IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

GAINESVILLE WOMAN CARE, LLC, et al., **Case No. 2015 CA 1323**

Plaintiffs,

CORRECTED PAGES: 1, 3, 5, 6, 7, 8, 9, 11
CORRECTIONS ARE IN RED

v.

STATE OF FLORIDA, et al.,

Defendants.
_____/

CORRECTED
ORDER GRANTING PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

Plaintiffs filed their Complaint on June 11, 2015, challenging the validity of Chapter 2015 - 118, Laws of Florida (House Bill No. 633) as an intrusion upon and violation of the privacy rights of Florida women as protected and guaranteed pursuant to Article I, section 23 of the Florida Constitution, and as a violation of Plaintiffs' and their patients' rights of equal protection of the laws of the State of Florida as guaranteed by Article I, section 2 of the Florida Constitution. The same day, Plaintiffs filed a Motion for an Emergency Temporary Injunction and/or Temporary Injunction that was grounded solely upon the right to privacy challenge set forth in Count I of their Complaint. A case management conference was held on June 16, 2015, at which time a pleading schedule was established and an evidentiary hearing was scheduled for June 24, 2015. The parties agreed that the Court was to consider the pleadings, together with the declarations filed with Plaintiffs' motion and supplemental reply, and that the parties were authorized but not required to present any witnesses or other evidence at that time. It should be made perfectly clear that this order does not address or otherwise rule on any aspect of the equal protection challenge set forth in Count II of the Complaint.

Having considered the Complaint, Plaintiffs' motion with declarations submitted, Defendants' response in opposition, Plaintiffs' reply in support, the arguments of counsel and being otherwise fully advised in the premises, the Court finds and rules as follows:

JURISDICTION AND VENUE

The Court has jurisdiction over this action pursuant to Article V, section 5(b) of the Florida Constitution and sections 26.012 and 86.011, Florida Statutes. Venue is proper in this Court pursuant to section 47.011, Florida Statutes.

STATUTORY SCHEME AND CHALLENGED LEGISLATIVE AMENDMENT

Section 390.0111, Florida Statutes is the current statutory law as to the termination of pregnancies in Florida, and section 390.0111(3), Florida Statutes, sets forth the "voluntary and informed written consent" requirements. Currently, the requirement is that the "physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, in person, informed the woman of . . ." certain required information set forth in said section. Section 390.0111(3)(a) 1, Florida Statutes. The actual information required to be given or provided to the patient will not be changed by Chapter 2015-118, Laws of Florida (House Bill No. 633) (hereinafter referred to as "HB633"), however, the timing for providing the information and the limited exception to the timing of delivery of the information will be changed. HB633 amends section 390.0111(3)(a)1 to read as follows:

> The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, *while physically present in the same room, and at least 24 hours before the procedure (emphasis added)*, informed the woman of . . .

Additionally, HB633, which is effective July 1, 2015, amends section 390.0111(3)(a)1c to add the following language:

> The physician may provide the information required in this subparagraph within 24 hours before the procedure if requested by the woman at the time she schedules or arrives for her appointment to obtain an abortion and if she presents to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking.

EXTRAORDINARY REMEDY OF TEMPORARY INJUNCTION

The parties are in agreement that the standard for issuance of a temporary injunction and that a temporary injunction is an extraordinary remedy in which the burden is:

> The issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly, [and] which must be based upon a showing of the following criteria: (1) The likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of public interest.

Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (*quoting Shands at Lake Shore, Inc. v. Ferrero*, 898 So. 2d 1037, 1038-39 (Fla. 1st DCA 2005.))

The failure of Plaintiff to meet its burden as to any of the four criteria will require denial of the temporary injunction. The parties diverge greatly from this point as to what standard will be applicable to this proceeding, with Plaintiffs arguing the "strict" scrutiny standard as set forth in the case of *In re T. W., A Minor*, 551 So. 2d 1186 (Fla. 1989), and *North Florida Women's Health and Counseling Services, Inc. v. State of Florida,* 866 So. 2d 612 (Fla. 2002), and Defendants arguing the "undo burden" standard as applied in the analysis of the Florida Supreme Court in *State v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006), and the Supreme Court of the United States in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Defendants concede the unavailability of an adequate remedy at law if the law goes into effect and is found to be unconstitutional. This Court's decision on whether Plaintiffs have carried their burden to show that they are likely to succeed on their position that the constitutional right of privacy is implicated by HB633, and if so,

whether the Defendants have sufficiently shown that HB633 meets the "strict" scrutiny standards required will provide the answers to whether there is irreparable harm and determine the public interest issue. In simple terms, the question presented to this Court is whether Plaintiffs have sufficiently shown that the requirements of HB633 impose a "significant burden," as opposed to insignificant burden, on a woman's right to an abortion.

ARTICLE I, SECTION 23

The only constitutional amendment at issue for the purpose of this motion is Article I, section 23 of the Florida Constitution which provides as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into his 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.

The Supreme Court of the United States in *Roe v. Wade*, stated: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 400 U. S. 113, 154 (1973). Ever since, there has been substantial litigation throughout the nation in both the federal and state courts as to the meaning and extent of the right recognized and the authority of the states to regulate any aspect of the right. It is not this Court's intention to discuss the history of such litigation or the numerous specific rulings cited and discussed in detail by the parties in their pleadings. It is this Court's limited function at this time to decide whether the Plaintiffs are entitled to the issuance of a temporary injunction, and what standard of review should be applied in making that decision.

"UNDUE BURDEN" AND "STRICT" SCRUTINY STANDARDS

Defendants' position is a straight forward claim that the 24-hour waiting period imposed by HB633 does not impose a substantial or significant burden on a woman's right to terminate pregnancy and should be analyzed under the "undue burden" standard as described in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in which it was noted that:

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the 'undue burden' standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

Id. at 876.

The Court, to further explain the meaning of "undue burden," stated:

> A finding of an 'undue burden' is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the 'undue burden' standard in a manner that is inconsistent with this analysis, we set out what, in our view, should be the controlling standard. (citations omitted).

Id. at 877.

Plaintiffs, on the other hand, claim that the use of the "undue burden" standard is totally inapplicable to this situation and is inconsistent with the pronouncements set forth in *In re T. W., A Minor*, 551 So. 2d 1186 (Fla. 1989), and *North Florida Women's Health and Counseling Services, Inc. v. State of Florida,* 866 So. 2d 612 (Fla. 2002). The Florida Supreme Court had made it explicitly clear that "the amendment embraces more privacy interests, and embraces more protection to the individual in those interests, than does the federal Constitution." *In re T. W., a Minor, 551 So. 2d* at 1192. The Court then went on to explain the correct standard to use:

> The privacy section contains no express standard of review for evaluating the lawfulness of a government intrusion into one's private life, and this Court when called upon, adopted the following standard:
>
> Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. *Winfield,* 477 So. 2d at 547. When this standard was applied in disclosural cases, government intrusion generally was upheld as sufficiently compelling to overcome the individual's right to privacy. We reaffirm, however, that this is a highly stringent standard, emphasized by the fact that no government intrusion in the personal decisionmaking cases cited above has survived.

In re T. W., a Minor, 551 So. 2d at 1192.

Applying the standard set forth above, the in *In re T.W., A Minor*, held that "section 390.001(4)(a), Florida Statutes (Supp. 1988), violates the Florida Constitution. Accordingly no further analysis under federal law is required." *Id.* at 1196.

Later, when the validity of section 390.01115, Florida Statutes (1999), entitled the (Parental Notice of Abortion Act) was held unconstitutional by the trial court, and affirmed by the District Court, the Supreme Court of Florida refused to retreat from or overturn the ruling or the "strict" scrutiny standard applied in *In re T.W., A Minor*, *supra*, and reinforced its application in privacy cases while clearly rejecting the State's attempt to have it apply the "undue burden" standard as used in federal cases. *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003). Addressing the State claim, the Court stated:

> The State claims that, despite the ruling of the trial court below, we should find the Parental Notice Act constitutional because the United States Supreme Court has approved similar parental notification statutes under the federal constitution. Further, the State relies on the United States Supreme Court decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), wherein a plurality of the Court abandoned the 'strict'

> scrutiny standard in favor of the less stringent 'undue burden' standard. The State urges this Court to recede from T.W. and adopt the same 'undue burden' standard in Florida. We decline to do so. (footnotes omitted).

Id. at 634.

The Court went on to state:

> . . .it is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right. Legislation intruding on a fundamental right is presumptively invalid and, where the right of privacy is concerned, must meet the 'strict' scrutiny standard. Florida courts consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity. The 'undue burden' standard, on the other hand, is an inherently ambiguous standard and has no basis in Florida's Right of Privacy Clause.

Id. at 635.

Having fully settled the issue of the applicability of the "strict" scrutiny standard and the unavailability of the "undue burden" standard in Right of Privacy Clause cases, especially as is applicable in termination of pregnancy cases, the Supreme Court of Florida decided *State v. Presidential Woman's Center*, 937 So. 2d 114 (Fla. 2006). The Court upheld the consent requirements of subsection 390.0111(3)(a)(1), Florida Statutes, without any discussion whatsoever of the "strict" scrutiny or "undue burden" standards. The Court stated:

> The termination of a pregnancy is unquestionably a medical procedure . . . the State may require physicians to obtain informed consent from a patient prior to terminating a pregnancy. This basic premise is without dispute in this litigation.(. . .) Therefore, it is reasonable to conclude that if the informational requirements of subsection (3)(a)(1) are comparable to those of the common law . . . this subsection which addresses informed consent certainly may have no constitutional prohibition or generate the need for an analysis on the issue of constitutional privacy.
>
> In considering whether the informational requirements of subsection (3)(a)(1) are analogous to the common law or other informed consent statutes implementing the common law concept . . .

Id. at 118.

It is within the confines of these cases, and the more detailed discussions contained therein, that Plaintiffs insist that all aspects of this case must be analyzed under the "strict" scrutiny standard, and Defendants just as rigorously insist that it be analyzed under the "undue burden" standard.

SUBSTANTIAL OR SIGNIFICANT BURDEN

Plaintiffs allege in the motion for temporary injunctive relief that:

> Absent injunctive relief from this Court, a sweeping restriction on Florida women's ability to access abortion services, unprecedented in this state, will take effect on July 1, 2015. Section one of Florida House Bill 633, signed by Governor Scott last night (June 10, 2015) would require a woman seeking an abortion to make an additional, unnecessary trip to her health care provider at least twenty-four hours before obtaining an abortion, in order to receive the same information she may currently receive on the day of the procedure. (citation omitted) The Act's unnecessary and burdensome requirements are imposed regardless of the distance the woman must travel to reach her provider, her own medical needs, her judgment, her doctor's judgment, or her individual life circumstances. By subjecting no other medical procedure in Florida, much less a medical procedure protected by the state Constitution as a fundamental right - the Act can only serve to deter women from seeking abortions, and to punish and discriminate against those who doting all women seeking abortions care to both a mandatory twenty-four hour delay and an additional-trip requirement - a burden placed on patients seeking abortions, and to punish and discriminate against those who do.

Plaintiffs' Motion, page 2.

At the hearing, Plaintiffs relied on the Declarations of Kristen Davey (owner and director of the clinic); Christine L. Curry, M.D., Ph.D.; Kenneth W. Goodman, Ph.D.; Sheila Katz, Ph.D.; and Lenore E. A. Walker, Ed.D. No additional evidence was offered. It should be noted that only the Declaration of Christine L. Curry, M.D., Ph.D. was properly verified as required by Rule 1.610, Fla. R. Civ. P. and in accordance with section 92.525, Florida Statutes. The Complaint and motion were not verified, and the declarations of Katz and Walker were not sworn, affirmed or verified. The Declarations of Davey and Goodman were affirmed to the best of their knowledge and belief.

Although the Defendants did not object to the infirmity in the pleading and declarations, the Court is aware of the strict compliance requirements of Rule 1.610, Fla. R. Civ. P. and case law relating to the same. This is especially so in a case in which the Court is being asked to enjoin the operation of a duly enacted legislative provision. The Court is also duly aware of the significance of the constitutional rights under review.

Defendants respond in summary by arguing:

> Contrary to Plaintiffs' contentions, this case - like the new legislation they are challenging - is not about preventing pregnant woman from obtaining abortions, or about curtailing their freedom of choice or their privacy. Rather, this case is about legislation crafted to improve existing law, the better to ensure that pregnant women are truly afforded a fair (albeit brief) opportunity to reflect and to consider more fully whether to consent to having abortions. The challenged legislation augments existing informed-consent provisions by requiring (with notable exceptions) that a 24-hour period elapse between the time when pertinent information is provided to a woman and the time she gets an abortion. Plaintiffs' contention that the legislation's 24-hour provision is an unconstitutional intrusion into the privacy of pregnant women is misguided and incorrect, as are Plaintiffs' attempts to subject the legislation to the strict scrutiny standard. But regardless of the standard applied, the legislation passes muster, and brings Florida in line with the majority of State in requiring a 24-hour waiting period.

Defendants' Response in Opposition, pp.1-2.

Defendants are clearly basing their defense of the legislation to the ruling of the Florida Supreme Court in *State v. Presidential Woman's Center*, 937 So. 2d 114 (Fla. 2006). Their logic is simplistic, but not necessarily incorrect. The legislature's right to require informed consent has been upheld as being grounded in the common law. *Id.* at 118. The Defendants' pleading clearly establishes that a number of states have a waiting period, although it is also clear that most, if not all, were established under the "undue burden" standard. *See* cases cited in Defendants' Response in Opposition, pp 10-11. What the Defendants have failed in any way to provide this Court is any

evidence that there is a compelling state interest to be protected in enhancing the informed consent already required of women and approved by the Supreme Court of Florida in *Presidential Woman's Center, supra.* There are no findings of fact or statements of legislative intent set forth in HB633. After an evidentiary hearing, the Court has no evidence in front of it in which to make any factual determination that a 24-hour waiting period with the accompanying second trip necessitated by the same is not an additional burden on a woman's right of privacy under the Florida's Right of Privacy Clause.

Defendants' statements and assumptions that somehow the Supreme Court of Florida has receded in any way from its rulings in *In re T.W.* or *North Florida Women's Health Counseling Services, Inc.,* on the grounds that the Court did not mention or discuss "strict" scrutiny and "undue burden" is unfounded in this jurist's humble opinion. They did not because in *Presidential Woman's Center*, there was no dispute about the right of the state to require informed consent prior to performing the medical procedure. 937 So. 2d at 118. The Court in *Presidential Woman's Center* was considering "whether the informational requirements of subsection 3(a)(1) are comparable to those of the common law **and other Florida informed consent statutes** (emphasis added) implementing the common law. . ." *Id.* at 118. Once it was determined that they were, there was no need to go further.

In this proceeding, the only evidence before the Court is that "Florida law does not require a twenty-four-hour waiting period for other gynecological procedures with comparable risk, or any other procedure I perform in my practice." Declaration of Christine Curry, M.D., Ph.D., p 4. This is a major issue in the case that the Defendants fail to address. Defendants simply state that thirteen other states have a waiting period and the United States Supreme Court has ruled it is not

unconstitutional under federal law. However, our Supreme Court has clearly stated that federal law has no bearing on Florida's more extensive right of privacy. This Court cannot agree that there is a presumption of constitutionality as to HB633, or that it is the Plaintiffs' burden to show that the added requirements to Florida women's exercise of termination of pregnancy decisions pursuant to the Florida Right of Privacy Clause are not a substantial or significant burden on that right. There is simply no record evidence at this time from which this Court may draw such a conclusion. No witnesses were presented at the scheduled hearing, and no affidavits or verified statements or declarations were offered into evidence. There was no legislative history or other evidence presented to this Court.

The Court finds that Plaintiffs have carried their burden for the issuance of temporary injunction under the "strict" scrutiny standard announced in *In re T.W., A Minor and North Florida Women's Health Counseling Services, Inc.* Plaintiffs have shown a substantial likelihood of success on the merits, that irreparable harm will result if the 2015- 118 Laws of Florida (HB633) is not enjoined, that they lack an adequate remedy at law, and that the relief requested will serve the public interest.

It is therefore **ORDERED and ADJUDGED** that Defendants are enjoined from enforcement of 2015- 118 Laws of Florida (HB633) until further order of the Court. This Court renders no opinion as to the matters set forth in the equal protection Count II of the Complaint.

DONE and ORDERED in Tallahassee, Leon County, Florida, July 1, 2015.

Charles A. Francis

CHARLES A. FRANCIS
Circuit Judge

Copies furnished to:
Served electronically through the Court's E-Portal to counsel of record

Signed JUL - 1 2015
Original to Clerk JUL - 1 2015
Copies sent JUL - 1 2015