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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' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs' motion for summary judgment is simple and straightforward: because the Mandatory Delay Law infringes on a woman's right to abortion by preventing her from effectuating her decision for a minimum of 24 hours after providing her informed consent, and because the State cannot as a matter of law show that this restriction furthers a compelling state interest in the least restrictive way, Plaintiffs are entitled to summary judgment. No mandatory abortion delay law has *ever* survived strict scrutiny, and binding Florida Supreme Court precedent will not allow a different result here.

The State's singular burden in opposing Plaintiffs' motion was to demonstrate the existence of a material factual dispute, and this it failed to do. Instead, the State inexplicably claims that it first needs to conduct broad, far-reaching discovery to "canvas the extensive array" of scientific literature, "consult with and . . . retain experts," and "review the factual bases for upholding similar 24-hour waiting periods" in other states. Defs.' Resp. Opp'n Pls.' Mot. Summ. J. ("State's Br.") 16, June 28, 2017. But the State's argument for a continuance under Fla. R. Civ. P. 1.510(f) is woefully deficient: the State has neither submitted an affidavit showing the existence and availability of any disputed facts, nor explained how such facts would demonstrate that the Mandatory Delay Law serves a compelling state interest in the least restrictive manner. Because the State failed to meet its burden in opposing Plaintiffs' motion, it cannot "avoid having a summary judgment rendered against [it]." *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164, 1167 (Fla. 1st DCA 2014) (quoting *Connell v. Sledge*, 306 So. 2d 194, 196 (Fla. 1st DCA 1975)).

The State's remaining arguments also fail as a matter of law. The State's continued reliance on federal case law that the Florida Supreme Court has repeatedly held irrelevant is nothing more than an ill-disguised attempt to skirt the boundaries of the Florida Constitution. The State's references to the temporary injunction ("TI") record are irrelevant, since Plaintiffs do not rely on it for

purposes of this motion. And the State's arguments that the Florida Supreme Court may not create binding legal precedent unless it is ruling on an appeal of final judgment are meritless. Because the Mandatory Delay Law is clearly unconstitutional, and because the State has offered no basis for conducting expansive discovery when such discovery cannot possibly result in a material factual dispute, summary judgment is warranted.

ARGUMENT

I. Summary Judgment Is Warranted Because the State Has Not Met Its Burden to Demonstrate the Existence of a Single Issue of Material Disputed Fact.

In their memorandum in support of their motion for summary judgment, Plaintiffs explained in detail why, as a matter of law, (1) Supreme Court precedent precludes every potentially compelling interest the State may assert, and (2) the mandatory delay and additional trip requirement is not the least restrictive means of advancing any legitimate, let alone compelling, State interest. *See* Pls.' Mot. Summ. J. & Supporting Mem. Law ("Pls.' Opening Br.") 20–34, June 1, 2017. Plaintiffs further explained why the failure to include an exception to the Mandatory Delay Law where continuing the pregnancy would jeopardize a woman's health is, as a matter of law, fatal to the State's defense. *Id.* at 35–36. Having met their initial burden to demonstrate the nonexistence of any genuine issue of material fact, "the burden shifted," *Cassady v. Moore*, 737 So. 2d 1174,

1178 (Fla. 1st DCA 1999), and "it [wa]s incumbent upon [the State] to demonstrate . . . the existence of an issue of material fact in order to avoid having a summary judgment rendered against [it]." *Lindsey*, 135 So. 3d at 1167. Because the State did not and cannot do so, summary judgment is warranted.

The State not only failed to demonstrate a single material factual dispute—it also failed to identify any discovery that could *hypothetically* lead to a material factual dispute. Fla. R. Civ. P. 1.510(f) places the burden on the party seeking a continuance of a motion for summary judgment to "show by affidavit the existence and availability of additional evidentiary matter, what it is and its materiality, what steps have been taken to obtain it, and that failure to have obtained such evidence sooner did not result from inexcusable delay." *DeMesme v. Stephenson*, 498 So. 2d 673, 676 (Fla. 1st DCA 1986) (affirming grant of summary judgment where "the requirements listed above were not met"); *see also Cia. Ecuatoriana De Aviacion v. U.S. & Overseas Corp.*, 144 So. 2d 338, 339 (Fla. 3d DCA 1962) (affirming grant of summary judgment where party seeking continuance failed to file an affidavit in accordance with applicable rule or to demonstrate "diligence" in seeking discovery). The State failed to meet this burden. And even if the State had attempted to satisfy these requirements (which it did not), the materiality standard is insurmountable: there is no evidence the State could produce that is "essential to the result" here, *Connell v. Guardianship of Connell*, 476 So. 2d 1381, 1382 (Fla.

1st DCA 1985)—i.e., capable of altering the outcome. *See also, e.g.*, *Estate of Herrera v. Berlo Indus., Inc*., 840 So. 2d 272, 273 (Fla. 3d DCA 2003) (holding summary judgment is proper where "future discovery would not yield any new information that the trial court either did not already know, or needed to make its ruling"); *Crespo v. Fla. Entm't Direct Support Org*., 674 So. 2d 154, 155 (Fla. 3d DCA 1996) (affirming trial court's denial of a continuance where discovery sought was "immaterial to the dispositive issues in the case").

First, as a matter of law, the State cannot prove that the Mandatory Delay Law furthers a compelling interest inasmuch as the Legislature does not similarly restrict medical procedures "that are far more risky" than abortion. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017). Second, the State cannot prove that the Mandatory Delay Law is the least restrictive means of furthering any hypothetical state interest inasmuch as the Legislature rejected numerous amendments that Florida's neighbors have adopted to mitigate the harm caused by similar laws. *See* Pls.' Opening Br. 8, n.4, 33-34 n.9 (listing states that allow an abortion patient to receive the required information by phone, mail, or website, and thus do not mandate an extra trip; that permit qualified individuals other than a physician to provide the mandatory information; and that exempt certain women facing difficult circumstances from mandatory delays). Because the State failed to meet its burden—and because no amount of discovery would enable

the State to meet its burden—summary judgment is proper.

The State protests that it needs more time to determine what evidence could possibly justify the Act, State's Br. 16-17, and that Plaintiffs seek to "prevent" the state from meeting its evidentiary burden, *id.* at 18. These arguments are meritless. Throughout the two years that this case has been pending, nothing has precluded the State from "canvas[ing] the extensive array of pertinent academic literature and scientific research," "consult[ing] with and as appropriate [] retain[ing] experts," or "review[ing] the factual bases for upholding similar 24-hour waiting periods in numerous other States." State's Br. 16-17. And, for over four months, the State has had the benefit of the Supreme Court's decision clarifying the appropriate legal standards. Moreover, Plaintiffs' motion did not take the State by surprise: Plaintiffs informed this Court and the State at the May 8, 2017, status conference that they would file a summary judgment motion within four weeks, and this Court made clear that discovery would remain available during that time. Thus, Plaintiffs do not attempt to impose an arbitrary roadblock in the State's path to victory: the State has had ample opportunity to demonstrate the existence of any disputed material facts—including in its opposition to the instant motion—and it has failed to do so. The State has made no effort, let alone a reasonably diligent effort, to show this Court how any discovery it hopes to conduct could possibly change the outcome of this case. *See, e.g.*, *A & B Disc. Lumber & Supply, Inc. v. Mitchell*, 799 So. 2d 301,

303 (Fla. 5th DCA 2001) ("[W]hen the non-moving party seeks to undertake discovery in support of a position which is not legally valid, it is not improper for the court to enter summary judgment before the discovery is complete.").

Indeed, even under the most generous reading, the State's passing reference to the absence of record data showing "how many women would be adversely impacted by the 24-hour wait, . . . how they would be impacted[,] . . . how many [] would be delayed beyond 24 hours, or . . . . how women would change their abortion plans were the challenged law to take effect," State's Br. 17-18, cannot be construed as creating a genuine issue of material fact: such data, to the extent it is even ascertainable, is immaterial. The Supreme Court has already explained that, as a matter of law, "[the Act] impacts only those women who have already made the choice to end their pregnancy," because a pregnant woman who decides that she wants or needs additional time to consider her decision after receiving the required information may *already* take that time under preexisting law. *Gainesville Woman Care*, 210 So. 3d at 1261. Whether there are 500, 5,000, or 50,000 such women has no bearing on the only remaining question in this case: does this infringement on the right to privacy advance a compelling state interest through the least restrictive means. It is similarly immaterial how many women would be delayed by *more than* 24 hours; the Supreme Court has already held that the 24-hour mandated delay is *itself* an infringement on the right to privacy subject to

strict scrutiny. Finally, the State's question regarding "how women would change their abortion plans"—i.e., whether some women may decide to carry the pregnancy to term instead—would be relevant only if the State could legitimately assert a compelling interest in protecting potential life. State's Br. 18. But as matter of law, it cannot. *See* Pls.' Opening Br. 26–28.

In sum, no scale of discovery, and certainly not the passing queries the State offers, could lead to a finding that would change the outcome in this case. Where, as here, the State has not met its burden, summary judgment is appropriate.

II. The Supreme Court Can Issue Binding Precedent Regardless of the Procedural Posture of a Case, And Did So Here.

The State's leading argument is that "determinations of law made by the Florida Supreme Court" in resolving a TI are not "binding on the merits." State's Br. 14, 15. That argument is demonstrably wrong. If it were true that the Supreme Court's decision affirming the TI in this case had no precedential value, then the Supreme Court could not have used that decision to "clarify" its abortion jurisprudence "[t]o the extent there is any doubt or confusion regarding our precedent," *Gainesville Woman Care*, 210 So. 3d at 1256; *see also id.* at 1258 ("Having clarified that any law implicating the right of privacy is subject to strict scrutiny review . . . ."), and the DCA would be free to ignore the Supreme Court's opinion in this case. Of course that is not the law. Indeed, the Supreme Court granted discretionary jurisdiction precisely because of the DCA's "misapplication"

of Supreme Court precedent. *Id.* at 1245 n.1. The State is wrong, and its interpretation of the law-of-the-case doctrine is equally flawed.

As the Florida Supreme Court has explained, the law-of-the-case doctrine requires that "questions of law *actually decided* on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't. of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) (emphasis added). The State merely attempts to distract from the Supreme Court's clear determinations of law in this case. As the Florida Supreme Court has expressly held, "a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decisions are based continue to be the facts of the case." *Id*. at 106. Accordingly, neither the parties nor this Court may disregard the legal reasoning and conclusions the Florida Supreme Court made in reversing the First DCA and affirming this Court's grant of a TI. *Cf. This That & the Other Gift & Tobacco, Inc. v. Cobb Cnty., Ga.*, 439 F.3d 1275, 1284-85 (11th Cir. 2006) (explaining that the law-of-the-case doctrine applied to an appellate court decision reached at the preliminary injunction stage, and that its "prior legal conclusion was binding on the district court").[1]

[1] The State's reliance on cases stating the general proposition that an appellate court's affirmance of a preliminary injunction is not "law of the case," *see* State's Br. 10-15, reflects a fundamental misunderstanding of Plaintiffs' position.

Were the State correct, then Plaintiffs would now need to re-litigate whether strict scrutiny applies—because the Supreme Court's holding that the Mandatory Delay Law implicates the right to privacy by its plain terms and is therefore subject to strict scrutiny, *Gainesville Woman Care*, 210 So. 3d at 1253, 1265, would be relevant only to the question of whether the TI was properly granted. Similarly, by the State's reasoning, the Supreme Court's conclusion that "social and moral concerns have no place in the concept of informed consent," *id.* at 1262—and that the DCA therefore erred by requiring the trial court to consider whether the State has a compelling interest in protecting "the unique potentiality of human life" and "the integrity of the medical profession," *id.*—would evaporate on remand, and this Court would have to spend judicial resources considering whether the Mandatory Delay Law furthers such social and moral interests. That is not the law. The Supreme Court's holdings in this case constitute binding precedent for all Florida courts, including this one.

Plaintiffs do not argue that the Supreme Court's *affirmance of the TI* constitutes "law of the case," or that the TI granted by this Court is "dispositive of the merits," as the State claims. *Id.* at 14. Rather, Plaintiffs argue that questions of law *actually decided* by the Supreme Court are binding on this Court, and Plaintiffs may properly rely on that binding precedent in support of their motion for summary judgment.

III. As the Florida Supreme Court Has Repeatedly Held, Federal Decisions Applying the "Undue Burden" Test are Wholly Irrelevant in Cases Brought under the Florida Constitution.

The State's persistent reliance on federal case law, *see* State's Br. 2, 4, 6, 18, ignores the Supreme Court's express "reject[ion] [of] the use of the federal 'undue burden' standard announced by the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874, 112 S. Ct. 2791, 120 L.E. 2d 674 (1992), in light of Florida's more encompassing, explicit constitutional right of privacy." *Gainesville Woman Care*, 210 So. 3d at 1254 (citing *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 634-35 (Fla. 2003)). The State's argument that "the justifications" underlying those inapposite decisions are nevertheless "factually relevant here as well," State's Br. 3, directly contradicts Florida Supreme Court precedent.

The Florida Supreme Court has strictly cabined the universe of interests that are sufficiently compelling to justify an infringement on the right to abortion, and the interests that other courts have found to justify mandatory delays for abortion care under the less rigorous "undue burden" test fall definitively outside those narrow boundaries. The U.S. Supreme Court upheld the mandatory delay at issue in *Casey* as "a reasonable measure to implement the State's interest in protecting the life of the unborn," notwithstanding that the challenged law "d[id] not further the state interest in maternal health and infringe[d] the physician's discretion to

exercise sound medical judgment." *Casey*, 505 U.S. at 885-86 (internal quotation marks and citations omitted). Because, under the Florida Constitution, a state interest in "protecting the life of the unborn" cannot *as a matter of law* justify a restriction on abortion before the point of fetal viability—and the Mandatory Delay Law applies from the very start of pregnancy—any evidence relating to such an interest is legally irrelevant. It is immaterial because it cannot change the outcome under Florida's strict scrutiny standard.

IV. The State's Remaining Arguments Regarding the Supreme Court's Decision are Meritless.

The State's fallback argument is that this Court should not rely on unidentified but "significant" portions of the Supreme Court opinion, either because they are dicta or because the State "disagrees" with the Supreme Court's findings "in numerous important respects." State's Br. 15-16. The State identifies neither the passages that it believes are dicta, nor the Supreme Court findings with which it disagrees, but assures the Court that it will eventually do so "under the proper circumstances." *Id.* at 16. The State's dissatisfaction with a Supreme Court decision resoundingly rejecting its defense of the Mandatory Delay Law does not provide a basis for denying summary judgment, and the holdings of the Supreme Court both in the instant case and in *In re T.W.* and *North Florida* are fatal to the State's defense, as a matter of law.

The Supreme Court has unequivocally held that the Mandatory Delay Law is subject to strict scrutiny. *Gainesville Woman Care*, 210 So. 3d at 1260 ("Because the Mandatory Delay Law, which impedes Florida women's exercise of their fundamental rights, implicates the right of privacy, the trial court was correct to conclude that strict scrutiny applies to this challenge."). And the Supreme Court has unequivocally held that only two interests are sufficiently compelling to justify an abortion restriction—and even then, only at certain stages of pregnancy:

> Under 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. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. . . . Under our Florida Constitution, the state's interest [in potential life] becomes compelling upon viability . . . [which] generally occurs upon completion of the second trimester.

In re T.W., 551 So. 2d 1186, 1193-94 (Fla. 1989). The Supreme Court was similarly unambiguous in holding that "social and moral concerns," including the State's interests in the "unique potentiality of human life" and "the integrity of the medical profession," "have no place in the concept of informed consent"—and that the DCA erred by requiring this Court to consider such interests as potential justifications for the Mandatory Delay Law. *Gainesville Woman Care*, 210 So. 3d at 1262. In addition, the Supreme Court has repeatedly held that the absence of parallel burdens on comparable—and far riskier—medical procedures precludes a

finding of compelling interest, because "the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by the provisions." *In re T.W.*, 551 So. 2d at 1195 (quoting *Ivey v. Bacardi Imports Co.*, 541 So. 2d 1129, 1139 (Fla. 1989)); *accord N. Fla.*, 866 So. 2d at 633-34. The State may not like these holdings, but holdings they are.

Finally, the State asks this Court to ignore the plain language of the Supreme Court's decision and instead speculate about the Court's underlying motivations. According to the State, the Supreme Court "never intended to prevent the State" from meeting its burden. State's Br. 9; *accord id.* at 2 ("[T]he case was not remanded for the purpose of foreclosing the State from meeting [its] burden."). But whereas it would be futile and inappropriate to attempt to ascertain what the Justices *hoped*, it is quite plain what the Court *did*: it resolved the legal questions before it, and in so doing, issued holdings and reasoning that are binding on this Court. In light of those holdings and that reasoning, the Supreme Court's earlier abortion jurisprudence, and the undisputed facts, entry of summary judgment is warranted here.

V. Plaintiffs Are Entitled to Summary Judgment Because the Act Is Unconstitutional as a Matter of Law and the State Has Failed to Identify Any Countervailing Material Factual Dispute that Warrants a Different Outcome.

Plaintiffs are now entitled to summary judgment because *as a matter of law,* the State has identified no disputed fact, and there is no disputed fact, that could

change the outcome here. The State's protestations that the TI record is insufficient to support Plaintiffs' motion, and that the State "never agreed to rest its entire defense of the challenged statute upon its submission in opposition to the temporary injunction motion," State's Br. 14, 17, are of no moment: Plaintiffs' motion does not rely on the evidence they submitted at the TI stage, or on the State's failure to introduce any evidence at that stage. The TI record is irrelevant.

Rather, Plaintiffs' motion is based on the undisputed facts in this case coupled with binding Florida Supreme Court precedent. It is undisputed that the State subjects no other medical procedure, even those "that are far more risky than termination of pregnancy," to a mandatory delay and additional-trip requirement, *Gainesville Woman Care*, 210 So. 3d at 1246; that the Florida Legislature rejected every attempt to render this law less intrusive and less harmful; and that the Act lacks an exception even when continuing the pregnancy will endanger a woman's health. Each of these undisputed and indisputable facts provides an independent basis for permanently invaliding the Act as a matter of law.

No mandatory abortion delay law has *ever* survived strict scrutiny. *See* Pls.' Opening Br. 17-20. While strict scrutiny is not always fatal, it is fatal here—as evidenced by the State's failure to suggest a single disputed fact that could provide a basis for this Court to find that Florida's explicit right to privacy, which is "as

strong as possible," *In re T.W.*, 551 So. 2d at 1191 (internal quotations omitted), permits a different result.

Because there is no evidence the State could introduce that would justify the Mandatory Delay Law, the State's request for a continuance should be denied, and Plaintiffs' motion for summary judgment should be granted.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 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/ Autumn Katz

Autumn Katz