IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-1127

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' EMERGENCY MOTION TO STAY THE FIRST DISTRICT COURT OF APPEAL'S DECISION PENDING REVIEW

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I. INTRODUCTION

Plaintiffs-Petitioners ("Plaintiffs"), seven abortion clinics and a physician who provides abortion care, have sought discretionary review in this Court of an unprecedented decision by the First District Court of Appeal ("First DCA") reversing a Temporary Injunction Order enjoining a law banning abortion at 15 weeks of pregnancy. Order Reversing Non-Final Order Granting Temp. Inj., *State v. Planned Parenthood of Sw. & Cent. Fla.*, No. 1D22-2034, 2022 WL 3643236 (Fla. 1st DCA Aug. 24, 2022) ("First DCA Reversal Order"); Order Granting Pls' Mot. for Emergency Temp. Inj., *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022 CA 912, 2022 WL 2436704 (Fla. 2d Cir. Ct. July 5, 2022) ("Inj. Order"). To end the irreparable harm and violation of Floridians' constitutional rights documented by the Circuit Court after hearing testimony from witnesses, Plaintiffs now move this Court to stay the First DCA's decision while the litigation continues.[1] Absent a stay, HB 5 will continue to cause irreparable

[1] As explained in Plaintiffs' jurisdictional brief filed earlier today, this Court has discretionary jurisdiction over the First DCA's decision reversing the temporary injunction because that decision directly conflicts with prior precedent and ignores the trial court's factual findings on irreparable harm. *See* Pet'rs' Br. on Jurisdiction, No. SC2022-1127, Aug. 31, 2022.

harm to Plaintiffs and their patients despite the Circuit Court's finding of its likely unconstitutionality. Given the ongoing harms and the need for urgent relief, Plaintiffs request expedited review of this motion and that the Court order the State to respond to this Motion by Friday, September 9, 2022, at 5:00PM ET.[2] *See* Fla. R. App. P. 9.300(a). In support of this Motion, Plaintiffs state as follows:

II. PROCEDURAL HISTORY

A. Lawsuit and Request for Temporary Injunction.

On June 1, 2022, Plaintiffs filed a motion for temporary injunction, seeking to enjoin the enforcement of House Bill 5, Ch. 2022–69 §§ 3–4, Laws of Fla. ("HB 5") (codified at §§ 390.011, 390.0111, Fla. Stat.), which bans virtually all abortions after 15 weeks of pregnancy, measured from the first day of a woman's last

[2] Plaintiffs also renew their motion, filed on August 19, 2022, for an order vacating the automatic stay of the temporary injunction and for expedited review of that motion, Pet'rs' Mot. to Vacate Stay of Inj., No. SC2022-1050, Aug. 19, 2022. Plaintiffs have moved concurrently with this motion to consolidate their petition for this Court to accept discretionary jurisdiction to review the First DCA's reversal of the temporary injunction with their previously filed petition to invoke discretionary jurisdiction over the First DCA's decision refusing to vacate the automatic stay of the temporary injunction. *See* Mot. to Consolidate, No. SC2022-1127, Aug. 31, 2022.

menstrual period ("LMP"). *See* Mot. for Emergency Temp. Inj. (App. 5–87).[3]

B. Temporary Injunction Proceedings.

On June 27, 2022, after the parties had fully briefed the Plaintiffs' motion for temporary injunction and conducted depositions, the Circuit Court held an evidentiary hearing in which it heard live testimony from three witnesses and received written testimony from a fourth witness. Dr. Shelly Hsiao-Ying Tien, a Plaintiff and a physician trained and board-certified in obstetrics and gynecology and maternal-fetal medicine who provides abortion care in Florida, testified on behalf of Plaintiffs both as an expert and as a fact witness. Inj. Order, 2022 WL 2436704, at *2. Pursuant to the parties' agreement, an additional expert witness for Plaintiffs, Dr. Antonia Biggs, Associate Professor in the Department of Obstetrics, Gynecology, and Reproductive Sciences at the University of California, San Francisco, submitted testimony via sworn declaration and a transcript of her deposition taken by the State. *Id.* The State

[3] Along with this Motion, Plaintiffs have filed an Appendix ("App.") that includes documents cited herein that were filed with the Circuit Court or the First DCA. Other record citations are to documents filed in this Court.

presented live and written testimony from Dr. Maureen Condic, Associate Professor of Neurobiology and Anatomy at the University of Utah, and Dr. Ingrid Skop, an obstetrician and gynecologist and Senior Fellow and Director of Medical Affairs at the Charlotte Lozier Institute, a pro-life research institution. *Id.* On June 30, 2022, the Circuit Court held oral argument. *Id.* at *3. By its terms, HB 5 took effect on July 1, 2022.

C. The Circuit Court's Injunction Order.

On July 5, 2022, the Circuit Court granted Plaintiffs' motion for a temporary injunction, barring the State from enforcing HB 5. *See* Inj. Order, 2022 WL 2436704, at *1. In support of its ruling, the Circuit Court held that Plaintiffs merited the issuance of a temporary injunction because they showed (1) a substantial likelihood of success on the merits, (2) that irreparable harm will result if HB 5 is not enjoined, (3) that they lack an adequate remedy at law, and (4) that the relief requested will serve the public interest. *See id.* at *2, 19–25.

Specifically, the Circuit Court found that HB 5 is likely unconstitutional under the state Privacy Clause, *see* Art. I, § 23, Fla. Const., and decades of precedent. Specifically, the Circuit Court held

that, because HB 5's ban on abortions after 15 weeks LMP implicates fundamental privacy rights, the law is presumptively unconstitutional, and the State failed to carry its heavy burden to show that the law advances a compelling state interest through the least restrictive means. Inj. Order, 2022 WL 2436704, at *1–2. Notably, the evidence demonstrated that the statute undermines rather than advances the State's purported interest in maternal health. *Id.* at *14, 21. The Circuit Court also concluded that Plaintiffs and their patients will suffer irreparable harm as a result of HB 5, both per se harm because of the violation of their constitutional rights and actual harm based on the evidence that HB 5 would "directly impede and interfere [with] the physician-patient relationship" and would undermine maternal health by forcing patients to undergo the medically riskier course of continuing pregnancy and giving birth or to seek abortion outside the medical system. *Id.* at *14, 16, 24. The Circuit Court further held that Plaintiffs properly have standing to bring this action and satisfied all requirements for third-party standing to assert the privacy rights of their patients. *Id.* at *17–18.

D. The State's Appeal and the Automatic Stay.

The Circuit Court entered the Injunction Order on July 5, 2022, and the State filed a notice of appeal that same day. *See* Notice of Appeal (App. 613–15). Pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), the temporary injunction order was automatically stayed. *See* Fla. R. App. P. 9.310(b)(2). Also on July 5, 2022, Plaintiffs posted the $5,000 bond set in the Injunction Order. *See* Notice of Posting Inj. Bond (App. 616–18).

On the same day, Plaintiffs filed an emergency motion to vacate the automatic stay, which the State opposed. *See* Emergency Mot. to Vacate (App. 619–31); State Resp. in Opp. to Emergency Mot. to Vacate (App. 632–38). On July 12, 2022, the Circuit Court denied the emergency motion to vacate. Order Denying Pls' Emergency Mot. to Vacate Automatic Stay of Temp. Inj., *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022 CA 912, 2022 WL 2680000 (Fla. 2d Cir. Ct. July 12, 2022) ("Circuit Court Stay Order"). Although the Circuit Court "believe[d] the Plaintiffs ha[d] met [the] three requirements" for vacating the automatic stay, it denied the motion because it concluded that the First DCA's past reversals of trial court orders vacating automatic stays "established a high barrier" for trial courts

to vacate such stays. *Id.* at *1–2. However, the Circuit Court also noted that Plaintiffs could seek relief from the First DCA. *Id.* at *2.

E. The First DCA's Refusal to Vacate the Stay and Plaintiffs' Invocation of this Court's Discretionary Jurisdiction.

The day after the Circuit Court denied the emergency motion to vacate, Plaintiffs asked the First DCA to vacate the stay; the State again opposed vacatur. *See* Appellees' Emergency Mot. to Vacate (App. 639–64); Appellants' Resp. in Opp. to Emergency Mot. to Vacate (App. 665–92).

On July 21, 2022, the First DCA refused to vacate the stay, holding that Plaintiffs "cannot obtain temporary injunctive relief as they cannot assert the privacy rights of pregnant women necessary to substantiate a showing of irreparable harm." Order Denying Motion to Vacate & Rejecting Suggestion for Certification, *State v. Planned Parenthood of Sw. & Cent. Fla.*, No. 1D22-2034, 2022 WL 2865900, at *3 (Fla. 1st DCA July 21, 2022) ("First DCA Stay Order"). Judge Kelsey dissented, stating that "precedent compels us to reverse" and permit the injunction to take effect. *Id.* at *4–5. The First DCA concluded its Order by indicating its intent to dispose of the State's appeal of the Circuit Court's temporary injunction order

unless the parties submitted additional briefing. *Id.* at *4. No party filed additional materials in the First DCA.

On August 10, 2022, Plaintiffs filed a notice to invoke this Court's discretionary jurisdiction to review the First DCA's Order refusing to vacate the automatic stay, showing that the order expressly and directly conflicts with decisions of this Court and other district courts of appeal. Pet'rs' Notice to Invoke Discretionary Jurisdiction, No. SC2022-1050, Aug. 10, 2022 (App. 693–96). On August 19, 2022, Plaintiffs filed a brief addressing this Court's jurisdiction to review that order. Pet'rs' Br. on Jurisdiction, No. SC2022-1050, Aug. 19, 2022.

F. The First DCA's Reversal of the Circuit Court's Temporary Injunction Order and Plaintiffs' Invocation of this Court's Discretionary Jurisdiction.

On August 24, 2022, the First DCA issued a one-paragraph decision reversing the Circuit Court's temporary injunction order, citing to its prior decision refusing to vacate the automatic stay and holding that Plaintiffs "could not assert irreparable harm on behalf of persons not appearing below." First DCA Reversal Order, 2022 WL 3643236, at *1.

On August 25, 2022, Plaintiffs filed a second notice to invoke this Court's discretionary jurisdiction, this time directed to the First DCA's reversal of the Circuit Court's order granting a temporary injunction. Pet'rs' Notice to Invoke Discretionary Jurisdiction, No. SC2022-1127, Aug. 25, 2022 (App. 697–700). That decision is within this Court's jurisdiction because—like the First DCA's decision refusing to vacate the automatic stay—it expressly and directly conflicts with a decision of this Court on the same question of law by contravening this Court's established precedents regarding irreparable harm and third-party standing. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); *see also Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263 (Fla. 2017); *State v. N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d 612 (Fla. 2003). In particular, the First DCA's decision departs from this Court's precedent by failing to apply a presumption of irreparable harm when constitutional privacy rights are violated and by denying Plaintiffs third-party standing to assert the rights of their patients. *See* Pet'rs' Br. on Jurisdiction, No. SC2022-1127, Aug. 31, 2022.

III. LEGAL STANDARD

Under Rule 9.310(a), which governs requests for a stay pending review, a party seeking a stay may file such a motion either in this Court or the district court of appeal. *State v. Roberts*, 661 So. 2d 821, 822 (Fla. 1995). In deciding such a motion, a court should consider the following factors: (1) the likelihood of harm if no stay is granted and the remediable quality of any such harm, (2) the likelihood of ultimate success on the merits, and (3) the likelihood that jurisdiction will be accepted by the Supreme Court. *State ex rel. Price v. McCord*, 380 So. 2d 1037, 1038 n.3 (Fla. 1980); *City of Miami v. Arostegui*, 616 So. 2d 1117, 1121 n. 5 (Fla. 1st DCA 1993) (citing *Price*); *Perez v. Perez*, 769 So. 2d 389, 391 n.4 (Fla. 3rd DCA 1999) (citing *Price*).

IV. ARGUMENT

These factors overwhelmingly support entering a stay in this case. First, Plaintiffs and their patients will suffer immediate and irreparable harm that cannot be remedied at law without a stay. Second, Plaintiffs and their patients have a strong likelihood of ultimately succeeding on the merits of their claims. Lastly, Plaintiffs respectfully suggest that this Court is likely to accept jurisdiction in

order to review the First DCA's refusal to vacate the automatic stay and its reversal of the Circuit Court's temporary injunction order, because both decisions directly conflict with this Court's precedents on the same questions of law.

Granting Plaintiffs' requests to stay the First DCA's decision and allow the injunction to take effect[4] would restore the status quo while litigation continues and allow Floridians to resume exercise of their constitutional right to decide whether to carry a pregnancy to term or obtain a pre-viability abortion—a right that this Court has repeatedly recognized is encompassed by the Florida Constitution's right of privacy.

A. Plaintiffs' Motion is Properly Before This Court.

This Court has held that motions for a stay under Rule 9.310(a) may be filed either in the district court of appeal or in this Court. *Roberts*, 661 So. 2d at 822 ("While a motion for stay and to recall a mandate may be filed in this Court, it may also be filed in the district court of appeal."). Although there are instances where a district court of appeal may be "better informed concerning the case and thereby

[4] *See* Pet'rs' Emergency Motion to Vacate Automatic Stay of Temporary Injunction, No. SC2022-1050, Aug. 19, 2022.

better able to predict the likelihood of this Court's accepting jurisdiction," *id.*, parties may file a motion directly in this Court, especially where the factors that sometimes make review by the district court of appeal preferable are inapplicable.

Here, this Court is well-positioned to decide this motion, and a motion in the First DCA is unnecessary and likely to be futile. First, this motion involves considerations of irreparable harm, and there is little reason to believe that the First DCA would adopt an irreparable harm analysis that differs from the analysis set forth in its existing orders that contravenes this Court's precedents. *See* Pet'rs' Br. on Jurisdiction, No. SC2022-1127, Aug. 31, 2022. Second, the controlling questions on this stay motion are predominantly legal, meaning this Court is well-equipped to address them, especially those that involve the First DCA's disregard of this Court's relevant precedents. Finally, because Plaintiffs' request for an emergency stay raises similar questions of law and therefore substantially overlaps with Plaintiffs' pending requests for this Court to exercise its discretionary jurisdiction to review the First DCA's orders, *see* Pet'rs' Br. on Jurisdiction, No. SC2022-1050, Aug. 19, 2022; Pet'rs' Br. on Jurisdiction, No. SC2022-1127, Aug. 31, 2022; Pet'rs' Mot. to

Consolidate, No. SC2022-1127, Aug. 31, 2022, it serves judicial economy and efficiency for this Court to consider these matters in tandem and to decide the request for a stay in the first instance. Thus, Plaintiffs' motion is properly before this Court, and this Court should decide this motion.

B. Irremediable Harm Will Result Absent a Stay

Without action by this Court to permit the Circuit Court's injunction to take effect, Plaintiffs and their patients who need abortion care after 15 weeks will endure substantial harm to their constitutional rights and, as detailed by the Circuit Court, to their health, lives, and futures, harms that are irreparable in nature and cannot be remedied at law. *See McCord*, 380 So. 2d at 1039 (an applicant must demonstrate "irremediable harm by the denial of a stay pending review in that Court"). Both as a legal matter and based on the Circuit Court's well-documented factual findings, Plaintiffs have shown irreparable harm, meaning they lack an adequate remedy at law. *See* 29 Fla. Jur. 2d Injunctions § 25.

First, the violation of Floridians' constitutional rights constitutes per se irreparable harm. Citing this Court's precedent, the Circuit Court found that HB 5 likely violates the constitutional

rights of Plaintiffs' patients and that "the threatened or actual loss of constitutional rights, even temporarily, is per se irreparable harm." Inj. Order, 2022 WL 2436704, at *24; *see also Gainesville Woman Care*, 210 So. 3d at 1264 (temporary injunction warranted based on irreparable harm to "women seeking to terminate their pregnancies in Florida" in challenge brought by abortion provider and non-profit organization). Where "certain fundamental rights are violated," including the right to abortion under the Privacy Clause, this Court has "presumed irreparable harm." *Id.* at 1263. In *Gainesville Woman Care*, a case that like this one was brought by abortion providers on behalf of themselves and their patients, this Court reinstated a temporary injunction against an abortion restriction, concluding that the likely violation of the patients' privacy rights was sufficient, in and of itself, to establish irreparable harm. *Id.* at 1263–64. So, too, here: the Circuit Court found—and the First DCA did not dispute—that HB 5 is likely unconstitutional. Under this Court's precedent, irreparable harm should have therefore been presumed.

Second, the record below also demonstrates that, as a factual matter, both Plaintiffs and their patients will suffer harm that cannot be remedied at law if HB 5 is not enjoined. The lack of an injunction

has coerced Plaintiffs, under threat of severe criminal and licensing penalties, to stop providing essential medical care in accordance with their medical judgment and their patients' best interests, directly impeding the doctor-patient relationship, and denying patients access to essential medical care they and their doctors have determined they need. *See* Inj. Order, 2022 WL 2436704, at *24. As the Circuit Court found, "Plaintiffs cannot[] remedy this harm to their ability to provide healthcare to their patients" through monetary damages or other remedies at law. *Id.*

The Circuit Court also properly found that HB 5 causes irreparable harm to the thousands of patients who, for various reasons, need abortion care after 15 weeks LMP every year. Nearly 5,000 patients obtained abortions in Florida in the second trimester in 2021, and, as the Circuit Court found based on the record evidence, there are numerous reasons why many of these patients would have been unable to obtain abortions before 15 weeks LMP. Inj. Order, 2022 WL 2436704, at *6–9, 20; Mot. for Emergency Temp. Inj., Ex. 1 – Declaration of Shelly Hsiao-Ying Tien ("Tien Decl.") ¶ 18 (App. 51); *see* State Resp. in Opp. to Mot. for Temp. Inj., Ex. A (App. 117–20). As the Circuit Court found, those reasons include delays in

recognizing pregnancy, poverty, substance abuse disorders, intimate partner violence, or diagnoses of maternal or fetal health conditions. Inj. Order, 2022 WL 2436704, at *6–8; Tien Decl. ¶¶ 33–48, 55–56 (App. 56–62, 64–65); Hr'g Tr. Vol. I (June 27, 2022) at 52:1–58:21, 59:20–63:5, 64:16–65:2, 68:14–16, 69:11–71:16 (App. 254–60, 261–65, 266–67, 270, 271–73).

Every day that HB 5 remains in effect, Florida patients who desperately need post-15-week abortion services are being turned away and forced to attempt to seek abortions hundreds of miles or more out of state, to attempt abortions outside the medical system, or to continue pregnancies against their will. *See* Inj. Order, 2022 WL 2436704, at *9 (crediting expert testimony that these harms will befall patients denied abortion care under HB 5); Hr'g Tr. Vol. I (June 27, 2022) at 66:21–67:25, 69:11–15 (App. 268–69, 271). These harms cannot be remedied through monetary damages or any other procedure available under Florida law. Inj. Order, 2022 WL 2436704, at *24; *see also Gainesville Woman Care*, 210 So. 3d at 1264 (in case brought by abortion providers, affirming temporary injunction based on irreparable harm to plaintiffs' patients).

In sum, as the Circuit Court found and the temporary injunction record demonstrates, Plaintiffs have proven that they and their patients will suffer immediate, and ongoing irreparable harm absent an effective injunction against HB 5's enforcement. A stay of the First DCA decision reversing the temporary injunction is necessary to enable this Court to restore the status quo by allowing the injunction to take effect and preventing ongoing irreparable injury to Plaintiffs and their patients.

C. Plaintiffs Have a Strong Likelihood of Ultimate Success on the Merits

Plaintiffs have a substantial likelihood of ultimate success on the merits because, as the Circuit Court found, under this Court's precedents, HB 5 is likely unconstitutional on its face and Plaintiffs have standing to challenge the statute. The First DCA did not reach the merits of Plaintiffs' constitutional claim, nor did it take issue with the Circuit Court's well-supported findings that Plaintiffs and their patients would suffer irreparable harm. Rather, in flagrant contravention of this Court's precedents, the First DCA reversed the temporary injunction on the sole ground that Plaintiffs lacked third-party standing and could not support the injunction by invoking the

unquestioned irreparable harm to their patients in need of post-15-week abortion care. First DCA Reversal Order, 2022 WL 3643236, at *1. This was clear error.

1. Plaintiffs Have Standing to Assert the Privacy Rights of Their Patients and Seek Injunctive Relief.

The First DCA did not reach the issue of the blatant unconstitutionality of HB 5 or consider the substantial evidence supporting the Circuit Court's conclusion that HB 5 is likely unconstitutional and will cause irreparable harm; instead, the First DCA denied Plaintiffs' motion to vacate the stay and reversed the Circuit Court's temporary injunction order by improperly rejecting this Court's settled law governing third-party standing. *See generally* First DCA Stay Order, 2022 WL 2865900; First DCA Reversal Order, 2022 WL 3643236.

This Court and the lower appellate courts have consistently permitted abortion providers that are identically situated to Plaintiffs to raise their patients' privacy rights under the state Constitution and, where applicable, have affirmed injunctive relief on such third-party claims based on the harm to patients in need of abortion care. *See* First DCA Stay Order, 2022 WL 2865900, at *4 (Kelsey, J.,

dissenting) ("Similar institutional parties have successfully asserted exactly those [third-party privacy] rights in many earlier cases."). Indeed, in *Gainesville Woman Care*, the plaintiff that received the temporary injunction against an abortion restriction was Gainesville Woman Care, an abortion provider that is also a Plaintiff in this case, and this Court affirmed injunctive relief based on harm to that plaintiff's patients. *See* 210 So. 3d at 1244, 1263–64 (affirming the trial court's finding of irreparable harm based on evidence showing "the law would require women seeking to terminate their pregnancies to make an additional, unnecessary trip to their health care provider and could impose additional harms by requiring a woman to delay the procedure or force her past the time limit for the procedure of her choice.").

Abortion providers were likewise permitted to seek and obtain injunctive relief based on harm to their patients' constitutional rights in other cases. 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 here—"have standing to assert the rights of their[] patients," and this Court then reinstated a permanent injunction based on those plaintiffs' third-party privacy

claims. 852 So. 2d 254, 260 (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. *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 115 (Fla. 2006); *State v. Presidential Women's Ctr.*, 707 So. 2d 1145, 1146-49 (Fla. 4th DCA 1998).

There is no basis to depart from these precedents and reject third-party standing in this case. To the contrary, as the Circuit Court found, Plaintiffs have satisfied all three of the factors necessary for third-party standing. First, HB 5 will cause (and is currently causing) Plaintiffs direct injury by forcing them "either to stop providing abortions after 15 weeks LMP, or to face criminal prosecution, license revocation, and other penalties." Inj. Order, 2022 WL 2436704, at *17; *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."). Second, Plaintiffs have a close relationship with their patients, as the State conceded. Inj. Order, 2022 WL 2436704, at *18. And third, 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."[5] *Id.*

Based on this Court's precedent and settled Florida law, Plaintiffs have standing to assert the privacy rights of their patients and are entitled to injunctive relief based on irreparable harm to those patients.

[5] The Circuit Court also concluded that the handful of cases cited by the State to contest the hindrance factor were materially distinguishable. 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* Inj. Order, 2022 WL 2436704, at *18.

2. The Circuit Court Correctly Found That This Court's Precedents and the Evidence Before it Mandated the Issuance of a Temporary Injunction.

The First DCA's decision reversing the temporary injunction focused solely on the erroneous conclusion that Plaintiffs lacked standing to assert the rights and harms of their patients. It did not take issue with the Circuit Court's detailed and well-documented findings and legal conclusions, based on decades of this Court's settled precedent, that HB 5 is likely unconstitutional.

a. Decades of This Court's Precedent Confirm That HB 5 is Presumptively Unconstitutional.

This Court has long held, and consistently reaffirmed, that the Florida Constitution's Privacy Clause protects the right to abortion prior to viability. *See, e.g., Gainesville Woman Care*, 210 So. 3d at 1254; *Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997); *In re T.W.*, 551 So. 2d 1186, 1191–92, 1194 (Fla. 1989). This Court has also instructed that Florida's constitutional right to privacy "is much broader in scope than that of the Federal Constitution." *Gainesville Woman Care*, 210 So. 3d at 1252 (quoting *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul.*, 477 So. 2d 544, 548 (Fla.

1985)). And this Court has made clear that any law that implicates the fundamental right to privacy—as HB 5 unquestionably does—is presumptively unconstitutional and can be upheld only if the State carries a heavy burden to prove that the law furthers a compelling state interest in the least restrictive manner. *Id.* at 1252–54, 1260; *see also Green v. Alachua Cnty.*, 323 So. 3d 246, 254 (Fla. 1st DCA 2021) (when considering motion for temporary injunction in constitutional challenge under the Privacy Clause, "the single question" is "the likelihood that the [challenged law] would survive strict scrutiny."), *reh'g denied* (July 16, 2021).

The State conceded as much in the proceedings below. Both in its briefing and during oral argument at the Circuit Court, the State acknowledged that "Florida's Supreme Court has determined that 'Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy'" and that the strict scrutiny standard applies to HB 5. Hr'g Tr. Vol. I (June 27, 2022) at 17:22–18:5, 22:22–23:10 (App. 219–20, 224–25); State Resp. in Opp. to Mot. for Temp. Inj. at 18 (App. 105); Appellants' Resp. in Opp. to Emergency Mot. to Vacate at 2 (App. 671). The State

cannot, and did not, overcome this heavy burden on the record in this case.

b. The Circuit Court's Detailed Factual Findings That the State's Asserted Interests Do Not Justify HB 5's Intrusion on Floridians' Constitutional Rights Are Presumptively Correct.

After hearing live testimony, supplemented by expert witnesses' declarations and deposition transcripts, the Circuit Court concluded both that HB 5 implicates the constitutional right to privacy and that the State did not satisfy its burden to show that HB 5 advances a compelling interest in the least restrictive manner. Inj. Order, 2022 WL 2436704, at *2. This Court has held that, in reviewing a lower court's decision on a motion for a temporary injunction, "a presumption exists as to the correctness of the ruling of the lower court." *Wells v. Cochrane*, 188 So. 87, 87 (Fla. 1939); *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 670 (Fla. 1993), *rev'd in part on other grounds by Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) ("Where an injunction is issued and challenged, Florida's appellate courts possess express authority to review the order. The scope of review, however, is limited. As a general rule, trial court orders are clothed with a presumption of correctness and will

remain undisturbed unless the petitioning party can show reversible error.").

The Circuit Court considered and rejected the State's argument that HB 5 advances two interests: protecting maternal health and preventing fetal pain. It concluded that not only did the ban fail to serve those interests in the least restrictive manner, in the case of the state's interest in protecting maternal health, HB 5 actually undermined that goal. Hr'g Tr. (June 30, 2022) at 6:17–19 (App. 475); State Resp. in Opp. to Mot. for Temp. Inj. at 18–22 (App. 105–09); Inj. Order, 2022 WL 2436704, at *2, 14, 21–22. In doing so, the Circuit Court found that Plaintiffs' witnesses' testimony as to the State's purported interests was "more credible" and rebutted the testimony of the State's witnesses. Inj. Order, 2022 WL 2436704, at *2, 13–17. In fact, the Court noted that the State's witness's testimony was, in many ways "inaccurate and overstated, or based on data from decades ago," and "out of step with mainstream medical organizations", *id.* at *13.

On the State's interest in "protecting maternal health," the Circuit Court found that the State witness's "testimony failed to show that abortion is unsafe after 15 weeks LMP or that HB 5 would

improve maternal health." *Id.* at *9. To the contrary, the evidence showed that "abortion is a very safe procedure"; that "serious complications are very rare"; that abortion, including after 15 weeks LMP, is "safer than carrying a pregnancy to term"; and that HB 5 "is likely to undermine rather than advance maternal health" by delaying some patients' abortions by forcing them to travel out of state, to attempt abortions outside the medical system, or to continue pregnancies against their will. *Id.* at *9–10, 14; *see also* Tien Decl. ¶¶ 25–27 (App. 53–54); Hr'g Tr. Vol. I (June 27, 2022) at 44:4–50:24 (App. 246–52). The Circuit Court also found that the State "did not present evidence showing that a complete ban on pre-viability abortion is the least restrictive means of protecting maternal health" because "[t]here are ways to encourage earlier abortions that are far less restrictive than a complete ban—the State, for instance, could provide information on abortion or other resources to women in Florida to make it easier to get abortions earlier." Inj. Order, 2022 WL 2436704, at *22.

Regarding the State's interest in "preventing fetal pain," the Circuit Court noted that it did "not believe the existing law permits consideration" of this interest before viability, and further found that

the State witness's opinions were "not properly supported" by evidence and thus failed "to establish that fetal pain perception is possible during the periods of gestation"—after 15 weeks LMP yet before fetal viability—that are at issue in this case. *Id.* at *14, 22. Rather, "the scientific evidence supports the conclusion that, due to the lack of necessary pathways, the earliest point at which a fetus could have the necessary components—or building blocks—to feel pain is 24–26 weeks LMP." *Id.* at *16; *see* Hr'g Tr. Vol. I (June 27, 2022) at 92:1–93:7 (App. 294–95); Hr'g Tr. Vol. II (June 27, 2022) at 245:19–246:21 (App. 447–48).

Based on this temporary injunction record, the Circuit Court concluded that the State failed to carry its burden under strict scrutiny to show that HB 5 advances a compelling state interest through the least restrictive means. Inj. Order, 2022 WL 2436704, at *2. Accordingly, the Circuit Court found that the law likely violates the right to privacy in the Florida Constitution. *Id.* at *24. Therefore, the Circuit Court further found that HB 5's enforcement will result in per se irreparable harm if it is enforced, and that an injunction is in the public interest. *Id.* at *24-25; *Gainesville Woman Care*, 210 So.

3d at 1263-64; *see also supra* Part IV.B. (discussion of Circuit Court's irreparable harm analysis).

The First DCA's order reversing the temporary injunction failed to engage with the Circuit Court's extensive and well-documented findings of fact and conclusions of law, all of which confirm that Plaintiffs have a likelihood of success on their claim and are entitled to injunctive relief. Accordingly, Plaintiffs have shown a likelihood of success on appeal, warranting a stay of the First DCA's order.

D. The Conflict With This Court's Precedent Suggests This Court is Likely to Accept Jurisdiction

Plaintiffs have invoked this Court's discretionary jurisdiction because of a direct conflict between the First DCA's decisions in this case and this Court's binding precedent as to irreparable harm and third-party standing. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). As this Court has established, it "in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself." *The Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). The conflicting opinion "must contain a statement or citation

effectively establishing a point of law upon which the decision rests." *Id.* But "it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction," only that the statement or citation in the opinion "hypothetically could create conflict if there were another opinion reaching a contrary result." *Id.*

The First DCA's decisions refusing to vacate the automatic stay and reversing the Circuit Court's temporary injunction clearly articulate material points of law that create conflict with other decisions of this Court that have reached a contrary result. First DCA Stay Order, 2022 WL 2865900; First DCA Reversal Order, 2022 WL 3643236. The First DCA's stay order held that Plaintiffs "cannot 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" and "cannot assert that *they* will suffer irreparable harm[.]" First DCA Stay Order, 2022 WL 2865900, at *3. In other words, the First DCA held that Plaintiffs lacked third-party standing to assert the rights of their patients and, as such, cannot show irreparable harm. However, as Judge Kelsey aptly noted in dissent, the First DCA's decision ignores and conflicts with this Court's

binding precedent as to irreparable harm in the case of constitutional violations and third-party standing in the context of abortion providers vis-à-vis their patients. *Id.* at *4 (Kelsey, J., dissenting); *see also Gainesville Woman Care*, 210 So. 3d at 1264 ("In light of finding that the Mandatory Delay Law is likely unconstitutional, there is no adequate legal remedy at law for the improper enforcement of the Mandatory Delay Law. Thus, the Mandatory Delay Law's enactment would lead to irreparable harm[.]"); *N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 616 (affirming injunctive relief in action brought by "women's clinics, women's rights groups, and physicians" on behalf of their patients). In its subsequent decision reversing the temporary injunction, the First DCA held that Plaintiffs "could not assert irreparable harm on behalf of persons not appearing below," incorporating the reasoning of its stay decision by reference. First DCA Reversal Order, 2022 WL 3643236, at *1.

Accordingly, both decisions are predicated on a disregard of this Court's precedents, resulting in decisions that plainly articulate a direct conflict with this Court's decisions on the same questions of law. Leaving these conflicts unaddressed will destabilize this Court's precedent and lead to confusion in the lower courts. Because the

First DCA's decisions meet the standard for this Court to accept discretionary jurisdiction based on a direct conflict, Plaintiffs respectfully suggest that there is a substantial likelihood that the Court will do so in order to resolve this discord.

V. CONCLUSION

This Court should stay the First DCA's erroneous decision reversing the Circuit Court's temporary injunction order, and, in order to prevent the irremediable harm befalling Plaintiffs and their patients each day that HB 5's unconstitutional mandate is allowed to remain, this Court should simultaneously enter an order granting Plaintiffs' emergency motion to vacate the automatic stay of the temporary injunction.

WHEREFORE, Plaintiffs respectfully request this Court enter an order staying the First DCA's reversal decision.

Respectfully submitted this 31st day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Petitioners' Emergency Motion to Stay the First District Court of Appeal's Decision Pending Review 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
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.

/s/ Whitney Leigh White
Whitney Leigh White