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

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Plaintiffs,

V.

STATE OF FLORIDA, ET AL.,

Defendants.

Case No.: 2015 CA 1323

ORDER GRANTING
DEFENDANTS' MOTION FOR SUMMARY FINAL JUDGMENT

Before the Court is Defendants' Motion for Summary Final Judgment. At the hearing on that motion on March 23, 2022, the Court indicated that it was granting the motion, that it would be entering a written order to that effect, and that it was cancelling the trial scheduled to commence on April 4, 2022. Plaintiffs have since filed a Motion to Stay the entry of final judgment pending Plaintiffs' appeal or, in the alternative, until April 30, 2022. For the reasons that follow, the Court grants the Motion for Summary Final Judgment and denies the Motion to Stay.

PERTINENT BACKGROUND

Florida's Preexisting Informed Consent Law for Abortions

Florida has general police power to protect the health and safety of its people. See Haire v. Fla. Dep't of Agric. & Consumer Servs., 870 So. 2d 774, 782

(Fla. 2004). This power extends to regulating abortion, as States have "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." Id. at 154; *accord* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 428 (1983); Gonzales v. Carhart, 550 U.S. 124, 158 (2007). This interest exists from the "outset of the pregnancy," Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (joint op.), and "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.

Prior to the filing of this lawsuit, Florida enacted the Woman's Right to Know Act, Section 390.0111(3), Florida Statutes, which provides in pertinent part that "[a] termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman." The Woman's Right to Know Act sets forth a number of requirements, including that the pregnant woman be informed, by the physician who will perform the abortion 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. Subsections (a) - (c) provide an exception to the consent requirement in the event of a medical emergency.

These provisions were upheld against a challenge brought under Article I, Section 23 of the Florida Constitution, which protects the right of privacy, in State

v. Presidential Women's Center, 937 So. 2d 114 (Fla. 2006). There, the Florida Supreme Court acknowledged that "[t]he doctrine of informed consent is well recognized, has a long history, and is grounded in the common law and based in the concepts of bodily integrity and patient autonomy." Id. at 116. None of these provisions is challenged in this action.

Florida's 24-Hour Waiting Period Law for Abortions

On June 10, 2015, the Governor of Florida signed House Bill No. 633, Ch. 2015-118, Laws of Fla. (entitled "An act relating to informed patient consent …") (the "Act"). Section 1 amends Section 390.0111(3)(a)1. to require that the informed consent disclosures discussed above be made by either the physician who is to perform the abortion or by the referring physician "while [the physician is] physically present in the same room, and at least 24 hours before the procedure…." The Act includes exceptions to the 24-hour waiting requirement for life-threatening emergencies and for documented instances of "rape, incest, domestic violence, or human trafficking." § 390.0111(3)(a), Fla. Stat.

The plain purpose of the Act is to enhance a pregnant woman's voluntary and informed consent by providing for a 24-hour window of opportunity for her to consider the important information which Florida law requires she be given.

As the United States Supreme Court has acknowledged, whether to have an abortion poses "a difficult and painful moral decision," and women who regret that

decision may experience "regret," "severe depression," "loss of esteem," "grief," and "sorrow." Gonzales, 550 U.S. at 159; see also H.L. v. Matheson, 450 U.S. 398, 411 (1981) ("The medical, emotional, and psychological consequences of an abortion are serious and can be lasting..."). The Florida Supreme Court has similarly recognized that the decision to abort is "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).

In passing the Act, Florida joined the majority of States, which have similar requirements,[1] including those that have recognized a right of privacy in their state constitutions.[2] Those laws have been upheld in numerous

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[1] See: Ala. Code § 26-23a-4 (2021); Ariz. Rev. Stat. Ann. § 36-2153(A) (2021); Ark. Code Ann. § 20-16-1703(b) (West 2021); Ga. Code Ann. § 31-9A-3 (West 2021); Idaho Code Ann. § 18-609(4) (West 2021); Ind. Code Ann. § 16-34-2-1.1(a) (West 2021); Kan. Stat. Ann. § 65-6709(a) (West 2021); Ky. Rev. Stat. Ann. § 311.725(1)(a) (West 2022); La. Stat. Ann. § 40:1061.10(D) (2021); Mich. Comp. Laws Ann. § 333.17015(3) (West 2021); Minn. Stat. Ann. § 145.4242(a)(1) (West 2021); Miss. Code Ann. § 41-41-33(1) (West 2021); Mo. Ann. Stat. § 188.027(1) (West 2021); Neb. Rev. Stat. Ann. § 28-327(1) (West 2021); N.C. Gen. Stat. Ann. § 90-21.82 (West 2021); N.D. Cent. Code Ann. § 14-02.1-02(11) (West 2021); Ohio Rev. Code Ann. § 2317.56(B) (West 2021); Okla. Stat. Ann. tit. 63, § 1-738.2(B) (West 2021); 18 Pa. Stat. and Cons. Stat. Ann. § 3205(a) (West 2022); S.C. Code Ann. § 44-41-330(C) (2021); S.D. Codified Laws § 34-23A-10.1(1) (2021); Tenn. Code Ann. § 39-15-202(d)(1) (West 2021); Tex. Health & Safety Code Ann. § 171.012(a)(4) (West 2021); Utah Code Ann. § 76-7-305(2) (West 2021); W. Va. Code Ann. § 16-2I-2 (West 2021); Wis. Stat. Ann. § 253.10(3)(c) (West 2021).

[2] See Art. II, § 8, Ariz. Const. (express right); Art. I, § 5, La. Const. (same); Art. I, § 10, S.C. Const. (same). Another four States have judicially recognized rights to privacy or abortion in their constitutions. See Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 692 (Mo. 2006) (en banc) (upholding a 24-hour waiting period despite Missouri's right to privacy); Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 653 - 55 (Miss. 1998) (upholding a 24-hour waiting period while acknowledging Mississippi's right to privacy is the "most valued by civilized man"); Mahaffey v. Att'y Gen., 564 N.W.2d 104, 109 (Mich. Ct. App. 1997) (per curiam) (upholding a 24-hour waiting period while recognizing Michigan's right to

judicial decisions, both state[3] and federal.[4] The Court, upon the State's

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privacy), *leave to appeal den'd*, 616 N.W.2d 168 (Mich. 1998); Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993) (upholding Ohio's statute requiring 24-hour abortion waiting period, despite Ohio's Constitution's recognizing a right to abortion implied in its right to liberty).

[3] State decisions include: Planned Parenthood of St. Louis Region v. Nixon, 185 S.W.3d 685, 691 (Mo. 2006) (en banc) (upholding 24-hour waiting period against privacy challenge); Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973 (Ind. 2005) (upholding 18-hour waiting period against facial constitutional challenge); 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); Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists, 257 P.3d 181, 194 (Ariz. Ct. App. 2011) (finding Arizona's requirement of a 24-hour wait was constitutional under its constitution); Mahaffey v. Att'y Gen., 564 N.W.2d 104 (Mich. Ct. App. 1997) (per curiam) (reversing trial court's conclusion that 24-hour wait was unconstitutional), *leave to appeal den'd*, 616 N.W.2d 168 (Mich. 1998); Preterm Cleveland v. Voinovich, 627N.E.2d 570 (Ohio Ct. App. 1993) (reversing trial court's "erroneous conclusion" thatstatute requiring 24-hour abortion waiting period was unconstitutional).

[4] Federal decisions include: Casey, 505 U.S. at 885–86 (upholding Pennsylvania's 24-hour waiting period); Bristol Reg'l Women's Ctr., P.C. v. Slatery, 7 F.4th 478 485–86 (6th Cir. 2021) (upholding Tennessee's 48-hour waiting period after being in effect for five years; no evidence that the waiting period prevented most women who wanted abortions from getting them); Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361, 374 (6th Cir. 2006) (in-person requirement and 24-hour waiting period are not facially unconstitutional, even if "some small percentage of the women actually affected by the restriction were unable to obtain an abortion"); A Woman's Choice–E. Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002) (upholding 18-hour waiting period); Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999) (upholding 24-hour waiting period); Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 533 (8th Cir. 1994) (24-hour waiting period not an undue burden); Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992) (upholding 24-hour waiting period and vacating trial court order preliminarily enjoining enforcement); Falls Church Med. Ctr., LLC v. Oliver, 412 F. Supp. 3d 668, 706 (E.D. Va. 2019) (upholding Virginia's 24-hour reflection period); Tucson Women's Ctr. v. Ariz. Med. Bd., 666 F. Supp. 2d 1091, 1105 (D. Ariz. 2009) (denying temporary injunction because plaintiffs cannot show 24-hour waiting provision will create a substantial obstacle to a significant number of women); Eubanks v. Schmidt, 126 F. Supp. 2d 451, 456 (W.D. Ky. 2000) ("[T]he twenty-four hour informed consent period makes abortions marginally more difficult to obtain, but … does not fundamentally alter any of the significant preexisting burdens facing poor women who are distant from abortion providers."); Planned Parenthood, Sioux Falls Clinic v. Miller, 860 F. Supp. 1409, 1420 (D.S.D. 1994) (increased costs caused by in-person requirement and 24-hour waiting period for informed consent "were not a substantial obstacle" to abortion), *aff'd*, 63 F.3d 1452 (8th Cir. 1995); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482, 1494 (D. Utah 1994) (holding 24-hour waiting period that required two trips to abortion facility), *rev'g in part on other grounds and dismissing appeal in part*, 75 F.3d 564 (10th Cir. 1995).

separate motion and in the exercise of its discretion under Section 90.202(2) of the Florida Evidence Code, takes judicial notice of the referenced laws and judicial decisions.

Plaintiffs' Complaint

Plaintiffs filed this action the day after House Bill No. 633 was signed into law.[5] Their Complaint ("Cmplt.") contains two counts. Count I asserts intrusions on the right of privacy of "women seeking or obtaining abortions in the state of Florida," in violation of Article I, Section 23 of the Florida Constitution. Cmplt. ¶ 68. Count II asserts that the Act violates the right to equal protection under article I, section 2 of the Florida Constitution in two ways: first, by allegedly "singling out abortion for onerous and medically unnecessary restrictions that the Florida Legislature does not impose upon any other procedure for which people may consent[,]" Cmplt. ¶ 70(a), and second, "by discriminating against women on the basis of their sex and on the basis of gender stereotypes," Id. at ¶ 70(b). The Complaint seeks only facial relief; for both claims, Plaintiffs seek a judicial determination that the Act is "void and of no effect." Id. at 17-18.

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[5] It is undisputed that Plaintiff Gainesville Woman Care LLC d/b/a Bread and Roses Women's Health Center ("GWC") is a for-profit entity that performs abortions; see Cmplt. ¶ 12, Ex. B-2 (Declaration of Kristin Davy, owner and director of GWC) at ¶ 13; see also GWC's website (http://www.breadroses.com/, last visited on February 1, 2022). It is further undisputed that Plaintiff Medical Students for Choice is a not-for-profit organization, and that, according to its website, its purpose is "[c]reating tomorrow's abortion providers and pro-choice physicians"; see http://www.msfc.org/, last visited on February 1, 2022).

By their Joint Answer and Affirmative Defenses of All Defendants to Complaint, Defendants[6] admitted this Court's jurisdiction and that venue properly lies in Leon County. Otherwise, Defendants denied the key allegations of the Complaint and Plaintiffs' entitlement to relief. Defendants further stated affirmative defenses of failure to state a cause of action and Plaintiffs' lack of standing to pursue claims on behalf of pregnant women.

The Temporary Injunction

Prior to the Act's effective date of July 1, 2015, Plaintiffs moved for entry of a temporary injunction to prevent the Act from taking effect. In support, Plaintiffs offered the expert declaration of Dr. Christine L. Curry. Given the expedited nature of the proceedings, the State offered only legal argument. Following a hearing, the Circuit Court (Francis, C.J.) entered a temporary injunction blocking the Act's enforcement.

The State took an appeal, and the First District vacated the injunction. State v. Gainesville Woman Care, LLC, 187 So. 3d 279 (Fla. 1st DCA 2016)

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[6] Defendants, collectively referred to as the "State," include the State of Florida; the Florida Department of Health; Joseph Ladapo, M.D., in his official capacity as Secretary of Health for the State of Florida; the Florida Board of Medicine; Zachariah P. Zacharia, M.D., in his official capacity as Chair of the Florida Board of Medicine; the Florida Board of Osteopathic Medicine; Sandra Schwemmer, D.O., in her official capacity as Chair of the Florida Board of Osteopathic Medicine; the Florida Agency for Health Care Administration; and Simone Marstiller, in her official capacity as Secretary for the Florida Agency for Health Care Administration. The identities of individuals sued in their official capacity have changed somewhat over the course of the litigation in accordance with Fla. R. Civ. P. 1.260(d)(1)'s provisions for substitution of public officers.

("Gainesville Woman Care I").

The Florida Supreme Court, on an application for review, reversed the First District's decision, reinstated the temporary injunction, and remanded the case to for further proceedings. Gainesville Woman Care, LLC v. State, 210 So. 3d 1243 (Fla. 2017) ("Gainesville Woman Care II"). In its decision, the Court opined that the Act is not a neutral informed consent law, is subject to strict scrutiny, and was unlikely to satisfy strict scrutiny based on the record then before the Court. However, the Court made clear that its ruling was "based on the evidence presented at the temporary injunction hearing," Id. at 1262, and that the absence of evidence from the State at that stage was "critical" to its analysis, Id. at 1260.

Summary Judgment in Plaintiffs' Favor Is Overturned

On remand, Plaintiffs moved for summary final judgment in their favor. Plaintiffs presented no evidence in support of their motion, not even Dr. Curry's prior declaration, and instead relied on the Florida Supreme Court's opinion in Gainesville Woman Care II. The State countered with numerous sworn declarations from physicians, patients, and an academic expert on the adverse mental health consequences associated with abortions and the benefits of waiting periods. The Circuit Court (Lewis, J.) granted Plaintiffs' motion.

On appeal, the First District reversed. State v. Gainesville Woman Care, *LLC*, 278 So. 3d 216 (Fla. 1st DCA 2019) ("Gainesville Woman Care III"). The

Court indicated that "we must be wary of reading too much into the Florida Supreme Court's decision because it focused on the State's lack of evidence. Its decision was based 'only [o]n the evidence before the trial court at the time it entered its temporary injunction order.'" Id. at 220 (quoting Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 926 (Fla. 2017)).

The Court recognized that, following the temporary injunction phase, "the State . . . built a case that raises genuine issues of material fact." 278 So. 3d at 218. The Court noted that "[a]mong the remaining unresolved issues is the parties' dispute about the informed consent medical standard" because "the State produced . . . evidence . . . that the absence of" a waiting period "falls below the accepted medical standard of care." Id. Additionally, the Court specifically stated that, "[i]f the State's experts prove correct," the Act "brings Florida in-line with the informed consent standard of care" and "would pass muster under the Florida Supreme Court's decision approving informed consent in the abortion context." Id. (citing Presidential Women's Center and Casey).

The Court further stated that, because Plaintiffs have brought a facial challenge, "the correct legal test is not whether the 24-hour Law violates the constitutional rights of some women in some circumstances, but whether it violates the rights of all women in all circumstances[,]" citing Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 243 So. 3d 894, 897 (Fla. 2018), and Cashatt v.

State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). Id. at 222-23. The Court held that Plaintiffs must meet the "no set of circumstances" test on their facial challenge; that the trial court in granting summary judgment for Plaintiffs had applied "the wrong legal test"; and that evidence "partly based on the hypothetical circumstances of women who have sophisticated medical knowledge, who are certain of the decision, who may have suffered violence, who live far from a clinic, or who have previously reviewed the required information" is legally insufficient on Plaintiffs' facial claim. Id. at 222.

The Court vacated the final judgment in Plaintiffs' favor and remanded the case to the Circuit Court for further proceedings. Id. at 223.

DEFENDANTS' MOTION FOR SUMMARY FINAL JUDGMENT

Following remand of this action to this Court, the parties engaged in extensive discovery, including written discovery requests, the production of documents, the exchange of expert opinions, and numerous depositions of fact and expert witnesses.

On February 8, 2022, Defendants filed a motion for summary final judgment in their favor along with a supporting memorandum of law, their statement of undisputed material facts, and an appendix containing copies of referenced record support for their positions. Plaintiffs responded with a memorandum of law in opposition to the motion as well as a statement of material disputed facts and an

appendix of referenced record support for their positions. Defendants thereafter submitted a reply in support of their motion, and the Court heard oral argument at a hearing held on March 23, 2022.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment must be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.150(a). The Florida Supreme Court has now adopted the federal standard, under which "'[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part' of rules aimed at 'the just, speedy and inexpensive determination of every action.'" In re Amends. to Fla. R. Civ. P. 1.510, 317 So. 3d 72, 75 (Fla. 2021) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986) (emphasis in original). A fact is material if it "might affect the outcome of the suit under the governing law." Id. at 248. Additionally "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion

for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).

NATURE OF THE PARTIES' DISPUTE

Plaintiffs argue that the Act's 24-hour waiting period on its face impinges on women's right of privacy, and that as a consequence the State must meet the strict scrutiny test and show both a compelling state interest and that the interest is met through the least restrictive means. Plaintiffs also argue that there are genuine issues of material fact as to whether the State meets that standard. As to the no set of circumstances test, Plaintiffs contend that it does not apply, even though they bring a facial challenge. Finally, Plaintiffs argue that the Act is subject to strict or heightened scrutiny for their equal protection claims.

The State argues that Gainesville Woman Care II does not control on the level of scrutiny at this stage because it was decided on the temporary injunction standard and without evidence from the State regarding the waiting period's function in protecting informed consent. The State also argues that because the Act clearly imposes no significant intrusion on women's right of privacy, strict scrutiny does not apply. In the alternative, the State argues that it satisfies strict scrutiny as a matter of law on the record before the Court because the Act furthers the State's compelling interest in fully informed consent and because the Act's provisions accomplish its objectives in the least restrictive manner. The State contends that there are no longer any genuine issues of material fact on these

issues—as underscored by Plaintiffs' plan to proceed to trial without a single fact witness. As to the facial challenge standard, the State argues that Plaintiffs must meet the no set of circumstances test but cannot do so. Regarding Plaintiffs' equal protection claims, the State argues that the Act is subject to rational basis review but that Plaintiffs' claims fail regardless of the applicable standard. Finally, the State contests Plaintiffs' standing because, in its view, abortion providers have a conflict of interest with the patients the Act is designed to protect.

THE COURT'S ANALYSIS

Based upon its review of the arguments of counsel, the pertinent caselaw, and the record, the Court grants summary judgment for the State.

Standing

The Court begins with the Plaintiffs' standing. The State argues that the Act serves, in part, to protect patients from the pressures of the doctor's office and from the abortion industry's failure to give women the necessary time to consider the important informed consent disclosures. The State further argues that the Plaintiffs generate income from providing abortions and generate more profits if they can do those abortions without a 24-hour waiting period. Therefore, the State argues, abortion providers lack standing because they cannot assert the rights of their patients, with whom they have a conflict of interest. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004); Gold Cross Ambulance & Transfer

v. City of Kan. City, 705 F.2d 1005, 1016 (8th Cir.1983).

While the State makes a good argument, the Court declines to resolve this case on standing grounds given that the State is entitled to judgment on the merits and given that this case has been on appeal twice without any appellate court finding that Plaintiffs lack standing. See Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936, 943 (Fla. 2002) (explaining that third-party standing limits are prudential rather than jurisdictional).

The Facial Challenge Standard

The Court turns next to the standard for a facial challenge. As the First District explained in Gainesville Woman Care III, "the correct legal test is not whether the 24-hour Law violates the constitutional rights of some women in some circumstances, but whether it violates the rights of all women in all circumstances." 278 So. 3d at 222 (citing Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 243 So. 3d 894, 897 (Fla. 2018)). This case came to this Court on remand from the First District with that instruction, and the Court must follow it. The Court therefore applies that standard. It does not consider evidence "partly based on the hypothetical circumstances of women who have sophisticated medical knowledge, who are certain of the decision, who may have suffered violence, who live far from a clinic, or who have previously reviewed the required information." Id. at 222. These arguments are properly considered only in an as-

applied challenge—"the basic building blocks of constitutional adjudication." Gonzales, 550 U.S. at 168.[7]

The Level of Scrutiny

The Florida Supreme Court has held that the right to privacy guaranteed by Article I, section 23 of the Florida Constitution includes the right to obtain an abortion. This Court does not believe that the 24-hour waiting period is a significant intrusion into that right. Twenty-six other States have similar restrictions, some of which have been in effect for many years. Moreover, Plaintiffs can point to no evidence that these laws have prevented any women - let alone all women - who desire an abortion from obtaining one.

Plaintiffs argue, however, that Gainesville Woman Care II requires this Court to apply strict scrutiny. See 210 So. 3d at 1245 ("[A]ny law that implicates the fundamental right of privacy, regardless of the activity, is subject to strict scrutiny and, therefore, presumptively unconstitutional."). Plaintiffs further note that the First District recently applied Gainesville Woman Care II in reviewing a decision denying a temporary injunction against a county mask mandate. See Green v. Alachua Cnty., 323 So. 3d 246, 254 (Fla. 1st DCA 2021) (remanding with instructions to apply strict scrutiny).

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[7] Plaintiffs are mistaken in characterizing the "no set of circumstances" test as applying only to the remedy after a privacy violation is established. Rather, Plaintiffs must satisfy that test or their facial challenge fails.

While the Court acknowledges that it is bound by these decisions to the extent they decide controlling questions of law, the State highlights several important distinctions.

First, Gainesville Woman Care II was a temporary injunction case, and the Florida Supreme Court decided that case without the benefit of any evidence from the State. Although the Court applied strict scrutiny, it made clear that its ruling was "based on the evidence presented at the temporary injunction hearing," 210 So. 3d at 1262, and that the absence of evidence from the State at that stage was "critical" to its analysis, Id. at 1260. The First District's decision in Green was likewise an application of the temporary injunction standard. See Green, 323 So. 3d at 250 (discussing the "evidentiary burden at a temporary injunction hearing").

Second, because the State offered no evidence, the Florida Supreme Court had no occasion to address whether the Act was merely a neutral informed consent provision which, under its precedent, is not subject to strict scrutiny. See Presidential Women's Center, 937 So. 2d at 116 ("The doctrine of informed consent is well recognized, has a long history, and is grounded in the common law and based in the concepts of bodily integrity and patient autonomy.").[8] With the

[8] There, the Florida Supreme Court reversed the lower courts, which had struck down the Women's Right to Know Act as violative of the right of privacy, and instead upheld the law as a valid informed consent measure. The opinion is devoid of discussion of strict scrutiny,

benefit of the State's evidence, it is now clear that similarly invasive procedures are typically subject to *de facto* waiting periods, and that abortion procedures uniquely are not. Thus, the Act merely brings abortions in line with the standard of care. The Florida Supreme Court's conclusion that Florida "does not require a parallel restriction on medical procedures," a point which the Court found "critical," is no longer supported by this more fully developed record. See Gainesville Woman Care II, 210 So. 3d at 1260; see also Gainesville Woman Care III, 278 So. 3d at 222 ("Rather than singling out and burdening abortion procedures with arbitrary requirements, the State's evidence indicates that the 24-hour Law brings abortion procedures in Florida into compliance with medical informed consent standards.").

Third, understanding Gainesville Woman Care II as a decision about the standard in a temporary injunction case where the State presents no evidence, rather than a general case about how to adjudicate right to privacy claims, is the only way to reconcile that case with the Florida's Supreme Court's other precedents. In re T.W., for example, applies the "significant restriction" test in determining whether an abortion restriction should be subject to strict scrutiny. 551 So. 2d at 1245; *accord* N. Fla. Women's Health & Counseling Servs. v. State, 866

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compelling state interest, and least restrictive means, suggesting that the Court viewed the legislation as not significantly intruding on privacy rights to warrant strict scrutiny.

So. 2d 612, 632 (Fla. 2003). Because the Florida Supreme Court has not overruled these cases, Gainesville Woman Care II should be interpreted consistent with them if at all possible. See Washington v. Howard, 25 F.4th 891, 899–900 (11th Cir. 2022) (explaining that courts should seek to "resolv[e] conflicts in . . . precedent" where possible).

While these arguments have significant weight, Gainesville Woman Care II and Green v. Alachua County suggest that strict scrutiny applies, so that is the standard that the Court will apply.

The State Satisfies Strict Scrutiny

"[I]n disclosural cases, government intrusion generally [i]s upheld as sufficiently compelling to overcome the individual's right to privacy." *In re T.W.*, 551 So. 2d at 1192. Consistently, in Gainesville Woman Care III, the First District stated: "We agree with the trial court that ensuring 'fully informed and genuinely voluntary' consent is a compelling state interest...." Id. at 222 (citing Presidential Women's Center). Applying that holding in this case, the First District held that, if Florida's evidence "prove[s] correct," the Act "would pass muster under the Florida Supreme Court's decision approving informed consent in the abortion context." Gainesville Woman Care III, 278 So. 3d at 218.

After the First District's remand, the parties engaged in extensive discovery. During that time the Florida Supreme Court adopted the federal summary

judgment standard, under which "'[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part' of rules aimed at 'the just, speedy and inexpensive determination of every action.'" In re Amends. to Fla. R. Civ. P. 1.510, 317 So. 3d at 75 (quoting Celotex, 477 U.S. at 327).

This Court now must decide on this more fully developed record, whether a trial is necessary. Critical to the Court's decision to grant summary judgment is the absence of evidentiary support sufficient to raise genuine fact issues for Plaintiffs' positions and Plaintiffs' plan to proceed to trial without fact witnesses.

Given Plaintiffs' lack of fact witnesses, the undisputed evidence clearly establishes that the Act furthers the State's interest in informed consent - which has been recognized by several courts as compelling - and is narrowly tailored to achieve that interest.[9]

The Act advances the State's interest in informed consent for several reasons. First, the medical industry typically provides for *de facto* waiting periods for elective, outpatient medical procedures that are comparably invasive to abortions. With the exception of emergencies or diagnostic procedures, medical

[9] The Florida Supreme Court has repeatedly upheld laws against right-of-privacy challenges applying strict scrutiny. See, e.g., J.A.S. v. State, 705 So. 2d 1381, 1386 (Fla. 1998); Jones v. State, 640 So. 2d 1084, 1087 (Fla. 1994); Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985); Fla. Bd. Of Bar Exam'rs re: Applicant, 443 So. 2d 71, 75 (Fla. 1983); see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (courts must be careful not to make strict scrutiny "strict in theory, but fatal in fact").

procedures that are comparably invasive to abortions are not routinely performed on the same day that informed consent information is provided to the patient by the medical professional.

Second, women in Florida who received a same-day abortion report that they did not have the opportunity to review or consider the mandatory informed consent information prior to undergoing the procedure. In many cases, the doctors performing abortions have no prior doctor-patient relationship with their abortion patients.

Third, some women who have abortions regret them and experience harm as a result. Hundreds of women who received medication abortions in Florida without the 24-hour waiting period in place have attempted to reverse the abortion within hours or days of the procedure. Women who have abortions, especially those who regret them, often experience psychological and emotional harm, such as anxiety disorders, depression, alcohol and drug abuse, and suicidal ideation and behavior; *accord* Gonzalez, 550 U.S. at 159 (recognizing that "some women come to regret their choice" and suffer "[s]evere depression," "loss of esteem," "grief, and "sorrow"); T.W., 551 So. 2d at 1193 ("The decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman.").

The undisputed facts similarly show that the Act is narrowly tailored.

Twenty-four hours is the minimum time needed to sleep on such an important decision. And it is shorter than or the same as waiting periods for other decisions that implicate significant constitutional interests—privacy or otherwise. See: § 63.082(4)(b), Fla. Stat. (24 hours before terminating parental rights); § 741.04(5), Fla. Stat. (3 days for a marriage license); § 61.19, Fla. Stat. (20 days for a divorce); § 61.19, Fla. Stat. (3 days to purchase a firearm).

In addition, as noted, the majority of other States have waiting period laws in place. Of those waiting periods, 17 are for 24 hours, one is for 18 hours, 4 are for 48 hours, and 6 are for 72 hours. Thus, with one exception, all waiting periods are for 24 hours or longer. The Court agrees with the State that the lone exception of an 18-hour waiting period is not significant to the analysis because 18 hours is functionally indistinguishable from 24 hours.

The Court further holds that the Act's exceptions support its constitutionality. For example, the requirement for getting documentation of violence or other extenuating circumstances (*e.g.*, rape, incest) is not onerous, as underscored by the exceedingly high volume of domestic and violence injunction hearings held before the Courts of Florida's Second Judicial Circuit.

Additionally, Plaintiffs' contention that the Act is not narrow enough because it does not allow for the use of telemedicine as a means for conveying informed consent information is meritless. Even Plaintiffs' expert physician, Dr.

Shelly Hsiao-Ying Tien, admits that important nonverbal cues—including movement of hands, legs, and feet—can be missed in the course of remote interactions.[10] United States v. Alvarez, 567 U.S. 709, 729 (2012) (restriction should be "least restrictive means among available, effective alternatives); Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 571 (Fla.1991) (actual means can vary).

For all these reasons, the Act satisfies strict scrutiny.

Plaintiffs' Equal Protection Claims

Because the Act meets the strict scrutiny standard, it necessarily meets the lesser standard of rational basis or intermediate scrutiny that would apply to Plaintiffs' equal protection claims.

Plaintiffs' Motion to Stay

That leaves Plaintiffs' Motion to Stay. Plaintiffs ask this Court to stay the entry of final judgment pending their appeal. In the alternative, they ask that the effective date of the Court's judgment be delayed until April 30, 2022.

As Plaintiffs' own cases recognize, a stay pending appeal is an "extraordinary remedy." Akiachak Native Cmty. v. Jewell, 995 F. Supp. 2d 7, 12

[10] Plaintiffs have sought to strike the State's reference in its Reply to Dr. Tien's deposition testimony on this topic. The Court denies that motion. Plaintiffs raised the telemedicine issue in their Response and cited to Dr. Tien's testimony later in the same deposition. It would be inequitable not to allow Defendants to refute Plaintiffs' argument with clear evidence in the record.

(D.D.C. 2014) (quotations omitted). Because the stay Plaintiffs request is the "functional equivalent of a temporary injunction pending appeal," they must show "proof of" "(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 the public interest." Bayfront HMA Med. Ctr., LLC v. Dep't of Health & Galencare, Inc., 290 So. 3d 596, 600 (Fla. 5th DCA 2020). It is not enough, as Plaintiffs suggest, merely to identify "serious, substantial, difficult" legal questions. Moreover, the above requirements must be satisfied regardless of the duration of the injunction Plaintiffs seek.

Plaintiffs are unlikely to succeed on the merits for the reasons explained in this Order. Nor have Plaintiffs proven irreparable harm in the absence of an injunction. They merely argue that a stay would avoid harm to "Floridians' privacy rights before the appellate courts have the opportunity to weigh in." But the State, not the Plaintiffs, represents "Floridians." If Plaintiffs want the extraordinary remedy of a stay, they must demonstrate why *they* will be harmed absent a stay. They have not done so. In any event, this Court's ruling merely puts the people of Florida in the same position as the people of a majority of States. This is hardly the sort of irreparable harm that would justify the extraordinary remedy Plaintiffs seek.

Plaintiffs likewise cannot show that an injunction would be in the public

interest. Because it is the province of the Legislature to determine what policies are in the public interest, it is always in the public interest for a constitutionally valid statute to remain in force. That is especially clear because, under Florida Rule of Appellate Procedure 9.310(b)(2), if this Court entered judgment against the State, the State would be entitled to an automatic stay. Given the Florida Supreme Court's clear preference to preserve legislative enactments pending appeal even when a trial court has found them invalid, it is all the more in the public interest that a legislative enactment this Court has found valid be maintained in effect during appeal.

For all these reasons, Defendants' Motion for Summary Final Judgment is **GRANTED** and Plaintiffs' Motion to Stay is **DENIED**.

DONE AND ORDERED in Leon County, Florida, on April 8, 2022.

ANGELA C. DEMPSEY
Circuit Judge

Copies sent to all counsel of record.