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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-381

GAINESVILLE WOMAN CARE, LLC, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

NATIONAL ABORTION FEDERATION'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF INTEREST

The National Abortion Federation (NAF) is the professional association of abortion providers. Its mission is to ensure safe, legal, and accessible abortion care, the availability of which promotes health and justice for women. NAF's members include approximately 400 private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. Together, NAF's members care for half of all women who choose abortion in the United States and Canada each year.

NAF is the leading organization offering accredited continuing medical education to health care professionals in all aspects of abortion care. Its member providers adhere to NAF's evidence-based *Clinical Policy Guidelines*, which set the standards for quality abortion care.

Through its supporting organization, the NAF Hotline Fund (the Hotline), NAF also operates a toll-free hotline, which was established in 1979 to help women access unbiased information and referrals to NAF member providers offering safe, high-quality abortion care. The Hotline receives thousands of calls each week from women, their partners, families, and friends. It offers: factual information about pregnancy and abortion; confidential, nonjudgmental support; referrals to quality abortion providers in the caller's area; limited financial

assistance for abortion care; help in understanding state abortion restrictions; and case management for women with special or unique needs.

NAF and its members share a direct and deep-seated interest in this litigation—and in Florida's well-settled constitutional right to abortion. Given its extensive experience with abortion patients, NAF can assist this Court in addressing the issues presented in this case by providing stories of Florida women's real-world experiences with the challenged 24-hour waiting period. Through these stories, which stem from the nearly two-month span during which the 24-hour waiting period was enforced, NAF will demonstrate how the challenged Act infringes on a woman's fundamental right to access abortion care.

STANDARD OF REVIEW

This Court's review of a temporary injunction is mixed: legal conclusions are reviewed *de novo*, and factual findings are reviewed for abuse of discretion. *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 961 (Fla. 2002), *overruled on other grounds by Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053 (Fla. 2010); *accord SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012); *Meadows v. Med. Optics, Inc.*, 90 So. 3d 924, 925 (Fla. 4th DCA 2012). Questions of statutory interpretation or constitutional construction are reviewed *de novo*. *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d 566, 570 (Fla. 2008) (constitutional construction); *BellSouth*

Telecomms., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003) (statutory interpretation).

Florida's constitutional right to privacy is a fundamental right that triggers strict scrutiny analysis. *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003) ("Florida's right of privacy is a fundamental right warranting 'strict' scrutiny"). "A legislative act impinging on this right is presumptively unconstitutional unless proved valid by the State." *Id.* Strict scrutiny requires the State to show that the challenged legislation "furthers a compelling State interest through the least intrusive means," *id.* at 625 n.16, and therefore "shifts the burden of proof to the [S]tate to justify an intrusion on privacy." *Id.* at 626 (citation omitted).

SUMMARY OF ARGUMENT

After the Florida Legislature enacted a mandatory 24-hour waiting period for women seeking abortion care in Section 390.0111(3), Florida Statutes (2015) (the Mandatory Delay Law or the Act), NAF heard from many women in Florida who were directly burdened by the Act. Their personal stories, some of which are recounted below, illustrate that the Act burdened Florida women financially, physically, and psychologically. And their firsthand accounts of these burdens—which did not previously exist for women in this state—clearly demonstrate that the Act infringes on Florida's explicit right to privacy, under which the right to

abortion is fundamental. In light of the tangible and substantial burdens that the Act imposes on Florida women, the State cannot establish that the mandatory 24-hour waiting period survives strict scrutiny. The First District Court of Appeal's decision must therefore be reversed.

ARGUMENT

FLORIDA WOMEN'S REAL-WORLD EXPERIENCES SHOW THAT THE MANDATORY DELAY LAW INFRINGES ON FLORIDA'S EXPLICIT, FUNDAMENTAL RIGHT TO PRIVACY BY IMPEDING ACCESS TO ABORTION CARE.

I. BACKGROUND AND APPLICABLE LAW.

The Florida Constitution establishes an explicit right to privacy, as part of its Declaration of Rights: "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." Art. I, § 23, Fla. Const. This Declaration was "created to protect each Floridian from government encroachment in his or her life." *N. Fla. Women's Health*, 866 So. 2d at 618. Florida's right to privacy is "much broader in scope than that of the Federal Constitution," *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) (quoting *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985)), and it "is clearly implicated in a woman's decision of whether or not to continue her pregnancy." *Id.* at 1192. There are fewer "more personal or private decisions concerning one's body that one can make in the course of a lifetime" than the decision to terminate a

pregnancy, and this Court has consistently recognized that abortion is a fundamental right under the Florida Constitution. *Id.* at 1192-93 (a woman's right to freely choose abortion is fundamental); *accord N. Fla. Women's Health*, 866 So. 2d at 621 (same).

The Mandatory Delay Law, which was codified in Section 390.0111(3), Florida Statutes (2015), requires a woman seeking abortion care to delay her procedure by at least 24 hours and to make an additional, medically unnecessary, trip to her healthcare provider. The Act's requirements violate Florida's explicit constitutional right to privacy.

II. FLORIDA'S MANDATORY DELAY LAW IMPAIRS WOMEN'S ACCESS TO ABORTION CARE.

Soon after the law became enforceable, Florida member facilities expressed to NAF their concern that patients were adversely affected by the increased hurdles imposed by the Act, and the Hotline noted a marked increase in callers concerned about travel logistics, women's ability to access their abortion care in a timely fashion, and related costs resulting from the delay. Through its Florida member facilities and the Hotline, NAF began collecting stories from patients who experienced difficulties accessing abortion care after the Act took effect.

The purpose of this brief is to illustrate some of the ways in which women in Florida were directly affected by the Act during the nearly two-month period that it was enforced. Women were willing to share their stories for the brief because they

want the Court to understand that the Act's burdens are real and substantial—not merely theoretical or trivial. Their stories demonstrate that the Act impedes their fundamental and constitutional right to privacy in various ways.

The State cannot show that subjecting women to these real-life impediments is the least restrictive means of furthering any compelling State interest. Florida's Mandatory Delay Law thus fails strict scrutiny.

A. The Act Impedes Access to Abortion Care by Creating Financial and Travel Obstacles for Women.

In 2014, 75% of abortion patients were low income. Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INSTITUTE 1, 7 (May 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf [hereinafter "Guttmacher Study"]. Forty-nine percent of abortion patients were living at less than the federal poverty level, and 26% were living at 100-199% of the poverty level. *Id.* at 7 ("a family of two with an income of $15,730 or less was considered poor in 2014; a family of four meets this threshold with an income of $29,820" under federal poverty guidelines). The majority of patients paid for their abortion care out of pocket. *Id.* at 1, 9-10.

The Mandatory Delay Law creates financial and travel obstacles for women who seek abortion care. Many women told NAF about the financial impact that the Act has had on them. The Act requires women to miss additional days of

work, which many can neither arrange nor afford. The Act also requires women who live far away from a facility to pay for overnight accommodations. Increased transportation costs exacerbate their struggles. The experiences of women who spoke with NAF and shared their stories demonstrate that this burden is especially severe for low-income women.

One woman who spoke with NAF, Asaililia Heath, is a single mother, who works as a truck driver to support her two children. Asaililia's last pregnancy with her youngest son had been high-risk, which necessitated bed rest for several months and multiple hospitalizations. She ultimately lost her job as a result of her absences and suffered severe financial hardship in paying for her medical expenses and caring for her children. Asaililia knew that her new pregnancy would again prevent her from working for a significant time, which would exacerbate her already-difficult financial situation. Knowing that she had "barely survived [her] last pregnancy" and that her income could not support another child, Asaililia chose to terminate her pregnancy. She made an appointment for abortion care at a Jacksonville clinic.

Asaililia had her counseling appointment on Friday, but because of the Mandatory Delay Law, she had to wait until Saturday, at the earliest, for her abortion procedure. But the clinic was completely full on Saturday, and Asaililia could not schedule her abortion until Monday. Because the nature of her work as a

truck driver did not allow her to work for only two days at a time—in this case, the Saturday and Sunday before her Monday appointment—Asailila was required to take an additional three days off from work, which she would not have had to take before the Act went into effect.

The Act had a direct financial impact on Asailila. In addition to the $465 she paid for her procedure, Asailila lost $450 in wages for the three extra days of work she had to miss, and she was forced to use all of the vacation time that she would have otherwise spent with her family. She also paid approximately $295 for a rental car (which she had to rent for additional days), $20 in gas money for the additional time for her friend (who drove Asailila and accompanied her to the clinic), and $25 for a babysitter for her friend's children during the additional trip. Before her pregnancy, Asailila was having a difficult time supporting her children, and the additional costs associated with the Mandatory Delay Law significantly exacerbated her financial situation.

Another woman who spoke with NAF, Ipek Sumbay, is a single mother with a young daughter. Ipek knew she could not financially care for another child, decided abortion care was right for her, and spoke with NAF regarding the difficulties she had experienced as a result of the Act. For Ipek to access abortion care, she had to arrange to take time off of work, find someone who would drive

and accompany her to her appointment, arrange for her daughter's childcare, and travel an hour each way to and from the facility—*twice*, because of the Act.

Ipek was unaware of Florida's new 24-hour waiting period and two-visit requirement until she called to schedule her procedure. She had to use vacation time to take a day off from work for her counseling appointment, and fortunately was able to schedule her procedure for a Saturday so that she and her driver did not both have to take additional time away from work. But, because she was required to visit the clinic twice, Ipek incurred more travel expenses for gas and endured additional burdens and stress to arrange childcare and travel for two days.

Likewise, "Athena" (name changed to protect privacy) faced financial and other difficulties due to the Mandatory Delay Law. Athena contacted an abortion provider on a Friday afternoon and scheduled her first appointment for the following Monday. The Mandatory Delay Law forced Athena to return for a second appointment on Tuesday. Because Athena lives 160 miles from the nearest available abortion facility, and was experiencing severe morning sickness that made extended travel extremely difficult, she had been planning to stay at a hotel the night before her procedure. The Act forced Athena to stay over an additional night, in order to attend her scheduled appointment the day after her counseling appointment.

Athena had a total of $300 in her bank account at the time, from the last paycheck she had received before she was sidelined by her morning sickness and unable to work her regular schedule. She could not afford to pay for her abortion care ($485), gas for the trip, and *two* nights in a hotel (one night more than she would have needed to stay had the new law not existed). With NAF's help, Athena was able to pay the additional costs that the Mandatory Delay Law necessitated and that she could not otherwise have covered, but the Act still subjected her to needless time off from work and loss of income.

"Katelynn" (name changed to protect privacy) also contacted NAF during the time that the Act was enforced. She is a single mother with one child, who was unemployed and knew that she could not financially support another child. She was living with her grandmother and child, but had extremely limited financial means. Although her father could drive her to her appointments, Katelynn had to cover additional costs for a hotel and gas for transportation because the clinic is far from her home. NAF was able to help Katelynn, but a significant portion of the costs imposed on her were caused by the Mandatory Delay Law.

Other women, who wish to remain anonymous, reported their struggles to travel or pay for their abortion care because of the Act's requirements. For instance:

- "I had to take off work and I barely have enough to pay rent. I had to find a way to the clinic both days."

- "I have a full time job which I am not able to get two days back to back or even in the same week scheduled off. Because of this, I had to cancel my second appointment several times."

- "This law forced me to drive two hours away from home, not once, but twice. This cost me extra money in gas, which I could not afford because I am a college student."

- "After this process is complete, I will have taken four days off work . . . and spent almost $500."

These accounts illustrate the burdens that the Act directly imposes on women who seek abortion care in Florida. These financial and travel burdens go far beyond those obstacles that women ordinarily face when seeking medical care. Indeed, these additional burdens are unnecessary and provide no benefit to women.

B. The Act Impedes Access to Abortion Care by Creating Difficulties for Women Who Already Have Children.

The majority of women who seek abortion care already have children. Guttmacher Study at 1, 7. In 2014, 59% of abortion patients had at least one previous birth. *Id.*

Asailila and Ipek are two women who fall within this majority. The mandatory 24-hour waiting period took time and money away from Asailila and Ipek's children and imposed emotional and practical burdens that they would not have otherwise experienced. Asailila reported that arranging and paying for additional childcare was nerve-wracking. And because her job as a truck driver already requires her to be away from her family for long stretches of time, the

Mandatory Delay Law was especially burdensome, forcing Asaililia to use up vacation days that she would have otherwise used to spend time with her children. Ipek found it especially difficult to arrange for childcare on a Saturday, because she is raising her daughter on her own and does not have any family locally; she only managed to find someone to watch her daughter during her procedure at the last minute, which Ipek found to be very stressful.

Other women, who wish to remain anonymous, called NAF for help and reported that they could not care for an additional child. The Act's two-trip requirement forced them to pay for extra childcare and miss extra work, burdening already stretched resources. For example:

- "I am a 33-year-old mother of three. I have a thirteen year old, ten year old, and two year old. I have been with the same man for seven years. . . .I have taken [birth control] religiously at 6:30 AM for two years, and then I found out I was pregnant. Knowing that I could not take care of a fourth child, I decided to medically abort. I got to the facility and found out I had to wait 24 hours. Now I have to have extra time off of work (losing money) [and] pay for an extra day of daycare (losing money). . . . If I had second thoughts of any kind, I wouldn't have made the appointment."

- "As soon as I found out I was expecting I knew I was not ready for a newborn. I just had a child in 2015. Because of the 24-hour wait period, I lost time off work two days instead of one . . . and I had to pay for childcare. I already had my mind made up."

For women who already have children, the Mandatory Delay Law exacerbates existing childcare concerns and places Florida women in the untenable

position of having to lose time with their children *and* pay for additional childcare, due to a medically unnecessary—but State-mandated—visit.

C. The Act Imposes Psychological and Physical Harms on Women Who Seek Abortion Care.

The Act's 24-hour waiting period, in reality, imposes a longer delay on many women, and women experience both psychological and physical harm as a result of the delay. In addition, the mandatory delay pushes women later in pregnancy, which can increase both costs and medical risks.[1]

Athena, for instance, experienced severe physical symptoms—including constant nausea and frequent vomiting—from her pregnancy. The Mandatory Delay Law forced Athena to remain in this painful state for an additional day, during which she could not ride in a car for more than 20 minutes without vomiting—let alone make two, 160-mile round trips to and from the abortion clinic (which was why she needed to spend money on a hotel).

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[1] "Evidence . . . indicates that patient mortality rates for abortions increase as the length of pregnancy increases. Studies also suggest that a large majority of women who have endured waiting periods prior to obtaining an abortion have suffered increased stress, nausea and physical discomfort, but very few have reported any benefit from having to wait. Moreover, evidence . . . indicates that the waiting period increases a woman's financial and psychological burdens, since many women must travel long distances and be absent from work to obtain an abortion." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 23-24 (Tenn. 2000).

Moreover, Athena grew fearful of losing her job and becoming unable to support herself because of the additional time that she was forced to take off. Athena cried as she expressed to NAF how difficult it was for her to wait to have her procedure, and the stress of sorting out all of the financial and logistical issues caused by the waiting period and two-visit requirement. Athena suffered emotional stress and prolonged, severe pregnancy-related symptoms as a direct result of the Act.

Like Athena, "April" (name changed to protect privacy) contacted NAF and reported horrible morning sickness, with constant nausea so extreme that she could not even get out of bed. For April, the Act made an already uncomfortable situation far more unpleasant by forcing her to cope with her extreme nausea for a longer time period, after she had already decided to end the pregnancy.

Similarly, "Cherisse" (name changed to protect privacy), a single mother, was very ill with morning sickness from her pregnancy and had trouble getting out of bed to care for her home and children. She contacted NAF for help obtaining her abortion care. After her first appointment for counseling, Cherisse—who had been looking for work—was fortunate to get a new job that could help support her children. But, because she could not take time off from work due to her new job, Cherisse was forced to delay her second visit to the clinic for an additional week due to the Mandatory Delay Law. Without the Act, Cherisse's abortion procedure

could have been provided earlier, and she would not have had to endure severe illness for an additional week.

"Alicia" (name changed to protect privacy) experienced significant mental anguish as a result of trying to arrange her procedure. She told NAF that she had scheduled an appointment for her abortion procedure on a certain day, but when the Mandatory Delay Law became enforceable—the day after she called NAF—she became frantic. Despite having planned to have her procedure on a specific day, she was able to receive only counseling. Alicia eventually scheduled and received her abortion care, but it caused her anxiety because she had to reschedule her appointment around her school's midterm examinations, caused her to fear that her parents would learn that she was pregnant, and caused her to stress about the additional costs imposed—and how she would find enough money to cover them—particularly those associated with the increased travel.

Likewise, when Ipek learned that accessing the care she needed would be much more difficult and complicated because of the Act, she was completely overwhelmed and frustrated because there was no medical reason for the delay.

Other women who shared their stories with NAF and wish to remain anonymous recounted similar psychological and physical impacts from the Act's requirements. For instance:

- "This law . . . forced me to stay pregnant for four extra days because of my schedule. During this time, I endured extreme morning sickness and other discomforts."

- "This was one of the hardest decisions I've ever made so it was harmful to me mentally and emotionally [to have] to wait another twenty-four hours."

- "I am a 41-year old married woman who has not taken the decision to have an abortion lightly. The fact [that] you have to wait 24 hours only adds to the already difficult decision you make as a woman to have an abortion. Myself and my husband have had to miss work [and] arrange additional childcare. The financial implications of missing work are also adding stress to us as a family, it would be better that once you have made your decision you can proceed so you can start to move forward."

- "I'm 30 years old and I have five beautiful girls. I decided to terminate this fetus because the father is very abusive towards me.[2] It would not be healthy to bring a child into this world into that kind of mess. My point is that this was the best decision for everyone involved in this specific situation. I have living children and I had made up my mind when I decided to call to schedule an appointment to go through with this. I thought it was really unfair to me that I had to wait another twenty-four hours after receiving counseling for it. My mind was made up and it made me more depressed to have to wait."

- One woman reported that the two visits resulted in a two-week delay in her abortion care, because her job requires a two-week notice for time off from work, and she had not timely requested an additional day before she learned about the Mandatory Delay Law. Without the Act, she could have had her counseling and procedure on the same day without causing her anxiety, both on a day that did not conflict with her work schedule.

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[2] While the Act exempts women who experience domestic abuse, § 390.0111(3), Fla. Stat. (2015), a woman must be able to produce a court order or other documentation, which many simply cannot obtain. As a result, the exemption has no effective mechanism to reduce its burden on abused women.

The Mandatory Delay Law imposes a significant financial, physical, and psychological toll. The State cannot demonstrate that the Act is the least restrictive means to fulfill a compelling state interest.

D. The Act Perpetuates Gender Bias by Undermining Women's Decision-Making Abilities.

Mandatory waiting periods reflect paternalistic and unfounded beliefs about pregnant women's decision-making abilities. *See Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 23 ("[t]o *mandate* that [a pregnant woman] wait even longer" after "hav[ing] seriously contemplated [her] decision" to choose abortion "insults the intelligence and decision-making capabilities of a woman" (citation omitted)). Through the Mandatory Delay Law, which sanctions a medically unnecessary waiting period—unique among medical procedures in Florida, as only women who seek abortion care are subject to a mandatory delay—the State has codified gender bias and made it plain to Florida women that their decisions are not to be trusted.

Despite any argument to the contrary, the evidence shows that the overwhelming majority of women who choose abortion care do *not* regret their decision. Corinne H. Rocca et al., *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, PLOS ONE (Jul. 8, 2015), http://journals.plos.org/plosone/article/asset?id=10.1371%2Fjournal.pone.0128832.PDF. In a recent study of 667 women seeking abortions at 30 facilities across the United States, 95% reported that abortion was the right decision for them

immediately after the procedure and at all points in time during the study's three-year period. *Id.* at 7. Similarly, a study of women who were forced to undergo Utah's 72-hour waiting period and two-visit requirement found that the waiting period "did not prevent women who presented for information visits . . . from having abortions, but did burden women with financial costs, logistical hassles and extended periods of dwelling on decisions they had already made." Sarah C.M. Roberts et al., *Utah's 72-Hour Waiting Period for Abortion: Experiences Among a Clinic-Based Sample of Women*, 48 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 4 (2016).

The many women who shared their stories with NAF do not wish they had taken more time to consider their abortion decisions, but instead object to the unnecessary delays and increased costs that they experienced as a result of the Act. Asailila, for example, believes that she made the right decision for herself, despite the additional burdens that the State imposed on her. Ipek described her serious, thoughtful decision about what she was going to do. Having to wait for care after making her decision, while also having to figure out the logistics for her two separate trips to and from the clinic was extremely burdensome—and was especially frustrating because there was no medical reason for the delay.

The personal accounts set forth in this brief show that, during the two-month time period that this law was enforced, the Act significantly infringed on women's

right to access abortion care. These accounts also demonstrate that the Act significantly impacted the ability to access abortion care in a myriad of concrete and unnecessary ways, which to no small extent adversely affected the lives of these women. The State cannot show that subjecting women to these real-life impediments is the least restrictive means of furthering any compelling State interest.

CONCLUSION

NAF respectfully submits this brief in support of the Petitioners' position, requesting this Court to reverse the First District Court of Appeal's decision and to uphold the temporary injunction of the Mandatory Delay Law while the underlying litigation proceeds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 13, 2016, a copy of this amicus curiae brief was electronically filed in this Court and served via registered e-mail on counsel listed below.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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