SC22-1050

In the Supreme Court of Florida

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA ET AL.,
Petitioners,

v.

STATE OF FLORIDA ET AL.,
Respondents.

On Petition for Discretionary Review from
the First District Court of Appeal
DCA No. 1D22-2034

RESPONSE TO EMERGENCY MOTION TO VACATE AUTOMATIC STAY

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INTRODUCTION

Petitioners seek to thwart the will of the Legislature and circumvent this Court's usual decisional processes by obtaining, by motion, vacatur of the automatic stay allowing Florida's 15-week abortion ban to take effect. That request is an attempted end-run around the fact that this Court plainly lacks jurisdiction to review the First District's decision declining to vacate that stay, which Petitioners are separately seeking in this same proceeding. The First District correctly held that Petitioners may not assert irreparable harm to themselves by asserting the irreparable harm of others not before the Court. That holding does not expressly and directly conflict with any decision of this Court. Petitioners cannot evade this Court's lack of jurisdiction by securing, by motion, the exact same relief that this Court lacks jurisdiction to provide Petitioners on the merits.

Petitioners' position on the merits of the constitutional issue is even more flawed. They are wrong to argue that the Privacy Clause of the Florida Constitution—protecting the right of the people "to be let alone" in their "private li[ves]"—somehow encapsulates a right to

abortion. But while this Court has said that the Privacy Clause protects a "woman's decision of whether or not to continue her pregnancy," *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989), that decision was "egregiously wrong" from the start. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). It ignored that the provision's plain text says nothing of abortion, that its drafters publicly disavowed guaranteeing abortion rights, and that the provision was ratified in response to decisions restricting *informational* privacy. Were this Court to address the meaning of the Privacy Clause here, it should therefore recede from its precedents and clarify that the original meaning of the clause has nothing to say about abortion—and certainly that the Privacy Clause is not so clear as to pry the abortion debate from the hands of voters.

The Court should decline to vacate the automatic stay.

BACKGROUND

1. Legal background

In 1980, the people of Florida amended the Florida Constitution to add a "Right of Privacy":

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not

> be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const. (the Privacy Clause).

This text aims to limit State-sanctioned information harvesting—it uses legal terms of art synonymous with informational privacy,[1] and it carefully carves out an exception for public access to government records. But this Court has construed the provision to do more, including to "implicat[e]" a "woman's decision of whether or not to continue her pregnancy," *In re T.W.*, 551 So. 2d at 1192, and under that holding has subjected abortion regulations to strict scrutiny, *see generally Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017) (*Gainesville Women Care II*).

2. Factual and procedural history

A. On March 4, 2022, the Florida Legislature enacted HB 5. *See* Ch. 2022-69, Laws of Fla. (2022), http://laws.flrules.org/2022/69. Titled an "act relating to reducing fetal and infant mortality," *id.*, HB 5 prohibits abortions if "the gestational age of the fetus is more

[1] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that the "right to be let alone" barred unjustified wiretapping); *see generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

than 15 weeks," subject to certain exceptions for maternal health and fatal fetal abnormalities. § 390.0111(1), Fla. Stat.

The Governor signed HB 5 into law on April 14, 2022. *See* Ch. 2022-69, Laws of Fla. The bill became effective July 1. *Id.* § 8.

B. Petitioners are several abortion clinics and a doctor that provides abortions. Pet'rs' App. 11. On June 1—three months after HB 5 was passed and almost two months after it was signed into law—they brought this facial challenge under the Privacy Clause and sought temporary injunctive relief. Pet'rs' App. 5–87. None of the Petitioners wished to obtain an abortion; they instead sued on behalf of their patients. State's App. 8–10, 20.

The State raised procedural and substantive defenses. Pet'rs' App. 88–202. Its evidence demonstrated that HB 5 leaves unregulated the vast majority of abortions in Florida, more than 94% of which in 2021 occurred before 15 weeks. Pet'rs' App. 119. But "recogniz[ing] that HB 5 would likely be subject to strict scrutiny under current precedent," the State "preserve[d]" the "arguments that strict scrutiny is the wrong standard," that the Privacy Clause of the Florida Constitution does not guarantee a right to abortion, and that this

Court should revisit and overturn its abortion precedents. Pet'rs' App. 105.

After a hearing, the circuit court enjoined the State from enforcing the law. Pet'rs' App. 613–726. It held that Petitioners have third-party standing to sue on behalf of their patients. Pet'rs' App. 658–62. It also presumed that Petitioners could assert the injuries of their patients to establish the irreparable harm needed to warrant a temporary injunction. Pet'rs' App. 674–76. And it reasoned that HB 5 was not narrowly tailored to further the State's interests in protecting maternal health and preserving unborn life. Pet'rs' App. 662–74.

C. The State appealed, triggering an automatic stay. Pet'rs' App. 727–29; *see* Fla. R. App. P. 9.310(b)(2). Petitioners moved to vacate the stay, but the circuit court denied the motion because Petitioners had not met the "very high burden" of establishing that "the most compelling circumstances" require vacatur. Pet'rs' App. 754–56.

Petitioners then moved to vacate the automatic stay in the First District. That court, too, denied relief. Pet'rs' App. 811–21. At the out-

set, the court did not treat Petitioners' motion as a freestanding request for relief. Because Petitioners had first moved for vacatur in the trial court, it properly treated the motion as a request for "review" of the trial court's order denying vacatur. *See* Fla. R. App. P. 9.310(f); Pet'rs' App. 811.

Applying the abuse-of-discretion standard, the First District held that the trial court did not err in denying the motion to vacate. Pet'rs' App. 816–17. It at first questioned whether Petitioners have third-party standing given that they failed to allege facts showing that their patients cannot adequately challenge HB 5. Pet'rs' App. 814. Yet the court did not resolve that question. Pet'rs' App. 815 ("[W]e do not and need not address [Petitioners'] standing to obtain declaratory relief[.]"). Rather, it held that Petitioners could not "obtain temporary injunctive relief" because even if they could "assert the privacy rights of pregnant women" for standing purposes, they could not do so to meet the "irreparable harm" element. *Id.* Petitioners were thus left to assert only their own money damages as irreparable harm—a theory the court rejected. Pet'rs' App. 814 ("[M]oney damages due to a decrease in patient volume do not suffice to demonstrate irreparable

injury." (emphasis omitted)).[2]

Because the First District's irreparable-harm holding applies equally to its review of the circuit court's temporary injunction, *see* Pet'rs' App. 816–17, the First District "direct[ed] the parties within fifteen days to provide any further briefing or arguments" on the merits of the State's appeal. *Id.* Neither party did so. Mot. 6. Instead, nearly three weeks later, Petitioners filed a notice to invoke this Court's jurisdiction on the ground that the First District's decision conflicts with the Court's precedent. Pet'rs' App. 822. Nine days after that, Petitioners submitted their jurisdictional brief, along with this emergency motion to vacate the automatic stay.

Meanwhile, hearing no objection from Petitioners, the First District reversed the temporary injunction for the same reason it denied the motion to vacate: "Appellees could not assert irreparable harm on behalf of persons not appearing below." State's App. 74. Petitioners then filed a notice to invoke from that decision, again arguing that the First District's ruling conflicts with the Court's precedent. *See*

[2] Judge Kelsey dissented. She would have held that Petitioners may assert the irreparable harms of their patients under this Court's precedent. Pet'rs' App. 818–20.

Pet'rs' Notice to Invoke at 2, *Planned Parenthood of Sw. and Cent. Fla. v. State*, SC22-1127.

STANDARD OF REVIEW

Without discussing the proper standard of review, Petitioners appear to presume that this Court may consider their vacatur motion de novo under Florida Rule of Appellate Procedure 9.310(b)(2). *See* Mot. 6–7. That is wrong. Though a party may move in either "the lower tribunal or the [appellate] court" to "vacate the [automatic] stay," Fla. R. App. P. 9.310(b)(2), when the party moves first in the lower tribunal, later appellate vacatur motions operate as motions for "[r]eview" of the "orde[r] entered by" the "lower tribunal[.]" Fla. R. App. P. 9.310(f); *see DeSantis v. Fla. Educ. Ass'n*, 325 So. 3d 145, 150–51 (Fla. 1st DCA 2020) (construing a Rule 9.310(b)(2) motion filed in appellate court as a motion for review of the trial court's order vacating the stay); *Everett v. Everett*, 196 So. 3d 483, 484 (Fla. 1st DCA 2016) ("We treat the motion [for an appellate stay] as a motion for review of the lower tribunal's order denying stay, *see* Fla. R. App. P. 9.310(f), and affirm.").

Because Petitioners tried their hand first in the trial court and

lost, this Court reviews the trial court's denial of the motion to vacate for abuse of discretion. *See Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 829 (Fla. 1st DCA 2018). That is a "highly deferential" standard. *Everett*, 196 So. 3d at 484. If "reasonable [people] could differ as to the propriety" of the trial court's decision, the Court should affirm. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (citation omitted).

ARGUMENT

THE COURT SHOULD DECLINE PETITIONER'S INVITATION TO LIFT THE AUTOMATIC STAY ALLOWING THE 15-WEEK BAN TO GO INTO EFFECT.

The people's elected representatives enacted a Florida law banning most abortions after 15 weeks' gestation. Though the circuit court temporarily enjoined that law, it acknowledged that an automatic stay of its injunction—a stay "grounded in judicial deference to governmental decisions," *Fla. Educ. Ass'n*, 325 So. 3d at 150 (discussing Fla. R. App. P. 9.310(b)(2))—should remain in place. That is because a court may override this judicial deference to the Legislature and vacate an automatic stay only "under the most compelling circumstances." *People United for Med. Marijuana*, 250 So. 3d at 828 (citation omitted). To establish such circumstances, Petitioners had

to show, at minimum: "(1) the equities are overwhelmingly tilted against maintaining the automatic stay, (2) [Petitioners] will suffer irreparable harm if the automatic stay is maintained, and (3) [Petitioners are] likely to prevail on the merits of the appeal." *Dep't of Agric. & Consumer Servs. v. Henry & Rilla White Found., Inc.*, 317 So. 3d 1168, 1170 (Fla. 1st DCA 2020) (quotations omitted). As demonstrated by the many cases denying vacatur, few situations meet this high bar.[3]

This case is no exception. As the First District held below, Petitioners cannot establish irreparable harm. Nor have they shown an overwhelming case on the equities. And at any rate, Petitioners are unlikely to establish that HB 5 is unconstitutional—the original meaning of the Privacy Clause was concerned with *informational* privacy, not with abortion rights, and Petitioners lack third-party standing to assert their patients' constitutional challenge. The trial court

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[3] *See, e.g.*, *People United for Med. Marijuana*, 250 So. 3d at 829 (reversing vacatur of automatic stay); *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070, 1084 (Fla. 1st DCA 2022) (same); *Fla. Educ. Ass'n*, 325 So. 3d at 151 (same); *Fla. Fish & Wildlife Conservation Comm'n v. Daws*, 256 So. 3d 907, 912 (Fla. 1st DCA 2018) (same). Many other examples are unavailable on Westlaw because trial-court orders setting aside the automatic stay are often reversed without a published opinion. *See, e.g.*, *DeSantis v. Scott*, 1D21-2685 (Fla. 1st DCA 2021).

therefore did not abuse its considerable discretion in declining to vacate the automatic stay.

A. Petitioners failed to establish irreparable harm.

1. To prove irreparable harm, Petitioners cite an injury that is not their own. They contend that HB 5 "violates the constitutional rights of [their] patients"—a purportedly "*per se* irreparable harm." Mot. 9. But the First District rejected that argument, holding that even if Petitioners have third-party standing to assert the rights of their patients, they cannot assert the irreparable harms of their patients to obtain temporary injunctive relief. Pet'rs' App. 815.

The First District was right. "[I]njuries to third parties" are "not a basis to find irreparable harm." *Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 326 (D.D.C. 2018); *accord 3299 N. Fed. Highway, Inc. v. Bd. of Cnty. Comm'rs of Broward Cnty.*, 646 So. 2d 215, 220 (Fla. 4th DCA 1994). Rather, "the *moving party* must establish that *it* will suffer irreparable harm because there is no adequate remedy at law." *Curvey v. Avante Grp., LLC*, 327 So. 3d 401, 403 (Fla. 5th DCA 2021) (emphasis added); *accord S. Fla. Limousines, Inc. v. Broward Cnty. Aviation Dep't*, 512 So. 2d 1059, 1061 (Fla. 4th DCA

1987).[4]

That requirement tracks the traditional scope of the injunctive remedy. *Cf. Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (courts typically fashion modern equitable remedies based on historical equitable practice). Florida equity courts historically drew injunctions to protect the parties. *Moore v. City Dry Cleaners & Laundry*, 41 So. 2d 865, 871 (Fla. 1949) ("[A]n injunction order should never be broader than is necessary to secure to the injured *party* the full relief warranted . . . ." (emphasis added). Given equity's insistence that relief be tailored to the complaining plaintiff, it is no surprise that courts demand that a plaintiff establish his own irreparable harm to justify temporary injunctive relief. *See Curvey*, 327 So. 3d at 403; *S. Fla. Limousines, Inc.*, 512 So. 2d at 1061.[5]

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[4] Third-party harm is of course relevant to the public-interest prong given the broader scope of that inquiry, but it does not go to irreparable harm. *See Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 213 (D.D.C. 2012).

[5] The text of the constitutional provision housing the power to issue injunctive writs also confirms this requirement. Florida courts grant injunctions under their "power to issue all writs necessary or proper to the complete exercise of their jurisdiction." *Black Voters*

Petitioners say nothing of this crucial inadequacy. They simply assume that because they have third-party standing to assert their patients' rights, they can appropriate their patients' injuries for their own purposes. But third-party standing is not a "jurisdictional" doctrine that allows a litigant to stand in for a third party in all respects. *See Potter v. Cozen & O'Connor*, No. 21-2258, 2022 WL 3642107, at *1 (3d Cir. Aug. 24, 2022); *cf. Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 684 (D.C. Cir. 2004) (discussing associational standing, which allows an organization to stand in for its members). The doctrine is far more limited: It allows a litigant to assert the *rights* of a third party in support of the litigant's own cause of action. *See Potter*, 2022 WL 3642107, at *6 (holding that dismissals for lack of third-party standing are not jurisdictional and are instead dismissals for failure to state a claim). It does not allow the litigant to commandeer the third party's *injuries* to advance its own ends. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941–42

Matter, 339 So. 3d at 1075 (quotations omitted). Third parties, however, are not subject to the court's jurisdiction; *parties* are subject to the court's jurisdiction. So it makes sense that a litigant must establish his *own* irreparable harm to obtain a temporary injunction.

(Fla. 2002) (discussing when a litigant may "raise[] the rights of third parties" (quotations omitted)); *Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344, 351 (1st Cir. 2004) (requiring a party asserting third-party standing to rely on his own injuries).

The very first element of the third-party-standing test makes this clear: "*The litigant* must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Alterra Healthcare*, 827 So. 2d at 941 (emphasis added). The doctrine thus does not allow a litigant to borrow a third party's injury—it requires the litigant to invoke her own. Once the litigant establishes her own injury, third-party standing allows her to use the constitutional rights of another to obtain an order remedying that litigant's harm. *See Potter*, 2022 WL 3642107, at *4–5. But she still must show that her *personal* harm necessitates relief. And it follows that this party-specific requirement would apply with even greater force when it comes to establishing the irreparable harm necessary to obtain the extraordinary remedy of temporary injunctive relief.

Nor did this Court hold otherwise in *Gainesville Woman Care II*.

True enough, the Court reinstated temporary injunctive relief for abortion providers asserting the rights of their patients because the alleged Privacy Clause violation "presum[ably]" caused "irreparable harm." Jur. Br. 8 (quoting *Gainesville Woman Care II*, 210 So. 3d at 1263). But the Court simply "presumed" that the privacy violation there inflicted "irreparable harm" on women seeking an abortion. *Gainesville Woman Care II*, 210 So. 3d at 1263. It did not consider—let alone resolve—whether the providers could assert the irreparable harms of their patients. *See id.* at 1263–64. That question "merely lurk[ed] in the record" and was "neither brought to the attention of the [C]ourt nor ruled upon." *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). It is thus "not to be considered as having been so decided as to constitute [a] precedent[.]" *Id.* (same).

In sum, Petitioners cannot assert the "individual" harms of their patients to establish irreparable harm. *See Alterra Healthcare Corp.*, 827 So. 2d at 941–42. They must instead rely on their own harms to obtain injunctive relief.

2. To that end, Petitioners assert just one harm individual to

them: that HB 5 bars them "from providing essential medical care in accordance with their medical judgment and their patients' best interests." Mot. 9–10.[6] But the State, not individual doctors, sets the standard for medical practice within its borders. *See Gassman v. United States*, 768 F.2d 1263, 1265 n.3 (11th Cir. 1985) (explaining that state law sets the standard of care); *Boedy v. Dep't of Pro. Regul.*, 463 So. 2d 215, 218 (Fla. 1985) (discussing the State's "compelling interest in the regulation of the practice of medicine within its boundaries"). Individual doctors therefore do not suffer irreparable harm simply because they disagree with the medical standards that the State has set. If that were so, the State could inflict irreparable harm on a doctor by telling her that she cannot prescribe heroin for a cold. That is not the law.

B. The equities are not overwhelmingly tilted against maintaining the automatic stay.

On the equities, vacating the stay would irreparably harm both

[6] Petitioners do not challenge the district court's holding that any alleged financial harm does not suffice to establish irreparable harm. Pet'rs' App. 814.

the State, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Manatee Cnty. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012), and "the public generally," *St. Lucie Cnty. v. N. Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984). By enjoining the State's duly enacted law, the circuit court stymied the State's "sovereign interest in enacting and enforcing state law," *State v. Nelson*, 576 F. Supp. 3d 1017, 1032 (M.D. Fla. 2021), and it robbed the people of protections that their elected representatives have determined are in "the public interest." *Berman v. Parker*, 348 U.S. 26, 32 (1954). The risk that these harms to the State will be for naught counsels in favor of leaving the automatic stay undisturbed. *Cf. N. Palm Dev. Corp.*, 444 So. 2d at 1135.

So do the public interests that HB 5 protects. That law safeguards maternal health, in part by encouraging women to avoid the increased health risks that accompany later-term abortions. Pet'rs' App. 105–06, 639.[7] It also shields unborn children from pain.

[7] The circuit court recognized that "the risk of serious complications from abortion increases as a pregnancy progresses," and that in some cases there will be "serious complications" resulting from abortions performed after 15 weeks' gestation. Pet'rs' App. 639.

Pet'rs' App. 107–09, 324–25.[8] And it preserves trust in the medical system through limiting a procedure that "some deem nothing short of an act of violence against innocent human life." *Gainesville Woman Care II*, 210 So. 3d at 1270 (Canady, J., dissenting) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (plurality op.)); *cf. Boedy*, 463 So. 2d at 218 ("[T]he state has a compelling interest in the regulation of the practice of medicine . . . to protect the health, safety and welfare of its citizens."). Those interests weigh in favor of leaving the law undisturbed. *E.g.*, *3299 N. Fed. Highway, Inc*, 646 So.

[8] The circuit court, to be sure, found that the unborn do not feel pain before 24–26 weeks. Pet'rs' App. 655–56. The State disputes that finding. But at the very least, the evidence showed that it is unclear whether the unborn feel pain at 15 weeks' gestation. Pet'rs' App. 459–60. And when a fact is subject to good-faith debate, it is the Legislature's prerogative to decide which side of the debate is most persuasive. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *cf. Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 786 (Fla. 2004) ("In reversing the trial court, the Fourth District concluded that the trial court erred in rejecting the legislative choice based on its own view of the scientific evidence and improperly substituted its judgment for that of the Legislature, which determined that the 1900–feet eradication zone was justified by the best available science. We agree." (citation omitted)); *see also* Amicus Br. of Fla. Pregnancy Ctrs. in Support of Appellants' Suggestion for Certification at 4–6 (filed July 8, 2022 in 1D22-2034).

2d at 227 (continued enforcement of an ordinance aimed at protecting public health and welfare weighed against granting of injunction).

Petitioners caption their motion an "emergency" one and claim that HB 5 causes irreparable harm to women by regulating the tiny fraction of abortions in Florida that occur after 15 weeks of gestation. But even after the Governor signed this bill on April 14, Ch. 2022-69, Laws of Fla., Petitioners waited more than seven weeks before suing. That "delay in seeking judicial relief" undermines their claim that the equities favor vacatur of the stay. *E.g.*, *Shouman v. Am. Exp. Travel Related Servs. Co.*, 566 So. 2d 875, 876–77 (Fla. 3d DCA 1990).

Concerns that the stay will trigger "uncertainty" about "the healthcare that [Petitioners] can provide and their patients can receive" (Mot. 20) do not move the needle either. HB 5 has now been in effect for nearly two months. Vacating the stay would only scramble again the time limitations for obtaining an abortion, sowing further "confusion and uncertainty for" the many medical personnel, patients, and law enforcement officials that HB 5 implicates. *See Fla. Educ. Ass'n*, 325 So. 3d at 151.

Nor will HB 5 meaningfully "delay" Petitioners from "provid[ing] constitutionally protected abortion care." Mot. 20. HB 5 leaves unregulated the vast bulk of abortions that occur in Florida, most of which are performed before 15 weeks—94% in 2021. Pet'rs' App. 119. And if HB 5 is upheld, those that might otherwise wait until after 15 weeks to obtain an abortion will almost certainly obtain the procedure earlier (as opposed to not at all). And even after 15 weeks, the law has exceptions for preserving the life and health of the mother, and for certain fetal abnormalities. *See* § 390.0111(1), Fla. Stat.

Petitioners protest too much in asking the Court to "disregard any argument the State may make" based on "how long the temporary injunction could be in effect." Mot. 21. A history of past delay tactics in the prosecution of abortion cases after securing a temporary injunction makes it more likely that the harms to the State and the public detailed above would persist should this Court vacate the stay. *Gainesville Woman Care*, for example, bounced up-and-down the court system for nearly *seven years*, in part because the plaintiffs—temporary injunction in hand—delayed in the prosecution of their case. Pet'rs' App. 749–50; *see also Gainesville Woman Care, LLC*

v. State, 2015-CA-1323 (Fla. 2d Jud. Cir.) (filed 6/2015; final judgment entered 4/2022). Gainesville Woman Care is again a Plaintiff here, and Petitioners appear intent on taking a similar path, having already blocked the State's attempts to consolidate the temporary-injunction hearing with a final hearing on the merits to expedite prosecution of this case to final judgment. State's App. 44–46. On appeal, Petitioners then cited the temporary-injunction posture of this appeal as a reason for further delay. *See* Pet'rs' Opp. to Suggestion for Cert. at 7 (filed on 7/11/22 in 1D22-2034).

Worse still, if this Court vacates the stay, Florida is poised to become an abortion destination for out-of-state residents seeking to dodge abortion restrictions in their home states. Like Florida, neighboring states have also passed abortion prohibitions.[9] Unless HB 5 remains in effect, residents from those states will undoubtedly flock

[9] **Georgia**: Ga. Code. § 16-12-141 (prohibiting abortion after fetal heartbeat is detectable subject to certain exceptions); **South Carolina**: S.C. Code Ann. § 44-41-680 (similar); **Alabama**: Ala. Code § 26-23H-4 (prohibiting abortion subject to certain exceptions); **Louisiana**: La. Stat. Ann. §§ 40:1061, 14:87.1 (similar); **Mississippi**: Miss. Code. § 41-41-45 (similar); **Tennessee**: Tenn. Code § 39-15-213 (similar); **Texas**: Tex. Health & Safety Code Ann. §§ 170A.001-170A.007 (similar).

to Florida to obtain late-term abortions. *See* Shefali Luthra, *Florida could be a critical access point for abortion, but the state's own battle is just starting*, The 19th (June 8, 2022) (noting that many have already "made the trek to Florida" to circumvent their home states' abortion restrictions). Florida should not become "a regional destination for [late-term] abortion," *id.*, in defiance of the public policy adopted by its "people and their elected representatives." *Dobbs*, 142 S. Ct. at 2279.

C. Petitioners are unlikely to succeed on appeal.

"A substantial likelihood of success on the merits is shown if good reasons for anticipating that result are demonstrated." *Bd. of Cnty. Comm'rs, Santa Rosa Cnty. v. Home Builders Ass'n of W. Fla., Inc.*, 325 So. 3d 981, 984 (Fla. 1st DCA 2021). As discussed above, Petitioners lack irreparable harm and the equities favor keeping HB 5 in place, *supra* 11–22, so there is "good reason" to expect that Petitioners will fail in defending an injunction barring enforcement of HB 5. Indeed, that expectation has already come to pass—Petitioners failed in defending the temporary injunction in the First District. State's App. 74–76.

But along with a lack of irreparable harm and a poor case on the equities, there are two other "good reasons" why Petitioners are unlikely to succeed on appeal.

1. Start with the merits. Petitioners contend that they will succeed on appeal because HB 5 fails strict scrutiny. Mot. 12–17. Strict scrutiny is indeed the standard that currently governs laws like HB 5 under this Court's precedent. *See N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 634–36 (Fla. 2003); *Gainesville Woman Care II*, 210 So. 3d at 1256. But the State respectfully submits that the Court is likely to revise its precedent in one of two ways, either of which will result in HB 5 surviving Petitioners' challenge.

To begin, this Court is likely to hold that the Privacy Clause of the Florida Constitution does not limit the Legislature from regulating abortion. As the U.S. Supreme Court recently explained in overruling *Roe v. Wade*, 410 U.S. 113 (1973), a right to abortion is not contained in any of the "broadly framed" rights the U.S. Supreme Court's pre-*Roe* precedents had established—whether framed as a "right to privacy," or as a "freedom to make 'intimate and personal

choices' that are 'central to personal dignity and autonomy.'" *Dobbs*, 142 S. Ct. at 2257 (quoting *Casey*, 505 U.S. at 851). That reasoning obliterates the foundation of this Court's own abortion precedents, which heavily relied on the now-abrogated *Roe v. Wade* and its progeny in establishing a right to abortion under the Florida Constitution. *See In re T.W.*, 551 So. 2d at 1193–94 (citing *Roe*, 410 U.S. at 163, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 429 n.11 (1983), and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986)). In fact, it is even less plausible to ground a right to abortion in a right to privacy alone, as Petitioners attempt to do in this litigation under the Florida Constitution. Even before *Dobbs*, the U.S. Supreme Court had "abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause." *Dobbs*, 142 S. Ct. at 2271 (citing *Casey*, 505 U.S. at 846). The Court did so because "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy." *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting); *see also Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) (A "transaction

resulting in an operation" such as an abortion "is not 'private' in the ordinary usage of that word.").

Florida's Privacy Clause creates a right "to be let alone and free from governmental intrusion into the person's *private life*." Art. I, § 23, Fla. Const. (emphasis added). That is naturally read to limit governmental snooping and information-gathering—but not to establish a liberty to destroy unborn (or any other) life. That reading is confirmed by the very next sentence, which clarifies that the right cannot be construed to limit access to public records. *See id.*

That is no doubt why, immediately before the Senate vote on the proposed privacy amendment occurred on May 14, 1980, the sponsor of that amendment, Senator Gordon, in an exchange with Senator Dunn on the Senate floor, disclaimed that it had any bearing on abortion:

> Senator Dunn: Senator, what do you think the effect of this amendment will be on the existing controversy involving right to life and abortion?
>
> Senator Gordon: I don't see that uhh—I don't see that it has any effect on that Senator.
>
> Senator Dunn: Senator you don't uh—you don't—you can't honestly say that this amendment addressing as you have contended the question of privacy will be the focal

> point of state litigation on the question of all laws dealing with, with the question of abortion or the taking of a uhh—of a—of a fetus under any condition?
>
> Senator Gordon: No, I don't see that at all. I don't know what that has to do with, with—I don't see what that has to do with intrusion in your—in—in—privacy in your home, I don't see that at all.

Fla. S., tape recording of proceedings (May 14, 1980) (on file with State Archives of Florida at Series S1238, Box 57) (discussion regarding impact on abortion under SJR 935).

These points hardly exhaust the wealth of evidence establishing that the Privacy Clause does not cover the abortion right. But they preview the substantial textual and historical support that this Court will have the opportunity to consider when the merits of this issue eventually come before it.

At any rate, even if a right to abortion could be located in the Privacy Clause, "[c]ommon sense dictates that" any such right would not be "absolute." *In re T.W.*, 551 So. 2d at 1193. Though "significant restrictions" on any such right might trigger strict scrutiny, "[i]nsignificant burdens" should not. *Gainesville Woman Care II*, 210 So. 3d at 1269–70 (Canady, J., dissenting). And a burden is insignificant if it preserves a "reasonable opportunity to choose" to have an abortion.

Dobbs, 142 S. Ct. at 2310 (Roberts, C.J., concurring in judgment). Here, the law does that, as it permits abortions through 15 weeks' gestation—which, again, constitute over 94% of abortions that occur in Florida today.

2. Petitioners also have not established third-party standing to assert the claims of their patients.

As a general rule, only individuals whose privacy rights are implicated by a law have standing to challenge it on right-to-privacy grounds. *See Alterra Healthcare*, 827 So. 2d at 941 (explaining that Florida's right to privacy "is a personal one" and belongs "solely to individuals"). Here, Petitioners are several abortion clinics and one abortion doctor, but none of them assert a personal right to privacy.[10] Petitioners instead seek to vindicate the privacy rights of their patients. State's App. 8–10.

To overcome the general bar on third-party standing and assert the constitutional rights of another, a litigant must show, among

[10] Petitioner Dr. Tien asserts her own rights along with those of her patients. State's App. 10. But Dr. Tien does not allege that she is pregnant or likely to become pregnant and therefore cannot assert her own privacy rights. *See State v. Alice P.*, 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979).

other things, that the third party cannot protect the party's own interests. *Alterra Healthcare*, 827 So. 2d at 941. Yet Petitioners nowhere allege that their patients cannot "protect [their] own interests," or facts from which this element could be inferred. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *see also N. Fla. Reg'l Hosp., Inc. v. Douglas*, 454 So. 2d 759, 761 (Fla. 1st DCA 1984) (litigant failed this element because the third party possessing the privacy right had an opportunity to intervene in the suit). Women in Florida routinely challenge abortion restrictions on their own behalf. *E.g.*, *In re T.W.*, 551 So. 2d at 1189; *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1037 (Fla. 2001). Indeed, *Roe v. Wade* itself was a suit brought by a pregnant woman. *See* 410 U.S. at 120; *see also id.* at 124–25 (holding that the case continued to present an Article III case or controversy despite the absence of evidence in the record that Roe was still pregnant).

The circuit court reasoned that the "time-limited nature of pregnancy" inherently poses a "hindrance" to women challenging a "time-limited abortion ba[n]" like HB 5. Pet'rs' App. 660–61. But the circuit court did not explain why time poses any hindrances unique to

women in their individual capacities; nor are any apparent. The time-limited nature of abortion erects no procedural barrier to judicial review. *See Roe*, 410 U.S. at 125 (abortion challenges qualify for the "capable of repetition, yet evading review" exception to mootness). And if such women faced the possibility of immediate irreparable harm, a temporary injunction could be sought.

D. In any event, the Court should decline to exercise its discretion to grant relief pending appeal.

Putting all these elements aside, Florida Rule of Appellate Procedure 9.310(b)(2) provides that a court "may . . . vacate" an automatic stay pending appeal. The inclusion of the word "may" acknowledges that the decision to vacate a stay is discretionary. That makes sense—Rule 9.310 is merely a specific application of the judiciary's power to issue "all writs necessary to the complete exercise of its jurisdiction." Art. V, § 3(7), Fla. Const.; *Jacksonville Elec. Light Co. v. City of Jacksonville*, 18 So. 677, 679 (Fla. 1895) ("If this court has [the] power" to "grant a temporary injunction, pending an appeal . . . it must be because of its authority to issue all writs necessary or proper to the complete exercise of [its] jurisdiction."); *cf. Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070, 1075 (Fla.

1st DCA 2022) (explaining this concept). And the power to issue constitutional writs is inherently discretionary. *See Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, 340 So. 3d 475 (Fla. 2022) (declining to exercise discretion to issue all-writs relief).

For a host of reasons, the Court should decline to grant that extraordinary relief here.

1. Most fundamentally, the Court lacks jurisdiction in the discretionary-review proceeding in which this motion has been filed, and it should not grant a constitutional writ in a proceeding in which it lacks jurisdiction. Recall, Petitioners filed this motion in tandem with a request for discretionary review of the First District's order declining to vacate the automatic stay. They allege one basis for this Court's jurisdiction: that the First District's decision expressly and directly conflicts with decisions from this Court. Pet'rs' App. 823. But an exceedingly "strict standard" governs express-and-direct-conflict jurisdiction, *Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021), and this case does not meet it.

Conflicts with this Court's precedent arise in two events: when the district court (1) "announce[s]" a "rule of law" that conflicts with

a rule announced by this Court or (2) applies a "rule of law" announced by this Court "in a manner that results in a conflicting outcome despite substantially the same controlling facts." *Id.* (simplified). Key in either case, though, is that this Court must have in fact *announced* a "rule of law" that clashes with the district court's decision. *See id.* It is not enough that a case decided by this Court might have come out differently had the Court considered and adopted the district court's stated "rule of law." *See, e.g.*, *Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986).

National Adoption Counseling illustrates the concept. There, the petitioners asserted that a decision dismissing a case for lack of standing conflicted with other decisions that resolved identical cases on the merits without discussing standing. *Id.* This Court dismissed the petition, holding that an "inferential or implied conflict inherent in [a] decisio[n]" cannot "serve as a basis for this Court's jurisdiction." *Id.* (quotations omitted).

Petitioners pose just such an "inferential" conflict here. They claim that the First District's rule—that abortion providers cannot

assert the harms of their patients to obtain temporary injunctive relief—must conflict with *Gainesville Woman Care II* because this Court awarded temporary injunctive relief to abortion providers asserting the constitutional rights of their patients. Jur. Br. 7–8. But as explained above, the Court there never even considered—let alone decided—whether litigants with third-party standing may also assert the harms of others for purposes of establishing irreparable harm. *Supra* 14–15; *see also Jackson*, 288 So. 3d at 1183 ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quoting *Webster*, 266 U.S. at 511)). *Gainesville Woman Care II* thus did not "announce" a legal rule on this point, meaning that the First District did not "announce" a conflicting rule or "apply" a settled rule in an incongruent way. *See Kartsonis*, 319 So. 3d at 623. At most, the First District resolved an open question of law contrary to Petitioners' interests. That is not enough to trigger this Court's limited jurisdiction.

Petitioners also argue that the First District's "holding that [Petitioners] lack third-party standing conflicts with numerous decisions

of this Court." Jur. Br. 8. But the First District did not hold that Petitioners lack third-party standing. To the contrary, it expressly reserved that question. Pet'rs' App. 815 ("[W]e do not and need not address [Petitioners'] standing to obtain declaratory relief."). To be sure, the court also held that Petitioners "cannot assert the privacy rights of pregnant women." Jur. Br. 9 (quoting Pet'rs' App. 815). But that was just a holding that Petitioners could not assert someone else's irreparable harm as their own, not a third-party-standing holding. *See* Pet'rs' App. 815 (Petitioners "cannot assert the privacy rights of pregnant women necessary to substantiate a showing of irreparable harm."). The First District reiterated that its holding was based on irreparable harm when it reversed the temporary injunction. *See* State's App. 74 ("[T]he temporary injunction is reversed as [Petitioners] could not assert irreparable harm on behalf of persons not appearing below.").

There is thus only one district court holding: Petitioners lack the power to assert the irreparable harms of their patients. Because that holding does not conflict with a decision of this Court, there is no jurisdiction in the pending discretionary review proceeding.

2. The unusual circumstances surrounding Petitioners' request also support denying relief. Petitioners seek by "emergency" motion the exact same relief—vacatur of the automatic stay—that they ask the Court to grant on the merits in their petition for discretionary review. What Petitioners request, in other words, is "an interim adjudication that has the proscribed effect of 'awarding execution before . . . judgment'" in this proceeding. *Black Voters Matter*, 339 So. 3d at 1082 (quoting *Kellerman v. Chase & Co.*, 135 So. 127, 128 (Fla. 1931)). That is a blatant end-run around the Court's typical decisional process and one it should not countenance.

Petitioners' delays in this Court also undermine their entitlement to discretionary relief. The First District entered its order declining to vacate the automatic stay on July 21. Pet'rs' App. 811. Petitioners waited nearly three weeks to invoke this Court's jurisdiction and another nine days to move for "emergency" relief. Pet'rs' App. 822–23; Mot. 24. Their tardiness undercuts any claim that the circumstances are so dire that this Court must grant extraordinary relief, particularly in this tortured posture. *Cf. Shouman*, 566 So. 2d at 876–77.

CONCLUSION

For these reasons, the Court should decline to vacate the automatic stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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