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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.

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**SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs submit this supplemental brief in further support of their motion for summary judgment filed on June 1, 2017. The State's responses to Plaintiffs' discovery requests are dispositive of this motion, for they lack any shred of evidence creating a genuine dispute of material fact. Indeed, more than two years after this Court (Francis, J.) concluded that strict scrutiny applied, eight months after the Florida Supreme Court affirmed that strict scrutiny applied, and three months after this Court continued the summary judgment hearing to afford the State additional time for discovery, the State *still* has not identified a single expert witness, fact witness, or document that it can rely on to overcome the Act's presumption of unconstitutionality. The State's baseless assertion that a woman

seeking an abortion—unlike any other patient—is incapable of determining for herself when she is fully informed and ready to proceed with her health care decision, is insufficient to create a *genuine* factual dispute.

The State's discovery responses are also dispositive for what they concede. First, the State formally admits to the core facts supporting Plaintiffs' motion, including that "no other medical procedures, including procedures that pose greater health risks" than abortion, are subject to a mandatory delay. Second, the State concedes that for women who are informed and certain of their abortion decision after hearing the state-mandated information, the mandatory delay and additional trip requirements are not essential; at best, they "may nonetheless benefit" such patients. As a matter of law, "[m]ay nonetheless benefit" is insufficient to survive strict scrutiny.

Because the State has not raised, and *cannot* raise, a genuine dispute of material fact that could overcome the Mandatory Delay Law's presumptive unconstitutionality, summary judgment is warranted.

## UNDISPUTED FACTS

In addition to the Statement of the Case and Undisputed Facts presented in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment 3–10 (June 1, 2017) [hereinafter "Pls.' MSJ Brief"], Plaintiffs' motion is supported by the following undisputed facts, which the State has admitted:

1. No other medical procedures, including procedures that pose greater health risks to a woman than first or second trimester termination of pregnancy, are subject to a mandatory delay requirement under Florida law. Defs.' Responses to Pls.' First Set of Requests for Admissions 2 (Sept. 18, 2017) [hereinafter "Defs.' Resps. First RFAs"], attached hereto as Ex. A.
2. The Florida Legislature rejected amendments to the Mandatory Delay Law that would have, *inter alia*:
    a. allowed a woman to waive the 24-hour mandatory waiting period and have the procedure on the same day as she receives the state-mandated information. Defs.' Responses to Pls.' Second Set of Requests for Admissions 3 (Sept. 18, 2017) [hereinafter "Defs.' Resps. Second RFAs"], attached hereto as Ex. B.
    b. allowed a woman to receive the state-mandated information without making an additional in-person visit. *Id.* at 4.
    c. allowed a physician to delegate provision of the state-mandated information to a registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant. *Id.* at 6.
    d. created an exception to the mandatory delay and additional trip requirements "when, on the basis of a physician's good faith clinical judgment, there is a risk to the woman's health." *Id.* at 8.

e. allowed a woman to waive the mandatory delay and additional trip requirements "if she lives 100 miles or more from the nearest abortion provider." *Id.* at 9.

f. allowed a woman to waive the mandatory delay and additional trip requirements if she "states that she is a victim of rape, incest, domestic violence, or human trafficking and is not able to present to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing her statement." *Id.* at 11.

g. created an exception to the mandatory delay and additional trip requirements "when, on the basis of a physician's good faith clinical judgment, there is . . . the presence of a severe fetal anomaly incompatible with sustainable life." *Id.* at 13.

3. There is *no* exception to the Mandatory Delay Law for "serious threats to health" that do *not* "entail at least some remote threat to life." Defs.' Response to Pls.' First Set of Interrogatories 14 [hereinafter "Defs.' Resps. First Interrogs."], attached hereto as Ex. C.

## LEGAL ARGUMENT

### I. Despite Repeated Opportunities, The State Has Not Identified a Single Witness or Document to Overcome the Presumption of Unconstitutionality. The State's Failure to Meet Its Evidentiary Burden Is Dispositive.

No mandatory abortion delay law in this country has ever survived strict scrutiny. *See* Pls.' MSJ Brief 17–20. The State asks this Court to find that there is a genuine factual dispute as to whether Florida's Mandatory Delay Law is the *only* exception to this multi-decade, multi-jurisdictional body of law. But in the more than two years that this case has been pending, the State has not identified a single expert witness, fact witness, or document to support its position.

Following the June 19, 2017, summary judgment hearing, Plaintiffs timely propounded discovery requests on the State. These included interrogatories requesting information about any expert or fact witnesses the State intends to call at trial, in order to determine whether there were any witnesses Plaintiffs might need to depose before submitting the supplemental briefing ordered by this Court. The State also served Plaintiffs with interrogatories and requests for production, and Plaintiffs provided comprehensive responses five days *before* they were due. *See* Pl.'s Response to Defs.' Second Set of Discovery Requests (Sept. 5, 2017), attached hereto as Ex. D.

On Wednesday, September 6, 2017, defense counsel contacted Plaintiffs' counsel to acknowledge that the State's discovery responses were due on Monday, September 11, and to ask for a one-week extension in light of the hurricane that was due to hit Florida that Sunday. *See* Counsel's Email Exchange Regarding Discovery 2 (Sept. 6–8, 2017), attached hereto as Ex. E. Plaintiffs immediately granted that request as to 36 of the 38 discovery requests, asking only that the State respond to the two interrogatories pertaining to the identity of any witnesses by September 11, as scheduled, but offering that they do so simply by email, with formal responses to come later. *Id.* at 2. Defense counsel agreed to do so. *Id.*

On Friday, September 8, 2017, defense counsel provided an email response to Plaintiffs' Interrogatories 15 and 16, which stated: "The State's review of the issues in this case and development of defenses is continuing . . . . [W]hile the State is exploring options and leads with respect to expert witnesses, the State has not yet identified any expert witnesses whom it expects to call at trial." *Id.* at 1. The State gave an identical response regarding fact witnesses. *Id.* Ten days later, on September 18, 2017—one day before the end of the 60-day continuance—defense counsel provided their responses to all discovery requests, including the same responses to Interrogatories 15 and 16. Defs.' Resps. First Interrogs. 18–20. The State has not supplemented these responses.

Similarly, in response to Plaintiffs' request for "[a]ll documents Defendants intend to rely on to show that the [Act] furthers a compelling state interest through the least restrictive means," the State responded that "it has not yet identified" any such documents. Defs.' Responses to Pls.' First Set of Requests for Production of Documents 2 (Sept. 18, 2017), attached hereto as Ex. F. Indeed, the State did not provide a *single* document in response to Plaintiffs' four requests for production.

Despite numerous opportunities—throughout the more than two years that this case has been pending, as well as the additional 60 days this Court granted the State after it failed to comply with Florida Rule of Civil Procedure 1.510 in opposing Plaintiffs' motion—the State has not identified any evidence that would justify this unconstitutional intrusion. Because the State has simply failed to raise any genuine dispute of material fact, summary judgment is warranted.

## II. If The State's Interest In Informing Abortion Patients of Medical Risks Were Compelling, Then Procedures Posing Greater Medical Risks Would Also Be Subject To a Mandatory Delay. They Are Not.

In its responses to Plaintiffs' discovery requests, the State abandons all but one of its compelling interest arguments. Defs.' Resps. First Interrogs. 5. Its sole remaining argument is that a woman seeking an abortion can give informed consent only if she has made an additional trip to her physician and then delayed her care by at least 24 hours—even though the State forces *no* other patient in Florida to make such a trip or endure such a delay. *Id.*; Defs.' Resps. First RFAs 2.

The State claims that it is appropriate to single out patients seeking abortion because abortion "is a serious matter with implications and consequences beyond those associated with other serious medical procedures." Defs.' Resps. First Interrogs. 6. But the Florida Supreme Court has twice "made clear . . . that '[t]he doctrine of medical informed consent" pertains "only and exclusively [to] the *medical risks*" associated with the procedure, *Gainesville*, 210 So.3d at 1262 (emphasis in original)—and the State admits, as it must, that medical procedures "that pose *greater health risks*" than abortion are not subject to a mandatory delay. Defs.' Resps. First RFAs 2 (emphasis added).

Under established Florida Supreme Court precedent, when the State singles out abortion for differential treatment, its asserted interests—even if "worthy"—cannot be considered compelling, as a matter of law. That is because "the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions." *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989) (internal quotation marks and citation omitted); *accord Gainesville*, 210 So.3d at 1260. That is particularly true here, where, as a matter of law, the asserted interest pertains only to information about the medical risks associated with abortion.

Indeed, the Mandatory Delay Law's inadequate exception for a woman who can "present[] . . . documentation evidencing that she is obtaining the abortion

because she is a victim of rape, incest, domestic violence, or human trafficking," § 390.0111(3), Fla. Stat. (2016), provides further evidence that the Act serves no compelling interest. If this mandate were really designed only to inform patients about the medical risks of abortion—rather than to unconstitutionally dissuade or punish women seeking abortions—then it is difficult to see why this subset of patients would be exempt.

Because there can be no genuine factual dispute that the Mandatory Delay Law fails to advance a compelling interest in informed consent, Plaintiffs are entitled to summary judgment.

## III. The State Cannot Explain Why a 24-Hour Mandatory Delay and Additional Trip Requirement With Virtually No Exceptions Is the "Least Restrictive Means" of Ensuring Informed Consent.

To overcome the presumption of unconstitutionality, the State must do more than identify a compelling interest in the abstract. Rather, it must show that there is a sufficient "nexus between the asserted interests and the means chosen," and that the law is "narrowly tailored to achieve the stated interests." *State v. J.P.*, 907 So. 2d 1101, 1117, 1119 (Fla. 2004). There are no facts in dispute that would allow the Mandatory Delay Law to survive this test.

First, the State does not (and cannot) plausibly explain why there is *no other possible way* to ensure that patients are adequately informed about abortion than by requiring virtually every woman seeking an abortion to receive the state-mandated

information in-person, and then to delay her care by at least 24 hours. While the State describes 24 hours as "the smallest *non-arbitrary* period of time *likely*" to serve its interests, this assertion is just as arbitrary as the mandate itself. Defs.' Resps. First Interrogs. 9 (emphasis added). There is no reason why some smaller unit of time would not constitute an equally "reasonable period of reflection." *Id.* And, as discussed *supra*, the State identifies no evidence supporting its claim.

Second, "[t]he scope of the exceptions" is of particular "significance in assessing whether an ordinance is narrowly tailored," *J.P.*, 907 So. 2d at 1117, and the dearth of exceptions here is fatal to the State's defense. The State opines that a woman who has received the state-mandated information and is certain of her abortion decision "may nonetheless benefit from an additional 24 hours of reflection." Defs.' Resps. First Interrogs. 10–11. But strict scrutiny requires far more than the hope that someone, somewhere, might somehow benefit from this presumptively unconstitutional law. Rather, the State must show an *actual* "need or problem." *J.P.*, 907 So. 2d at 1118 (holding that 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"); *see also Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1016 (1st Cir. 1981) (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").

The Mandatory Delay Law also "sweeps too broadly," *J.P.*, 907 So. 2d at 1117, by failing to provide meaningful exceptions for a woman who would find it beneficial to proceed with her health care decision once she has made up her mind and received the state-mandated information. Indeed, while the State claims that its interest is in protecting patients, the Mandatory Delay Law treats a woman's claim of rape, incest, domestic violence, or human trafficking as presumptively false—of no significance unless the State can "verify" its truth. Defs.' Resps. First Interrogs. 15. As discussed *supra*, the State asserts this need to "verify" such an assertion without an ounce of evidence. A less restrictive means would be to trust a woman when she says she has suffered such violence.

Finally, the State fails to address the key fact that a Florida woman *may already take* "an additional 24 hours of reflection," or more, if she believes she would benefit from it. The State's only response to this dispositive fact is that "[p]ermission to take an additional 24 hours or longer is not the same as requiring a 24-hour waiting period, nor does it have the same effect." Defs.' Resps. First Interrogs. 17. This is true. But the State's acknowledgement that there is a difference between allowing women who need more time to take it, as opposed to forcing women who are ready to delay, does not suffice to show either that there is

a problem that needs to be solved, or that the Mandatory Delay Law is the *least restrictive* solution to any such problem.

## IV. The State Concedes that Some Health Conditions Do Not Fall Within The Mandatory Delay Law's Medical Emergency Exception, which Condemns the Act.

The State concedes that the Mandatory Delay Law applies even when continuing the pregnancy poses a threat to health, and that the medical emergency exception applies only if the pregnancy also poses a threat to the patient's life. Defs.' Resps. First Interrogs. 14 (opining that "[m]ost, if not all, *serious* threats to health" would fit within the medical emergency exception, and those that do not "are not serious enough to warrant an exception" (emphasis added)). As explained in Pls.' MSJ Brief 35–36, a restriction on abortion that applies even when it *harms* a woman's health cannot survive strict scrutiny when restrictions on abortion are permitted only if they are expressly "designed to *safeguard* the health" of the pregnant woman (and even then, only in the second trimester). *In re T.W.*, 551 So. 2d at 1193 (emphasis added). For this reason alone, judgment is warranted as a matter of law.

## CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment. As the State's responses to Plaintiffs' discovery requests did not disclose any documents, factual testimony, or expert testimony that the State intends to rely on

in defending the Mandatory Delay Law, the parties' arguments set forth at the July 19, 2017, hearing are virtually unchanged. Accordingly, while Plaintiffs are willing and able to attend the scheduled November 21, 2017, hearing, Plaintiffs would also consent to have their motion for summary judgment decided on the papers.

Respectfully submitted,

/s/ Julia Kaye

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of October, 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/ Susan Talcott Camp
Susan Talcott Camp