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

GAINESVILLE WOMAN CARE LLC, et al.,

Plaintiffs,

v. **CASE NO. 37 2015 CA 001323**

STATE OF FLORIDA, et al.,

Defendants.
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DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN EMERGENCY TEMPORARY INJUNCTION AND/OR A TEMPORARY INJUNCTION

Defendants—the State of Florida; the Florida Department of Health; John H. Armstrong, M.D., in his official capacity as Secretary of Health for the State of Florida; the Florida Board of Medicine; James Orr, M.D., in his official capacity as Chair of the Florida Board of Medicine; the Florida Board of Osteopathic Medicine; Anna Hayden, D.O., in her official capacity as Chair of the Florida Board of Osteopathic Medicine; the Florida Agency for Health Care Administration; and Elizabeth Dudek, in her official capacity as Secretary of the Florida Agency for Health Care Administration—hereby jointly respond in opposition to Plaintiffs' Motion for an Emergency Temporary Injunction and/or a Temporary Injunction ("Motion").

Contrary to Plaintiffs' contentions, this case—like the new legislation they are challenging—is not about preventing pregnant women from obtaining abortions, or about curtailing their freedom of choice or their privacy. Rather, this case is about legislation crafted to improve existing law, the better to ensure that pregnant women are truly afforded a fair (albeit brief) opportunity to reflect and to consider more fully whether to consent to having abortions.

The challenged legislation augments existing informed-consent provisions by requiring (with notable exceptions) that a 24-hour period elapse between the time when pertinent information is provided to a woman and the time when she gets an abortion. As shown below, the State has a strong and well-established interest in making sure that consents to abortions are genuinely both informed and voluntary. Plaintiffs' contention that the legislation's 24-hour provision is an unconstitutional intrusion into the privacy of pregnant women is misguided and incorrect, as are Plaintiffs' attempts to subject the legislation to the strict scrutiny standard. But regardless of the standard applied, the legislation passes muster, and brings Florida in line with the majority of States in requiring a 24-hour waiting period.

The Challenged Legislation and Summary of Arguments

It has long been recognized that the States, including Florida, wield the general police power to protect the health and safety of their People. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("[T]he structure and limitations of federalism … allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'") (citations omitted). Consistently, the Supreme Court of Florida has recognized that the police power of the State of Florida extends to protecting the lives, health, safety, morals, and welfare of the public. *Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 782 (Fla. 2004); *Newman v. Carson*, 280 So. 2d 426, 428 (Fla. 1973).

It is well settled that the States' police power legitimately extends to the provision of abortion services. In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court acknowledged, in the context of abortions, that a State has "important interests in safeguarding health, in maintaining medical standards, and in **protecting potential life**." *Id*. at 154 (emphasis added). *See also City of Akron v. Akron Ctr. for Reprod. Health, Inc*., 462 U.S. 416, 428 (1983)

(State has an "important and legitimate interest in protecting the potentiality of human life"); *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). In *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion), the United States Supreme Court further acknowledged that a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child[,]" *id*. at 846, and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning[,]" *id.* at 873 (quoted in *Gonzales v. Carhart*, 550 U.S. at 159).

Section 390.0111(3), Florida Statutes, provides that "[a] termination of pregnancy may not be performed or induced except with **the voluntary and informed written consent** of the pregnant woman or, in the case of a mental incompetent, **the voluntary and informed written consent** of her court-appointed guardian." (Emphasis added.) Section 390.0111(3) sets forth a number of requirements for the consent to be voluntary and informed, including, *inter alia*, that the pregnant woman be informed, by the physician who will perform the procedure or by her referring physician, of "[t]he nature and risks of undergoing or not undergoing the proposed-procedure…." § 390.0111(3)(a)1.a., Fla. Stat. Thus, the statute acts to promote the State's legitimate interests by seeking to ensure that a pregnant woman, faced with a decision as to whether or not to undergo an abortion, clearly gives consent to an abortion that is both voluntary and informed.

Subsection (a) of section 390.0111(3) provides for an exception to the consent requirement in the event of a medical emergency. Subsection (b) sets forth requirements to be met by a physician in a medical emergency in which informed consent cannot be obtained,

including obtaining a corroborative medical opinion attesting that a medical necessity for emergency procedures exists and that continuation of the pregnancy would threaten the life of the pregnant woman; or—if a second physician is unavailable—documenting reasons for the medical necessity to proceed with the abortion. Subsection (c) provides that violation of subsection 390.0111(3) constitutes grounds for disciplinary action against the physician, but also that "[s]ubstantial compliance or a reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any action brought under this paragraph."

None of these provisions of section 390.0111(3) is challenged in this action.

On June 10, 2015, the Governor of Florida signed into law House Bill No. 633, section 1 of which amends section 390.0111(3), which pertains to required consents for abortions, in two important respects. First, while the informational disclosures required for voluntary and informed consent remain unchanged, subsection (3)(a)1. is modified to require that the information be disclosed by the physician who is to perform the abortion or by the referring physician "while physically present in the same room, and at least 24 hours before the procedure…." Second, subsection (3)(a)1. is modified by the addition of the following language:

> The physician may provide the information required in this subparagraph within 24 hours before the procedure if requested by the woman at the time she schedules or arrives for her appointment to obtain an abortion and if she presents to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking.

These provisions are to become effective as of July 1, 2015.

Notably, the clear intent of these amendments is to enhance a pregnant woman's voluntary and informed consent, by providing for a brief, 24-hour window of opportunity for her

to consider the important information which the statute requires must be furnished to her, so that she can duly consider the nature and consequences of the impending procedure.

This window of opportunity for reflection is, on its face, all the more reasonable considering that some women who have abortions come to regret that they rushed to have the procedure. As the United States Supreme Court acknowledged:

> Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure this phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

Gonzales v. Carhart, 550 U.S. at 159. The Florida Supreme Court has recognized the decision as one "fraught with specific physical, psychological, and economic implications that are uniquely personal for each woman." *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).

The 24-hour window also is facially reasonable when considering that physicians and abortion clinics may have a bias in favor of encouraging abortions, whether stemming from personal philosophy or financial incentive.

Plaintiffs—all abortion providers or their affiliates—filed this action the day after House Bill No. 633 was signed into law, to contest the validity of the 24-hour waiting time added to section 390.0111(3) by the legislation.[1] While their Complaint purports to state separate causes of action for violations of Article I, section 23 (Count I—Right to Privacy) and Article I, section

[1] Plaintiff Gainesville Woman Care LLC d/b/a Bread and Roses Women's Health Center ("Bread and Roses") is a for-profit entity that performs abortions. *See* Complaint ¶ 12, Ex. B-2 (Declaration of Kristin Davy, owner and director of Bread and Roses) at ¶ 13; *see also* Bread and Roses' website (http://www.breadroses.com/, last visited on 06-17-15). Plaintiff Medical Students for Choice, while technically a not-for-profit organization, is committed—as its website's mission statement conspicuously states—to "[c]reating tomorrow's abortion providers and pro-choice physicians" (http://www.msfc.org/, last visited on 06-17-15).

2 (Count II—Right to Equal Protection) of the Florida Constitution, the instant Motion pursues relief only as to the privacy claim. And while the Complaint fails to specify whether the constitutional challenge is facial or as-applied, it is patent that the challenge is facial: Plaintiffs seek a judicial determination that section 1 of House Bill 633 is "void and of no effect," and further seek temporary and final injunctive relief to enjoin Defendants from enforcing the provisions of the amendment. Complaint at 17-18.

As shown below, by their Motion Plaintiffs seek the extraordinary relief of a temporary injunction to prevent the new legislation from taking effect on July 1, 2015. Thus, Plaintiffs seek to enlist the Court in frustrating the intent of the duly-elected representatives of the People of Florida, who have a strong and legitimate interest in ensuring that pregnant women, before undergoing abortions, in fact be fully informed—both through being furnished with pertinent medical information by their healthcare providers, and through having a 24-hour waiting period to consider that information so that any consent they give will truly be both voluntary and informed.

Plaintiffs' claims are legally and factually infirm. As a matter of settled Florida law, Plaintiffs err in seeking to have their claims assessed under the strict scrutiny standard, because the challenged informed-consent requirement does not constitute a substantial invasion of a pregnant woman's privacy. That no substantial invasion arises from a 24-hour waiting time requirement is underscored time and again by judicial decisions of courts outside Florida, including a decision by the United States Supreme Court, rejecting constitutional challenges to comparable requirements in other States. (The majority of States have, by statute, also imposed

24-hour waiting time requirements in advance of abortions.[2]) In rejecting the same sorts of factual claims as the instant Plaintiffs make, those courts further have rejected the same sorts of evidentiary showings as Plaintiffs offer, concluding that such showings are inadequate to warrant entry of relief.

Plaintiffs' failure is complete: they simply cannot meet the essential requirements—all of which must be satisfied—to qualify for a temporary injunction. They are unlikely to prevail on the merits, regardless of the legal standard applied; they cannot demonstrate irreparable injury; and they cannot overcome the strong public interest in favor of a 24-hour waiting period.

Argument

In moving for the extraordinary remedy of a temporary injunction, the movant bears a correspondingly heavy burden:

> The issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly, [and] which must be based upon a showing of the following criteria: (1) The likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of public interest.

Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (quoting *Shands at Lake Shore, Inc. v. Ferrero*, 898 So. 2d 1037, 1038-39 (Fla. 1st DCA 2005)). *Accord City of Jacksonville v. Naegele Outdoor Adver. Co.*, 634 So. 2d 750 (Fla. 1st DCA 1994). As a matter of law, courts must exercise great caution and be "sparing" in entering temporary

[2] *See*: Ala. Code § 26-23a-4; Ariz. Rev. Stat. §36-2153; Ark. Code § 20-16-903; Ga. Code § 31-9A-3; Idaho Code § 18-609(4); Kan. Rev. Stat. § 65-6709(a); Ky. Rev. Stat § 311.725(1)(a); La. Rev. Stat. § 40:1299.35.6(B)(3); Mich. Comp. Laws § 333.17015(3); Minn. Stat. § 145.4242(a)(1); Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327(1); N.C. Gen. Stat. § 90-21.82; N.D. Code § 14-02.1-03, Ohio Rev. Code § 2317.56(B); Okla. Stat. § 1-738.2(B); 18 Pa. Cons. Stat. § 3205(a)(1); S.C. Code § 44-41-330(C); S.D. Codified Laws § 34-23A.10.1; Tenn. Code § 39-15-202(d)(1); Tex. Health & Safety Code § 171.012(a)(4); Utah Code § 76-7-305(2)(a); Va. Code § 18.2-76(B); W. Va. Code § 16-2I-2(b); Wis. Code § 253.10(3)(c).

injunctions. *Thompson v. Planning Comm'n of City of Jacksonville*, 464 So. 2d 1231, 1236 (Fla. 1st DCA 1985); *see also Johnson v. Killian*, 27 So. 2d 345, 346 (Fla. 1946). Before a court properly can issue a temporary injunction, the movant must demonstrate that all four factors—each an essential element—have been met; the failure to satisfy any one is fatal to obtaining that relief. *See, e.g., De Leon v. Aerochago, S.A.*, 593 So. 2d 558, 559 (Fla. 3d DCA 1992).

Here, Plaintiffs clearly fail to satisfy at least three of the four essential elements, necessitating denial of their Motion.

I. PLAINTIFFS ARE NOT SUBSTANTIALLY LIKELY TO PREVAIL ON THE MERITS.

In seeking a temporary injunction, Plaintiffs bear the burden of demonstrating that they are substantially likely to prevail on the merits. *See Colucci v. Kar Kare Auto. Group, Inc.*, 918 So. 2d 431, 440 (Fla. 4th DCA 2006) ("To prevail on an action for temporary injunctive relief, a party must demonstrate a substantial likelihood of prevailing on the merits."); *Mid-Florida At Eustis, Inc. v. Griffin*, 521 So. 2d 357 (Fla. 5th DCA 1988). A temporary injunction can never "be entered in the absence of a substantial likelihood that the party seeking the injunction is entitled to relief on the merits. Such a likelihood is required under Florida law." *Naegele Outer Adver.*, 634 So. 2d at 753. Plaintiffs concede that they must demonstrate a substantial likelihood of success on the merits. Motion at 9.

As a threshold matter, because this action seeks a declaration that a duly-enacted statutory provision is unconstitutional, the question of whether Plaintiffs satisfy this element must be assessed under a rubric that is highly deferential to the State. First, statutes enacted by the Legislature and signed into law by the Governor enjoy a presumption of validity. *State v. State Bd. of Educ. of Fla.*, 467 So. 2d 294, 297 (Fla. 1985); *Bunnell v. State*, 453 So. 2d 808, 808

(Fla. 1984). Indeed, "[t]o overcome the presumption, the invalidity must appear beyond reasonable doubt…." *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004) (quoting *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184 (Fla. 1957). That presumption of validity fully applies when a statute's constitutionality is challenged. *State v. Bussey*, 463 So. 2d 1141, 1144 (Fla. 1985); *Felts v. State*, 537 So. 2d 995, 1000 (Fla. 1st DCA 1988). Second, "if the legal rights of the parties are in dispute, a temporary injunction should not be issued." *Colucci*, 918 So. 2d at 440 (citing *Storer Comm'ns, Inc. v. State, Dep't of Legal Affairs*, 591 So. 2d 238, 240 (Fla. 4th DCA 1991)). Thus, any doubt as to whether the challenged amendment is constitutional must be resolved **against** entering a temporary injunction.

Moreover, because the constitutional challenge is facial, under Florida law Plaintiffs must show that **"no set of circumstances exists under which the statute would be valid**." *Fla. Dep't of Rev. v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005) (emphasis added).

Plaintiffs contend: that the challenged amendment, because it deals with abortions, must *ipso facto* be assessed under the standard of strict scrutiny; that, under that standard, the State must show that the amendment offers the least restrictive means of achieving the desired result; and that the standard cannot be met, justifying the enjoining of the amendment *pendente lite*. Thus, in effect, Plaintiffs seek to foist their heavy burden for obtaining injunctive relief onto the State. Plaintiffs are fundamentally wrong, both as to the applicable standard, and as to whether the amendment would satisfy the strict scrutiny test were it to be applied. Either way, Plaintiffs fail to show the requisite substantial likelihood of prevailing on the merits.

A. <u>The Strict Scrutiny Standard Does Not Apply</u>.

Plaintiffs insist that the 24-hour waiting period is unconstitutional unless it survives strict scrutiny—that is, the law must further a compelling interest through the least intrusive means.

Specifically, they contend that "strict scrutiny is required whenever the Legislature singles out abortion in imposing a burden on access to health care." Motion at 14. It is not difficult to see why they argue for such a high standard: every time a similar waiting period has been challenged under a lesser standard, that challenge has failed. *Casey*, 505 U.S. at 855-56 (24-hour wait period for abortion is constitutional and not undue burden); *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006); *A Woman's Choice–E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999) (upholding 24-hour waiting period and explaining that any resulting hardships do not amount to unconstitutional burden); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky. 2000); *Utah Women's Clinic v. Leavitt*, 844 F. Supp. 1482, 1494 (D. Utah 1994) (holding 24-four hour waiting period that required two trips to abortion facility not an undue burden on right to abortion), *rev'd in part and dismissing appeal in part*, 75 F.3d 564 (10th Cir. 1995); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409 (D.S.D. 1994); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994); *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (holding abortion law requiring 24-hour wait period is constitutional and vacating trial court order preliminarily enjoining enforcement); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091, 1105 (D. Ariz. 2009); *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973 (Ind. 2005) (upholding 18-hour waiting period against facial constitutional challenge); *Planned Parenthood of St. Louis Reg. v. Nixon*, 185 S.W.3d 685, 691 (Mo. 2006) (en banc) (upholding 24-hour waiting period against constitutional privacy challenge); *Mahaffey v. Attorney General*, 564 N.W.2d 104 (Mich. Ct. App. 1997), *leave to appeal den'd*, 616 N.W.2d 168 (Mich. 1998); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 655 (Miss. 1998) (24-hour waiting period is not a substantial obstacle to a woman seeking abortion of a nonviable fetus); *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d

684 (Ohio Ct. App. 1993) (reversing trial court's "erroneous conclusion" that statute requiring 24-hour abortion waiting period was unconstitutional).[3]

Contrary to Plaintiffs' argument, Florida law does not have a blanket strict scrutiny rule for abortion. The very cases on which Plaintiffs rely, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), and *North Fla. Women's Health & Counseling Servs., Inc.*, 866 So. 2d 612 (Fla. 2003), dispel this notion. Under both *T.W.* and *North Florida*, strict scrutiny is limited only to those laws, such as the parental notification requirements examined in the two cases, that significantly burden the right to abortion. The State's position here is supported by the Florida Supreme Court's decision approving the very informed consent statute which the challenged amendment modifies. *See State v. Presidential Women's Ctr.*, 937 So. 2d 114 (Fla. 2006).

The Florida Supreme Court first considered the right to abortion in *T.W.* That case involved a minor seeking to avoid a statutory requirement that she notify and obtain the consent of her parents before obtaining an abortion. 551 So. 2d at 1189. Although the opinion contains some unqualified language that might suggest that any regulation of abortion must be narrowly tailored to advance a compelling state interest, *e.g.*, *id.* at 1193 ("The State must prove that the statute furthers a compelling state interest through the least intrusive means."), a careful reading shows that *T.W.* distinguishes between **significant** burdens, which must satisfy this strict scrutiny, and **insignificant** burdens, which need not. This is made clear in the Court's discussion

[3] Delaware's waiting period was held unconstitutional under the undue burden standard because, unlike the law at issue here, Delaware's statute contained no exception to protect the health of the mother. *Planned Parenthood of Del. v. Brady*, 250 F. Supp. 2d 405, 410 (D. Del. 2003). Contrary to Plaintiffs' claim, subsection 390.0111(3)(a)'s 24-hour waiting time provision contains an exception for "medical emergencies," and subsection 390.0111(3)(c) affords defenses for physicians who reasonably believe that complying with the informed-consent requirements would threaten the life **or health** of a patient, as more fully discussed *supra*.

of the consequence of there being no compelling interest in protecting maternal health before the end of the first trimester. That consequence is not a flat prohibition against legislation addressing abortion-related matters in any way whatsoever, including informed consent requirements. Rather, the opinion states that "prior to the end of the first trimester, the abortion decision ... may not be **significantly restricted** by the state." *Id.* at 1193 (emphasis added). By contrast, "[i]nsignificant burdens during either period"—that is, before or after the end of the first trimester—are permitted when they "substantially further important state interests." *Id.*[4] The Court then analyzed the parental consent statute under the compelling interest standard only after recognizing that the statute caused a "**substantial** invasion of a pregnant female's privacy." *Id.* at 1194 (emphasis added).

Significantly, the Florida Supreme Court's evaluation of the consent statute's successor 14 years later in *North Florida* confirms that *T.W.* only required strict scrutiny for significant burdens. Specifically, *North Florida* recognized *T.W.* as holding that "if a legislative act imposes a **significant restriction** on a woman's (or minor's) right to seek an abortion, the act must further a compelling state interest through the least restrictive means." 866 So. 2d at 621 (emphasis added). Thus, the questions for the Court were: "(1) Does the Parental Notice Act impose a **significant restriction** on a minor's right of privacy? And **if so**, (2) does the Act further a compelling State interest through the least intrusive means?" *Id.* at 631 (emphasis added). If not, however, there would be no need to reach the second question's strict scrutiny analysis.[5] The rule in *T.W.* and *Northern Florida* is the same. The State assumes the burden of

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[4] Although Plaintiffs quote this language, Motion at 12, they totally ignore its significance.

[5] *North Florida*'s rejection of the undue burden standard (*see* Motion at 13-14) must be understood in the context of that opinion's clear recognition that *T.W.* requires a compelling

proving a least restrictive means of furthering a compelling interest only if the burden on the abortion right is significant.

The Florida Supreme Court's approval, just three years after *North Florida*, of the existing informed consent statute, § 390.0111(3), Fla. Stat., with no reference whatever to strict scrutiny, further indicates that not every abortion regulation must meet that standard. *See Presidential Women's Ctr.*, 937 So. 2d 114. Unquestionably, the statute "single[d] out" abortion, as Plaintiffs assert (*see* Motion at 14). It set forth the rules to be followed to establish informed consent prior to a "termination of pregnancy." *Presidential Women's Ctr.*, 937 So. 2d at 115 n.1 (quoting § 390.011(3), Fla. Stat.). The statute withstood a state-law privacy challenge because it was "comparable" to informed consent requirements for other medical procedures, as it required doctors to provide information to women about the relevant medical risks of the abortion procedure and the risks of carrying the pregnancy to term. *Id.* at 118. Significanrtly, the Court did not say the statute was identical to informed-consent statutes for other medical procedures (and indeed it was not), or that it would have to be to pass muster. The statute also required the physician to inform the woman of the "probable gestational age of the fetus at the time the termination of the pregnancy is to be formed." *Id.* at 115 n.1 (quoting § 390.0111(3)(a)(1)(b), Fla. Stat.).[6] Such a requirement clearly is abortion-specific. Moreover, it relates only to the developmental progress of the fetus, not the physical health of the mother. Yet the Court

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interest only where the burden imposed is significant, and cannot fairly be read to subject insignificant burdens, such as brief waiting periods, to the strict scrutiny standard.

[6] The current version of § 390.0111(3) contains an additional abortion-specific requirement. As part of the informed-consent process, the physician to perform an ultrasound and must "offer the woman the opportunity to view the live ultrasound images and hear an explanation of them." § 390.0111(3)(a)(1)(b)(I), Fla. Stat. This requirement has not been challenged in reported case opinions, nor is it challenged here.

concluded that the statute "may have no constitutional prohibition or generate the need for an analysis on the issue of constitutional privacy." *Id.* at 118. Indeed, nowhere does *Presidential Women's Center* mention either strict scrutiny or compelling interests, notwithstanding that the district court below, whose opinion was reversed, had applied the compelling interest standard. *See State v. Presidential Women's Ctr.*, 884 So. 2d 526, 531 (Fla. 1st DCA 2004), *rev'd* 930 So. 2d 114 (Fla. 2006).

Finally, the voters' rejection of a proposed constitutional amendment, providing that the Florida Constitution offers no more privacy protection for abortion rights than does the federal Constitution, in no way supports imposition of the strict scrutiny standard in this case. No case authority exists for any such notion. Nor does logic support it. As of the time of that vote, neither the Florida Supreme Court nor the United States Supreme Court had ever held that either Constitution required a compelling-interest standard to uphold every abortion-related law—indeed, the Florida Supreme Court had said the very opposite, and the United States Supreme Court had never subjected insignificant restrictions on abortion to that standard. It follows that the voters could not have intended a *per se* rule of strict scrutiny for any and all laws relating to abortion.[7] Plaintiffs' construction of voters' intent must be rejected as sheer speculation.

In sum, the Florida case law rejects Plaintiffs' proposition that any law affecting or singling out abortion necessarily requires a strict-scrutiny analysis. Only if the assailed provision "significantly restricts" the abortion right does the State bear the burden of showing that the provision is the least restrictive means of furthering a compelling governmental interest. On its

[7] Furthermore, voters opposing the amendment may just as well have objected to its proposed ban on spending public funds for abortions, including paying for "health-benefits coverage that includes coverage of abortion." Fla. HJR 1179 (2011) at 1 (proposed art. I, § 28(a), Fla. Const.).

face, a 24-hour waiting period is not a significant restriction, and accordingly the strict-scrutiny standard does not apply.

B. A 24-hour Waiting Period Is Neither Unduly Burdensome Nor Unconstitutional.

As shown above, the United States Supreme Court and numerous state and federal courts have uniformly held that a one-day waiting period, to assure informed and considered consent before elective abortion, is neither unduly burdensome nor unconstitutional.

The right to have an abortion is not, and never has been held by any court to be, absolute. A 24-hour waiting period does not detract from the qualified right of a woman to have an abortion. *Casey*, 505 U.S. at 887 ("Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand."). Rather, a brief waiting period is a valid component of informed consent. *Id.* ("[T]he informed consent requirement facilitates the wise exercise of [the right to decide to terminate a pregnancy]"); *Pro-Choice Mississippi*, 716 So. 2d at 656 (24-hour delay simply "ensures that a woman has given thoughtful consideration in deciding whether to obtain an abortion"). "Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe* [*v. Wade*]." *Casey*, 505 U.S. at 873. In *Casey*, the United States Supreme Court made clear that a "State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion." *Id.* at 878. This, in fact, is the precise purpose of the amendment at issue here: a modest measure to ensure that a woman's choice to terminate her pregnancy is well-informed, well-considered, and completely voluntary.

"The doctrine of informed consent is well recognized, has a long history, and is grounded

in the common law" of Florida. *Presidential Women's Ctr.*, 937 So.2d at 116. The doctrine's very purpose is to provide patients with information to be considered by them, as well as a meaningful opportunity for them to contemplate that information, **before** undergoing abortion procedures. Florida's informed-consent abortion statute, which has been upheld against a state constitutional privacy challenge, requires physicians to inform patients of "[t]he nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a **knowing and willful** decision of whether to terminate a pregnancy," § 390.0111(3)(a)(1)(a), Fla. Stat. (2005) (emphasis added). The "knowing and willful decision" the State properly encourages necessarily implies some deliberation, which is not instantaneous upon hearing the risks and consequences of abortion. *See Casey*, 505 U.S. at 885 ("The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision."). By providing a brief period of time for deliberation on the critical information, the challenged amendment in no way directs the outcome of a woman's decision, much less prevents her from making a free choice. If anything, a deliberate, considered decision will more fully amount to a woman's confident election of her chosen course.

Contrary to what Plaintiffs would have the Court believe, the 24-hour provisions at issue are by no means extraordinary. As noted earlier, similar and identical laws are on the books in a majority of States, as valid exercises of their sovereign right to protect the general welfare.

The burdens Plaintiffs assert as to additional costs stemming from the 24-hour waiting period are both hypothetical and external factors, not obstacles created by the State. As a matter of law, the right of privacy in Florida's Constitution "does not create an entitlement to the

financial resources to avail oneself of the choice of abortion." *Renee B. v. Fl. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001). "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Harris v. McRae*, 448 U.S. 297, 314-17 (1980) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)); *see also Karlin*, 188 F.3d at 486 (upholding statute as constitutional, where although "mandatory waiting period would likely make abortions more expensive and difficult for some …. women to obtain, …. plaintiffs have failed to show that the effect of the waiting period would be to prevent a significant number of women from obtaining abortions"); *Clinic for Women*, 837 N.E.2d at 981 (no unconstitutional burden created by 18-hour abortion waiting period, for "[a] law or ordinance does not violate the Constitution solely because it directly or indirectly results in economic hardship").

Although the right of privacy protects a woman's qualified right to choose an abortion, it does not prohibit the State from enacting regulations simply because some women may face some difficult circumstances. As the Florida Supreme Court made clear in upholding the abortion regulations challenged in *Renee B.*, "Poverty may make it difficult for some women to obtain abortions. Nevertheless, the State has imposed no restriction on access to abortions that was not already present. Therefore we find that the rules in question do not violate the right of privacy in the Florida Constitution." 790 So. 2d at 1041. Indeed, "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure," and such regulations are nevertheless valid and constitutional. *Casey*, 505 U.S. at 874.

Apart from the courts' consistent rejection of Plaintiffs' cost argument, it is noteworthy

here that Plaintiff Bread and Roses, in its earlier-referenced website, invites patients who "need financial assistance to contact the clinic for more information" and further advises patients: "If you are having trouble coming up with the money to have an abortion procedure there are some organizations that may be able to help. Please call our office for more information." It is telling that Bread and Roses' owner admits that "approximately one-fourth of our patients receive funding from charitable organizations that help poor women pay for abortions." Motion, Exhibit B-2, Davy Declaration, at ¶ 13. This assertion suggests that three-fourths of Bread and Roses' patients may not need or qualify for financial assistance, and leaves open the prospect for poor patients to receive more assistance to defray any added costs from the 24-hour waiting time. The availability of financial assistance further undermines Plaintiffs' already-infirm position that the 24-hour waiting time is unconstitutional on the basis of added monetary cost. And it certainly cannot sustain the facial relief they seek here, for which it is well settled that they must demonstrate beyond a reasonable doubt that no set of circumstances exists under which the statute would be valid. *See Fla. Dep't of Rev.*, 918 So. 2d at 256; *Franklin*, 887 So. 2d at 1073.

The same reasoning leads to rejection of Plaintiffs' argument that the 24-hour waiting period is unlawful because some women may have to travel some distances to reach an abortion clinic and then repeat the trip. Every court that has considered this objection to a 24-hour waiting period has rejected it. Moreover, as with the poverty issue, the geographical location of abortion clinics, and pregnant women's choices as to where to live, are not matters for which the State is responsible, because the State has not caused them. But it also is noteworthy that Plaintiffs—and their declarants—conspicuously avoid mention of the challenged amendment's provision that would permit pregnant women to receive the pertinent information **from their referring physicians**, instead of the physicians who would perform the abortions, thereby

obviating the need for making second trips to the abortion clinics.

The very burdens of which Plaintiffs complain were considered in *Casey* and found to not be undue burdens implicating constitutionality. 505. U.S. at 887. Acknowledging that a 24-hour waiting period may increase costs and potentially delay abortions for some women, the Supreme Court concluded that any particular burdens did not amount to substantial obstacles. *Id.* at 886-87.

In addition to being uniformly rejected by courts assessing the constitutionality of 24-hour waiting times, Plaintiffs' asserted grounds for complaint also must fail because Plaintiffs' proffered evidence in their attached declarations is conclusory and lacking in meaningful statistical corroboration. The declarations are loaded with indefinite language such as "some" and "may," and attempt to draw unwarranted inferences from broader statistics as to the overall safety of abortions while making somewhat contrary claims that delays in abortions result in greater harm; yet the declarants cannot meaningfully connect any of these inferences to the challenged amendments at all, much less in a fashion that would warrant striking down the amendments. Nothing new, beyond what has been presented and argued to the many courts to consider the 24-hour time periods, is presented here by Plaintiffs and their chosen declarants. Courts faced with such conclusory and methodologically unsound evidence on the claimed adverse impact of 24-hour waiting periods have soundly rejected that evidence as insufficient to support relief. *See, e.g.: Eubanks*, 126 F. Supp. 2d at 457 ("The studies fail to answer the critical question: why do some women who are forced to wait twenty-four hours ultimately not have an abortion? Many factors affect a woman's decision to have an abortion. The waiting period law may be one of them. However, little reliable data shows what actually motivates decision making."); *Karlin*, 188 F.3d at 486-88 (methodological flaws led to finding that

plaintiffs failed to show that Mississippi's 24-hour waiting time caused the reported drop in abortions or that Wisconsin's 24-hour waiting time is likely to impose an undue burden on Wisconsin women); *Tucson Women's Ctr.*, 666 F. Supp. 2d at 1101-03 (despite declarations from medical experts and dozens of patients, evidence statistically insufficient to establish various factors, including number of women whose abortions are delayed by 24-hour waiting time who will face serious health threats as a result, impact of exception for medical emergencies, and effect of one-week delays in receiving abortions); *Cincinnati Women's Servs.*, 468 F.3d 361 at 372-74 (rejecting statistical arguments against 24-hour waiting period). If anything, Plaintiffs here offer even less, with no declarations from patients, and only one declaration from a physician. That the five instant declarants routinely fail even to mention that patients could receive the relevant information from their referring physicians is notable.

C. Temporary Injunctive Relief Would Be Improper Even Under the Strict Scrutiny Standard.

Even if the strict scrutiny standard were to be applied here, the State would meet that burden anyway. Plaintiffs cannot show, and do not even seriously attempt to show, that the State has no "legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[,]" *Planned Parenthood of Se. Pa.*, 505 U.S. at 846, or in establishing "a reasonable framework for a woman to make a decision that has profound and lasting meaning," *id*. at 873 (quoted in *Gonzales v. Carhart*, 550 U.S. at 159). As shown, the law is well settled that the State has every right to enact laws for such purposes. That includes laws to ensure that pregnant women contemplate these matters outside the presence of the physicians who stand ready to perform the abortion procedures.

The only remaining question is whether a 24-hour waiting time is the least-restrictive

reasonable time period to achieve this end. But the notion that the courts should second-guess the Legislature, and substitute their judgment—deciding instead that perhaps half a day, or perhaps one hour, would be more appropriate—finds no support in the law. Indeed, the obvious reasonableness of a 24-hour waiting period has been affirmed repeatedly by the many courts which have considered the question, as shown above.

The landscape of the case law makes clear that Plaintiffs cannot establish a substantial likelihood of success on the merits of their claim. That numerous other courts have considered abortion laws mandating 24-hour waiting periods to be constitutional further underscores that the burden on pregnant women alleged here by Plaintiffs is insignificant and is justified by the balance of important interests. As the United States Supreme Court decided in *Casey*, and as decided in many other State jurisdictions, a 24-hour waiting period before deciding to terminate a pregnancy does not impair the right to abortion and is not a significant burden. The same reasoning leads to the same conclusion in assessing Plaintiffs' claimed violation of the right of privacy under Florida's Constitution. Because Plaintiffs have failed to satisfy the high burden of demonstrating "a prima facie, clear legal right to the relief requested," their request for a temporary injunction must be denied. *See Naegele Outdoor Adver. Co. v. City of Jacksonville*, 659 So. 2d 1046, 1048 (Fla. 1995), as modified on reh'g (Aug. 24, 1995) (citation omitted).

II. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE INJURY.

As shown above, Plaintiffs have failed—as have the other plaintiffs who have challenged other States' comparable 24-hour waiting times—to provide reliable evidence to show the likely impact of the new legislation on pregnant women, much less that any such impact would be harmful to them, much less still that it would be substantial enough to implicate their constitutional privacy rights so as to warrant enjoining the legislation. The plain intent of the

legislation is to ensure that pregnant women get a fair, albeit short (only one day), opportunity to contemplate a serious decision—**not** to prevent them from having abortions if they so choose. The notion that pregnant women could actually **benefit** from the brief delay seems not to have occurred to Plaintiffs and their declarants. If it did occur to them, they give no hint to the Court that it did, and they offer no meaningful or reliable statistics on that sort of salutary impact, either.

Plaintiffs' failure to carry their heavy burden to show irreparable injury must, as a matter of law, result in denial of the Motion.

III. THE PUBLIC INTEREST STRONGLY FAVORS THE STATE'S POSITION.

Plaintiffs basically ignore the State's strong interests in protecting fetuses and pregnant women—and the State's fundamental police power to act on those interests—in pitching their arguments for enjoining the enforcement of a statute. Likewise, as noted, Plaintiffs ignore the prospects for improving pregnant women's decision-making as a result of the 24-hour waiting period. Instead, Plaintiffs embrace a nonexistent policy that would disavow any meaningful role for the State with respect to the entire matter of abortions, because—as Plaintiffs see it—anything that might result in significant numbers of pregnant women changing their minds about having abortions would amount to an unconstitutional intrusion into the women's privacy. But the State does have a legitimate interest in the protection of the unborn, in the welfare of pregnant women, and in the regulation of licensed physicians and clinics, all on the People's behalf as determined by their elected legislators.

The State has not unconstitutionally overplayed its interests in enacting the 24-hour waiting period, and Plaintiffs have failed to meet their burden of proving otherwise. For this reason alone, as a matter of law, the Motion should be denied.

Conclusion

For all the reasons stated above, Plaintiffs' Motion should be denied.

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Certificate of Service

I hereby certify that, on this 19th day of June, 2015, a copy of the foregoing was filed electronically with the Clerk of the Court through the Florida Courts eFiling Portal, and thereby was served via email on counsel of record.

/s/ Blaine H. Winship
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