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

After refusing to identify a single expert witness, fact witness, or document in response to Plaintiffs' discovery requests, the State sprung six declarations and dozens of documents on Plaintiffs and the Court two weeks before argument. The State offers no explanation for why this information was unavailable when Plaintiffs timely sought it through discovery, nor would any such excuse be credible; the declarations are dated as early as October 11 and include witnesses the State has plainly been aware of for years.[1] Nevertheless, the State's eleventh-hour evidence does not defeat Plaintiffs' motion for summary judgment.

[1] For instance, declarant Sherri Daume provided legislative testimony in support of the Mandatory Delay Law in 2015; Spring Malone's declaration is dated October

First, the State does not contest that the Act lacks an exception for a patient whose health (but not life) will be jeopardized if she is forced to delay her abortion and prolong her pregnancy. Under Florida Supreme Court precedent, a restriction on abortion that applies even when it *harms* a patient's health cannot survive strict scrutiny, so the State's concession on this point—which was unavoidable given the statutory text—is dispositive. This alone condemns the Act as a matter of law.

Second, the State does not, and cannot, raise a material dispute of fact as to whether a 24-hour mandatory delay and additional trip requirement with virtually no exceptions is the *least restrictive means possible* of ensuring informed consent for abortion. It is not, as is apparent both from the State's admissions and the Act's plain terms. The State's reliance on two women's decades-old experiences only underscores the lack of narrow tailoring: as a matter of law, the State may not impinge the fundamental right of privacy of virtually *every* woman seeking an abortion on the ground that *some* women may regret not taking additional time to consider their decision—time that, of course, a woman is free to take under preexisting law. This, too, entitles Plaintiffs to summary judgment.

11, 2017; and Dr. Carlos LaMoutte's declaration is undated. Defs.' Suppl. Resp. Opp'n Pls.' Mot. Summ. J. 13 & Exs. 5, 9 (Nov. 6, 2017) [hereinafter "Defs.' Suppl. Opp'n Br."]

Finally, the State's last-ditch exhibits still are not "sufficient to reveal a genuine issue" as to whether the Act serves any compelling interest when the State has conceded that more dangerous procedures are not similarly restricted. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). The Florida Supreme Court has always found such differential treatment of abortion to be fatal under strict scrutiny, and the State gives this Court no reason to diverge from that precedent. To the contrary, each of the State's attempted justifications is foreclosed by precedent and by the admissions of the State or its witnesses.

No mandatory abortion delay law has ever survived strict scrutiny, and the State has not raised a factual dispute that could possibly justify its request that this Court become the first in a half century of abortion jurisprudence to make a contrary holding. Judgment is warranted as a matter of law.

LEGAL ARGUMENT

I. The State Does Not, and Cannot, Contest Plaintiffs' Argument That the Absence of a Health Exception Is Fatal to the Act.

The State does not dispute that the Mandatory Delay Law applies even when forcing a woman to prolong her pregnancy jeopardizes her health, as long as her *life* is not threatened by the delay. *See* Pls.' Suppl. Br. Supp. Pls.' Mot. Summ. J. 12 & Ex. C, at 14, Ex. B, at 8 (Oct. 19, 2017) [hereinafter "Pls.' Suppl. MSJ Br."]. As Plaintiffs have previously explained, this is fatal to the Act: a law that forces a

patient to *delay medical care to the detriment of her health* cannot possibly be the least restrictive means of furthering any compelling state interest. *See* Pls.' Mot. Summ. J. & Supp. Mem. Law 35-36 (June 1, 2017) [hereinafter "Pls.' MSJ Br."]. The Florida Supreme Court has crystallized this point, expressly holding that restrictions on abortion are permitted *only* to the extent that they "safeguard" a woman's health—and even then, only in the second trimester of pregnancy. *Id.* at 36 (quoting *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989)). The State does not, and cannot, contest this either. Thus, even if the Act furthered a compelling interest (which it does not), it still cannot survive strict scrutiny.

II. The State Has Not Raised a Material Factual Dispute as to Whether the Act is Narrowly Tailored. It Is Not, Which Condemns It.

The State does not and cannot rebut Plaintiffs' argument that the Mandatory Delay Law fails the narrow tailoring prong of the strict scrutiny test. Indeed, the State does not even try to explain why 24 hours is the smallest unit of time that constitutes a "reasonable period of reflection." Pls.' Suppl. MSJ Br. Ex. C, at 9. Nor does the State attempt to explain how a law that sweeps so broadly—applying even to a woman who seeks an abortion because a doctor has confirmed that her

pregnancy is doomed, *id.* at Ex. B, at 13[2]—could possibly be the least restrictive means of serving any compelling state interest.

The Act's singular exception helps illustrate this deficiency, because it is necessarily either over- or under-inclusive. If, as the State claims, a delay is necessary to ensure informed consent, then a woman who can prove she has suffered rape, incest, domestic violence or human trafficking would also be unable to give informed consent without the mandated delay, and so would not be exempt. At the same time, if an exemption is necessary to mitigate the Mandatory Delay Law's harms, then any woman who has suffered such violence should be spared the Act's burdens as well, even if she lacks documentation. A mandate this broad and inflexible cannot possibly be considered narrowly tailored.

The State makes a feeble attempt to justify the requirement that the state-mandated information be given to the patient *in-person* at least 24 hours in advance of the abortion, but these arguments fare no better. The State first asserts that "the

[2] The State's argument that the Mandatory Delay Law is necessary to ensure that patients have time to consider alternatives to abortion—namely, parenting or adoption—fails to justify the Act under any circumstances, but is especially meritless and cruel when applied to patients who have received a diagnosis of a lethal fetal anomaly. *See* Defs.' Suppl. Opp'n Br. 5-8. This alone warrants summary judgment: the Act cannot be deemed narrowly tailored when it extends to patients for whom it clearly serves no purpose, and on whom it would inflict particularly acute psychological harm.

Florida Supreme Court has already upheld the requirement that a woman be told critical information **in person, by a physician**, against a facial constitutional privacy challenge . . . .” Defs.’ Suppl. Opp’n Br. 20 (emphasis in original) (citing *State v. Presidential Women’s Ctr.*, 937 So. 2d 114, 115 & n.1 (2006)). But the in-person requirement is, of course, mentioned nowhere in the Florida Supreme Court’s decision in *Presidential*. The preexisting informed consent law imposed no mandatory delay and required no additional trip: the patient would necessarily be “in-person” at the clinic when she heard this information because she was already present to receive medical care. Moreover, because the preexisting informed consent provisions upheld in *Presidential* were “comparable to other informed consent statutes” in Florida, *see Gainesville Woman Care, LLC, v. State*, 210 So. 3d 1243, 1256-57 (Fla. 2017), they did not implicate the right of privacy, and the Court did not evaluate any of those provisions under strict scrutiny. Here, by contrast, the Act clearly implicates the right of privacy and is subject to strict scrutiny. *Id.* at 1258-59. The State thus finds no support in *Presidential*.

Next, the State argues that the in-person requirement is necessary to ensure that the patient has an opportunity to consider the ultrasound results during the 24-hour delay. Defs.’ Suppl. Opp’n Br. 20. But when asked how this serves any interest for “[a] woman who has received [the state-mandated information], feels certain of her abortion decision, *and has already seen* an ultrasound of this or a

previous pregnancy," the State offers only that such a patient "may nonetheless benefit from an additional 24 hours of reflection." Pls.' Suppl. MSJ Br. Ex. C, at 11 (emphasis added). As Plaintiffs have explained, and the State has not disputed, "may nonetheless benefit" is insufficient to withstand strict scrutiny. *See* Pls.' Suppl. MSJ Br. 10.

The State's assertion that some women are ambivalent about their abortion decision and might change their minds if subjected to the Act's burdens also cannot defeat summary judgment. *See* Defs.' Suppl. Opp'n Br. 11-16 & Exs. 7-9. Even assuming arguendo that these assertions were true, the State cannot show that overriding *every* woman's decision about the timing of her abortion is the least restrictive means of affording more time to *some* women who may be ambivalent. For instance, a less restrictive means would be to allow those woman who are certain of their decisions to waive the delay—but the Legislature rejected an amendment that would have done just that. *See* Pls.' Suppl. MSJ Br. Ex. B, at 3.

Indeed, the State's declarations from two patients who regret the abortions they had forty and twelve years ago, respectively, and who wish that they had taken more time to consider their decisions (which they admit they could have done), only underscores the lack of narrow tailoring. A law that impinges the right of privacy of virtually every Florida woman seeking an abortion can no more be justified on the basis of such testimony than could a juvenile curfew law be

justified on the basis of testimony from two people claiming that they might have been less likely to get into trouble as a teen if, decades earlier, a law had forced them to remain at home at night. *See State v. J.P.*, 907 So. 2d 1101, 1118 (Fla. 2004) (striking juvenile curfew ordinances under strict scrutiny in part because they "apply throughout the cities without any showing of a *city-wide need or problem*" (emphasis added)).

To survive strict scrutiny, the State carries the burden of persuading this Court that there is *no* less restrictive way to ensure informed consent than this one-size-fits-all mandate: the delay period cannot be reduced below 24 hours; the patient cannot receive the state-mandated information by phone or website and then view the ultrasound on the day of her scheduled abortion, even if she has previously seen an ultrasound; and the State cannot add *any* additional exceptions—no matter how certain the woman is in her decision, how sophisticated her medical knowledge, how much violence she has suffered but cannot prove, or how desperate her need to end her pregnancy. Because the State has not raised any genuine dispute of fact that would enable this Court to so conclude, summary judgment is warranted for this reason alone.

III. The State's Eleventh-Hour Evidence Also Fails to Create a Material Factual Dispute as to Whether the Mandatory Delay Law Advances a Compelling State Interest.

The State's admission that "no other medical procedures, including procedures that pose greater health risks" than abortion, are subject to a mandatory delay is likewise dispositive of this motion and this case. Pls.' Suppl. MSJ Br. 7-9 & Ex. A, at 2. The Florida Supreme Court has repeatedly held that such differential treatment of abortion is fatal under strict scrutiny, striking down parental involvement laws even though the State claimed they were necessary to protect the "well-being of the immature minor" and even though the U.S. Supreme Court had upheld similar laws based on a concern about minors' "inability to make critical decisions in an informed, mature manner[.]" *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989) (quoting *Bellotti v. Baird*, 442 U.S. 622, 634 (1979)). Time and again—in 1989, 2003, and 2017—the State has claimed that abortion restrictions were *uniquely* necessary to ensure that patients could make an informed decision, and time and again, the Supreme Court has rejected this "abortion is different" argument under strict scrutiny. Pls.' MSJ Br. 24-26 (quoting *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 633-34 (Fla. 2003)).

The State now asks this Court to make a leap, diverging both from this uniform Florida Supreme Court precedent and from the uniform conclusions of every court to consider a mandatory abortion delay law under strict scrutiny. The

State attempts to resurrect the "abortion is different" argument with claims that are disproven by the State's own admissions and those of its witnesses, and are not "sufficient to reveal a genuine issue." *Landers*, 370 So. 2d at 370. For this reason, too, summary judgment is warranted.

A. The State's Claim that the Act's Differential Treatment of Abortion is Justified By the Medical Risks Associated with Abortion Is Foreclosed by Binding Precedent and the State's Own Admission.

"[T]he doctrine of medical informed consent" pertains "only and exclusively [to] the *medical risks*" associated with the procedure, *Gainesville Woman's Care*, 210 So. 3d at 1262 (emphasis in original), and the State cannot justify the Act's differential treatment of abortion on the basis of medical risks associated with abortion when it has already admitted that more dangerous procedures are not subject to a mandatory delay. *See* Pls.' Suppl. MSJ Br. 7-8. This admission "preclude[s] [the State from] ever obtaining a judgment, . . . [so] there is no necessity for a trial and a summary judgment is proper." *Connolly v. Sebeco, Inc.*, 89 So. 2d 482, 484 (Fla. 1956).

Moreover, there can be no genuine dispute regarding the safety of abortion: the U.S. Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt* affirms that "abortions are safe—indeed, safer than numerous procedures that take place outside hospitals[.]" 136 S. Ct. 2292, 2315 (2016), *as revised* (June 27, 2016); *see also id.* at 2320 (Ginsburg, J., concurring) ("'[a]bortion is one of the

safest medical procedures performed in the United States'" (quoting Br. for Am. Coll. of Obstetricians & Gynecologists, Am. Med. Ass'n, Am. Acad. Of Family Physicians & Am. Osteopathic Ass'n, as Amici Curiae, 6-10)).[3]

The State relies on testimony that some surgical outpatient procedures are more likely to involve "adverse medical incidents" when performed in an office-based setting. Defs.' Suppl. Opp'n Br. 4 & Ex. 3, at ¶ 4. This cannot possibly justify the Act under strict scrutiny: first, because no other procedure performed in an office-based setting is subject to a mandatory delay; and second, because the Mandatory Delay Law applies even to abortions performed in a hospital.

Under binding Florida Supreme Court precedent, the State cannot justify an abortion restriction on the basis of medical risks when more dangerous procedures are not subject to parallel burdens. *N. Fla.*, 866 So. 2d at 650; *In re T.W.*, 551 So.

[3] Ignoring the Supreme Court's factual findings in *Hellerstedt*, the State instead relies on an amicus brief in support of the *losing* party in that case—to no avail. That brief lists seven incidents in Florida for the period 2009-2015 in which an ambulance was purportedly called to an abortion clinic (without providing any further details). Defs.' Suppl. Opp'n Br. 3-4 & Ex. 2. Even if true, these seven calls only corroborate the extremely low risk of complications: there were roughly half a million abortions performed in Florida during that period. *See, e.g.*, Agency for Health Care Administration, Reported Induced Terminations of Pregnancy (ITOP), http://ahca.myflorida.com/MCHQ/Central_Services/Training_Support/docs/ITOPByCounty_2014.pdf (showing 72,107 abortions in 2014); Agency for Health Care Administration, Reported Induced Terminations of Pregnancy (ITOP), http://ahca.myflorida.com/MCHQ/Central_Services/Training_Support/docs/ITOPByCounty_2015.pdf (showing 72,023 abortions in 2015).

2d at 1195; *see also Gainesville Woman Care*, 210 So. 3d at 1260-61. The State has not raised a genuine dispute of material fact that could warrant diverging from this well-established precedent.

B. The State's Claim that the Act's Differential Treatment of Abortion is Justified Because Every Other Medical Procedure Has a Built-In Waiting Period Is Disproven By Its Own Expert and Does Not Create a Genuine Dispute of Material Fact.

The State next tries to circumvent Florida Supreme Court precedent and justify the Act's differential treatment by arguing that "abortion is unique among medical procedures in that medical providers are not affording a built-in consent period." Defs.' Suppl. Opp'n Br. 8. But the State's own expert, Dr. Carlos Lamoutte, disproves this point, admitting that he sometimes performs other non-emergency gynecological procedures "during the same appointment in which I consulted the patient." *Id.* at Ex. 5, at ¶ 4. This is fatal to the State's defense. Because it is undisputed that abortion is *not* the only medical procedure that may be performed on the same day that a physician provides the counseling information, and yet abortion is the *only* medical procedure subject to a mandatory delay, the State cannot raise a genuine and material factual dispute as to whether the Act serves a compelling interest in informed consent. [4]

[4] Although none of these minor points would be sufficient to defeat summary judgment even if true, Plaintiffs feel compelled to correct some of the State's more

C. The State's Claims About the "Consequences of Less Than Fully Informed Consent" Are Immaterial Because the Act Does Not Further Informed Consent.

Finally, the State asserts that the Mandatory Delay Law is necessary because of the "consequences of less than fully informed consent." Defs.' Suppl. Opp'n Br. 18-19.[5] This argument cannot preclude summary judgment, because Plaintiffs do

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egregious mischaracterizations of the record. The State argues that Plaintiff Bread and Roses "routinely" performs abortions on a "same-day, on-demand basis," Defs.' Suppl. Opp'n Br. 8, 10, even though the record shows that Bread and Roses's patients typically wait "between 48 hours and one week" from the time they call to schedule an appointment to the time they arrive at the clinic, Pls.' Suppl. MSJ Br. Ex. D, at 13. The State suggests that Bread and Roses withholds state-mandated information from patients until they are "in the operating room, just minutes before undergoing the procedure," Defs.' Suppl. Opp'n Br. 8, even though the record shows that Bread and Roses provides the informed consent materials and information to a patient well before she enters the procedure room, and at least an hour before she gives her written consent, Pls.' Suppl. MSJ. Br. Ex. D, at 6-11. The State's claim that Plaintiff charges a $150 fee to "any woman who decides not to go through with the abortion," Defs.' Suppl. Opp'n Br. 11, is particularly offensive; as noted in the initial informed consent paperwork, the clinic charges patients $150 to cover the costs of diagnostic tests, and does so *only if* a patient actually receives such tests, *id.* at Ex. 1, at 0012. Moreover, the record shows that Bread and Roses engages in extensive efforts to offer individually-tailored counseling, screen for and protect against coercion, and ensure that patients are able to make well-informed, deliberative decisions. *See*, *e.g.*, Pls.' Suppl. MSJ Br. Ex. D, at 5-12, 15-18; Defs.' Suppl. Opp'n Br. Ex 1, at 0001, 0003-07, 0012-14.

[5] While this Court need not make a single credibility determination in order to grant Plaintiffs judgment as a matter of law, it bears noting that the State's opposition relies on the work of "experts" who have been widely discredited. *Compare* Defs.' Suppl. Opp'n Br. Ex. 10 (Decl. of Priscilla K. Coleman citing studies by, *inter alia*, Vincent Rue), *with, e.g., Planned Parenthood of the Great Nw. v. Streur*, No. 3 AN-14-04 711, slip op. at 7 (Alaska Super. Ct. Aug. 27, 2015)

not dispute the importance of informed consent before a patient undergoes any form of medical care, including abortion. Moreover, this concern would be material only if the Act in fact furthered informed consent and thus prevented any harms caused by "less than fully informed consent." But, as explained *supra*, the State cannot possibly prove that the Act is necessary to ensure informed consent when it is undisputed that (1) more dangerous procedures are not similarly restricted, Pls.' Suppl. Opp'n Br., Ex. A, at 2, (2) abortion is *not* the only non-emergency gynecological procedure performed without a prior consultation visit, Defs.' Suppl. Opp'n Br. Ex. 5, at ¶ 4, and (3) the State allows some women to proceed with their abortion without a mandatory delay if they can prove they have suffered sexual and/or domestic violence, § 390.0111(3)(a)(1), Fla. Stat. Furthermore, as the Florida Supreme Court has stated, whereas informed consent is a "patient-driven" doctrine, the Act's rigid, across-the-board mandate "turns informed consent on its head" by interfering with the doctor-patient relationship. *Gainesville Woman Care*, 210 So. 3d at 1257-58.

(recognizing Coleman as an "anti-abortion activist involved in honing the movement's message") *and Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1333–34 (E.D. Pa. 1990) (finding Rue's testimony on psychological effects of abortion lacking in credibility and colored by personal bias), *aff'd in part, rev'd in part on other grounds*, 947 F.2d 682 (3rd Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment. While the State's eleventh-hour evidence does not change the nature of Plaintiffs' arguments, in light of the new documents and testimony the State has submitted, Plaintiffs request that the hearing on November 21, 2017, proceed as scheduled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 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