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

GAINESVILLE WOMAN CARE, LLC, ET AL.,

Plaintiffs,

V.

STATE OF FLORIDA, ET AL.,

Defendants.

Case No.: 2015-CA-001323

FINAL SUMMARY JUDGMENT FOR PLAINTIFFS

THIS CASE is before me on Plaintiffs' Motion for Summary Judgment on their claim that House Bill 633, codified at § 390.0111, Fla. Stat. (2015) (the Act) is facially unconstitutional as an impermissible intrusion upon privacy rights under article I, section 23 of Florida's Constitution. I have considered the motion, the response thereto, the arguments of counsel, and the authorities cited. For the reasons set forth below, I find, as a matter of law, that the Act is unconstitutional on its face and that Plaintiffs are entitled to the injunctive relief sought.

Article I, section 23 of Florida's Constitution is an express directive from the citizens of Florida to their government to stay out of their private, personal matters unless there is some really good reason to do so. And it's hard to imagine a more private, personal matter than decisions concerning medical treatment, especially something so "fraught with specific physical, psychological and economic implications of a uniquely personal nature for each woman" as the decision

whether or not to terminate a pregnancy. See *In re T.W. 551 So. 2d 1186 (Fla. 1989).*

Indeed, in this case, the Florida Supreme Court has determined that the Act "clearly imped[es] the exercise of [a woman's] constitutional right[]" to end her pregnancy and is therefore subject to strict scrutiny, *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258-59 (Fla. 2017). Thus, the burden is on the government to prove that the Act furthers a compelling state interest and does so in the least restrictive manner consistent with that purpose. Id @ 260. The evidence the State proffers in opposition to Plaintiffs' motion falls short of meeting this burden.

There were no legislative findings accompanying the Act, but the after- the-fact compelling state interest advanced in support of the Act is to insure that a woman's consent to an abortion is fully informed and genuinely voluntary. While this is certainly a worthy goal, the Act suffers from the same selective approach, the same differential treatment of abortion versus other medical procedures that has doomed other legislation in the past. See e.g., *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 620 (Fla. 2003) (quoting *In re T.W.,* 551 So. 2d 1186, 1192 (Fla. 1989). The essential problem is that the language of the Act---what's in it and what's not---belies the claimed compelling nature of the state interest being advanced, and demonstrates ambivalence, if not

outright hostility, to the mandate that the least restrictive measures be utilized to advance that interest.

For a patient to give valid, informed consent to any medical treatment in Florida, the health professional must conform to an "accepted standard of medical practice among members of the medical profession" and provide the patient with information conveying three things: 1) the nature of the procedure, 2) the medically acceptable alternatives to the procedure, and 3) the procedure's substantial risks. § 766.103(3)(a)(1)-(2), Fla. Stat. (2016). This general informed consent law does not mandate that patients delay their care after receiving the required information or make an additional visit to the doctor. *See id.* Patients may receive this informed consent counseling at any time before their procedure, including on the same day as their scheduled procedure.

Florida's informed consent law specific to abortion largely mirrors this general informed consent statute. The abortion-specific law requires the physician to inform the patient of "[t]he nature and risks of undergoing or not undergoing" the abortion procedure; "[t]he probable gestational age of the fetus, verified by an ultrasound," which is relevant to the nature and risks of the procedure; and "[t]he medical risks to the woman and fetus of carrying the pregnancy to term." § 390.0111(3)(a)(1)(a)-(c), Fla. Stat. The Florida Supreme Court previously upheld this abortion-specific consent law because it is "comparable to the common law

and to informed consent statutes implementing" it, including Florida's general informed consent law. *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 120 (Fla. 2006); *accord Gainesville Woman Care*, 210 So. 3d at 1257 (citing *Presidential Women's Ctr.*, 937 So. 2d at 121 (Pariente, J., concurring)).

The Act amends this pre-existing, abortion-specific informed consent law to require that a patient make a separate, medically unnecessary visit to her physician to receive exactly the same information described above, and then delay her abortion by at least 24 hours. § 390.0111(3)(a)(1), Fla. Stat.; *see also Gainesville Woman Care*, 210 So. 3d at 1261. Florida law subjects no other medical procedure, including those that pose greater health risks than abortion, to a mandatory delay.

The Act contains two narrow exceptions. The first is for a woman who can "present[] 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." § 390.0111(3)(a)(1)(c), Fla. Stat. This exception does not apply to a woman who lacks documentation of these assaults.

The second exception is for a woman experiencing a "medical emergency." § 390.0111(3)(a), Fla. Stat. The term "medical emergency" is undefined, but the statute specifies that a woman may obtain care without delay only if "continuation

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of the pregnancy would threaten [her] *life*." § 390.0111(3)(b), Fla. Stat. (emphasis added).

The Legislature rejected proposed amendments that would have, *inter alia*, allowed a woman to waive the mandatory delay and additional trip requirements, Pls.' Suppl. MSJ Br. Ex. B, at 3; allowed a woman to receive the state-mandated information without making an additional in-person visit, *id.* at Ex. B, at 4; allowed a physician to delegate provision of the state-mandated information to a registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant, *id.* at Ex. B, at 6; created an exception to the mandatory delay and additional trip requirements "when, on the basis of a physician's good faith clinical judgment, there is a risk to the woman's health," *id.* at Ex. B, at 8; allowed a woman to waive the mandatory delay and additional trip requirements "if she lives 100 miles or more from the nearest abortion provider," *id.* at Ex. B, at 9; allowed a woman to waive the mandatory delay and additional trip requirements if she "states that she is a victim of rape, incest, domestic violence, or human trafficking and is not able to present to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing her statement," *id.* at Ex, B, at 11; and created an exception "when, on the basis of a physician's good faith clinical judgment, there is . . . the presence of a severe fetal anomaly incompatible with sustainable life," *id.* at Ex. B, at 13.

The State argues that it was justified in singling out abortions for these additional requirements because the standard protocol for other comparable medical procedures calls for a delay between an initial consultation and the procedure. In other words, other medical procedures have a *de facto* waiting period and there is no need to mandate it by law for them.

The evidence proffered on this point, however, does not suggest that all practitioners at all times follow this protocol for all comparable procedures. Indeed, one of the State's own experts acknowledged that he will perform procedures without a delay on some occasions. We could argue about whether those procedures are as serious or as intrusive as abortions, but the point is that practitioners in every other area of medical practice can exercise discretion as to whether, and for how long, and for what purpose, a particular treatment or procedure is delayed after an initial consultation. Common sense dictates that there will be occasions when a trip to the emergency room, for example, will result in some invasive medical procedure or treatment without any delay---and not limited to instances in which the patient's life is at risk.

A mandated delay law applicable to all medical procedures would not burden those who routinely follow such a protocol, and it would catch the outliers, so as to ensure fully informed and fully voluntary consent to *all* medical procedures for *all* patients. If that is the compelling state interest sought to be

advanced, you would expect it to apply across the board.

The other evidence proffered really just goes to why a waiting period would enhance informed consent, e.g., they might change their mind about having the procedure, women seeking an abortion are under a lot of stress and it is difficult to make a rational decision under stress, having an abortion without due deliberation may increase risk of anxiety, depression, suicide, and drug use, significant numbers of women later regret the decision to have an abortion, and when they can reverse the procedure, they often do.

None of this, however, justifies singling out abortions for the mandatory delay, when no other medical procedure, including those with greater medical risks, are subject to a mandatory delay. Setting aside the fact that the Florida Supreme Court has held that the doctrine of medical informed consent pertains only to the *medical risks* associated with the procedure, the decision to have other medical procedures can also be stressful, can later lead to regrets about the decision, which can cause anxiety, depression and drug use. And this can happen regardless of the time taken to make the decision.

The Act exempts patients who have (1) suffered rape, incest, domestic violence or human trafficking *and* (2) can document that fact. § 390.0111(3)(a). If, as the State insists, a forced delay and additional trip is necessary to ensure fully informed and voluntary consent, why would the fact that the patient has suffered

such abuse eliminate the need for a delay? It would seem that the stress level would be higher, in fact. And why require documentation for this exception to apply? The State has given no explanation for this glaring inconsistency. If your goal is to make sure the patient makes an informed decision, this exception makes no sense at all.

To overcome the presumption of unconstitutionality, the State also bears the burden of showing that there is a sufficient "nexus between the asserted interests and the means chosen," and that the law is "narrowly tailored to achieve the stated interests." State v. *J.P.*, 907 So. 2d 1101, at 1117 and1119 (Fla. 2004). The lack of appropriate exceptions in the Act also undermines the State's argument that it has utilized the least restrictive approach to advancing its purported compelling state interest.

Under the Act, there are no circumstances under which a woman can waive the mandated delay, regardless of how certain she is of her decision, how sophisticated her medical knowledge, how much violence she has suffered but cannot prove, nor how desperate her need to end her pregnancy, nor how far away she is from the clinic, whether she has been extensively counseled before arriving, has previously and recently received all the required information, and viewed an ultrasound the day before. The woman must receive the required information from

a physician, face to face, rather than from a registered nurse, physician assistant, or other medical professional.

Of particular concern is that, even if her doctor, in good faith, advises that a delay might be adverse to her health, the Act requires the patient to delay the procedure. A law that forces a patient to delay medical care to the detriment of her health cannot be the least restrictive means of furthering any compelling state interest.

The Florida Supreme Court has held that restrictions on abortion are permitted *only* to the extent that they "safeguard" a woman's health—and even then, only in the second trimester of pregnancy. *Id.* at 36 (quoting *In re T.W.*, 551 So. 2d at 1193). Indeed, the Court struck the parental consent law at issue in *In re T.W.* in part because it "fail[ed] to make any exception for emergency *or therapeutic abortions*," which was one of the ways in which that statute "fail[ed] to provide adequate procedural safeguards." *In re T.W.*, 551 So. 2d at 1196 (emphasis added). Similarly, in this case, the State has not proffered evidence that raises any genuine issues of material fact sufficient to explain how a law that sweeps so broadly can be found to be the least restrictive means of serving any compelling state interest.

Accordingly, for the reasons set forth above, because the State cannot as a matter of law meet its burden under strict scrutiny, the Act is declared facially unconstitutional and permanently enjoined in all of its applications.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 9th day of January, 2018.

TERRY P. LEWIS, Circuit Judge

Copies to:

All parties of record