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

RESPONDENTS' BRIEF ON JURISDICTION

ASHLEY MOODY
Attorney General

JOHN GUARD (FBN374600)
Chief Deputy Attorney General
JAMES H. PERCIVAL (FBN1016188)
Deputy Attorney General
NATALIE P. CHRISTMAS (FBN1019180)
Assistant Attorney General

HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
henry.whitaker@myfloridalegal.com

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Counsel for Respondents

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STATEMENT OF THE ISSUES

The State supplements Petitioners' statement with these issues:

1. Whether Petitioners lack third-party standing to assert the constitutional claims of their patients.

2. Whether HB 5—which prohibits most abortions after 15 weeks' gestation—violates Article I, Section 23 of the Florida Constitution.

STATEMENT OF THE CASE

Petitioners claim that the First District—in declining to vacate an automatic stay of the circuit court's temporary injunction—defied this Court's abortion precedent. But Petitioners are mistaken: This Court has never expressly addressed the issues resolved by the First District below, so this case does not meet the "strict standard" that governs express-and-direct conflicts. *See Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021). Respect for this Court's jurisdictional limits therefore compels the State to urge this Court to deny review.

That said, the State agrees that the issues in this case are exceptionally important and merit this Court's consideration. So if this Court concludes that there is jurisdiction to review the First District's decision, the Court should accept review, take this opportunity to overturn its erroneous abortion precedent, and uphold HB 5 as constitutional.

A. 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).

That text uses legal terms of art synonymous with informational privacy,[1] and carefully carves out an exception for public access to government records. Still, 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 1186, 1192 (Fla. 1989), and under that holding has subjected abortion regulations to strict scrutiny, *see Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017) (*Gainesville Women Care II*).

B. Factual and procedural history

1. 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 than 15 weeks," subject to exceptions for maternal health and fatal

[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).

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.

2. Petitioners are several abortion clinics and a doctor who provides abortions. Pet'rs' App. 124.[2] 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. Mot. App. 5–87. None of the Petitioners wished to obtain an abortion; they instead sued on behalf of their patients. Pet'rs' App. 124–25.

The State raised procedural and substantive defenses. Mot. App. 88–202. Its evidence demonstrated that HB 5 leaves unregulated the vast majority of abortions in Florida, more than 94% of

[2] This brief uses the following citation format:

- Petitioners' amended appendix to their jurisdictional brief (Pet'rs' App.);
- Petitioners' appendix to their motion to vacate the automatic stay (Mot. App.);
- State's appendix to its response to Petitioners' motion to vacate the automatic stay (Resp. App.).

which in 2021 occurred before 15 weeks. Mot. 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 does not guarantee a right to abortion, and that this Court should revisit and overturn its abortion precedents. Mot. App. 105.

After a hearing, the circuit court enjoined the State from enforcing the law. *See Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022-CA-912, 2022 WL 2436704, at *1 (Fla. 2d Jud. Cir. July 5, 2022). It held that Petitioners have third-party standing to sue on behalf of their patients. *Id.* at *17–18. It also presumed that Petitioners could assert the injuries of their patients to establish the irreparable harm needed to warrant a temporary injunction. *Id.* at *24. And it reasoned that HB 5 was not narrowly tailored to further the State's interests in protecting maternal health and preserving unborn life. *Id.* at *19–24.

3. The State appealed, triggering an automatic stay. Mot. App. 727–29; *see* Fla. R. App. P. 9.310(b)(2). Petitioners moved to va-

cate 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. *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022-CA-912, 2022 WL 2680000, at *1–2 (Fla. 2d Jud. Cir. July 12, 2022).

Petitioners then moved to vacate the automatic stay in the First District. That court, too, denied relief. *See State v. Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d 863, 869 (Fla. 1st DCA 2022). Though 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, *id.* at 867, the court did not resolve that question, *id.* at 867–68 ("[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.* at 868. Petitioners were thus left to assert only their own money damages as irreparable harm—a theory the court rejected. *Id.* at 867 ("[M]oney damages due to a decrease in

patient volume do not suffice to demonstrate irreparable injury." (emphasis omitted)).[3]

Because the First District's irreparable-harm holding applies equally to its review of the circuit court's temporary injunction, 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.* at 869. Neither party did so. Resp. App. 74. 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. Mot. App. 822–26 (SC22-1050). Petitioners then submitted their jurisdictional brief, along with an emergency motion to vacate the automatic stay. That motion remains pending.

Meanwhile, hearing no objection from Petitioners, the First District reversed the temporary injunction for the same reason it denied the motion to vacate: "[Petitioners] could not assert irreparable harm on behalf of persons not appearing below." Resp. App. 74. Petitioners

[3] Judge Kelsey dissented. She would have held that Petitioners may assert the irreparable harms of their patients under this Court's precedent. *See Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d at 869–71 (Kelsey, J., dissenting).

then filed a notice to invoke from that decision, again arguing that the First District's ruling conflicts with this Court's precedent. *See* Notice to Invoke at 2, *Planned Parenthood of Sw. & Cent. Fla. v. State* (SC22-1127). They later filed a jurisdictional brief and a motion to stay the First District's mandate. That motion remains pending, though the First District's mandate has issued. *See* Mandate, *Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d 863 (No. 1D22-2034) (issued 9/12/2022).

In sum, there are two discretionary-review proceedings pending—the first concerning the First District's refusal to vacate the automatic stay, and the second concerning the First District's reversal of the temporary injunction. This brief relates to the first proceeding.

ARGUMENT

I. The Court should deny review because it lacks jurisdiction over the First District's decision.

Petitioners allege one basis for this Court's jurisdiction to review the First District's decision refusing to vacate the automatic stay: that the decision expressly and directly conflicts with decisions from this Court. Mot. App. 823. But an exceedingly "strict standard" governs express-and-direct-conflict jurisdiction, *Kartsonis*, 319 So. 3d at

623, 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). The key in either case 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. *See 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.* (simplified).

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 the Court there awarded temporary injunctive relief to abortion providers asserting the constitutional rights of their patients. Jur. Br. 7–8. But *Gainesville Woman Care II* simply "presum[ed]" that the asserted Privacy Clause violations inflicted "irreparable harm" on women seeking an abortion. *See* 210 So. 3d at 1263. The Court did not consider—let alone resolve—whether the providers could assert the irreparable harms of those women to obtain injunctive relief. *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). And because this Court has not "announced" a precedent on this point, the First District could not have "announced" a conflicting rule

or "applied" a settled rule in an incongruent way. *See Kartsonis*, 319 So. 3d at 623.

Petitioners next contrive a conflict by reading the First District's decision to hold "that Plaintiffs lack third-party standing." Jur. Br. 8–9. But the First District held no such thing; it expressly reserved whether Plaintiffs had third-party standing. *See Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d at 867–68 ("[W]e do not and need not address [Petitioners'] standing to obtain declaratory relief."). True enough, the court held that Petitioners "cannot assert the privacy rights of pregnant women necessary to substantiate a showing of irreparable harm." *Id.* at 868. Yet 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 id.* The First District reiterated that its holding was based on irreparable harm when it reversed the temporary injunction. *See* Resp. 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 cannot assert the irreparable harms of their patients. And this Court has

never held otherwise. Because the First District's holding does not conflict with a decision of this Court, there is no jurisdiction to review the First District's decision.

II. If the Court has jurisdiction over the First District's decision, it should accept review.

Jurisdictional problems aside, this case presents critically important issues. So if this Court determines that it has jurisdiction, it should accept review to revisit and overturn its erroneous abortion precedent.

This case presents "one of the most controversial issues in American law"—the "constitutionality of laws regulating abortion." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting). And a definitive answer to whether Florida's Constitution protects the right to abortion has never been more significant. In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022), the U.S. Supreme Court overturned *Roe v. Wade*, 410 U.S. 113 (1973), and returned the regulation of abortion to the people. Now, this Court's abortion precedents are the only barrier to meeting that ideal in Florida.

Whatever one's views on this issue, the importance of resolving

whether this Court's abortion precedents remain viable is manifest. For many, those precedents preclude the Legislature from regulating a procedure that they "deem nothing short of an act of violence against innocent human life." *Gainesville Woman Care II*, 210 So. 3d at 1270 (Canady, J., dissenting) (citation omitted). For many others, those precedents safeguard important interests in "bodily integrity" and "autonomy." *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006). Few issues, in short, have more "profound moral and spiritual implications." *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) (plurality op.). And those issues are now impossible to ignore in Florida, which has become an abortion destination for out-of-state residents seeking to dodge abortion restrictions in their home states. *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);[4] State's Resp.

[4] https://19thnews.org/2022/06/florida-abortion-law-access-point-uncertain-future/.

21 n.9 (collecting examples of states with stricter abortion laws).

CONCLUSION

The Court lacks conflict jurisdiction. But if it concludes otherwise, the Court should accept review and uphold HB 5 as constitutional.

Respectfully submitted,

ASHLEY MOODY
Attorney General

JOHN GUARD (FBN374600)
Chief Deputy Attorney General
JAMES H. PERCIVAL (FBN1016188)
Deputy Attorney General
NATALIE P. CHRISTMAS (FBN1019180)
Assistant Attorney General

HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
henry.whitaker@myfloridalegal.com

Counsel for Respondents

Date: September 20, 2022

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served by the Florida Courts E-Filing Portal, or by email, on September 20, 2022, to the following:

Benjamin J. Stevenson
ACLU FOUNDATION OF FLORIDA
3 W. Garden St., Ste. 712
Pensacola, FL 32502

Daniel Tilley
ACLU FOUNDATION OF FLORIDA
4343 West Flagler St., Ste. 400
Miami, FL 33134

Nicholas Warren
ACLU FOUNDATION OF FLORIDA
336 East College Ave., Ste. 203
Tallahassee, FL 32301

April A. Otterberg
Shoba Pillay
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

Tassity S. Johnson
JENNER & BLOCK LLP
1099 New York Ave., NW, Ste. 900
Washington, D.C. 20001

Whitney Leigh White
Jennifer Dalven
Andrew Beck
Johanna Zacarias
ACLU FOUNDATION
125 Broad Street
New York, NY 10004

Attorneys for Petitioners Gainesville Woman Care, LLC d/b/a Bread and Roses Women's Health Center; Indian Rocks Woman's Center, Inc. d/b/a Bread and Roses; St. Petersburg Woman's Health Center, Inc.; and Tampa Woman's Health Center, Inc.

Autumn Katz
Caroline Sacerdote
CENTER FOR REPRODUCTIVE RIGHTS
199 Water St., 22nd Floor
New York, NY 10038

Attorneys for Petitioner A Woman's Choice of Jacksonville, Inc.

Attorneys for Petitioners

Jennifer Sandman
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 William St., 9th Floor
New York, NY 10038

Carrie Y. Flaxman
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Ave., NW,
Ste. 300
Washington, DC 20005

Attorneys for Petitioners Planned Parenthood of Southwest and Central Florida; Planned Parenthood of South, East and North Florida; and Shelly Hsiao-Ying Tien, MD., M.P.H.

/s/ *Henry C. Whitaker*
Solicitor General

CERTIFICATE OF COMPLIANCE

I certify that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman font and contains 2,330 words.

/s/ *Henry C. Whitaker*
Solicitor General