IN THE SUPREME COURT OF FLORIDA

Case No. SC16-381

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

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

Lower Case No. 1D15-3048

PETITIONERS' BRIEF ON JURISDICTION

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INTRODUCTION

Plaintiffs-Petitioners seek discretionary review of a non-final order of the First District Court of Appeal ("DCA Order") reversing a temporary injunction of Chapter 2015-118, § 1, Laws of Florida, codified at § 390.0111(3) ("the Mandatory Delay Law" or "the Act"). The Mandatory Delay Law prevents a woman seeking an abortion from having the procedure for at least 24 hours after meeting with her physician, and requires her to make an additional, medically unnecessary trip to her doctor. As a result of the DCA Order, these unprecedented restrictions on the fundamental right to privacy are currently in effect.

In reversing the temporary injunction order ("TI Order"), the DCA expressly misconstrued this Court's precedent in *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003), raising the bar for when strict scrutiny applies to a law infringing upon the right to abortion and defying this Court's precedent on what constitutes a compelling interest sufficient to justify an intrusion on the right to privacy. This Court therefore has jurisdiction to review the DCA Order and clarify the relevant constitutional standard, Fla. R. App. P. 9.030(a)(2)(A)(ii)—and there is an urgent need for such intervention. Unless this Court acts, Plaintiffs-Petitioners ("Plaintiffs") and others seeking to vindicate their right to privacy will be forced to litigate their claims under the DCA's reduced constitutional standard, and will suffer irreparable harm as a result.

STATEMENT OF THE CASE AND FACTS

Since the legalization of abortion over 40 years ago, Florida women have been able to make safe, informed decisions about their own medical care, in consultation with their doctors, free from significant state interference. The Mandatory Delay Law disrupts this status quo by preventing a woman seeking an abortion from effectuating her decision for at least 24 hours and requiring her to make an additional, unnecessary trip to her physician.[1] No Florida law imposes similar restrictions on patients seeking any other form of gynecological care, *see* TI Order, App. B at 10 (citing Decl. of Christine Curry, M.D., Ph.D., at 4),[2] or,

[1] There are two extremely narrow exceptions: (1) where a woman can present written proof that she is a victim of rape, incest, domestic violence, or human trafficking, § 390.0111(3)(a)(1), Fla. Stat.; and (2) where continuation of the pregnancy would threaten the woman's life, *id.* at (3)(b).

[2] To clarify the DCA's material mischaracterization of the TI Order, Plaintiffs include a conformed copy of the TI Order in their Appendix. *See* Fla. R. App. P. 9.120(d) cmt. (1977 amdmt.) (noting that it is proper to include conformed copy of trial court decision where the district court order "does not set forth the basis of decision with sufficient clarity to enable the supreme court to determine whether grounds for jurisdiction exist"). Although the DCA Order states that the circuit court had before it no "sworn affidavits or verified statements or declarations" in support of Plaintiffs, DCA Order, App. A at 4, the TI Order in fact relied on the sworn, verified declaration of Christine Curry, M.D., Ph.D.—a board-certified obstetrician-gynecologist at the University of Miami Hospitals and at Jackson Memorial Hospital—about the harms the Act will impose on her patients, *see* TI Order, App. B at 8, 10. Thus, when the trial court "noted repeatedly the lack of evidence before it," DCA Order, App. A at 4 (emphasis omitted), it was referring to *the State's* failure to submit any evidence to show that the Act satisfies strict scrutiny, *see* TI Order, App. B at 9-10 ("Defendants have failed . . . to provide this Court . . . any evidence that" the Act serves "a compelling state interest").

indeed, any other form of medical care at all, *see* § 766.103(3)(a)(1)-(2), Fla. Stat.; Fla. H.R., recording of proceedings (Apr. 22, 2015), *available at* http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015041243&TermID=86, 1:27:55–1:28:04 (Bill Sponsor Rep. Sullivan conceding that no other health care is subject to a mandatory delay under Florida law).

The Governor signed the Act into law on June 10, 2015, with an effective date of July 1, 2015. The following day, Plaintiffs filed this lawsuit and sought an emergency temporary injunction. Plaintiffs are Gainesville Woman Care, LLC, a provider of safe, legal, high-quality reproductive health services, including first-trimester abortion care, and Medical Students for Choice, a not-for-profit organization with chapters in Florida that seeks to ensure that abortion remains safe and legal in the United States and abroad.

After a hearing on Plaintiffs' motion in which Defendants-Respondents[3] (collectively, "the State") neither disputed Plaintiffs' evidence nor presented any evidence of their own, the circuit court temporarily enjoined the Mandatory Delay

[3] Defendants-Respondents are 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.

Law on June 30, the day before it was set to take effect. The circuit court rejected the State's argument that the Act survives Florida constitutional scrutiny because it might survive federal constitutional scrutiny, reasoning that *North Florida*—in which this Court refused to adopt the federal "undue burden" standard for abortion restrictions—remains good law. *See* TI Order, App. B at 10-11. The court concluded that Plaintiffs "ha[d] carried their burden for the issuance of [a] temporary injunction under the 'strict' scrutiny standard announced in *In Re T.W., A Minor* and *North Florida* . . . ." *Id.* at 11.

The State immediately filed a notice of appeal, triggering an automatic stay of the injunction. *See* Fla. R. App. P. 9.310(b)(2). On Plaintiffs' motion and after a telephonic hearing on July 2, the trial court lifted the automatic stay. The State did not appeal the vacatur of the stay.

The DCA held oral arguments on the State's appeal of the TI Order on February 9. On Friday, February 26, the DCA both reversed the TI Order and *sua sponte* reversed the vacatur of the automatic stay "effective immediately upon release of th[e] opinion." DCA Order, App. A at 7.

Later that same day, Plaintiffs filed in the DCA both a notice to invoke this Court's discretionary jurisdiction and an emergency motion requesting a stay pending review by this Court. In support of their motion, Plaintiffs asserted that Florida women already are suffering irreparable injury as a result of the DCA

Order, and will experience further harm absent a stay: First, enforcement of the Act is depriving Florida women of their fundamental right to privacy. Second, it is threatening a woman's confidentiality and privacy by increasing the risk that her family members, employers, or others will discover that she intends to end the pregnancy. Third, it is increasing the costs and the burdens of the procedure by requiring additional time off work, lost wages, travel costs, and child care. Fourth, it is increasing the risks to women's health by delaying some women from obtaining abortion care for days, if not weeks. Finally, it could prevent some women from obtaining an abortion altogether. In support of that motion, Plaintiffs submitted a new declaration from Kristin Davy, the owner and administrator of Gainesville Woman Care, LLC, attesting to the massive disruption and physical, financial, and emotional harms that the DCA Order has already caused her patients who were unable to receive the health care they sought on the day of their scheduled procedure. That stay motion remains pending.

Plaintiffs seek this Court's review to clarify the appropriate constitutional standard and, ultimately, to reinstate the temporary injunction.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review the DCA decision because it expressly construes a provision of the Florida Constitution. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii). The DCA Order provides

four novel interpretations of the state right to privacy: First, it holds that a circuit court may never find that a state statute constitutes a "significant restriction" on the right to abortion as a matter of law—i.e., based on the statute's plain terms. Second, it holds that "evolutions in federal law" are relevant to the state privacy jurisprudence, and that this Court's precedent to the contrary has been overruled by ballot initiative. Third, it holds that the circuit court committed legal error when it concluded that the State had not met its burden under strict scrutiny because it failed to introduce any evidence that the Act actually furthers any compelling state interests. Finally, it dramatically expands the list of state interests that could be considered sufficiently compelling to justify an intrusion on the right to privacy. For each of these reasons, this Court has jurisdiction.

ARGUMENT

Florida is one of only five states with an explicit constitutional right to privacy. *Compare* Art. I, § 23, Fla. Const., *with* Alaska Const. art. 1, § 22; Cal. Const. art. 1, § 1; Haw. Const. art. 1, § 6; Mont. Const. art. 2, § 10. The question of whether and to what extent this fundamental right permits governmental intrusion into one of the most "personal [and] private decisions concerning one's body that one can make in the course of a lifetime," *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989), is of great public importance and likely to arise again. Indeed, in the new legislative session, seven abortion restrictions have been introduced, and

several have already passed out of committees. *See* S.B. 602, 2016 Leg., Reg. Sess. (Fla. 2016); S.B. 1718 (same); S.B. 1722 (same); H.B. 1 (same); H.B. 233 (same); H.B. 865 (same); H.B. 1411 (same). In light of the significance of this question, this Court should step in to clarify the appropriate constitutional standard.

The DCA Order deviates from this Court's privacy jurisprudence in four ways: First, the DCA held that a circuit court may never find that a state statute constitutes a "significant restriction" on the right to abortion as a matter of law. *See* DCA Order, App. A at 5–6; *see also id.* at 8-9 (Thomas, J., concurring). Instead, the DCA held, a circuit court must always make substantial "factually-supported findings" regarding the law's likely effects before strict scrutiny can apply, regardless of whether the significance of the intrusion is apparent from the law's plain terms. *See id.* at 5; *see also id.* at 3-4. Under this construction, even a law that affirmatively prevents a woman from effectuating her decision to have an abortion for 24 hours, 72 hours, two weeks—or that bans abortion outright, as two bills currently pending in the legislature would do, *see* S.B. 1718; H.B. 865—is not subject to strict scrutiny unless and until a circuit court issues "sufficient factually supported findings" on the harms that such a law would impose. But the question of whether a law that affirmatively prevents a woman from exercising her constitutional right to abortion, even temporarily, implicates the right to privacy is not a *factual* determination, but a *legal* one. *See, e.g., Planned Parenthood of*

Missoula v. State, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *9 (Mont. Dist. Ct. Mar. 12, 1999) (it is "apparent" as a matter of law that 24-hour mandatory delay infringes upon Montana's explicit constitutional right to privacy because "[t]he State . . . is telling a woman that she cannot exercise a fundamental constitutional right for a 24-hour period."). This Court should clarify that, as a matter of Florida constitutional law, whether such affirmative interference implicates the right to privacy can be resolved based on the Act's plain terms.

Second, the DCA held that the circuit court erred in failing to consider "the benefits of . . . evolutions in *federal* law" as part of its state constitutional privacy analysis. DCA Order, App. A at 5 (emphasis added). That interpretation directly contradicts the holding in *North Florida*, in which this Court explicitly rejected the State's argument that such "evolutions" in federal abortion law are relevant to Florida's independent privacy jurisprudence. *North Florida*, 866 So. 2d at 634–36, 640. The DCA justified its departure from this Court's jurisprudence by stating that the 2004 adoption of article X, section 22, of the Florida Constitution "in effect overruled *North Florida Women's* . . . ." DCA Order, App. A at 5. The DCA erred in holding that this Court's constitutional analysis has been overruled by ballot initiative, and this Court should exercise its discretionary jurisdiction to clarify that *North Florida* remains good law.

Third, the DCA misconstrued the nature of the "strict scrutiny" test for intrusions on the right to privacy. The DCA rejected the circuit court's holding that the State cannot satisfy strict scrutiny when it presents no evidence that an abortion restriction advances a compelling state interest. *Compare* DCA Order, App. A at 5-6 ("The trial court's failure to make sufficient factually-supported findings . . . about the State's compelling interests, renders the . . . injunction deficient . . . ."), *with* TI Order, App. B at 9-10 ("What the Defendants have failed in any way to provide this Court is any evidence that there is a compelling state interest . . . ."). However, whether the Mandatory Delay Law actually furthers the State's asserted interests in enhancing the existing informed consent process or maintaining the integrity of the medical profession, is a factual question, and the State's failure to introduce any such evidence—particularly in the absence of any legislative findings, *see* DCA Order, App. A at 4—was fatal for purposes of opposing Plaintiffs' motion for a temporary injunction. *See Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1034 (Fla. 1999) (State's failure to present evidence in support of its asserted compelling interest was fatal to its defense).

Finally, the DCA Order ignores binding precedent regarding what constitutes a compelling state interest in the context of abortion. The DCA held that a circuit court applying strict scrutiny to an abortion restriction—even a restriction that applies in the first trimester of pregnancy—must consider whether

the State has a compelling interest, *inter alia*, "in protecting the unique potentiality of human life, in protecting the organic law of Florida from interpretations and impacts never contemplated or approved by Floridians or their elected representatives, and in protecting the viability of a duly-enacted state law." DCA Order, App. A at 6. However, under this Court's precedent, none of these purported interests can support a significant restriction on a woman's decision to have a first- or second-trimester abortion. *In re T.W.*, 551 So. 2d at 1193-94.

If this Court declines to exercise its jurisdiction to correct the DCA's constitutional interpretation, Plaintiffs must return to the circuit court to re-litigate their likelihood of success on the merits under the DCA's reduced standard, and will suffer irreparable harm as a result. Moreover, unless and until this Court clarifies the relevant standard, the DCA Order will have reverberations in any actions within the First DCA involving an infringement upon the right to privacy—and, in light of the State's "home venue privilege," the First DCA is the likeliest venue for any such litigation. *See Bush v. State*, 945 So. 2d 1207, 1212 (Fla. 2006). There is thus an urgent need for clarification from this Court.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction to review the decision below, which vacated the temporary injunction and allowed this unprecedented intrusion into a woman's private decision-making to take effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served by electronic mail on the individuals listed below, this 7th of March, 2016.

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CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS

I hereby certify that this brief, prepared in Times New Roman 14-point font, complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). I further certify that this brief complies with the 10-page limit stated in Florida Rule of Appellate Procedure 9.210(a)(5)(A).

/s/ Julia Kaye

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