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

GAINESVILLE WOMAN CARE, LLC, et al.,

Plaintiffs,

Case No. 2015 CA 001323

v.

STATE OF FLORIDA, et al.,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR AN EMERGENCY TEMPORARY INJUNCTION AND/OR A TEMPORARY INJUNCTION

In their initial Motion, Plaintiffs demonstrated that they were entitled to injunctive relief in this case to preserve the status quo, showing a substantial likelihood of success on the merits, irreparable harm, the lack of a remedy at law, and that an injunction is in the public interest. Rather than grapple with these factors, Defendants' Opposition focuses almost entirely on cases from other jurisdictions that, lacking Florida's strong constitutional commitment to privacy, apply a lesser standard to judge the constitutionality of abortion restrictions. These cases are simply not applicable here: Plaintiffs are substantially likely to succeed on the merits, handily meet the other three factors, and are entitled to a Temporary Injunction.

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Act Is Subject to Strict Scrutiny

Perhaps understanding that Chapter 2015-118, § 1, Laws of Florida ("the Act") cannot survive strict scrutiny, the state spends the lion's share of its brief arguing that, contrary to the Florida Supreme Court's decisions interpreting Florida's strong constitutional protection of

privacy, strict scrutiny does not apply to the present case. These arguments fail: The Florida Constitution provides the strongest possible protection of the individual right to privacy, and the challenged law, by imposing a mandatory delay and an additional-trip requirement on women seeking an abortion, represents a significant incursion on that right to privacy. It is therefore subject to strict scrutiny. No doubt aware that the Act cannot survive that stringent review, Defendants conflate Florida's strict scrutiny standard with the less protective federal "undue burden" standard adopted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In *North Florida Women's Health and Counseling Services, Inc. v. Florida*, 866 So. 2d 612, 626 (Fla. 2003), the Florida Supreme Court emphatically rejected that lesser standard, and Defendants' attempts at obfuscation cannot save the Act.

1. *The Act Significantly Restricts a Woman's Fundamental Right to Privacy and Is Therefore Subject to Strict Scrutiny*

Because the Act's mandatory delay and additional-trip requirements represent significant restrictions on a woman's right to make a personal decision about her own medical care, it is, as a threshold matter, subject to strict scrutiny. Attempting to avoid strict scrutiny, Defendants assert that the Act will not impose "significant restrictions," but these arguments fail.

Under Florida law, privacy is "a fundamental right of self-determination subject only to the state's compelling and overriding interest." *In re Guardianship of Browning*, 568 So. 2d 4, 9-10 (Fla. 1990). "[P]rivacy has been defined as . . . a 'physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by government or by society at large.'" *Id.* at 10 (citation omitted). "An integral component of self-determination is the right to make choices pertaining to one's health . . . ." *Id.* The Act significantly intrudes upon this zone of privacy: By forcing a woman who has already made a decision about her own medical care to wait to effectuate that decision, the Act both

communicates and enforces the Legislature's judgment that she cannot make a considered decision, worthy of respect, without monitoring, oversight, and instruction from the state. That is the inescapable meaning of the state's repeated patronizing references to the need for a woman "to reflect and to consider more fully" the decision she has already made to end a pregnancy. Defs.' Resp. at 1. That alone is a significant restriction, but the Act goes further: It forces her to make an additional, unnecessary trip to her health care provider[1]—itself a significant restriction.[2] As explained in detail in Plaintiffs' Motion and in the supporting declarations, this requirement of an additional trip presents a serious difficulty for those women who are low-income, live under the threat of domestic abuse, or must travel a long distance to their nearest clinic. Defendants' repeated claims that a twenty-four-hour waiting period is "reasonable" ignore the

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[1] In contrast to this requirement of the Act, some states impose a delay, but do not require the additional, in-person visit to the clinic because the woman can receive the mandated information by phone, online, or by mail. *See* Pls.' Mot. at 22 & n.9. Of the twenty-six mandatory delay laws Defendants cite in their brief, Defs.' Resp. at 7 n.2, only ten require the woman to make an additional in-person visit to the clinic. *See* Ariz. Rev. Stat. §36-2153; La. Rev. Stat. § 40:1299.35.6(B)(3); Miss. Code § 41-41-33; Mo. Stat. § 188.027; Ohio Rev. Code § 2317.56(B); S.D. Codified Laws § 34- 23A.10.1; Tex. Health & Safety Code § 171.012(a)(4); Utah Code § 76-7-305(2)(a); Va. Code § 18.2-76(B); Wis. Code § 253.10(3)(c). Two other states have enacted mandatory delay laws that will require an in-person visit, which have not gone into effect yet. *See* 2015 Ark. Acts 1086, § 2 (effective July 22, 2015); 2015 Tenn. Pub. Acts. ch. 473, § 1 (effective July 1, 2015). Indiana also has a mandatory delay and additional trip provision not cited by the defendants. *See* Ind. Code § 16-34-2-1.1. Thus, contrary to the defendants' representations, the Act is well outside the mainstream and would place Florida in the small minority of only thirteen states that impose this burden.

[2] Defendants suggest that a woman may avoid the extra trip to a clinic far from her home because the Act allows a "referring physician" to perform the mandated consent procedures. Defs.' Resp. at 18-19. But it will be difficult for abortion providers to verify whether the required informed consent information has already been provided to a patient, with significant penalties flowing from a mistake. Additionally, the Act requires that the ultrasound component of the consent procedures be performed by "the physician who is to perform the abortion or by" someone "working in conjunction with" him or her. § 390.0111, Fla. Stat. (3)(a)(1)(b)(i). So no physician who is not already "working in conjunction" with the abortion provider may perform the informed consent. The utility of the "referring physician" provision is thus illusory. *See* Rebuttal Decl. of Kristin Davy, attached hereto as Ex. B, ¶ 10 (June 22, 2015).

serious threats that the Act poses for these vulnerable populations. The Act singles out abortion patients for these significant restrictions, and thus triggers strict scrutiny.[3]

Accordingly, courts using the same framework as Florida[4] have held that mandatory delay requirements significantly restrict the fundamental right to privacy and must survive strict scrutiny. *See Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985), *aff'd*, 484 U.S. 171 (1987) ("a waiting period places a direct and substantial burden on women who seek to obtain an abortion"); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1015 (1st Cir. 1981) (twenty-four-hour delay "constitutes a substantial state-created burden on a woman's fundamental right"); *Charles v. Carey*, 627 F.2d 772, 785 (7th Cir. 1980) ("[t]he 24 hour mandatory waiting period imposes burdens" and must be justified by strict scrutiny); *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 552 F. Supp. 791, 797-98 (E.D. Pa. 1982) (twenty-four-hour delay "is a legally significant burden on a woman's right to seek an abortion"); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1146 (D.R.I. 1982) ("Because the 24-hour period has more than a de minimis effect on a woman's abortion

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[3] The defendants' reliance on *State v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006), does nothing to change the outcome of this threshold question. *See* Defs.' Resp. at 13-14. The law at issue in that case imposed no *significant* restrictions on abortion that were not imposed on other procedures. *Presidential Women's Ctr.*, 937 So. at 118-20. Instead, once the state had agreed to a limiting construction, the informed consent requirements in that case were "analogous" to those for other medical procedures, and therefore did not implicate the right of privacy. *Id.* at 118. In contrast, the Act challenged here singles out abortion patients for unique burdens, and is without analogue in Florida law. *See* Pls.' Mot. at 18-19.

[4] This includes federal courts applying the strict scrutiny standard that pertained under the federal Constitution in *Roe v. Wade*, 410 U.S. 113 (1973), before the U.S. Supreme Court lowered federal protection to the "undue burden" standard in *Casey*. Indeed, in its reasoning on "significant restrictions" in *In re T.W.*, 551 So. 2d at 1193, the Florida Supreme Court relied on the pre-*Casey* decision in *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, which *invalidated* a twenty-four-hour waiting period. 462 U.S. 416, 430, 449-50 (1983), *overruled in part by Casey*, 505 U.S. at 838.

decision, the state must demonstrate a compelling interest to justify this substantial interference."); *Leigh v. Olson*, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980) (the "waiting period . . . is a direct and substantial burden on the exercise of the woman's fundamental constitutional right to terminate her pregnancy"); *Margaret S. v. Edwards*, 488 F. Supp. 181, 213 (E.D. La. 1980) ("Unlike the requirement of informed consent, the . . . waiting period is a direct obstacle to having an abortion" and thus triggers strict scrutiny); *Women's Cmty. Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 550 (D. Me. 1979) ("The burden imposed on the woman's abortion decision [by a waiting period] is legally significant." (internal quotation marks omitted)); *Mahaffey v. Attorney Gen. of Michigan*, No. 94-406793 AZ, 1994 WL 394970, at *7 (Mich. Cir. Ct. July 15, 1994) ("[T]he 24-hour waiting period provision is unconstitutional. . . . [T]his provision would inhibit, impede, or infringe upon the exercise of a woman's fundamental right to have an abortion."), *rev'd in part on other grounds*, 564 N.W.2d 104 (Mich. Ct. App. 1997); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 24 (Tenn. 2000) ("[T]he two-day waiting period has the effect of placing 'a substantial obstacle in the path of a woman seeking an abortion.'" (citation omitted)). The Act must likewise satisfy strict scrutiny.

Defendants wrongly suggest that only those laws that *prevent* the exercise of a constitutional right rise to the level of a significant restriction triggering strict scrutiny. *See, e.g.*, Defs.' Resp. at 2, 16-17, 22. That is wrong: Harms short of prevention are cognizable as significant restrictions of constitutional rights under Florida law. For example, in *In re T.W.* and *North Florida*, there was no suggestion by the court that the parental involvement provisions would generally prevent minor women from obtaining abortion care, nor any suggestion that such a finding was necessary to the application of strict scrutiny. *See In re T.W.*, 551 So. 2d 1186; *North Florida*, 866 So. 2d 612. Other Florida cases likewise make clear that strict scrutiny

applies to laws that "*impair*[] the exercise" of a constitutional right, even if they do not prevent its exercise altogether. *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004) (emphasis added); *see also id.* (under strict scrutiny, striking down juvenile curfew ordinances as violation of right to privacy, although ordinances did not wholly prevent juveniles from being outside during evening hours); *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) ("to find that a right has been violated it is not necessary for the statute to produce a procedural hurdle which is *absolutely* impossible to surmount"). The Act is thus a significant restriction on the privacy rights of all women whose medical decision-making it burdens.[5]

2. Lesser Federal Standards are Irrelevant to Florida's Unique, Strong Privacy Protections

Unable to prevail under the foregoing legal standards governing when a restriction is "significant" as articulated in *In Re T.W.*, Defendants attempt to blur the distinction between the strict scrutiny standard that applies in Florida and other states that protect abortion as a fundamental right and the lesser, federal "undue burden" standard articulated in *Casey*, 505 U.S. at 874. But the distinction is stark, and Defendants' attempt fails.

In 1973, in *Roe v. Wade*, the U.S. Supreme Court held that under the federal Constitution's implicit privacy right, abortion regulations were subject to strict scrutiny. 410 U.S. 113 (1973). In 1980, the people of Florida voted to explicitly protect their right to privacy

[5] While mostly silent on the vulnerable populations of women for whom the Act would impose particular, additional burdens, *see* Pls.' Mot. at 6-7, Defendants do argue that this Court should ignore the impact of the Act's restrictions on poor women, *see* Defs.' Resp. at 17-19. But the cases Defendants cite for this point hold only that there is no right to public funding for abortions, because a poor woman's inability to afford an abortion was not the government's duty to remedy. They also make clear, contrary to Defendants' argument, that this principle is not applicable where, as here, a law imposes state-created burdens. *Harris v. McRae*, 448 U.S. 297, 317 (1980) (cited in Defs.' Resp. at 16-17); *Renee B. v. Fl. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001).

by enacting article I, section 23 of the Florida Constitution. When the Florida Supreme Court was called upon to determine what protection this amendment extended to the right to abortion, it held that the people had intended to protect that right as fundamental, and to apply the strict scrutiny framework that *Roe* had laid out (including *Roe*'s holding that any interest in a woman's health becomes compelling only at the end of the first trimester). *See In re T.W.*, 551 So. 2d at 1193.[6]

Then in 1992, in *Casey*, 505 U.S. at 874, the U.S. Supreme Court rolled back the strict scrutiny test in favor of the "undue burden" test. Following that change in federal law, in the *North Florida* case, the state asked the Florida Supreme Court to overturn *its* holding in *In Re T.W.* to adopt the undue burden test. This the Florida Supreme Court refused to do:

> In order to adopt the "undue burden" standard, as the State urges, we would have to abandon an extensive body of clear and settled Florida precedent in favor of an ambiguous federal standard. Most important, however, we would have to forsake the will of the people. If Floridians had been satisfied with the degree of protection afforded by the federal right of privacy, they never would have adopted their own freestanding Right of Privacy Clause. In adopting the privacy amendment, Floridians deliberately opted for substantially more protection than the federal charter provides.

North Florida, 866 So. 2d at 635-36. Following this holding, the Legislature attempted to roll back Florida's independent privacy protections by referring a constitutional amendment to the voters in 2012 that would have substituted the undue burden standard for the strict scrutiny standard. The voters firmly rejected the Legislature's invitation, reasserting their interest in protecting all Floridians' privacy rights as strongly as possible. *See Initiative Information: Prohibition on Public Funding of Abortions; Construction of Abortion Rights,* Fla. Dep't of St.,

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[6] Thus, although Defendants emphasize the need to exercise restraint in enjoining enactments by the "duly-elected representatives of the People," *see* Defs.' Resp. at 6, they nowhere admit that it is the *people of Florida themselves who directly enacted the Privacy Clause.*

Division of Elections, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82 (last visited June 6, 2015).[7]

Against this clear backdrop and controlling precedent, the defendants try mightily to make the federal standard hold sway in Florida. This attempt fails. As an initial matter, *every* case they cite that upheld a mandatory delay used a less protective standard than strict scrutiny; the vast majority apply the undue burden standard. By contrast, courts applying the strict scrutiny test (which is the test Florida applies) have consistently struck down waiting periods.[8] Indeed, of the four other states with constitutional privacy protections analogous to Florida's—Alaska, California, Hawaii, and Montana[9]—none has a mandatory delay. *See* Guttmacher Institute, *State Polices in Brief: Counseling and Waiting Periods for Abortion* (June 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. In fact, when a twenty-four-hour waiting period was enacted by the Montana Legislature in 1995, the state courts struck it down under that state's constitutional protection of privacy. *See Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *9 (Mont. Dist. Ct. Mar. 12, 1999) (attached as Ex. A).

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[7] Defendants argue that it is inappropriate to rely on this history in determining what judicial standards should apply. *See* Defs.' Resp. at 14. But numerous courts have in fact relied on exactly this kind of history. *See, e.g.*, *Sanford v. Garamendi*, 284 Cal. Rptr. 897, 905 (Cal. Ct. App. 1991) (stating it was "not insignificant" that voters rejected proposition that would have expressly repealed financial code section); *State ex rel. King v. Lyons*, 248 P.3d 878, 883, 891-93 (N.M. 2011) (regarding "as significant" rejection of constitutional amendment by "popular vote"); *see also Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001) ("legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction"). Regardless, even if this Court chooses not to consider the amendment's rejection, *North Florida* remains controlling law that the undue burden test does not apply.

[8] *See* cases cited in Pls.' Mot. at 23 n.10.

[9] *See Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996); *see also* Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 Rutgers L.J. 971, 974-75 (2006); Alaska Const. art. 1, § 22; Cal. Const. art. 1, § 1; Haw. Const. art. 1, § 6; Mont. Const. art. 2, § 10.

In particular, Defendants conflate these two very different standards in arguing that the Act's restrictions are insignificant and thus do not trigger strict scrutiny. *See supra* Part I.A.1. The unstated but clear analytical premise of their argument is that the Act's restrictions are *insignificant* as a matter of Florida law because those same requirements—a mandatory twenty-four-hour delay and additional trip—are not *undue burdens* under federal law. *See* Defs.' Resp. at 15-20. This subterfuge fails. *First*, as binding Florida Supreme Court precedent makes clear, the undue burden test has no place in Florida law. *See* Pls.' Mot. at 13-14. *Second*, Defendants' reimagining of what constitutes a "significant restriction" in Florida would elide the distinction between Florida's strict scrutiny and the federal undue burden standard, and would subsume the former within the latter. As Defendants would have it, only laws that are so egregious that they fail even the federal standard would be "significant" enough to trigger Florida's strict scrutiny. But that is not the law: Strict scrutiny is the standard of review in Florida for a much broader category of restrictions than those that fail the federal test. *See, e.g.*, *North Florida*, 866 So. 2d at 634. That is the case here: Notwithstanding the fact that similar laws would pass federal constitutional muster, strict scrutiny applies in this Florida Court because the Act targets abortion for significant restrictions.

B. Defendants Cannot Meet Their Burden of Demonstrating that the Act Survives Strict Scrutiny

Strict scrutiny requires the state to show that the Act will further a compelling interest and that no less intrusive means of serving that interest are available. The state has not met its heavy burden under this standard.[10]

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[10] Defendants also repeatedly misstate the respective burdens of the parties in this case. Plaintiffs clearly bear the burden of demonstrating each of the elements necessary for granting a temporary injunction. Pls.' Mot. at 9. But Plaintiffs are not required, as Defendants urge, to

First, Defendants largely fail to articulate any government interest that the Florida Supreme Court has recognized as "compelling" throughout pregnancy. Instead, they claim to have "important" and "legitimate" state interests. *See* Defs.' Resp. at 2, 3, 5, 20, 21. But the law is clear: Merely important interests are sufficient to justify a law only where it imposes only insignificant restrictions. Where a law imposes *significant* restrictions upon a woman's fundamental rights, the state must demonstrate *compelling* state interests. *In re T.W.*, 551 So. 2d at 1193.[11]

Second, as to a state interest in ensuring women are fully informed as part of women's health—an interest that is only compelling after the first trimester and thus cannot support the

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show that "no set of circumstances exists under which the statute would be valid." Defs.' Resp. at 9 (citation omitted). The Florida Supreme Court has never imposed such a requirement in an abortion case, *see, e.g.*, *North Florida,* 866 So. 2d 612; *In re T.W.* 551 So. 2d 1186, but even under such a requirement, the Act would not pass constitutional muster, as it substantially interferes with fundamental state constitutional rights. Defendants also bizarrely suggest that Plaintiffs must prove that the Act is unconstitutional "beyond a reasonable doubt," citing a case concerning the Florida Constitution's single subject rule. Defs.' Resp. at 18. Such a standard has never been applied in the privacy context. *See, e.g.*, *North Florida*, 866 So. 2d 612; *Winfield*, 477 So. 2d 544. Finally, Defendants suggest that their heavy burden is somehow lessened here because legislative enactments are presumed valid. Defs.' Resp. at 8-9. Defendants are mistaken; as explained in *State v. Bussey,* 463 So. 2d 1141, 1144 (Fla. 1985), cited by Defendants, it is only "*in the absence of an impingement upon constitutional rights* [that] an act of the legislature is presumed to be constitutional" (emphasis added). Legislation such as the Act that impinges upon fundamental rights "is *presumptively unconstitutional* unless proved valid by the State." *North Florida*, 866 So. 2d at 626 (emphasis added).

[11] While the state asserts interests in potential life and maternal health, under well-settled Florida law, the former becomes compelling only after viability, and the latter, only in the second trimester at the earliest. *See* Pls.' Mot. at 16-17; *In re T.W.*, 551 So. 2d at 1193. To the extent Defendants are claiming that the Act would further an interest in potential life by causing "significant numbers of pregnant women [to] chang[e] their minds about having abortions," Defs.' Resp. at 22, they are relying on a state interest that is simply not compelling prior to viability. Under the federal standard, merely important interests, including the state's interest in dissuading a woman from having a pre-viability abortion, may justify a restriction that does not rise to an undue burden. But under Florida law, a *compelling* interest is necessary to justify any significant restriction, and before viability, the state's interest in protecting potential life is not compelling.

Act—the defendants cannot demonstrate that the Act would actually serve that interest. As Plaintiffs' informed consent expert, Dr. Kenneth Goodman, explained, mandatory waiting periods are wholly incompatible with physicians' ethical obligations and with the underlying principles of informed consent that protects patients' health. Goodman Decl. ¶¶ 14-17. Defendants do not even mention Dr. Goodman's testimony, and do not explain why additional informed consent restrictions are necessary for abortion, but not for other, riskier medical procedures. Instead, Defendants gratuitously malign abortion providers, suggesting that they "have a bias in favor of encouraging abortions . . . [based upon] financial incentive." Defs.' Resp. at 5. As Kristin Davy, director of Plaintiff Bread and Roses, explains, Bread and Roses offers information to their patients on all available options, including where to obtain prenatal care, adoption services, and the financial assistance available to women for whatever option they choose. Rebuttal Decl. of Kristin Davy, attached hereto as Ex. B, ¶ 5 (June 22, 2015). Ms. Davy also explains that while almost all of her abortion patients are already firm in their decision by the time they arrive for their appointment, *id*. ¶ 4, the clinic makes no effort to steer women towards any particular decision regarding their pregnancies, *id*. ¶ 5.

Defendants' claim that the Act serves women's health is also foreclosed by their concession that the Act's only actual medical exception is for life-threatening emergencies. *See* Defs.' Resp. at 3-4, 11 n.3. Rather than dispute that the lack of a health exception itself makes the law unconstitutional, Defendants rely on an affirmative defense that a physician may raise in a disciplinary action, requiring her to prove that she had a "reasonable belief that complying with the" mandatory delay "would threaten the life or health of the patient." § 390.0111(c), Fla. Stat. In so arguing, Defendants only highlight the medical peril in which the Act places Florida women: The Act forces a Florida doctor to choose between complying with the mandatory delay

requirement by denying her patient medically necessary care, or providing such care, knowing that she risks being dragged before the Board of Medicine and made to prove the objective reasonableness of her belief that her actions were necessary—on pain of possible license revocation.[12] Such a scheme does not adequately protect women's health. Indeed, the Legislature rejected amendments that would have provided an actual exception to allow physicians to provide immediate medical care to protect their patients' health. *See* Pls.' Mot. at 21.

Finally, Defendants all but concede that the Act is not the least restrictive means of serving any of the interests asserted here. Ignoring Plaintiffs' many examples of other, less restrictive means, *see* Pls.' Mot. at 20-23, the state simply insists, without explanation, on "the obvious reasonableness of a 24-hour waiting period," Defs.' Resp. at 21, as if reasonableness, obvious or otherwise, were enough to show that a law employs the least restrictive means under strict scrutiny; it is not.

Because the Act serves no compelling state interest, and less restrictive means are available to accomplish any of the interests asserted by the state, the Act cannot survive strict scrutiny. Plaintiffs have demonstrated a substantial likelihood of success on the merits.[13]

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[12] And this defense provides no protection to clinics that may face licensure penalties as a result of violations of the Act.

[13] Defendants erroneously describe Plaintiffs' burden and argue that Plaintiffs must demonstrate a "clear legal right to the relief requested" in order to obtain a temporary injunction. *See* Defs.' Resp. at 21. This is wrong. As the Florida Supreme Court explained in *Liberty Counsel v. Florida Bar Board of Governors*, "To obtain a *permanent* injunction, the petitioner must 'establish a clear legal right . . . .'" 12 So.3d 183, 186 n.7 (Fla. 2009) (emphasis added) (citation omitted). By contrast, to obtain a temporary injunction—as Plaintiffs seek with this motion—the petitioner must demonstrate only "a substantial likelihood of success on the merits." *Id.* (citations and quotation marks omitted).

II. PLAINTIFFS SATISFY THE OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF

Plaintiffs satisfy the remaining requirements for injunctive relief—which Defendants as much as concede in the single page they dedicate to these questions. *See* Defs.' Resp. 21-22.

A. Plaintiffs and Their Patients Will Suffer Irreparable Harm That Cannot Be Remedied by Damages[14] Absent a Temporary Injunction

If this law were to go into effect on July 1, the irreparable harm Plaintiffs and their patients would suffer is clear: Plaintiffs would be forced to turn away their patients, who would be unable to obtain the abortion care for which they had scheduled appointments that day. Instead, they would have to schedule additional appointments, make alternative work and childcare arrangements, and return to the clinic at least twenty-four hours later to obtain medical care protected by the Florida Constitution as a fundamental right. The constitutional injury is imminent: When these women are delayed, they experience harm. That is, regardless of whether Plaintiffs' patients are eventually able to return to the clinic for their abortion care, they will already have suffered a violation of their right to privacy and thus irreparable harm. Pls.' Mot. at 24-26; *see Coal. to Reduce Class Size v. Harris*, No. 02-CA-1490, 2002 WL 1809005, at *2 (Fla. Cir. Ct., July 17, 2002) (finding plaintiffs would suffer irreparable injury in light of "the time constraints involved" and the "significant impact on the[ir] state and federal constitutional rights"), *aff'd sub nom. Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959 (Fla. 2002); *see also Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1289 (M.D. Ala. 2013) (finding irreparable harm where challenged abortion restriction would "threaten[] the constitutionally protected privacy of the plaintiffs' patients"); *id.* ("courts presume that violations to the

[14] Defendants essentially concede the point that damages are not available in stating that Plaintiffs cannot meet "at least three of the four essential elements" for injunctive relief. *See* Defs.' Resp. at 8.

fundamental right to privacy are irreparable" (citing *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981)). The Act will also irreparably harm Plaintiffs by preventing them from delivering medically appropriate abortion services and forcing them to comply with a law that will harm their patients.

Defendants do not even attempt to refute that these harms exist in their brief.

B. A Temporary Injunction Will Serve the Public Interest

Moreover, Plaintiffs have established that the public interest will be served by a temporary injunction. For more than forty years, physicians in Florida have provided safe and legal abortions to women without a legislative mandate that all women make an additional, unnecessary trip to the clinic, at least twenty-four hours before terminating a pregnancy. Florida women and families have shaped their lives around the expectation that the Florida Constitution protects their fundamental right to privacy, including the right to obtain an abortion, and that women can obtain an abortion when they and their physicians judge it to be appropriate. The public interest will be served by an injunction that maintains this status quo and vindicates the Florida Constitution. *See* Pls.' Mot. at 26; *Coal. to Reduce Class Size*, 2002 WL 1809005, at *2 (holding that injunction would serve public interest by vindicating constitutional provision); *see also Strawser v. Strange*, 44 F. Supp. 3d 1206, 1210 (S.D. Ala. 2015) ("It is always in the public interest to protect constitutional rights." (citing *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008))); *Planned Parenthood v. Aakhus*, 14 Cal. App. 4th 162, 172 (Cal. Ct. App. 1993) ("Because respondent's suit helped to preserve a constitutional privacy right, it necessarily conferred a significant benefit on the public.").

Defendants do not even attempt to argue that enjoining the Act to maintain the status quo will disfavor the public interest. Instead they once more invoke the state's alleged "strong"

interests in "protecting fetuses and pregnant women" and speculate, without any basis, that there is the "prospect for improving women's decision-making as a result of the 24-hour waiting period." Defs.' Resp. at 22. These arguments fall far short of demonstrating that an injunction will disfavor the public interest, and are an affront to those women who make this serious decision because they have concluded that it is the best one for them and their families. A temporary injunction will protect the public interest.

CONCLUSION

For the above-stated reasons and those contained in Plaintiffs' Motion for an Emergency Temporary Injunction and/or a Temporary Injunction, this Court should grant temporary injunctive relief to preserve the status quo while this case proceeds on the merits.

Respectfully submitted,

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