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IN THE SUPREME COURT OF FLORIDA

PLANNED PARENTHOOD OF GREATER ORLANDO, INC., n/k/a PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, INC., a Florida non-profit corporation,

Petitioner,

vs.

MMB PROPERTIES, a Florida general partnership,

Respondent.
_____/

Case No. SC15-1655

5th DCA Case No. 5D14-2920

Osceola Case No. 14-CA-1636-OC

RESPONDENT MMB PROPERTIES'S RESPONSE TO PETITIONER'S MOTION TO REVIEW ORDER DENYING MOTION TO STAY ISSUANCE OF MANDATE

COMES NOW, Respondent MMB PROPERTIES ("MMB"), by and through its undersigned counsel, and hereby files this, its Response to Petitioner PLANNED PARENTHOOD OF GREATER ORLANDO, INC. ("Planned Parenthood")'s Motion to Review Order Denying Motion to Stay Issuance of Mandate ("Motion for Stay") (cited as "Mot.").

OVERVIEW AND SUMMARY OF THE ARGUMENT

Appellant's motion seeks the extraordinary remedy of a stay of a district court's mandate. The motion is all the more extraordinary because it essentially

asks this Court to reverse – on motion – the temporary injunction issued by the trial court, which was affirmed by the district court.

The temporary injunction prohibited, among other things, the performance of abortions in the Oak Commons medical park because such actions violated private restrictive covenants. While portions of the injunction inured to Planned Parenthood's benefit, the aspect of the temporary injunction related to performance of abortions was affirmed by the Fifth District. *See Planned Parenthood of Greater Orlando v. MMB Props.*, 171 So. 3d 125, 127 (Fla. 5th DCA 2015) (the "Opinion") ("We conclude that, while the restriction is rather poorly drafted, it is not unclear. It prohibits the property from being used as an outpatient surgical center, the common and ordinary meaning of which is a facility or place for, or for the purpose of, performing outpatient surgical procedures."). Consequently, Planned Parenthood's abortion activities which had been temporarily enjoined by the trial court order upon MMB's filing of the requisite bond, remained enjoined in light of the Fifth District's affirmance. The mandate, which issued by the Fifth District on August 28, 2015, added nothing to the injunction as it pertained to abortion, and returned full jurisdiction over the matter to the trial court.

Consequently, because the mandate was not the source of, and merely affirmed the trial court injunction against abortions, if this Court were to quash the Fifth District's order denying Planned Parenthood's motion to stay the mandate,

abortions would remain enjoined. Planned Parenthood has therefore sought relief that, respectfully, does not logically follow from its argument.

Planned Parenthood requested a stay of the mandate because, while the temporary injunction against Planned Parenthood's performance of abortions has remained since the trial court order, its enforcement was stayed by the Fifth District's non-final order staying enforcement of the temporary injunction pending resolution of the appeal on the merits. *See Planned Parenthood of Greater Orlando v. MMB Props.*, 148 So. 3d 810 (Fla. 5th DCA 2014) (the "Stay Order"). Planned Parenthood has admitted that it has performed surgical abortions during the time of the stay. The Fifth District's final order, on the merits and following full briefing, inherently and necessarily ended the non-final stay of the temporary injunction. Op., 171 So. 3d at 130. Planned Parenthood's intent in requesting a stay of the mandate from the Fifth District was, and by its current motion is, in actuality an attempt to reinstate the stay in order to take advantage of MMB's inability to enforce the temporary injunction, so as to return to violating the private restrictions by performing abortions.

Essentially, what Planned Parenthood *actually* seeks is for this Court to stay the *trial court*'s presently enforceable temporary injunction. There is no reason to grant Planned Parenthood the extraordinary relief it seeks. Indeed, granting that relief would provide Planned Parenthood with a successful end-around on the

appellate process, achieving a virtual reversal of the temporary injunction while proceedings in this Court play out. Given the normal amount of time Supreme Court actions take to resolve, it is likely that the trial court case would conclude first, effectively reversing the temporary injunction before it ever would have had meaningful consequence.

The motion is also premised upon a misapprehension of a conflict in the districts regarding limitations on a trial court's authority when reviewing a motion for reconsideration, as a conflict regarding that evidence which an appellate court may consider when reviewing the actual injunction order on appeal. Instead of incorporating the factual findings of the trial court and the district court, Planned Parenthood's Motion includes select, out of context references to affidavits or testimony, and in many instances no references at all. Also improperly, Appellant's motion incorporates alleged facts occurring after July 1, 2015, over a year after the hearing on MMB's Motion for Temporary Injunction.

The district court considered the appeal of two orders by Planned Parenthood: first, the order granting the temporary injunction, and second, the order denying the Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction ("Motion to Reconsider"). Op. at 2, n.1. The trial court order denying the Motion to Reconsider provided, "The Court having considered the Motion and being otherwise fully advised in the premises, hereby

Orders and Adjudges that the Defendant's Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction is Denied." *See* Respondent's Appendix Ex. A. The order denying the Motion to Reconsider did not otherwise articulate the reason(s) for the denial. *Id*.

The district court issued the detailed Opinion on both trial court orders on May 22, 2015. The district court considered the order denying the Motion to Reconsider to be a denial of two motions, one to reconsider (the "first motion[1]"), and one to dissolve or modify (the "second motion"). Op. at 2, n.1. The district court acknowledged that Planned Parenthood failed to argue the second motion in its brief. *Id*. Additionally, because Planned Parenthood filed four affidavits in support of its Motion to Reconsider (the "post-hearing affidavits") and absent argument, the district court recognized that any affidavits filed in support of the second motion could only be used to prove changed circumstances, which were not even asserted. *Id.* at 4. In this limited respect only – of recognizing the limitation imposed by the Fifth District on the trial court's discretion – the district court acknowledged in a footnote conflict with the Third and Fourth District Courts of Appeal *on that issue*. *Id.* at 4 n.3. Importantly, the district court *did not* conclude that *but for* the failure to show changed circumstances, it would have reversed the

[1] To the extent this second order simply denied a motion to reconsider a previous non-final order, it was not appealable. *Agere Sys. Inc. v. All Am. Crating, Inc*., 931 So. 2d 244, 245 (Fla. 5th DCA 2006).

order denying the Motion to Reconsider.

The particular relief requested in that portion of the Motion to Reconsider that was effectively the second motion was a request to remove the injunction against performing sonograms, and a request to remove the language prohibiting Planned Parenthood from performing other unspecified procedures as vague language. Both of these requests were granted by the Fifth District in the Opinion. Op. at 2.

In regard to MMB's request for an injunction against surgical abortions, the district court concluded that "while the restriction is rather poorly drafted, it is not unclear. It prohibits the property from being used as an outpatient surgical center, the common and ordinary meaning of which is a facility or place for, or for the purpose of, performing outpatient surgical procedures." Op. at 8. The court continued, "[h]aving construed, de novo, the restrictive covenant, we readily find that the trial court's factual findings as to this issue are supported by competent, substantial evidence." The opinion endorsed the trial court's findings that: (1) surgical abortions are outpatient surgical procedures, (2) Planned Parenthood's facility is not a physician's practice of medicine, and, (3) even if the facility is a physician's practice of medicine, the performance of abortions was not ancillary or incidental to the practice. *Id.*

Planned Parenthood filed its present motion despite that changed

circumstances was not cited in the trial court's order or in the district court's opinion as a basis for the courts' respective orders, despite the fact that Planned Parenthood failed to raise any argument in regard to the second motion in its brief to the district court, and despite the fact that Petitioner effectively received the relief requested in the second motion. Petitioner proffers that perhaps if this Court reviews the conflict alleged between the districts, the Court will not only render a decision on the district conflict, but will also find error in both the district court's *de novo* construction of the restrictions and the district court's holding that the trial court's factual findings were supported by competent, substantial evidence. Those conclusions are without merit – and certainly do not *prove* a likelihood of prevailing. Those conclusions are also insufficient to give cause for an effective reversal of the temporary injunction and the district court's mandate *on motion* to this Court.

STANDARD FOR STAYING APPELLATE MANDATES

Before a mandate may be stayed (even if the Court concludes that Planned Parenthood actually seeks that relief), an appellate court must examine the four factors derived from the Committee Notes to Rule 9.120 of the Florida Rules of Appellate Procedure. "These factors include (1) the likelihood that jurisdiction will be accepted by the supreme court, (2) the likelihood that the movant will prevail on the merits in the supreme court, (3) the likelihood of harm if the stay is

not granted, and (4) the likelihood that the harm would be irreparable in the absence of the stay." *State v. Miyasato*, 805 So. 2d 818, 825 (Fla. 2d DCA 2001).

Seldom should stays of mandates be issued. In fact, a stay of mandate should be issued only when the stay is "essential." *See Oliveira v. State*, 765 So. 2d 90, 91 (Fla. 4th DCA 2000); *City of Miami v. Arostegui*, 616 So. 2d 1117, 1121 n.5 (Fla. 1st DCA 1993); *see also* Fla. R. App. P. 9.120, 1977 Comm. Ns. ("The advisory committee was of the view that the district courts should permit such stays only when essential.").

The burden to prove these elements to the district court is on the moving party. *Miyasato*, 805 So. 2d at 826, n.2 ("The burden of persuasion in this context must be placed on the movant."). For the reasons that follow, it is clear the district court did not err in denying Planned Parenthood's motion to stay the mandate.

APPELLANT'S MOTION SHOULD BE DENIED

Planned Parenthood did not meet its burden of showing the district court that this Court will likely accept review and then agree with the minority of district courts of appeal on the conflict cited. Furthermore, Planned Parenthood has given this Court no basis to determine that – even if this Court disfavored the majority position on that conflict – the district court's holding in the case at bar would then be invalidated. Lastly, Planned Parenthood has shown no likelihood of irreparable harm and has shown no "essential" reason to stay the mandate.

I. PLANNED PARENTHOOD IS NOT LIKELY TO PREVAIL ON THE MERITS.

A. Changed circumstances are irrelevant to whether the Fifth District should have considered belated affidavits in reviewing the trial court's order granting the temporary injunction.

Planned Parenthood's motion misapprehends the district court's opinion, particularly in regard to the relevance of the changed circumstances issue to the post-hearing affidavits at issue, and then the relationship of the post-hearing affidavits to each of its respective appeals. Planned Parenthood attempts to link changed circumstances to the post-hearing affidavits in its motion, claiming that the district court should have considered those affidavits – filed after the evidentiary hearing on the temporary injunction – because Planned Parenthood appealed the trial court's denial of the Motion to Reconsider. However, the motion offers no citation to the alleged changed circumstances (which, again, was never argued on appeal) nor the reason why the affidavits were relevant to the district court's consideration of the appeal of the order granting the temporary injunction.

In its opinion, the district court analyzed the proper review of the post-hearing affidavits for purposes of its review of the order granting the temporary injunction. Op. at 4-5. The Opinion stated, "[t]hus, while Planned Parenthood timely appealed the injunction order and can therefore challenge the sufficiency of the evidence presented at the injunction hearing, it cannot rely on evidence

submitted after the injunction hearing in support of that challenge." Op. at 5. Accordingly, despite Planned Parenthood's attempts to integrate the issues, the district court's assessment of the post-hearing affidavits in regard to its consideration of the order on the temporary injunction was separate from its analysis of the proper review of the subsequent motions and the application of the issue of changed circumstances.

Again, even if the trial court were permitted to consider the post-hearing affidavits, that consideration would still be left to the trial court's discretion. In the case at bar, the trial court did not identify the failure to show changed circumstances as a basis for its denial of the Motion to Reconsider. *See* Respondent's Appendix Ex. A. In fact, the trial court clearly stated in its order that it was "fully advised in the premises." *Id*. As the district court noted in the opinion, "[g]enerally, a trial court is afforded 'wide discretion to either grant, deny, *dissolve, or modify* a temporary injunction, and an appellate court will not intercede unless the aggrieved party clearly shows an abuse of discretion.'" Op. at 3 (citations omitted). No district would require the trial court to *grant* the motion.

Planned Parenthood nevertheless argues that the belated affidavits offer "…uncontested evidence..." Mot. at 12-13. But by their nature, these affidavits could – at best – only offer *additional* evidence to the evidence properly adduced at the hearing. They would not have somehow rendered the remaining admitted

evidence insubstantial or incompetent. Unlike affidavits submitted after the hearing, the witnesses provided at the hearing were subject to examination and cross-examination, and gave the trial court the benefit of assessing credibility. In short, the four post-hearing affidavits may have afforded the district court and the trial court more reading material, but they would have done nothing to disturb the "competent, substantial" evidence supporting affirmance of the injunction against outpatient surgical abortions.

B. This Court would likely conclude that the First, Second, and Fifth Districts are correct in requiring a change in circumstances to modify or dissolve an injunction.

The conflict of law "acknowledge[d]" in the district court's opinion at 4 n.3 concerns a trial court's permissible scope of review on one element of the case at bar, a motion to modify or dissolve an injunction. *See Minty v. Meister Fin. Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014). The majority of appellate districts, including the First, Second, and Fifth Districts require a "movant to 'demonstrate that the scenario underlying the injunction no longer exists so that continuation of the injunction would serve no valid purpose.'" *Spaulding v. State*, 150 So. 3d 852, 853 (Fla. 2d DCA 2014) (*citing Alkhoury v. Alkhoury*, 54 So. 3d 641, 642 (Fla. 1st DCA 2011)). That requirement is absent in the Third and Fourth Districts. *Minty*, 132 So. 3d at 376 ("In this district, modification of a temporary injunction entered after notice and hearing does not require an evidentiary showing

of a change in circumstances demonstrating the temporary injunction is no longer equitable.”). The conflict is not new. It was discussed (though not certified) no later than *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So. 2d 744, 745-46 (Fla. 4th DCA 1999) (disagreeing with, *inter alia*, *Miller v. Jacobs & Goodman, P.A.*, 639 So. 2d 1088 (Fla. 5th DCA 1994)).

MMB submits that the majority of districts on this issue have “gotten it right.” The majority jurisprudence is consistent with the policy that motions for reconsideration should not “reargue an issue previously addressed by the court when the reargument merely advances new … supporting facts which were available for presentation at the time of the original argument.” *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996). “[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly.” *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1370 (S.D. Fla. 2002). “For reasons of policy, courts and litigants cannot be repeatedly called upon to backtrack through the paths of litigation which are often laced with close questions … There is a badge of dependability necessary to advance the case to the next stage. “ *Id*. Motions to reconsider are inappropriate vehicles for asking “the Court to rethink what the Court … already thought through – rightly or wrongly.” *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

The majority rule is consistent with that policy. In fact, even the Third

District's dissenting judge in *Bay N Gulf, Inc. v. Anchor Seafood, Inc.* called the that court's position flawed and prophesied that the Third District would ultimately reverse course. 971 So. 2d 842, 845 (Fla. 3d DCA 2007) ("I believe the flaw in *Precision Tune* – transported today by the majority into the jurisprudence of this Court – arises from that court's failure to appreciate the differences between an injunction entered ex parte, and one, like that here, entered with prior notice and an opportunity to be heard . … Having considered Judge Sawaya's thoughtful reprise of himself in *Thomas*, I fear the next mea culpa might be our own.").

Conversely, adopting the position of the Third and Fourth Districts could potentially allow enjoined parties unlimited "free appeals" in the form of endless motions to dissolve or modify long-entered injunctions. Critically, in the context of this case at least, Judge Jordan is no longer presiding over the lower court division. Injunctions are inherently discretionary, and enjoined parties would be incentivized to move for reconsideration every time a new judicial officer rotated into a division as the succeeding trial judge has below. Adopting the Third and Fourth District positions would undermine finality to judicial decrees, steeply increase the cost of injunctive litigation, and erode faith in our justice system where contradictory trial court orders are issued in the same case.

Planned Parenthood has not satisfied its burden to show a likelihood that this Court will adopt the minority view.

C. The Fifth District applied the proper rule of construction to the land restriction at issue.

Regardless of the district conflict, the central holding of the Fifth District's opinion, after several pages of analysis, was as follows:

> We conclude that, while the restriction is rather poorly drafted, it is not unclear. It prohibits the property from being used as an outpatient surgical center, the common and ordinary meaning of which is a facility or place for, or for the purpose of, performing outpatient surgical procedures.

Op. at 8. This was expressly a *de novo* construction. *Id.*

In its Motion, Planned Parenthood has strung together cases that construed statutes rather than land restrictions in support of an alternative and rejected statutory definition. Mot. at 13. However, a review of those authorities reveals they actually support the district court's opinion. For example, the Third District in *Debaun*, like the district court's opinion in the case at bar, referenced dictionary definitions to ascertain the plain and ordinary meaning of the words "sexual" and "intercourse." *State v. Debaun*, 129 So. 3d 1089, 1092 (Fla. DCA 3d 2013). Finding the plain and ordinary meaning of the words, *Debaun* reasoned it need not look to case law and other statutes to determine possible meanings. *Id.* at 1092 (citing *Paul v. State*, 112 So. 3d 1188, 1195 (Fla.2013) ("recognizing that the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent")). *Debaun* was also guided by the tenet that a statute "must be construed in its entirety and as a

whole … and in such manner that it does not 'render part of [the] statute meaningless." (quotations omitted). Serendipitously, even a case cited by Planned Parenthood for its jurisdictional statement utilized the Webster dictionary to interpret the word "express" for the purpose of interpreting this Court's conflict jurisdiction. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *see also Ceco Corp. v. Goldberg*, 219 So. 2d 475, 476-77 (Fla. 3d DCA 1969) ("…it is axiomatic that we construe the statue as a whole entity…in order to arrive at a construction which avoids illogical results").

While the trial court and Fifth District construed a land restriction rather than a statutory term – like the Third District in *Debaun* – the lower courts ascertained the plain and ordinary meaning of the terms at issue and considered the totality of the restriction at issue. The district court reasoned that after considering the totality of the restrictions at issue, to adopt the construction offered by Planned Parenthood would render the restrictions meaningless. Op. at 8.

Particular note should also be made of *Reform Party of Florida v. Black*, 885 So. 2d 303, 312 (Fla. 2004), which is cited by Planned Parenthood for the erroneous proposition that courts should turn first to Florida statutes to define a contract term before referencing dictionary definitions. Similar to the district court's decision to *not* adopt the inexact definition from the State regulatory scheme requested by movant, this Court in *Reform Party* explicitly refused to

adopt the Federal Election Commission definition of "national party" when interpreting a statute, finding no evidence the Legislature intended to incorporate the FEC definition within the use of the term "national party." *Id.* at 313-14. In so doing, this Court cited *Nehme v. Smithkline Beecham Clinical Laboratories., Inc.*, 863 So. 2d 201, 204-05 (Fla. 2003), for the following proposition:

> One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature. When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary.

Planned Parenthood has provided no basis for this Court's reversal of the district court's *de novo* construction.

D. The non-dispositive district court order granting a stay of the injunction does not support stay of issuance of the mandate.

Planned Parenthood argues that the interim non-dispositive opinion issued by the district court, granting a stay of the injunction pending appeal supports both the likelihood that jurisdiction will be accepted by this Court, and the likelihood that movant will prevail on the merits in this Court. Mot. at 12. ("Planned Parenthood should succeed on the merits. This Court, *like the unanimous Stay Panel, is likely to find* both that Kissimmee health center is not an outpatient surgical center and that surgical abortions are ancillary and incidental to a physician's practice of medicine.") *Id.* (emphasis added).

That argument rests on the incorrect premise that the district court, in issuing the stay, substituted its factual findings for that of the trial court, and that this Court will do the same. The premise is curious, considering that Planned Parenthood's jurisdictional brief argues that trial courts should have more inherent authority. The district court considering the motion for stay clearly did not improperly appropriate to itself the fact finding role, but only considered the narrow emergency matter before it, with the incomplete argument and record available on that date.

It must be noted that the stay was entered after Planned Parenthood filed its initial brief, but before MMB filed its answer brief. The only hearing transcript in the court file for the district court's review was a transcript filed by Planned Parenthood, which excluded over twenty pages of legal argument, and was so riddled with errors that virtually every sentence in the transcript was revised to some degree by a later-filed corrected transcript. The corrected transcript was not provided to the parties until the same day the stay order was entered, ultimately filed by MMB with the appendix to the answer brief. Thus, the district court's initial decision to stay the injunction was made not only without the benefit of briefing, but without the benefit of an accurate and complete record.

Subsequently, after considering Planned Parenthood's appeal on the merits, the district court correctly concluded that the trial court's factual determinations

must be accepted if supported by competent, substantial evidence. Op at 3 (citing *Charlotte Cnty. v. Vetter*, 863 So. 2d 465, 469 (Fla. 2d DCA 2004)). After full briefing and review of the complete record, the district court ruled as follows: "Having construed, de novo, the restrictive covenant, *we readily find that the trial court's factual findings as to this issue are supported by competent, substantial evidence*." Op. at 8 (emphasis added).

The interim order on the then emergency motion for stay, predicated upon an erroneous transcript and incomplete briefing, provides no basis to cast doubt upon or muddle the district court's final opinion. At best, the interim stay order offers a cautionary tale.

II. PLANNED PARENTHOOD HAS NOT MET ITS BURDEN OF SHOWING IRREPARABLE HARM OR THAT THE STAY IS ESSENTIAL.

"[I]rreparable harm does not exist where the potential loss is compensable by money damages." *Barclays Am. Mtg. Corp. v. Holmes*, 595 So.2d 104, 105 (Fla. 5th DCA 1992); *see also Hiles v. Auto Bahn Fed'n, Inc.*, 498 So.2d 997, 998 (Fla. 4th DCA 1986) (no irreparable harm because the loss can be compensated by money damages in the context of temporary injunction.) In regard to theoretical harm, the federal courts have interpreted "irreparable injury" to denote an injury that is "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Va. Petroleum Job. Ass'n v.*

Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958) ("[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.").

Absolutely no support is offered for Planned Parenthood's claim of *irreparable* harm or why stay is *essential*.[2] Planned Parenthood's reference to monetary harm certainly does not provide a basis for stay of the mandate. Notably, Planned Parenthood's two pages of discussion of harm include one empirical harm: "Revenue from any follow up visits and other associated services that may be requested from these patients will also be lost." Mot. at 16. Furthermore, it must be noted that even though momentary harm does not qualify as "irreparable harm," MMB has already posted a bond to protect Planned Parenthood from any monetary harm caused by the injunction. The sufficiency of the bond amount was not challenged on appeal, nor was it addressed in Planned Parenthood's present motion.

Likewise, Appellant's ethereal rhetoric about its "mission" and "reputation" are without question uncertain and theoretical. Planned Parenthood has not shown that its reputation – whatever that might be – will be *irreparably* harmed, nor has it shown that it its mission – whatever that might be – will be irreparably harmed by

[2] Planned Parenthood's assertions of harm not only fail to prove irreparable harm, but evidence the exact inverse of a business operation where surgical abortions are ancillary and incidental, lending support to the trial court's finding in that regard.

abiding by the restrictions of the medical community where it knowingly proceeded to locate. Taken to heart, Planned Parenthood appears to assert that any restriction on its business activities – even one it has alleged is so minor as to be "ancillary and incidental" to its physician's practice – will necessarily lead to irreparable harm. Such an interpretation of irreparable harm would naturally render the standard impotent.

The instant case also does not involve state action infringing anyone's legal right to abortion, and therefore constitutional concerns are not implicated in this case, despite Petitioner's platitudes. Regardless, even where state action is involved, and where customers may be exercising a fundamental right, enterprises may not locate wherever they please. *Bossier City Med. Suite, Inc. v. City of Bossier City*, 483 F.Supp. 633, 648 (W.D. La 1980).

Weighing the harm to MMB caused by Planned Parenthood's violation of the restrictions against the purported harm to Planned Parenthood by abiding by the restrictions is also not appropriate.[3] The district court has already considered the harm alleged by Planned Parenthood and determined, utilizing an opinion issued by this Court, that "… the trial court properly rejected Planned Parenthood's

[3] The district court reasoned, "However, MMB correctly argues that when injunctions enforce restrictive covenants on real property, irreparable harm is not required. Op. 9 (citing *Stephl v. Moore*, 114 So. 455 (Fla. 1927), etc.). There also has been no *evidence* – as opposed to legal argument and postulations – of the respective parties' harms since the district court's stay order was entered, despite Petitioner's argument to the contrary.

argument that it would suffer irreparable harm if the injunction were granted. As the court correctly noted, Planned Parenthood was aware of the restrictions and proceeded forward at its own peril." Op. at 10 (citing *Wood v. Dozier,* 464 So. 2d 1168, 1170 (Fla. 1985)). This Court should, respectfully, similarly reject Planned Parenthood's claim of irreparable harm in its present motion.

Accordingly, because Planned Parenthood failed to prove irreparable harm, the stay of the mandate was properly denied.

III. JURISDICTION IS NOT LIKELY TO BE ACCEPTED BY THIS COURT BECAUSE THE CONFLICT QUESTION IS MOOT.

As articulated above, the district court's opinion was not reliant upon the conflict question referenced in Planned Parenthood's Motion. Therefore, the question is moot, and MMB respectfully submits that the case at bar is not a prime candidate for the jurisdiction of this Court.

CONCLUSION

Respectfully, MMB submits that this Court is unlikely to accept jurisdiction, but even in the alternative, MMB respectfully submits that this Court is unlikely to agree with the minority of districts on the conflict question cited. However, even if this Court ultimately reverses over two decades of majority jurisprudence, affirmance of the Fifth District's opinion and the trial court's injunction order should still result because the interdistrict conflict was not dispositive to the Opinion's holding. It bears repeating that the trial court having more inherent

authority would clearly not give cause to reversing the trial court's orders in the case at bar.

Furthermore, contrary to showing support for a stay, Planned Parenthood demonstrated within its motion the necessity for its denial. Planned Parenthood now claims that it has been performing prohibited outpatient surgical procedures since the issuance of the district court's stay pending appeal. Mot. at 15-16. Consequently, the status quo in Oak Commons was disrupted when Planned Parenthood began to perform those procedures in violation of the Restrictions. In requesting a second stay while it seeks review to this Court, based on misapprehension of the district court's opinion, Planned Parenthood is simply seeking to delay compliance with the clear terms of the restrictions. "[I]t is not unusual for the Florida Supreme Court to issue rulings more than one year after oral argument." *Stern v. Bank of Am. Corp*., 2015 WL 3440419, *3 (M.D. Fla. May 28, 2015). A stay of the mandate would result in injustice by delay.

For the foregoing reasons, MMB respectfully requests that Planned Parenthood's motion be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Service through the District Court of Appeals and/or Florida E-Portal System to: **Donald E. Christopher, Esq.** and **Kyle A.**

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this submission complies with the font and spacing requirements of Fla. R. App. P. 9.210, in that it was generated with 14-point Times New Roman and/or 12-point Courier New fonts and 1" margins.

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