomy," *id.* at 1262, the Act *undermines* patient autonomy by operating exclusively to prevent "women who have already made the choice to end their pregnancies" from doing so, *id.* at 1261. As the Supreme Court emphasized, a pregnant woman who decides that she wants or needs additional time to consider her decision after receiving the information *already* required under preexisting Florida law may *already* take that time under preexisting Florida law. *Gainesville Woman Care*, 210 So. 3d at 1261. Thus, because the Act does not provide women with any additional information, and serves only to impede women who are otherwise ready to effectuate their abortion decision, the State cannot show that the mandatory delay and additional

trip requirements will enhance the informed consent process "in a direct and material way." *State v. J.P.*, 907 So. 2d 1101, 1116-17 (Fla. 2004).

Moreover, the absence of any parallel burdens on other medical procedures, even those "that are far more risky than termination of pregnancy," forecloses the State's defense as a matter of law. *Gainesville Woman Care*, 210 So. 3d at 1246; *accord id.* at 1261.[6] Time and again, the Florida Supreme Court has rejected "the State's 'abortion is different' argument," *North Florida*, 866 So. 2d at 634, finding that any interest allegedly served by a law singling out abortion cannot be considered compelling when the Legislature does not similarly restrict other, comparable medical procedures—let alone those that impose far greater medical risks. *Id.* at 633-34 (striking parental notification law for abortion purportedly justified by "an interest in protecting immature minors and preserving family unity" because "those interests are not deemed sufficiently compelling to justify interference with comparable decisions"); *In re T.W.*, 551 So. 2d at 1195 (striking parental consent law for abortion because, "[i]n light of th[e] wide authority that

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[6] *See also* 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 (bill sponsor admitting that the Florida Legislature has never required a mandatory delay for any other medical procedure); *S.B. 724 Legislative History* (rejecting Amendment 829796, which would have mandated a similar 24-hour delay for a vasectomy, a surgical sterilization procedure for men).

the state grants [to minors]," the Court is "unable to discern a special compelling interest . . . in protecting the minor only where abortion is concerned");[7] *cf. Gainesville Woman Care*, 210 So. 3d at 1257 (explaining that the pre-existing abortion-specific informed consent law at issue in *Presidential Women's Center* "avoided any constitutional infirmity" only because the Court interpreted it as "a neutral informed consent statute that is comparable to other informed consent statutes").

The State's failure to impose parallel burdens on comparable medical procedures also precludes any argument that the Mandatory Delay Law promotes women's physical or mental health—an interest that, in any event, becomes sufficiently compelling to justify a restriction on abortion only at the start of the second trimester, *In re T.W.*, 551 So. 2d at 1193, whereas the Act applies from the very start of the first trimester, *Gainesville Woman Care*, 210 So. 3d at 1262. A twenty-four hour delay and additional trip to the physician are "not required of any

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[7] The Supreme Court rejected the State's argument in this case, *see, e.g.*, State's S. Ct. Br. at 42, that the ballot initiative adopted by Florida voters in 2004 allowing a parental notification requirement for minors seeking abortion overruled the Court's constitutional analysis in *North Florida*. *Gainesville Woman Care*, 210 So. 3d at 1262 ("[I]t was also error for the First District to insinuate that the voters in any way overruled our decision in *North Florida* . . . . Article X, section 22, of the Florida Constitution is an extremely limited provision of the constitution . . . . [which] did not amend the right of privacy in article I, section 23, of the Florida Constitution.").

other medical procedure including those gynecological procedures that are far more risky than termination of pregnancy." *Gainesville Woman Care*, 210 So. 3d at 1246. "[T]he fact that the Legislature has not chosen to require [a mandatory delay for] other pregnancy-related conditions that are more dangerous than abortion" makes clear that "the true purpose of this legislation" is not to protect women, but "instead, is to infringe on the [woman's] right to choose an abortion." *North Florida*, 860 So. 2d at 650-51 (Pariente, J., concurring). The lack of any genuine interest in protecting women's health is further highlighted by the Legislature's *rejection* of two amendments that would have incorporated an exception to the delay mandate for a woman whose health (but not necessarily life) is threatened by continuing the pregnancy. *See infra* at 33. There is thus no plausible, let alone compelling, interest the State can assert regarding the pregnant woman's health or ability to give informed consent.

2. Interests Relating to the Embryo or Fetus

Whereas the State's interest in protecting potential life becomes compelling only at the point of fetal viability (typically, the start of the third trimester), *In re T.W.*, 551 So. 2d at 1193-95, "the requirements of the Mandatory Delay Law, generally, will only apply to first- and second-trimester abortions," *Gainesville Woman Care*, 210 So. 3d at 1248 n.3 (citing § 390.0111(1), Fla. Stat.). For that reason alone, the State cannot assert an interest in potential life as compelling here.

But this Court need not revisit *In re T.W.* in order to conclude that any asserted interest in potential life fails as a matter of law—the Supreme Court has already disposed of that argument *in this case*.

In reversing this Court's TI order, the DCA "admonished the trial court for failing to make findings regarding the State's compelling interests," including "protecting the unique potentiality of human life." *Id.* at 1261. This, the Supreme Court explained, was in error:

> As to the "unique potentiality of human life," . . . this law is part of the medical informed consent law that this Court has already held was a statute designed to inform the patient of only the medical risks of continuing or not continuing the pregnancy. This Court made clear in Presidential Women's Center that "[t]he doctrine of medical informed consent is rooted in the concepts of bodily autonomy and integrity . . . and it is logical that physicians be required to inform the patient only and exclusively of the medical risks of terminating or not terminating the pregnancy." 937 So. 2d at 119 (emphasis added). *Such social and moral concerns have no place in the concept of informed consent.*

Id. at 1262 (emphasis added). In other words, the State may not co-opt the informed consent process to serve its own moral agenda. Thus, even if the State could demonstrate that the mandatory delay and additional trip requirement would

in fact discourage some women who had intended to have an abortion from doing so, that is not a permissible justification for the Act *as a matter of law*.[8]

3. Interests Relating to Other "Social and Moral Concerns"

Any other social or moral concern the State could advance by forcing a woman to remain pregnant against her wishes for at least 24 hours is unavailing. The Supreme Court has already addressed whether this Court was required to consider the State's interests in a range of social goals before concluding that Plaintiffs were likely to succeed in proving the Mandatory Delay Law unconstitutional—and decisively said no.

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[8] As it did in its earlier briefing, the State may now try to conflate an interest in protecting potential life with an asserted interest in protecting women's mental health. *See, e.g.*, State's S. Ct. Br. 17 (abortion poses mental health risks because it is a "difficult and painful moral decision" (internal quotation marks and citation omitted)). First, the State's interest in women's health becomes compelling only in the *second* trimester, *In re T.W.*, 551 So. 2d at 1193, while the Act applies from the very start of pregnancy. Second, even assuming *arguendo* that such an allegation were true, this patent attempt to circumvent Supreme Court precedent fails: as a matter of law, the State may not restrict a woman's access to abortion before the third trimester based on "moral concerns" about abortion, *Gainesville Woman Care*, 210 So. 3d at 1262 (citing *Presidential Women's Ctr.*, 937 So. 2d at 121 (Pariente, J., concurring)); discussing these moral concerns in the same sentence as alleged health risks cannot change the result. Moreover, the State's failure to impose parallel burdens on any other medical procedure, including "life-or-death" medical decisions, *North Florida*, 866 So. 2d at 633 (quoting *In re T.W.*, 551 So. 2d at 1195), is, again, fatal to any such defense. *See supra* at 24–26.

First, the DCA erred in requiring this Court to issue findings on the State's purportedly compelling interests in "protecting the organic law of Florida from interpretations and impacts never contemplated or approved by Floridians or their elected representatives," and "protecting the viability of a duly-enacted state law." *Id.* at 1261. This is both because the Supreme Court "has never recognized that the State might have a compelling interest" in such matters, and because treating such matters as compelling interests would, of course, "render the highest level of judicial review toothless in almost all cases because the State could be deemed to have a compelling interest in upholding any law, no matter how patently unconstitutional it may be." *Id.* at 1261-62. In light of this precedent, the State cannot argue now that its interest in enforcing the Act is compelling simply because the State disagrees with the Florida Supreme Court's constitutional interpretations and thinks that all "duly-enacted" state laws should be upheld.

More significantly, the Supreme Court conclusively rejected the State's argument that the Mandatory Delay Law protects the "integrity of the medical profession" by ensuring that physicians and abortion clinic staff do not "encroach[] on the private decisions of pregnant women." State's S. Ct. Br. at 39. The Court did so on two grounds. First, the Court reasoned that the Act, by its plain terms, undermines the patient-physician relationship by "placing the State squarely between a woman who has already made her decision to terminate her pregnancy

and her doctor who has decided that the procedure is appropriate for his or her patient." *Gainesville Woman Care*, 210 So. 3d at 1258. Other courts striking down mandatory abortion delay laws have similarly observed that these sweeping restrictions apply "despite [a] doctor's contrary medical judgment." *Women's Med. Ctr. of Providence*, 530 F. Supp. at 1145-46 (emphasis added). Second, as a matter of law, the Court held that "the integrity of the medical profession" is the kind of "social and moral concern[] [that] ha[s] no place in the concept of informed consent." *Id.* at 1262. No amount of evidence can resuscitate an interest that the Supreme Court has already declared legally insufficient.

In opposing Plaintiffs' motion, the State may proffer additional social interests that the Act allegedly serves—notwithstanding that they were neither identified by the Legislature or mentioned by the State in opposing the TI. Conjuring such a list would do the State no good. Because Florida law subjects no other health care to this kind of interference, any other "social [or] moral" interests the State attempts to raise can only be justified by the same "abortion is different" argument that the Supreme Court has repeatedly rejected. *See supra* at 24–26.

Because there is no evidence the State could introduce that would show that the Act serves a compelling interest, summary judgment is warranted.

IV. The Act Does Not Use the Least Intrusive Means.

Even if the State could establish that the Act furthers a compelling state interest—which it cannot—it cannot show that the Act furthers those interests "in the least restrictive way." *Gainesville Woman Care*, 210 So. 3d at 1260. Under strict scrutiny, "[t]here must be a nexus between the asserted interests and the means chosen" and the court must examine whether the challenged law employs "the least restrictive alternative to achieve the goals." *J.P.*, 907 So. 2d at 1117. Thus, to "justify [this] intrusion on privacy," the State bears the burden of proving that less intrusive alternatives would be less effective than the Act at furthering a compelling interest. *Gainesville Woman Care*, 210 So. 3d at 1252-53. As a matter of law, the State cannot meet this exacting test.

At the outset, the State already ensures that a woman's decision to have an abortion is well informed, and the Legislature made no findings that the pre-existing informed consent law was inadequate. Women seeking abortions are already advised of exactly the same information the Act requires them to receive, § 390.0111(3)(a), Fla. Stat., and have been obtaining safe and legal abortion care in Florida for forty years with no need for a mandatory delay and additional trip to their physician. The Act adds nothing, because "a woman can already take all of the time she needs to decide whether to terminate her pregnancy, both before she arrives at the clinic and after she receives the

required counseling information." *Gainesville Woman Care*, 210 So. 3d at 1261; *accord id.* at 1246. Accordingly, Florida's existing informed consent law is itself a less intrusive means of ensuring that pregnant women's decisions are sufficiently informed.

Further, even if the Florida Legislature had evidence that the current law was inadequate—which it did not—it could easily have added to the pre-existing informed consent law's requirements in a less intrusive way, as demonstrated by the many proposed amendments that the Legislature rejected. For example, the following amendments 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 she receives the required information. This would have effectively created an exception for women who are already informed and certain of their abortion decision. *See* Compl. Ex. A-3; *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, thus eliminating the need to make an additional, burdensome, medically unnecessary visit to the physician. *See* Compl. Ex. A-5, A-6; *H.B. 633 Legislative History*; *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 the 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; *H.B. 633 Legislative History*; *see also Gainesville Woman Care*, 210 So. 3d at 1261 ("[T]he

delay is, at a minimum, twenty-four hours, but it may be considerably more if the doctor is not available or the date falls on a weekend.").

Other rejected amendments would have alleviated the intrusion the Mandatory Delay Law would impose on specific groups of women:

- Amendments 591932 and 113284 would have incorporated an exception for a woman whose health, but not necessarily life, is threatened by continuing the pregnancy. *See* Compl. Ex. A-11, A-12; *H.B. 633 Legislative History*; *S.B. 724 Legislative History.*
- Amendment 449942 would have created an exception from the mandatory delay and additional-trip requirements for a woman who lives more than 100 miles away from the nearest abortion provider. *See* Compl. Ex. A-4; *H.B. 633 Legislative History.*
- Amendments 874120, 888882, and 113284 would have created a broader exception for a victim of sexual assault. *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 created an exception for a woman who has received a diagnosis of a severe fetal anomaly. *See* Compl., Ex. A-11, A-12; *H.B. 633 Legislative History*; *S.B. 724 Legislative History*.

Indeed, many of the rejected amendments reflect the current practices of other states' mandatory delay laws, further demonstrating that the Act does not utilize the least intrusive means.[9] *See North Florida*, 866 So. 2d at 642 (Anstead,

[9] For instance, many states allow all women to receive the counseling information by phone, mail, or website, thus eliminating the additional trip requirement, and by a qualified person other than the physician, thus mitigating scheduling challenges. *See supra* n.4. Other states exempt certain women in particularly difficult circumstances from the additional trip requirement. *See, e.g.*, Utah Code §§ 76-7-305(7)(a)-(b) (exception in cases of lethal fetal anomaly); Va. Code § 18.2-76(B)

C.J., concurring) (explaining that challenged law was not the least intrusive means because other states have "less intrusive schemes that serve the same purpose"). The Legislature's rejection of these exceptions highlights the Act's over-breadth. *See Bellotti*, 641 F.2d at 1016 (finding mandatory abortion delay law not to be narrowly tailored because, *inter alia*, "[n]o . . . exception is made . . . for the many women who have in fact known all the information imparted by the form long in advance of visiting an abortion clinic"); *J.P.*, 907 So. 2d at 1118 (holding that Florida juvenile curfew did not use least intrusive means where, *inter alia*, "the curfews apply throughout the cities without any showing of a city-wide need or problem"). It is indisputable that the State could have furthered its interest in ensuring informed consent through means less intrusive than forcing every woman seeking an abortion to delay her procedure by at least twenty-four hours and make an additional, medically unnecessary trip to her physician. No facts the State might adduce can change that legal conclusion, which condemns the Act.

(exception if the woman lives 100 or more miles away from the nearest abortion provider). Florida's medical emergency exception is also exceptionally narrow, even among states that strictly regulate access to abortion. *See, e.g.*, Ga. Code Ann. § 31-9A-5(a) (exception for life endangerment *or* to avert a "serious risk of substantial and irreversible impairment of a major bodily function"); Neb. Rev. Stat. Ann. § 28-326 (exception for life endangerment *or* to avert "substantial impairment of a major bodily function"); Tex. Health & Safety Code § 171.012(a)(4)-(5) (exception if physician certifies to a "specific medical condition that constituted [a medical] emergency").

V. The Act Is Unconstitutional Because It Forces a Woman to Delay Her Abortion Even When Continuing the Pregnancy Threatens Her Health.

The Mandatory Delay Law threatens a woman's health by forcing her to delay her abortion, no matter how grave her condition or how rapidly her health is deteriorating, as long as continuing the pregnancy does not threaten her "life." *See* § 390.0111(3)(b), Fla. Stat. This deficiency is apparent from the face of the Act. Such a law could not withstand judicial review under even the lesser federal "undue burden" standard and plainly fails under strict scrutiny. Taken alone, this defect renders the Act invalid.

In *Planned Parenthood v. Casey*, the U.S. Supreme Court began its analysis of a 24-hour mandatory delay requirement by examining the scope of its "medical emergency" exception, which encompassed not just a threat of death, as here, but also that of "substantial and irreversible impairment of a major bodily function." 505 U.S. at 879. Had the medical emergency exception been so narrow as to "foreclose[] the possibility of an immediate abortion despite some significant health risks," it would have been unconstitutional, "for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Id.* at 880 (citations omitted). The federal right to privacy thus prohibits laws that impose a delay even when continuing the pregnancy threatens a woman's health.

It is inconceivable that the more protective Florida Constitution would not proscribe such interference as well. Indeed, as the Supreme Court held, "prior to the end of the first trimester, the State [i]s not permitted to restrict a woman's right to choose to terminate her pregnancy" for any reason, *Gainesville Woman Care*, 210 So. 3d at 1255, and restrictions on abortion that apply in the second trimester are permitted only if they are expressly "designed to *safeguard* the health" of the pregnant woman, *In re T.W.*, 551 So. 2d at 1193 (emphasis added). Yet the Act waives its additional-trip and delay mandates only when a physician concludes "to a reasonable degree of medical certainty [that] continuation of the pregnancy would threaten the *life* of the pregnant woman." § 390.0111(3)(b), Fla. Stat. (emphasis added). In no other circumstance does the State require a patient either to delay for at least twenty-four hours care necessary to preserve her health, or to wait until her condition becomes so severe that her life is in danger. Unconscionably, that is what the Act does—and it must therefore be struck down as a matter of law.[10]

[10] The Legislature explicitly rejected an amendment that would have protected a woman whose health, not just life, is threatened by delaying an abortion. *See supra* at 33. Therefore, this Court cannot rewrite the scope of the medical emergency exception, because doing so would violate legislative intent. *Dep't of Ins. v. Ins. Servs. Office*, 434 So. 2d 908, 911 (Fla. 1st DCA 1983) (the fact that "the legislature expressly considered, but *rejected*," an amendment that would have

VI. Facial Relief Is Proper in This Case.

The State has argued that facial temporary injunctive relief was improper absent a finding that there is "no set of circumstances" in which the Mandatory Delay could constitutionally apply. *See* State's S. Ct. Br. at 44–46. This Court rejected that argument in temporarily enjoining the Act in all its applications; the Supreme Court validated that determination in affirming facial temporary relief; and this Court should do the same again in granting permanent relief. Even if Plaintiffs were required to satisfy the "no set of circumstances" test—which, as explained *infra*, they are not—facial invalidation would be proper, because this law poses a "total and fatal conflict with applicable constitutional standards." *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (citations omitted). The Act prohibits *all* Florida women from effectuating their abortion decision until at least twenty-four hours have passed, "clearly impeding the exercise of [their] constitutional rights," *Gainesville Woman Care*, 210 So.3d at 1258-59; thus, the Act fails strict scrutiny in *all* circumstances. Because there are no facts the State

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prohibited a certain practice "provides strong evidence that the legislature did not intend" to completely prohibit that practice (emphasis in original)); *see also Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) (finding it "impossible to preserve the constitutionality of the [] ordinance without effectively rewriting it, and [] declin[ing] to 'legislate' in that fashion").

could introduce that would prove the Mandatory Delay Law constitutional in *any* application, it should be struck down in its entirety.

Regardless, Plaintiffs are not required to demonstrate that the "no set of circumstances" test is satisfied in order to obtain facial relief: not only is there no precedent for applying this test in the context of Florida's constitutional right to privacy, but, as the Supreme Court acknowledged in this case, it has "both upheld and invalidated [restrictions on abortion] without any mention of a 'no-set-of-circumstances' test." *Gainesville Woman Care*, 210 So. 3d at 1265 (citing *Presidential Women's Ctr.*, 937 So. 2d at 115; *North Florida*, 866 So. 2d at 626; *In re T.W.*, 551 So. 2d at 1192–93); *see also Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998) (holding a statute concerning grandparent visitation, which impermissibly intruded upon a parent's fundamental privacy right, to be facially unconstitutional after applying strict scrutiny, with no mention of the "no set of circumstances" test). Plaintiffs are unaware of any case, nor have Defendants cited any during the two years that this case has been pending, applying this "no set of circumstances" test to a facial challenge under the Florida Constitution's Privacy Clause. Just as the Florida Supreme Court facially invalidated parental consent and notification requirements rather than limiting relief to only those minors for whom the laws were likely to cause actual harm or delay, *see In re T.W.*, 551 So. 2d at 1188, 1196;

North Florida, 866 So. 2d at 640, this Court should strike down the Mandatory Delay Law on its face.

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment on their claim that the Act violates the Privacy Clause of the Florida Constitution.

WHEREFORE, based on the foregoing arguments and authorities, Plaintiffs respectfully request that this Court enter summary judgment in favor of Plaintiffs and grant the relief requested in the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court through the Florida Courts eFiling Portal, and served via email on counsel of record. In addition, Plaintiffs will deliver a courtesy copy to the Court's chambers.

/s/ Julia Kaye
Julia Kaye