IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2022-1127

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, on behalf of itself, its staff, and its patients, *ET AL.*,

Petitioners,

v.

STATE OF FLORIDA, *ET AL.*,

Respondents.

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

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

PETITIONERS' BRIEF ON JURISIDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

STATEMENT OF THE ISSUES

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

The First DCA reversed the TI based solely on its erroneous view that Plaintiffs—a doctor and health care facilities that provide abortion care—could not support the injunction by raising the irreparable harm their patients experience from being denied abortions that are prohibited under HB 5. Petitioners' App'x 4 (citing the First DCA's own earlier opinion denying Plaintiffs' motion to vacate the automatic stay); *see also State v. Planned Parenthood of Sw. & Cent. Fla.*, No. 1D22-2034, 2022 WL 2865900 (Fla. 1st DCA July 21, 2022) ("1st DCA Denial of Vacatur"). The issues presented

are: whether the DCA Order conflicts with this Court's precedent by, first, failing to presume irreparable harm in cases where there is a substantial likelihood that a law violates the Florida Constitution, as this Court held in *Gainesville Woman Care, LLC v. State*, 210 So.3d 1243, 1245 (Fla. 2017), including where (as in *Gainesville Woman Care*) plaintiffs assert the privacy rights of third parties; and second, by denying Plaintiffs third-party standing to assert their patients' privacy rights and irreparable injury, despite contrary outcomes in *Gainesville Woman Care*, 210 So.3d 1243, *State v. Presidential Women's Ctr.*, 937 So.2d 114, 115 (Fla. 2006), and *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So.2d 612, 615 (Fla. 2003).

If this Court grants review, Plaintiffs-Petitioners may raise additional arguments in defense of the TI, including arguments on the merits of their privacy claim.

STATEMENT OF THE CASE AND FACTS

In 1980, Floridians amended the state constitution to add an explicit right of privacy not contained in the U.S. Constitution. Art. I, § 23, Fla. Const. ("Privacy Clause"). In the decades since, this Court has repeatedly held that the right of privacy is "clearly implicated in

a woman's decision of whether or not to continue [a] pregnancy[,]" that the "right to make that choice freely is fundamental[,]" and that legislative invasions of that right are presumptively unconstitutional. *In re T.W.*, 551 So.2d 1186, 1192–93 (Fla. 1989) (quotation marks omitted); *accord Gainesville Woman Care*, 210 So.3d at 1256; *N. Fla. Women's Health & Counseling Servs.*, 866 So.2d at 620–21, 626.

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

Plaintiffs-Petitioners, a group of reproductive health clinics and a physician who, prior to HB 5, provided abortion care in Florida that is now banned ("Plaintiffs"), filed suit on behalf of themselves, their staff, and their patients, alleging that HB 5 violated fundamental rights under the Privacy Clause. Plaintiffs sought emergency

temporary injunctive relief. The trial court held an evidentiary hearing on the TI motion on June 27, 2022, including oral and written testimony from four expert and fact witnesses, and heard oral argument on June 30, 2022.

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

On July 5, 2022, the Circuit Court entered a 68-page written order enjoining enforcement of HB 5. *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022-CA-912, 2022 WL 2436704 (Fla. 2d Cir. Ct. July 5, 2022) ("2d Cir. Ct. TI Order"). Based on extensive factual findings, the Circuit Court concluded that the State failed to carry its heavy burden under strict scrutiny. *Id.* at *2. The court credited Plaintiffs' witnesses and found that HB 5 does not advance, and in fact undermines, maternal health, *id.* at *9–14, 21–22; that no reliable scientific evidence supported the State's asserted interest in preventing fetal pain, *id.* at *14–16, 22–23; and that patients denied abortion care under HB 5 will be forced to travel significant distances out of state at great economic and personal cost, to attempt to terminate their pregnancies outside the medical system, or to carry a pregnancy to term against their will, *id.* at *9, 14, 21. Because HB 5 likely violates constitutional rights, the Circuit Court found that its

enforcement would result in *per se* irreparable harm and that an injunction is in the public interest. *Id.* at *24-25.

The Circuit Court also concluded that Plaintiffs have standing to assert their patients' privacy rights. The court noted that this ruling is consistent with prior decisions of this Court, *id.* at *17 (citing cases), and further found, based on witness testimony, that Plaintiffs satisfy all criteria for third-party standing: HB 5 will injure them by forcing them "either to stop providing abortions after 15 weeks LMP,[1] or to face criminal prosecution, license revocation, and other penalties," *id.*; they have a close relationship with their patients, as the State conceded, *id.* at *18; and their patients are hindered in suing to protect their own interests by "the time-limited nature of pregnancy, when compared to how long litigation can take," and because many abortion patients "face difficult circumstances, including poverty," that would make it difficult for them "to litigate the complex matters . . . individually and on a compressed timeframe," *id.*

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

The State appealed, triggering an automatic stay of the injunction, Fla. R. App. P. 9.310(b)(2), which Plaintiffs moved to vacate. Although the Circuit Court found that Plaintiffs satisfied all requirements for vacatur, it nonetheless denied the motion. *Planned Parenthood Sw. & Cent. Fla. v. State*, No. 2022-CA-912, 2022 WL 2680000, at *1 (Fla. 2d Cir. Ct. July 12, 2022).

Plaintiffs then moved in the First DCA to vacate the stay of the injunction. On July 21, 2022, the First DCA denied relief, holding that Plaintiffs lacked third-party standing and could not "obtain temporary injunctive relief as they cannot assert the privacy rights of pregnant women necessary to substantiate a showing of irreparable harm, an indispensable requirement of a temporary injunction." 1st DCA Denial of Vacatur, 2022 WL 2865900, at *3. Judge Kelsey dissented, explaining that "precedent compels us to reverse" and vacate the automatic stay. *Id.* at *5 (Kelsey, J., dissenting).

On August 10, 2022, Plaintiffs filed a notice to invoke this Court's discretionary jurisdiction concerning the First DCA's refusal to vacate the stay. That notice is pending in this Court as Case No. SC2022-1050. On August 19, 2022, Plaintiffs filed their jurisdictional brief, arguing that the First DCA's irreparable harm and third-party

standing rulings conflict with decisions of this Court and other courts of appeal. On the same day, Plaintiffs also filed an emergency motion in this Court to lift the automatic stay.

Five days later, August 24, 2022, the First DCA issued a single-paragraph opinion reversing the TI. Petitioners' App'x 4. Citing its decision refusing to vacate the automatic stay as the sole authority supporting reversal of the TI and echoing the reasoning of that decision, the First DCA held that Plaintiffs "could not assert irreparable harm on behalf of persons not appearing below." *Id.* (citing 1st DCA Denial of Vacatur, 2022 WL 2865900, at *4). Judge Kelsey again dissented for the same reasons expressed in her earlier dissent from the automatic stay decision. *Id.* at 5.

The following day, Plaintiffs filed a second notice to invoke this Court's discretionary jurisdiction concerning the reversal of the TI, resulting in the opening of this case in this Court. Concurrently with this brief, Plaintiffs have also filed a motion to consolidate this case with their pending petition in Case No. SC2022-1050 to invoke this Court's jurisdiction over the First DCA's refusal to vacate the automatic stay, and an emergency motion to stay the First DCA's decision reversing the TI.

ARGUMENT

A. Standard for Discretionary Jurisdiction

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

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

The DCA Order reversing the TI relies exclusively on the same reasoning as its earlier decision refusing to vacate the automatic stay,

and it conflicts with this Court's binding precedent and decisions of other district courts on the same two grounds as its earlier decision: (1) the conclusion that Plaintiffs failed to show irreparable harm misapplies this Court's precedent on the irreparable harm prong of the test for temporary injunctive relief; and (2) the conclusion that Plaintiffs lack third-party standing to assert the constitutional rights of their patients, incorporated into the DCA Order by citation to the earlier order, conflicts with numerous decisions of this Court and district courts of appeal in which identically situated plaintiffs were permitted to assert claims based on their patients' privacy rights. *See* 1st DCA Denial of Vacatur, 2022 WL 2865900, at *4–5 (Kelsey, J. dissenting).

First, the DCA Order ignored and misapplied this Court's precedent on irreparable harm in constitutional challenges. The First DCA held that Plaintiffs "could not assert irreparable harm on behalf of persons not appearing below." Petitioners' App'x 4 (citing 1st DCA Denial of Vacatur, 2022 WL 2865900); *see also* 1st DCA Denial of Vacatur, 2022 WL 2865900, at *3 (holding that Plaintiffs "cannot lawfully obtain a temporary injunction" based on the irreparable harm to patients who are denied constitutionally protected abortion

care under HB 5). This conclusion starkly conflicts with this Court's decision in *Gainesville Woman Care*. There, the Court reversed and reinstated a temporary injunction against an abortion restriction based on irreparable harm to the plaintiffs' patients, even though those patients did not appear as parties to the proceeding. *Gainesville Woman Care*, 210 So.3d at 1263–64 (citing trial court's finding that "women seeking to terminate their pregnancies in Florida would be harmed by the enforcement" of the restriction). Where "certain fundamental rights are violated," including the right to abortion under the Privacy Clause, this Court "presumed irreparable harm," even where that harm befell third parties not before the Court. *Id.* at 1263.

The DCA Order failed to properly apply this presumption of irreparable harm based on the loss of constitutional rights. In fact, its one-paragraph order relied exclusively on the erroneous conclusion that irreparable harm had not been shown and wholly ignored the trial court's conclusion, based on extensive factual findings, that HB 5 is likely unconstitutional and will therefore cause *per se* irreparable harm to Floridians seeking abortions. *See* 2d Cir. Ct. TI Order, 2022 WL 2436704, at *9–24. In failing to presume

irreparable harm, the DCA Order reversing the TI thus misapplies and conflicts with this Court's holding in *Gainesville Woman Care* that irreparable harm follows as a matter of course when plaintiffs, as here, show a substantial likelihood of success in a constitutional privacy challenge.

Second, the First DCA's holding that Plaintiffs cannot rely on harms to third parties "not appearing below" incorporates the erroneous holding in the earlier order denying vacatur of the automatic stay that Plaintiffs lack third-party standing to assert the constitutional rights of (and constitutional harms to) their patients. *See* Petitioners' App'x 4 (citing 1st DCA Denial of Vacatur, 2022 WL 2865900); *see also* 1st DCA Denial of Vacatur, 2022 WL 2865900, at *3 (holding that Plaintiffs "cannot assert the privacy rights of pregnant women").[2] This conflicts with multiple cases in which this

[2] The cases that the First DCA cited to suggest that the requirements for third-party standing are not satisfied here all involve materially distinguishable circumstances. In particular, none involved a challenge to a time-based abortion ban like HB 5. Patients affected by HB 5 are, by definition, already 15 weeks pregnant and would be racing against imminent mootness, presenting a very real risk that they would lose their right to abortion entirely and be forced to carry a pregnancy to term before a court could grant relief. *See* 2d Cir. Ct. TI Order, 2022 WL 2436704, at *18.

Court and district courts of appeal have permitted abortion providers identically situated to Plaintiffs to raise their patients' privacy rights under the state Constitution, and, where applicable, affirmed injunctive relief on such third-party claims. *See* 1st DCA Denial of Vacatur, 2022 WL 2865900, at *4 (Kelsey, J., dissenting) ("Similar institutional parties have successfully asserted exactly those [third-party privacy] rights in many earlier cases.").

In *Gainesville Woman Care*, this Court held that Gainesville Woman Care, a Plaintiff in this case, was entitled to a temporary injunction based on third-party privacy claims in a constitutional challenge to an abortion restriction. *See* 210 So. 3d at 1247. In *North Florida Women's Health & Counseling Services*, the First DCA held that physicians who provide abortion care—like Plaintiff Dr. Shelly Hsiao-Ying Tien— "have standing to assert the rights of their . . . patients," and this Court reinstated a permanent injunction based on those plaintiffs' third-party privacy claims. *State v. N. Fla. Women's Health & Counseling Servs., Inc.*, 852 So.2d 254, 259–60 (Fla. 1st DCA 2001), *quashed on other grounds*, 866 So.2d 612 (Fla. 2003). And in *State v. Presidential Women's Center*, both the Fourth DCA and this Court considered the merits of privacy claims brought

by abortion clinics and a physician on behalf of their patients, just like Plaintiffs did here. *Presidential Women's Ctr.*, 937 So.2d at 115–16; *State v. Presidential Women's Ctr.*, 707 So.2d 1145, 1146 (Fla. 4th DCA 1998) ."); *see also State v. Benitez*, 395 So.2d 514, 517 (Fla. 1981) ("A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries."); *accord Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("A physician has standing to challenge an abortion law that poses for him a threat of criminal prosecution."). The DCA Order reversing the TI, therefore, "results in a conflicting outcome despite substantially the same controlling facts." *Kartsonis*, 319 So. at 623.

Both conflicts create discretionary jurisdiction in this Court.

CONCLUSION

For the foregoing reasons, this Court should exercise its discretionary jurisdiction to review the DCA Order, which reverses the TI, prevents Plaintiffs from vindicating their patients' privacy rights, and allows irreparable harm to Floridians' constitutional rights to continue. As explained in their motions filed concurrently with this brief, Plaintiffs also respectfully request that the Court (1) issue an emergency stay of the First DCA's decision to prevent the

dissolution of the TI during the pendency of this Court's review and to preserve this Court's ability to rule on Plaintiffs' motion to vacate the automatic stay, restore the status quo, and prevent ongoing irreparable harm; and (2) consolidate this case with their earlier-filed petition to invoke discretionary jurisdiction, No. SC2022-1050.

Respectfully submitted this 31st day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Plaintiffs-Petitioners' Brief on Jurisdiction has been furnished by electronic mail to all counsel of record by filing the document with service through the e-Service system, Fla. R. Jud. Admin. 2.516(b)(1), this 31st day of August, 2022.

/s/ Whitney Leigh White

CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS

I certify that this motion complies with the applicable form and font requirements under Florida Rule of Appellate Procedure 9.045. I further certify that this brief complies with the word limit for computer-generated briefs stated in Florida Rule of Appellate Procedure 9.210(a)(2)(A).

/s/ Whitney Leigh White