

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

Lower Tribunal Nos. 1D22-2034; 2022-CA-912

PETITIONERS' BRIEF ON JURISIDICITION

Whitney Leigh White (PHV)
Jennifer Dalven (PHV)
Johanna Zacarias (PHV)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2690
wwhite@aclu.org
jdalven@aclu.org
jzacarias@aclu.org

*Attorneys for Petitioners Gainesville
Woman Care, LLC; Indian Rocks
Woman's Center, Inc.; St. Petersburg
Woman's Health Center, Inc.; and
Tampa Woman's Health Center, Inc.*

Daniel Tilley (FL Bar #102882)
ACLU FOUNDATION OF FLORIDA
4343 West Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714
dtilley@aclufl.org

Benjamin James Stevenson (FL #598909)
ACLU FOUNDATION OF FLORIDA
3 W. Garden St., Suite 712
Pensacola, FL 32502
(786) 363-2738
bstevenson@aclufl.org

Attorneys for Petitioners

Autumn Katz (PHV)
Caroline Sacerdote (PHV)
CENTER FOR REPRODUCTIVE
RIGHTS
199 Water St., 22nd Floor
New York, NY 10038
(917) 637-3600
akatz@reprorights.org
csacerdote@reprorights.org

*Attorneys for Petitioner A Woman's
Choice of Jacksonville, Inc.*

April A. Otterberg (PHV)
Shoba Pillay (PHV)
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-9350
aotterberg@jenner.com
spillay@jenner.com

Attorneys for Petitioners

Jennifer Sandman (PHV)
PLANNED PARENTHOOD FEDERATION
OF AMERICA
123 William Street, 9th Floor
New York, NY 10038
(212) 261-4584
jennifer.sandman@ppfa.org

*Attorneys for Petitioners Planned
Parenthood of Southwest and Central
Florida; Planned Parenthood of South,
East and North Florida; and Shelly Hsiao-
Ying Tien, M.D., M.P.H.*

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INTRODUCTION AND STATEMENT OF THE ISSUES

Plaintiffs-Petitioners seek discretionary review of a non-final order of the First District Court of Appeal (“DCA Order”) denying their motion to vacate the automatic stay of the circuit court’s temporary injunction (“TI”) against House Bill 5, Ch. 2022-69, §§ 3–4, Laws of Fla. (“HB 5”) (codified at §§ 390.011, 390.0111, Fla. Stat.), and holding that Plaintiffs-Petitioners lack third-party standing. HB 5 bans abortion after 15 weeks of pregnancy in defiance of the Florida Constitution and decades of this Court’s precedent, causing widespread, irreparable harm to Floridians who are being denied their fundamental rights to make deeply personal decisions about their families, bodies, and health free of government interference.

The issues presented are: whether the First DCA decision conflicts with this Court’s precedent by, first, failing to presume irreparable harm in cases where there is a substantial likelihood that a law violates the Florida Constitution, as this Court held in *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1245 (Fla. 2017), including where (as in *Gainesville Woman Care*) plaintiffs assert the privacy rights of third parties; and second, by holding that

abortion providers lack third-party standing to assert their patients' privacy rights, despite contrary outcomes in *Gainesville Woman Care*, 210 So. 3d 1243, *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 115 (Fla. 2006), and *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 615 (Fla. 2003). If this Court grants review and requests the parties to address issues beyond those identified here, Plaintiffs-Petitioners would plan to raise additional arguments in defense of the TI, including arguments on the merits of their privacy claim if required.

STATEMENT OF THE CASE AND FACTS

In 1980, Floridians amended the state constitution to add an explicit right of privacy not contained in the U.S. Constitution. Art. I, § 23, Fla. Const. ("Privacy Clause"). In the decades since, this Court has repeatedly held that the right of privacy is "clearly implicated in a woman's decision of whether or not to continue [a] pregnancy[,]" that the "right to make that choice freely is fundamental[,]" and that legislative invasions of that right are presumptively unconstitutional. *In re T.W.*, 551 So. 2d 1186, 1192–93 (Fla. 1989) (quotation marks omitted); accord *Gainesville Woman Care*, 210 So. 3d at 1256; *N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 620–21, 626.

In direct contravention of these protections, the Florida legislature earlier this year enacted HB 5, which bans abortion after 15 weeks of pregnancy. HB 5, §§ 3–4 (codified at §§ 390.011, 390.0111, Fla. Stat.). Health care providers who violate HB 5 are subject to felony prosecution and up to five years’ imprisonment, §§ 390.0111(10)(a), 775.082(8)(e), 775.083(1)(c), Fla. Stat., as well as administrative fines and license revocation, *id.* §§ 390.011(13), 390.018, 456.072(2), 458.331(2), 459.015(2), 464.018(2); Fla. Admin Code R. 59A-9.020.

Plaintiffs-Petitioners, a group of reproductive health clinics and a physician who, prior to HB 5, provided abortion care in Florida that is now banned (“Plaintiffs”), filed suit on behalf of themselves, their staff, and their patients, alleging that HB 5 violated fundamental rights under the Privacy Clause. Plaintiffs sought emergency temporary injunctive relief. The trial court held an evidentiary hearing on the TI motion on June 27, 2022, including oral and written testimony from four expert and fact witnesses, and heard oral argument on June 30, 2022.

On July 1, 2022, HB 5 went into effect.

On July 5, 2022, the circuit court entered a written order enjoining enforcement of HB 5. Petitioners' App'x 4–117. Based on extensive factual findings, the circuit court concluded that the State failed to carry its heavy burden under strict scrutiny. *Id.* at 5. The court credited Plaintiffs' witnesses and found that HB 5 does not advance, and in fact undermines, maternal health, *id.* at 28–40, 58–59; that no reliable scientific evidence supported the State's asserted interest in preventing fetal pain, *id.* at 41–47, 62–63; and that patients denied abortion care under HB 5 will be forced to travel significant distances out of state at great economic and personal cost, to attempt to terminate their pregnancies outside the medical system, or to carry a pregnancy to term against their will, *id.* at 26–27, 60. Because HB 5 likely violates constitutional rights, the circuit court found that it will result in *per se* irreparable harm and that an injunction is in the public interest. *Id.* at 65–68.

The circuit court also concluded that Plaintiffs have standing to assert their patients' privacy rights. *Id.* at 48. The court noted that this is consistent with prior decisions of this Court, *id.* at 48–49, and further found, based on witness testimony, that Plaintiffs satisfy all criteria for third-party standing: HB 5 will injure them by forcing

them “either to stop providing abortions after 15 weeks LMP,¹ or to face criminal prosecution, license revocation, and other penalties,” *id.* at 49; they have a close relationship with their patients, as the State conceded, *id.* at 51; and their patients are hindered in suing to protect their own interests by “the time-limited nature of pregnancy, when compared to how long litigation can take,” and because many abortion patients “face difficult circumstances, including poverty,” that would make it difficult for them “to litigate complex matters . . . individually and on a compressed timeframe,” *id.* at 51–52.

The State appealed, triggering an automatic stay, Fla. R. App. P. 9.310(b)(2), which Plaintiffs moved to vacate. Although the circuit court found that Plaintiffs satisfied all requirements for vacatur, it nonetheless denied the motion on July 12, 2022. Petitioners’ App’x 118–21. Plaintiffs moved again for vacatur of the stay in the First DCA. On July 21, 2022, the First DCA denied relief, holding that Plaintiffs “cannot obtain temporary injunctive relief as they cannot assert the privacy rights of pregnant women necessary to substantiate a showing of irreparable harm, an indispensable

¹ As dated from the patient’s last menstrual period. See HB 5, § 3 (codified at § 390.011(7), Fla. Stat.).

requirement of a temporary injunction.” *Id.* at 126. Judge Kelsey dissented, explaining that “precedent compels us to reverse.” *Id.* at 131 (Kelsey, J., dissenting). The TI appeal is pending.

On August 10, 2022, Plaintiffs filed a notice to invoke this Court’s discretionary jurisdiction.

ARGUMENT

A. Standard for Discretionary Jurisdiction

This Court has discretionary jurisdiction to review the DCA Order because it expressly and directly conflicts with a decision of the Supreme Court on the same question of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). A conflict giving rise to this Court’s discretionary jurisdiction exists where the lower court’s order “announce[s] . . . a conflicting rule of law” or “appl[ies] . . . a rule of law in a manner that results in a conflicting outcome despite substantially the same controlling facts.” *Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021) (quotation marks omitted). The conflicting decision of this Court need not squarely address the issue on which the conflict exists if it “reasonably may be read” to conflict with the lower court’s decision. *See Pub. Health Tr. of Dade Cty. v. Menendez*, 584 So. 2d 567, 569 (Fla. 1991).

B. The DCA Order Conflicts With This Court’s Binding Precedents and Other District Court Decisions.

The DCA Order conflicts with “binding precedent from the Florida Supreme Court” and other district court decisions on two grounds, as Judge Kelsey explained in dissent: (1) it misapplies this Court’s precedent on the irreparable harm prong of the test for temporary injunctive relief; and (2) its third-party standing holding conflicts with numerous decisions of this Court and district courts of appeal permitting identically situated plaintiffs to assert claims based on their patients’ privacy rights. *See* Petitioners’ App’x 129–31 (Kelsey, J. dissenting).

First, the DCA Order misapplied this Court’s precedent on irreparable harm in constitutional challenges. The First DCA held that Plaintiffs “cannot lawfully obtain a temporary injunction” based on the irreparable harm that will unquestionably befall their patients who are denied constitutionally protected abortion care under HB 5. *Id.* at 126. This conclusion starkly conflicts with this Court’s decision in *Gainesville Woman Care*. There, the Court reversed and reinstated a temporary injunction against an abortion restriction based on irreparable harm to the plaintiffs’ patients. *Gainesville Woman Care*,

210 So. 3d at 1263–64 (citing trial court’s finding that “women seeking to terminate their pregnancies in Florida would be harmed by the enforcement” of the restriction). Where “certain fundamental rights are violated,” including the right to abortion under the Privacy Clause, this Court “presumed irreparable harm,” even where that harm befell third parties. *Id.* at 1263.

The DCA Order failed to properly apply this presumption of irreparable harm based on the loss of constitutional rights. In fact, it wholly ignored the trial court’s conclusion, based on extensive factual findings, that HB 5 is likely unconstitutional and will therefore cause *per se* irreparable harm to Floridians seeking abortions. See Petitioners’ App’x 53–67. Instead, the First DCA considered (and rejected) only purportedly “economic” harm to Plaintiffs themselves. *Id.* at 125 (quotation marks omitted). The DCA Order thus misapplies and conflicts with this Court’s holding in *Gainesville Woman Care* that irreparable harm follows as a matter of course when plaintiffs, as here, show a substantial likelihood of success in a constitutional privacy challenge.

Second, the First DCA’s holding that Plaintiffs lack third-party standing conflicts with numerous decisions of this Court and the

district courts of appeal. The First DCA held that Plaintiffs “cannot assert the privacy rights of pregnant women,” Petitioners’ App’x 126, pointing to a handful of cases in which individual pregnant women raised their own privacy rights in materially distinguishable proceedings,² *id.* at 125. This conflicts with multiple cases in which this Court and district courts of appeal permitted abortion providers identically situated to Plaintiffs to raise their patients’ privacy rights under the state Constitution, and, where applicable, affirmed injunctive relief on such third-party claims. *See id.* at 129 (Kelsey, J., dissenting) (“Similar institutional parties have successfully asserted exactly those [third-party privacy] rights in many earlier cases.”).

In *Gainesville Woman Care*, this Court held that Gainesville Woman Care, a Plaintiff in this case, was entitled to a temporary injunction based on third-party privacy claims in a constitutional challenge to an abortion restriction. *See* 210 So. 3d at 1247. In *North Florida Women’s Health & Counseling Services*, the First DCA held

² None of the cases cited by the First DCA involved a challenge to a time-based abortion ban like HB 5. Patients affected by HB 5 are, by definition, already 15 weeks pregnant and would be racing against imminent mootness, presenting a very real risk that they would lose their right to abortion entirely and be forced to carry a pregnancy to term before a court could grant relief. *See* Petitioners’ App’x 51–52.

that physicians who provide abortion care—like Plaintiff Dr. Shelly Hsiao-Ying Tien— “have standing to assert the rights of their . . . patients,” and this Court reinstated a permanent injunction based on those plaintiffs’ third-party privacy claims. *State v. N. Fla. Women’s Health & Counseling Servs., Inc.*, 852 So. 2d 254, 259–60 (Fla. 1st DCA 2001), *quashed on other grounds*, 866 So. 2d 612 (Fla. 2003). And in *State v. Presidential Women’s Center*, both the Fourth DCA and this Court considered the merits of privacy claims brought by abortion clinics and a physician on behalf of their patients, just like Plaintiffs did here. *Presidential Women’s Ctr.*, 937 So. 2d at 115–16; *State v. Presidential Women’s Ctr.*, 707 So. 2d 1145, 1146 (Fla. 4th DCA 1998). The First DCA’s third-party standing holding, therefore, “results in a conflicting outcome despite substantially the same controlling facts.” *Kartsonis*, 319 So. at 623.

Both conflicts create discretionary jurisdiction in this Court.

CONCLUSION

For the foregoing reasons, this Court should exercise its discretionary jurisdiction to review the DCA Order, which prevents Plaintiffs from vindicating their patients’ privacy rights and allows irreparable harm to Floridians’ constitutional rights to continue. As

explained in their motion filed concurrently with this brief, Plaintiffs also respectfully request that the Court vacate the automatic stay of the circuit court's injunction pending this Court's review.

Respectfully submitted this 19th day of August, 2022.

/s/ Whitney Leigh White

Whitney Leigh White* (N.Y. #5687264)
Jennifer Dalven* (N.Y. #2784452)
Johanna Zacarias* (N.Y. #5919618)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2690
wwhite@aclu.org
jdalven@aclu.org
jzacarias@aclu.org

*Attorneys for Petitioners Gainesville
Woman Care, LLC; Indian Rocks
Woman's Center, Inc.; St. Petersburg
Woman's Health Center, Inc.; and
Tampa Woman's Health Center, Inc.*

Autumn Katz* (N.Y. #4394151)
Caroline Sacerdote* (N.Y. #5417415)
CENTER FOR REPRODUCTIVE
RIGHTS
199 Water St., 22nd Floor
New York, NY 10038
(917) 637-3600
akatz@reprorights.org
csacerdote@reprorights.org

*Attorneys for Petitioner A Woman's
Choice of Jacksonville, Inc.*

April A. Otterberg* (Ill. #6290396)
Shoba Pillay* (Ill. #6295353)
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-9350
aotterberg@jenner.com
spillay@jenner.com

Attorneys for Petitioners

/s/ Daniel Tilley

Daniel Tilley (FL Bar #102882)
ACLU FOUNDATION OF FLORIDA
4343 West Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714
dtilley@aclufl.org

Benjamin James Stevenson (FL
#598909)
ACLU FOUNDATION OF FLORIDA
3 W. Garden St., Suite 712
Pensacola, FL 32502
(786) 363-2738
bstevenson@aclufl.org

Attorneys for Petitioners

Jennifer Sandman* (N.Y.
#3996634)
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 William Street, 9th Floor
New York, NY 10038
(212) 261-4584
jennifer.sandman@ppfa.org

*Attorneys for Petitioners Planned
Parenthood of Southwest and
Central Florida; Planned
Parenthood of South, East and
North Florida; and Shelly Hsiao-
Ying Tien, M.D., M.P.H.*

* Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Plaintiffs-Petitioners' Brief on Jurisdiction 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 19th day of August, 2022.

/s/ Whitney Leigh White

**CERTIFICATE OF COMPLIANCE FOR
COMPUTER-GENERATED BRIEFS**

I certify that this motion 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/ Whitney Leigh White