IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2022-1050

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, on behalf of itself, its staff, and its patients, *ET AL.*,
Petitioners,
v.

STATE OF FLORIDA, *ET AL.*,
Respondents.

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

Consolidated With Case No. SC2022-1127
Lower Tribunal Nos. 1D22-2034; 2022-CA-912

FLORIDIANS FOR REPRODUCTIVE FREEDOM'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Floridians for Reproductive Freedom ("FRF") is dedicated to protecting and improving the health and wellbeing of Floridians. House Bill 5 ("HB 5") causes grave harm to those interests.

FRF is a coalition of local, state, and national organizations united to educate and advocate for convenient, affordable, and safe access to the full range of reproductive care. FRF envisions a future where all Floridians have access to comprehensive reproductive health care, including abortion, with dignity and respect. Accordingly, FRF promotes policies, programs, and reforms that advance the social and economic benefits of reproductive freedom. FRF and its members therefore share a direct interest in this litigation and in the right to an abortion under the Florida Constitution.

FRF has heard stories from its members regarding the specific and severe harms caused by HB 5 across the state of Florida. Counsel, on behalf of FRF, spoke with doctors and other reproductive care providers to document these harms. By telling their stories, FRF can help the Court understand the often life-threatening harm and

challenges pregnant Floridians and medical professionals have faced and will continue to face if this Court does not enjoin HB 5.

SUMMARY OF THE ARGUMENT

Reproductive care providers have first-hand knowledge of how HB 5 has impacted their patients. Specifically, compliance with the law has required them to stand by as their patients suffer potentially life-threatening harm and deny their patients medically necessary care. This submission documents just some of the horrific suffering that doctors and care providers have recounted. For instance, they have treated pregnant patients who were forced to wait for leaking amniotic fluid (a potentially life-threatening, but treatable, condition) to devolve into tachycardia, fever, and finally sepsis before their condition was deemed dangerous enough that doctors could treat it under the law. Others recalled patients who were forced to travel across state lines with high risk conditions, including infections and bulging membranes that could induce labor prematurely and danger unnecessarily. The stories go on. These first-hand accounts, describing experiences in the eight months since HB 5 took effect, convey but a fraction of the harm that HB 5 has caused—and will continue to cause if not enjoined.

Even where patients are, in theory, still eligible for an abortion under HB 5—either because their pregnancy has not yet reached 15 weeks or because their circumstances appear to fall within one of the law's narrow exceptions—the law's vague requirements and the realities of available care mean they are often unable to exercise that right in practice. The practical challenges of recognizing a pregnancy, deciding to terminate, and securing the care needed, often after a long wait, and all before 15 weeks, are often insurmountable. With its compressed timeline, HB 5 can force decisions about abortion without adequate opportunity for further medical testing or consultation with loved ones, spiritual advisors, or counselors.

And after 15 weeks, physicians are unsure how to adhere to HB 5 when their patients are obviously at risk, but it is not clear whether their situations fit into one of the law's limited exceptions. Providers, uncertain about the law's exact reach and constrained by the risk of criminal penalties, must watch pregnant patients experience needless suffering and unnecessary risk.

Worse still, HB 5 exacerbates inequities for marginalized communities, like many rural and poor Floridians who already have limited access to health care, and who are least able to bear the life-

altering consequences of being denied care due to HB 5. The effects of HB 5 will only get worse as clinics get busier and more doctors are constrained from providing this necessary care. The Court must reinstate the injunction.

ARGUMENT

I. *The law "does not allow us to intervene until it's too late."*

Providers across Florida report that HB 5 prevents them from providing medically necessary care, the denial of which results in physical, mental, and emotional harm. Rather than allowing providers to care for their patients' dangerous but fully treatable conditions, the law ties their hands and "*does not allow [them] to intervene until it's too late*" and their patients' conditions have become life threatening, as one OBGYN in Florida put it. In doing so, the law turns the Hippocratic Oath on its head, replacing "First, do no harm" with a command to stand by while patients suffer.

Again and again, providers told similar stories. Several spoke of experiences with "*pre-viable leakage of fluid,*" a rare condition that is potentially "*survivable for a fetus, but only in a handful of cases and with a high risk of permanent neurological deficits.*" Notably, the condition "*can become lethal to the mother when bacteria makes its*

way to the membrane around the baby and travels throughout the body which can lead to sepsis, shock, and death." But risk to the mother's life, and painful suffering, can be avoided with an abortion soon after the condition is detected. However, because HB 5's first exception only permits abortions after 15 weeks where "necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function," Fla. Stat. § 390.0111(1)(a), providers often cannot treat this condition when it arises. Instead, they must, at times, wait until the patient takes "*a turn for the worst*" before providing care.

In the words of one OBGYN:

> *I had a patient who was absolutely ecstatic when she found out she was pregnant.*
>
> *But at 18 weeks, things took a turn for the worst when she started leaking fluid. Even though this is well known to be a potentially life-threatening condition, I could not address it by terminating the pregnancy because the case was not yet lethal. I was forced to wait and watch my patient's condition deteriorate, rather than provide basic medical care.*
>
> *And it did—exactly as I knew it would. First, the patient developed tachycardia, which is a fast heart rate and a sign of things getting worse. Then, a fever. Ultimately, the patient developed sepsis, which is the body's response to a severe infection and is life threatening.*

> *But for HB 5, this patient could have been low-risk, and treated on an outpatient basis. Instead, she was transferred to the ICU when the levels of oxygen in her blood became dangerously low, signaling the risk to her life.*
>
> *It was only then, when my patient was in the ICU dying of sepsis, that the law allowed me to terminate her pregnancy and save her life.*

This story is far from unique. That same physician explained that, "*sadly, this example is one of many*" where patients can be treated only once they reach a grave risk of death.

Other providers agreed. Another physician explained that, although pre-viable leakage of fluid is a known "*potential threat to maternal life where the chance of fetal survival is incredibly low and maternal risk is quite high*," HB 5 forces many providers to tell their patients to "*go home, check their temperatures, and come back only when they have a fever.*" This is a dangerous approach, the physician explained, because "*once a patient has a fever, they are already at high risk of sepsis.*" In this scenario, some patients may not be able to receive care in time to avoid severe risks to their lives and health.

Other medical conditions lead to similarly devastating risks under HB 5's regime. One OBGYN described a pregnant patient who required multiple blood transfusions due to extreme blood loss. Prior

to HB 5, the OBGYN would have considered terminating the pregnancy to save the patient's life. But because the blood transfusions were life sustaining, doctors felt the patient was not at risk of death or "substantial and irreversible physical impairment" as required under the exception. Under HB 5, doctors were too scared to provide the best treatment medically available. The patient ultimately was forced to travel over an hour, in a precarious condition, to receive the medically necessary care.

One clinic director recalled a patient who arrived with a "*bulging membrane*" and where "*the medical staff saw an infection developing in the placenta*," another indication of potential harm:

> *The clinic was stuck.*
>
> *The situation was quickly becoming grave for the patient and it would be risky for her to wait or travel to receive care since the bulging membrane could induce labor prematurely at any moment. The patient, understandably, was terrified.*
>
> *At the same time, doctors were unwilling to perform an abortion because they were not yet confident the condition was fatal. The doctors were trying to maintain the patient's health while also following the law.*
>
> *In the end, the patient was forced to travel in her deteriorating condition to obtain an abortion in another state.*
>
> *This is what our care looks like today.*

II. *"Many times in medicine it is … shades of grey, which is why we use our judgment to make the best decisions with our patients. With this law we are not able to do that."*

HB 5 creates heightened risks for patients with underlying, pre-existing medical conditions that make pregnancy particularly dangerous by denying providers the ability to exercise their expert judgment in consultation with their high-risk patients.

As one OBGYN put it:

> *I've got lots of patients with health issues that make their pregnancies high risk but not so severe that anyone will certify they are eligible for an abortion. These conditions include multiple sclerosis, high blood pressure, Crohn's Disease, and other autoimmune disorders—all conditions that can be seriously exacerbated by pregnancy or can vastly increase the risk of other serious health issues. But the law leaves no room for addressing these risks.*

As a result, providers explained, their patients face difficult choices and can be forced to accept the dangers of their high-risk pregnancies. One physician recalled:

> *Prior to the ban, I had a patient with brain cancer who came to me more than 15-weeks pregnant.*
>
> *The patient's neurosurgeon had told her that if she didn't end the pregnancy, she couldn't get optimal treatment for her cancer because she would have to delay chemotherapy treatment. If she did that, she would have a shorter life expectancy.*

> *Before the law took effect, we were able to provide an abortion. If she was seeking care now, it is unclear if we would have been able to do it.*

Providers also highlighted the distinct harms caused by HB 5's lack of an exception for mental health, Fla. Stat. § 390.0111(1)(a), meaning that physicians cannot perform an abortion after 15 weeks even where patients have a psychological condition that puts them, their pregnancy, and their unborn children in great danger:

> *The mother of an adult with severe schizophrenia and intellectual disabilities came to us when she realized her daughter was pregnant. There was no doubt in the mother's mind that her daughter was incapable of taking care of a child and that continuing the pregnancy would be extremely risky.*
>
> *But unfortunately, the 15-week mark had already passed and there was nothing we could do for her here.*
>
> *We spent a week calling clinics around the country. We were ultimately able to find an appointment in Colorado, more than a thousand miles away, where the daughter was able to receive the treatment her mother/guardian and I believed was best.*

Risks arising from severe mental health disorders are not the law's only missing exception. One provider recalled that when a "*14-year old rape victim came to the clinic*," because HB 5 lacks an exception for rape (as well as for incest or human trafficking) and the child was more than 15 weeks pregnant, "*there was nothing we could*

do. Our denial of care was just one more traumatic experience this child had to suffer in addition to sexual assault and an unwanted pregnancy."

These stories also illustrate a repeated experience described by healthcare providers: HB 5 prevents doctors and patients from exercising their best medical and personal judgment to make the decisions that they believe are best. As one physician articulated: "*Many times in medicine it is not black and white, it is shades of grey, which is why we use our judgment to make the best decisions with our patients. With this law we are not able to do that.*"

III. *"It is confusing and causing chaos."*

Providers also report that the vagueness of HB 5's exceptions, coupled with the fear of criminal liability for violating the law, are causing significant uncertainty and confusion and preventing them from providing necessary care to their patients.

In order to provide care under either of the law's exceptions, HB 5 requires two physicians to sign off. Fla. Stat. § 390.0111(1). However, "*doctors don't know how to interpret the law,*" one provider lamented. Given the ambiguities in the law's text and lacking any interpretive guidance on how the law should apply, providers are

unsure of which conditions qualify under HB 5's narrow exceptions for post-15-week abortions. Unsurprisingly, providers report that it is common for two physicians to evaluate the same patient and come to different conclusions.

Regarding the exception for a "fatal fetal abnormality," one provider described three different standards various doctors apply to determine whether death will result "upon birth or imminently thereafter," Fla. Stat. §§ 390.011(6); 390.0111(1)(c): "*Some doctors believe that only death within 48 hours of birth is imminent. Others consider death within the first year to be imminent. And there are other physicians who take a different approach entirely and do not believe they can sign off on a fatal fetal abnormality unless the fetus has less than a 10% chance of survival.*" This can make it difficult to get two different doctors to sign off on whether a patient presents with a fatal fetal abnormality. Providers report similar confusion surrounding HB 5's exception for abortions to save the life of the pregnant patient: "*Nobody knows what life threatening actually means. It is confusing and causing chaos.*" This lack of clarity makes pregnant Floridians in dire circumstances sicker than they need to be.

Given these uncertainties, some providers are unwilling to provide care even when they believe it may be permitted because they are afraid of losing their license or facing criminal liability for getting it wrong. One OBGYN explained that there are doctors "*who will sign off on abortions as medically necessary but refuse to provide the care themselves for fear of liability*." As one clinic counselor explained:

> *There are times when a doctor will refer a patient to us for termination but refuse to sign the necessary forms for fear of potential liability.*
>
> *So we have to find another doctor willing to see the patient, review their files, and sign off.*
>
> *These are often patients who are seeking abortions because their condition is life threatening. In the time it takes to find these doctors, the patients' conditions can deteriorate, causing needless suffering and putting their lives at even greater risk.*

Another story shared by that provider illustrates the physical and emotional harms caused by the law's lack of clarity:

> *We had one patient come to us for a D&C [dilation and curettage procedure] to remove a demised fetus.*
>
> *The patient was referred to us by an OBGYN who was, the patient told us, unfamiliar with the law's requirements and unwilling to perform the procedure for fear of potential legal consequences.*
>
> *Imagine that. Because of the uncertainty caused by the law, the patient had to wait for days with a dead fetus inside of*

> *her until she was able to receive the care she needed at our clinic.*
>
> *In addition to the unimaginable psychological impact this experience no doubt had on the patient, it also could have caused medical problems, too. If the D&C was not performed in a timely manner, this situation could have become very dangerous.*

Even other patients who do not need abortion care are seeing their access to treatment compromised due to the time and effort providers must invest to comply with HB 5's requirements. As one physician explained, "*because we are devoting so much time to abortion-related care, time is being taken away from the other areas of my practice*." Long waits at clinics are becoming typical, and are compounded by the requirement that doctors must see patients *twice* with at least a 24-hour delay between appointments before providing an abortion. Fla. Stat. § 390.0111(c).

These challenges harm not just patients but providers: "*We are doing everything we can to treat as many patients as possible. But we are experiencing mental anguish and exhaustion watching the harms of the new law play out.*" Absent an injunction, the effects of HB 5 will only make it worse.

IV. *"[A]t the first available appointment, she was already 14 weeks and 5 days."*

In practice, the 15-week ban entirely denies abortion care to many who need it, want it, and should be eligible for it under HB 5. Many Floridians do not discover they are pregnant until after 15 weeks. And for those who do, they face a compressed window in which to decide to seek an abortion. They must have enough time for two appointments, separated by at least 24 hours—and often much more than 24 hours due to the bottleneck at clinics seeing increased numbers of patients—before hitting the 15-week mark. Fla. Stat. § 390.0111(c).

Stories abound of patients who are boxed out of the care they need and should be entitled to due to this compressed timeline. One physician recounted a story of a patient who, while experiencing marital difficulties and working full time, was delayed in discovering a pregnancy:

> *Our clinic is very busy and at the first available appointment, she was already 14 weeks and 5 days. While she had made steps to terminate the pregnancy and expressed concerns about remaining pregnant, she was not able to schedule lab work before 15 weeks.*
>
> *Because of the time to schedule an initial appointment, conduct the necessary lab work, and the delay caused by*

> *the law's waiting period, the effective ban for her, and many like her, was earlier than 15 weeks. As a result, this woman was unable to exercise her right to terminate her pregnancy.*

The difficulty in obtaining abortion care before 15 weeks is compounded by other family obligations, as the majority of Floridians who seek abortions are parents already.[1] One provider's story highlighted the difficulty this poses:

> *We had a patient who was already a mother to a chronically ill child. When the patient came in for her first appointment, she was 14 weeks and 3 days pregnant. The Florida 15-week ban, combined with the 24-hour waiting period, meant that if she was going to be able to exercise her right to have an abortion, she urgently needed care.*
>
> *We squeezed her in to make sure we could see her and comply with the 24 hour waiting period. But on the day of her second appointment, her chronically ill son became sick. She was unable to leave him. She missed her appointment, and was unable to obtain an abortion in Florida.*

On rushed timelines like these, as one physician explained, there is a greater risk that "*care is compromised.*"

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[1] *See* Katherine Korsmit, et al., *Abortion Surveillance – United States, 2020*, 71 MMWR SURVEILLANCE SUMMARIES 1, 20 (Nov. 25, 2022), U.S. DEP'T OF HEALTH AND HUMAN SERVICES/CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/mmwr/volumes/71/ss/pdfs/ss7110a1-H.pdf.

V. *"Patients are scared they will lose access to an abortion if they take more time to consider their decision."*

HB 5's 15-week timeline causes yet another harm: Providers emphasized that patients often do not have enough time to fully consider their options and consult with loved ones and others before making the decision to terminate a pregnancy.

The time crunch created by the law is especially challenging when it comes to decisions that relate to potential fetal abnormalities. Many fetal abnormalities cannot be definitively detected until well after 15 weeks. One screening test for genetic abnormalities (non-invasive prenatal testing or NIPT) typically can be done starting at 10 weeks, but that test is not a definitive diagnosis. Physicians explained that they do not recommend terminating a pregnancy based on the results of an NIPT test alone. Instead, for abnormal results, physicians recommend performing an amniocentesis—testing a sample of amniotic fluid—to definitively diagnose a fetal abnormality. An amniocentesis, however, cannot be done until 14 to 20 weeks into

a pregnancy.[2] This timing makes it nearly impossible to receive the results of this more definitive test and make life-changing decisions before the 15-week mark.

One OBGYN told the story of a patient who had received an abnormal prenatal screening test and was forced to make a decision to terminate before a conclusive amniocentesis could be performed:

> *My patient, a mother of two, was at 13 weeks. So enough time to get an abortion under the law, but not much time to spare.*
>
> *After she received an abnormal prenatal screening result, I said that I would not recommend performing an abortion based on the screening because there was a risk that the test was a false positive and that there was actually nothing abnormal. So I recommended a follow-up diagnostic test that would provide some additional information.*
>
> *There was not enough time to get the test done and get an abortion before 15 weeks. With two small children already at home, she knew she would be unable to adequately care for a third child with special needs.*
>
> *She felt she could not afford to take the risk of waiting for more conclusive results and miss the 15-week window. I wish I could have told her there was more time to decide, but under this law there just isn't.*

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[2] *See* Mayo Clinic Staff, *Amniocentesis*, MAYO CLINIC (Oct. 7, 2022), https://www.mayoclinic.org/tests-procedures/amniocentesis/about/pac-20392914.

> *She ended this pregnancy knowing there was a chance the fetus had no genetic abnormalities, but not willing to take the risk that it might. The 15 week ban forced her to make a decision with only part of the necessary information.*

Another OBGYN told the story of a patient unable to seek further information about fetal defects before the 15-week mark:

> *The patient had just found out she was pregnant, but had also received the news that the fetus had massive swelling (hydrops) and a heart defect. As I always do, I counseled the patient and referred her to a doctor for a high-risk consultation.*
>
> *The patient wanted to consult with a high-risk physician to discuss outcomes and conduct a further workup before making a decision to terminate the pregnancy. But because the doctor for the high-risk consultation was not able to see the patient until the 15-week mark passed, she lost her ability to terminate.*

The compressed timeline created by HB 5 also means that "*[p]atients are scared they will lose access to an abortion if they take more time to consider their decision.*" As a result, one provider explained, "*pre-abortion counseling sessions have become shorter rather than longer because they do not want to risk delaying their procedure by disclosing any uncertainty about their decision.*" And if there is not enough time even to work through the decision with a clinic counselor, there is certainly not enough time to adequately

consult the loved ones, counselors, and faith advisors who many rely on for support when making major life decisions. (Needless to say, it would be impractical for patients to find a lawyer and bring a lawsuit to challenge the law on this truncated timeline.) Unlike patients facing cancer diagnoses and other illnesses who may want to seek further consultation, pregnant Floridians are now up against a strict legal clock that gives them no time to seek further consultations, evaluate their treatment options, and then decide whether and when to seek treatment.

VI. *"Without the resources to travel out of state for care, my patient will be forced to carry to term."*

HB 5's harms are exacerbated in marginalized communities, where HB 5 further perpetuates existing inequalities. It is well documented that patients who lack financial resources and the wherewithal to seek medical care face particular hurdles in obtaining reproductive care.[3] That is especially the case in Florida, which has

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[3] *See, e.g.,*. Usha Ranji, et al., *Beyond the Numbers: Access to Reproductive Health Care for Low-Income Women in Five Communities*, HENRY J. KAISER FAMILY FOUND. (Nov. 2019), https://files.kff.org/attachment/Executive-Summary-Beyond-the-Numbers-Access-to-Reproductive-Health-Care-for-Low-Income-

a high rate of rural poverty and already limited access to reproductive care providers.[4]

HB 5 exacerbates these inequalities. One OBGYN who works at a rural hospital in Florida explained the difficulty in obtaining signatures from two doctors. That OBGYN is frequently the only doctor treating pregnant patients at a rural hospital; if a patient comes in and requires termination after 15 weeks, there are no other doctors to sign off. The physician lamented, "*Despite my medical training, I have to sit on my hands and can't do anything.*" While the law permits a single physician to sign off on a post 15-week abortion as necessary for "emergency medical procedures," if another

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Women-in-Five-Communities (documenting the difficulties marginalized communities face in accessing reproductive care).

[4] *See, e.g.*, State Fact Sheet, Economic Research Service, U.S. DEP'T OF AGRICULTURE (updated Feb. 24, 2023), https://data.ers.usda.gov/reports.aspx?StateFIPS=12&StateName=Florida&ID=17854 (estimating that the poverty rate in rural Florida is 18.9%, while the rate in urban areas is just over 12%); State Facts About Abortion: Florida, GUTTMACHER INST. (June 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-florida#1 ("In 2017, some 73% of Florida counties had no clinics that provided abortions, and 24% of Florida women lived in those counties.").

physician is unavailable, Fla. Sta. § 390.0111(1)(b), physicians may be uncertain what constitutes an "emergency" and fearful of facing criminal liability for making the decision unilaterally.

Another provider shared the story of two patients in similar situations, whose outcomes differed vastly because of the intersection of HB 5's requirements with their divergent socio-economic conditions:

> *I had two patients at the same stage of pregnancy. They were both thrilled to be pregnant. But that changed when they both received a fatal fetal diagnosis at 19 weeks. That's when their stories diverge.*
>
> *One patient had private insurance. She was able to get her OBGYN, along with a second physician to sign the necessary paperwork required by the Florida law and receive an abortion. The second patient had Medicaid. With Medicaid, she didn't have a designated physician and instead received care at a clinic with rotating physicians. She had no one 'in-house' who she could turn to sign the necessary paperwork. Since no physician would sign the forms, my clinic could not help her obtain an abortion.*

A story shared by another provider exemplifies how patients in marginalized communities with limited resources are forced to carry unwanted pregnancies to term under HB 5 and why the availability of out-of-state care is simply not an option for many:

> *The patient had immigrated to the United States and already had a small child. They lived in a single room*

> *together. She washed dishes at a nearby restaurant to support the two of them. While the clinic offered financial support for her to travel to receive an abortion, she couldn't afford child care, couldn't risk losing her job if she left, and was worried about the impact travel could have on her immigration status. Without the resources to travel out of state for care, my patient will be forced to carry to term.*

These practical barriers to accessing out-of-state care are common: Providers report that many patients have never left their county, let alone travelled on an airplane. For them, the idea of leaving the state is unfathomable. And travelling to another state requires more than just transportation expenses. Providers explained that many patients do not have adequate support systems or are unable to take off work or leave their existing children to get abortion care—meaning that the harms HB 5 causes are particularly severe for the most vulnerable Floridians.

CONCLUSION

FRF respectfully submits this brief in support of the Petitioners' position, requesting this Court to reverse the decision below and thereby limit the suffering HB 5 is causing across our state.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Floridians for Reproductive Freedom's Amicus Curiae Brief in Support of Petitioners has been furnished by electronic mail to all counsel of record by filing the document with service through the e-Service system, Fla. R. Jud. Admin. 2.516(b)(1), this 9th day of March, 2023.

/s/ Edward Soto

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable form and font requirements under Florida Rule of Appellate Procedure 9.045. I further certify that this brief complies with the word limit for computer-generated briefs stated in Florida Rule of Appellate Procedure 9.210(a)(2)(A).

/s/ Edward Soto