FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-2034

STATE OF FLORIDA, et al.,

Appellants,

v.

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, et al.,

Appellees.

On appeal from the Circuit Court for Leon County.
John C. Cooper, Judge.

July 21, 2022

ORDER DENYING MOTION TO VACATE AUTOMATIC STAY AND REJECTING SUGGESTION FOR CERTIFICATION

B.L. THOMAS, J.

We review Appellees' "Emergency Motion to Vacate Automatic Stay of Temporary Injunction" to determine whether the trial court abused its discretion in denying Appellees' same motion below. In so moving, Appellees carry a heavy burden of persuasion:

> Rule 9.310(b)(2) provides for an automatic stay when the state or a public officer seeks review of a trial court's order. The automatic nature of the stay is grounded in

> judicial deference to governmental decisions. *See St. Lucie [Cnty.] v. N. Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984). The rationale for automatically staying such orders when a public official seeks appellate review is that "planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference." *Id.* An automatic stay also seeks to protect the public against "any adverse consequences realized from proceeding under an erroneous judgment." *Id.* And so, a trial court may vacate an automatic stay only "under the most compelling circumstances." *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828 (Fla. 1st DCA 2018) (quoting *State, Dep't of Env't Prot. v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998)). The party seeking to vacate an automatic stay has the burden of producing evidence showing "the most compelling circumstances." *See Pringle*, 707 So. 2d at 390. In deciding whether to vacate the automatic stay, the court must consider "(1) the government's likelihood of success on appeal, and (2) the likelihood of irreparable harm if the automatic stay is reinstated." *People United*, 250 So. 3d at 828. A trial court abuses its discretion by vacating an automatic stay when the party seeking to vacate the stay does not make the necessary showing of compelling circumstances, when the government is likely to succeed on appeal, or when reinstatement of the stay is unlikely to cause irreparable harm. *See id.* at 828–29.

DeSantis v. Fla. Educ. Ass'n, 325 So. 3d 145, 150–51 (Fla. 1st DCA 2020).

In this case, the trial court granted a temporary injunction enjoining chapter 2022-69, Laws of Florida (2022) ("HB 5"), entitled an "act relating to reducing fetal and infant mortality." The law became effective on July 1, 2022, and was codified in part as sections 390.011 and 390.0111, Florida Statutes. Absent certain exceptions for the mother's health and fatal fetal conditions, the law prohibits abortions if "the gestational age of the fetus is more than 15 weeks." § 390.0111(1)(a)–(c), Fla. Stat. (2022). Under Florida Rule of Appellate Procedure 9.310(b)(2), as noted above,

the order granting the injunction was automatically stayed when the State of Florida filed its notice of appeal.

After the bill was enacted, Appellees, several abortion clinics and a single abortion medical doctor, challenged the law as a violation of article I, section 23 of the Florida Constitution, seeking declaratory and injunctive relief. Art. I, § 23, Fla. Const. ("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."). No pregnant woman asserted any claim under the suit. Appellees stated that they recognized "people of all gender identities, including transgender men and gender-diverse individuals, may also become pregnant and seek abortion services, and would thus also suffer irreparable harm under HB 5." But no such person asserted any claim in the suit either.

In the complaint, the abortion clinics asserted that they sued on behalf of their staff, including physicians "and patients." Dr. Shelly Hsiao-Ying Tien, M.D., M.P.H, sued on behalf of herself and her patients. The complaint states:

> [A]bsent an injunction, Plaintiffs and their staff will be forced to stop providing care to patients seeking abortions after 15 weeks . . . contrary to their good-faith medical judgment and their patients' needs and wishes. With no one available to provide such care in Florida, *Florida women* will suffer irreparable harm . . . [and thus] [t]he Act irreparably harms Plaintiffs, Plaintiffs' staff, and their *patients*, and there is no adequate remedy at law for the Act's violation of the Florida Constitution.

(emphasis added). The complaint requested as a remedy that the circuit court issue a "declaratory judgment that Section 4 of HB 5 and the related definitions in Section 3(6) and 3(7) of HB 5 violate the rights of Plaintiffs, their *patients*, and Floridians, as protected by the Florida Constitution, and are therefore void and of no effect." The complaint further requested that the circuit court issue "temporary and final injunctive relief . . . *enjoining* Defendants . . . from enforcing, threatening to enforce, or otherwise applying the provisions of that statute."

To be clear then, Appellees have not asserted a violation of their own constitutional rights. Instead, they seek to vindicate the privacy rights of their patients. Yet contrary to the circuit court's order ruling that pregnant women cannot adequately challenge abortion-related legislation, history provides numerous examples of such legal actions. *See, e.g.*, *Renee B. v. Fla. Ag. for Health Care Admin.,* 790 So. 2d 1036, 1037 (Fla. 2001); *In re T. W.,* 551 So. 2d 1186, 1189 (Fla. 1989); *Burton v. State,* 49 So. 3d 263, 264 (Fla. 1st DCA 2010); *see generally, Alterra Health Care Corp. v. Est. of Shelley*, 827 So. 2d 936, 938 (Fla. 2002). Here, Appellees failed to allege in their complaint that pregnant women cannot assert their own rights in court. Conversely, the State here and below has argued that Appellees cannot assert any purported irreparable harm on behalf of pregnant women.

Furthermore, a temporary injunction cannot be issued absent a showing of irreparable harm. *Hernando Cnty. Sch. Bd. v. Rhea,* 213 So. 3d 1032, 1040 (Fla. 1st DCA 2017) ("To obtain an injunction, the movant must establish four criteria," including "the likelihood of irreparable harm."). As to Appellees themselves, any loss of income from the operation of the law cannot provide a basis for a finding of irreparable harm as a matter of law. And the parties do not dispute that the operation of the law will not affect the majority of provided abortions. We have unambiguously held that "case law is clear that economic harm does not constitute irreparable injury; that is, . . . money damages due to a decrease in patient volume *do not suffice to demonstrate irreparable injury*." *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 476 (Fla. 1st DCA 2018) (emphasis added).

And we very recently held that a circuit court may not grant a preliminary remedy in a civil suit, but may only issue a constitutional writ of injunction, known now as a "temporary injunction," which is *procedural relief*, under the authority of article V, section 5(b) of the Florida Constitution. *Sec'y of State Cord Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 47 Fla. L. Weekly D1152, 2022 WL 1698353, at *1 (Fla. 1st DCA May 27, 2022) ("The function of the writ is solely preservative or preventative—*to preserve the subject matter in controversy* until a final disposition after a trial." (emphasis added)).

While we do not and need not address Appellees' standing to obtain declaratory relief, we do hold that they 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: "'irreparable harm cannot be speculative, but must be real and ascertainable.'" *Mayport Hous. P'ship, Ltd. v. Albani*, 244 So. 3d 1176, 1177 (Fla. 1st DCA 2018) (citation omitted).

As we held in *Black Voters Matter*:

> A temporary injunction is not an adjudication; it does not decide the merits. *See City of Miami Beach v. State ex rel. Taylor*, 49 So. 2d 538, 538 (Fla. 1950) (approving temporary restraining order because it did not purport to "decide any material points in controversy, but only to preserve the status quo pending the litigation"); *Lieberman v. Marshall*, 236 So. 2d 120, 125 (Fla. 1970) (noting that the "purpose of an injunction is not to take sides"); *Naegele Outdoor Advert. Co.*, 634 So. 2d at 754 (noting that a temporary injunction "does not decide the merits of the case"); *see also Michele Pommier Models, Inc. v. Diel*, 886 So. 2d 993, 995–96 (Fla. 3d DCA 2004) ("The purpose of a temporary or preliminary injunction is not to resolve disputes, *but rather to prevent irreparable harm by maintaining status quo until a final hearing can occur* when full relief may be given."); *cf. Camenisch*, 451 U.S. at 395, 101 S. Ct. 1830 (noting that the findings of fact made by a court granting a preliminary injunction are not binding at the trial on the merits, so "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits"), *cited in Naegele Outdoor Advert. Co.*, 634 So. 2d at 754; *cf.* Fed. R. Civ. P. 65(a)(2) (permitting a trial court to consolidate a hearing on a temporary injunction with the trial on the merits).

Black Voters Matter, 2022 WL 1698353, at *6 (emphasis added).

Here, Appellees cannot lawfully obtain a temporary injunction as they cannot assert that *they* will suffer irreparable harm unless the trial court preserves the *status quo ante*. *Green v.*

Alachua Cnty., 323 So. 3d 246, 250 (Fla. 1st DCA 2021) ("We read the supreme court's jurisprudence on the right to privacy to require that we make a single, threshold, *de novo* inquiry when considering a temporary injunction appeal—Does the challenged law implicate an individual's right of privacy?"); *see generally*, *Alterra Health Care Corp.*, 827 So. 2d at 941–42 ("[E]ven where a constitutional right to privacy is implicated, that right is a personal one, inuring *solely to individuals."* (emphasis added)).

Appellees' claims are based on the allegation that they are in doubt regarding *their* ability to *provide* abortions, not that they themselves may be prohibited from obtaining an abortion after a certain time.

Thus, the trial court had no lawful authority to issue a temporary injunction, because it was indisputably not necessary to preserve its jurisdiction to address Appellees' *declaratory* claims.

Therefore, Appellees cannot meet the higher burden of persuasion here to support their motion to vacate the automatic stay because they cannot show: "(1) the equities are overwhelmingly tilted against maintaining the automatic stay, (2) [Appellees] *will suffer irreparable harm if the automatic stay is maintained,* and (3) [Appellees are] likely to prevail on the merits of the appeal." *Dep't of Agric. & Consumer Servs. v. Henry & Rilla White Found., Inc.*, 317 So. 3d 1168, 1170 (Fla. 1st DCA 2020) (quotations omitted) (emphasis added). Appellees here cannot show irreparable harm will occur should a temporary injunction not issue, which is fatal to their Emergency Motion To Vacate Automatic Stay. For this reason alone, the trial court did not abuse its discretion in correctly denying the motion to vacate the automatic stay below.[*]

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[*] The dissent relies on cases in which the issue we address here was not raised and therefore could not be decided by the court, or cases in which the issue itself was not addressed. *See Anheuser-Bush Companies Inc. v. Staples,* 125 So. 3d 309, 312 (Fla. 1st DCA 2013) (stating "we are not at liberty to address issues that were

Thus, this Court denies Appellees' Emergency Motion to Vacate the Automatic Stay, filed on July 13, 2022.

We also reject Appellants' "Suggestion for Certification" that this case requires immediate resolution by the Florida Supreme Court, filed on July 5, 2022.

Finally, as we noted in *Black Voters Matter*: "In cases like this, the stay and the temporary injunction on appeal go hand in hand, so naturally we consider them together." 2022 WL 1698353, at *10. We therefore direct the parties within fifteen days to provide any further briefing or arguments for our consideration, before the

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not raised by the parties," and issues not raised by parties on appeal are waived or abandoned) (citations omitted); *Bell v. State*, 289 So. 2d 388, 391 (Fla. 1973) ("It is the long standing rule of this Court that when assignments of error are not argued in the briefs they will be deemed abandoned unless jurisdictional or fundamental error appears in the record."). The dissenting opinion cites no case in which a court addressed a disputed issue of whether a party could assert the alleged irreparable harm of a person *not present* in the litigation and thereby obtain a lawful temporary injunction. Therefore, the dissenting opinion's reliance on those cases is misplaced.

In addition, the dissenting opinion cites to cases decided before the United States Supreme Court decided *Dobbs*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). We note the following statements from that opinion: "The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine." *Id.* at 2275. Thus, any former decision from the United States Supreme Court acknowledging such "standing" of a party to advocate on behalf of a person not appearing in the case, regarding that person's purported irreparable harm is now in question. *Id.* And as we noted above, the majority has not "injected" this issue. Quite the contrary, Appellants specifically presented this precise argument in their Response to the Emergency Motion to Vacate the Automatic Stay of the Temporary Injunction.

court disposes of the appeal of the non-final order granting the temporary injunction.

RAY, J., concurs; KELSEY, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

KELSEY, J., dissenting.

I am constrained to dissent in light of what I can only conclude is binding precedent from the Florida Supreme Court and this Court.

In the specific context of abortion regulation, the Florida Supreme Court has held that even "minimal" loss of the constitutional right of privacy is per-se irreparable injury. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263 (Fla. 2017) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")). We applied this Florida Supreme Court holding in *Green v. Alachua County*, 323 So. 3d 246 (Fla. 1st DCA 2021), holding that the typical four-part test for temporary injunctive relief "collapses" into the single question of whether the challenged law implicates the right of privacy. *Id*. at 250 ("We read the supreme court's jurisprudence on the right to privacy to require that we make a single, threshold, *de novo* inquiry when considering a temporary injunction appeal—Does the challenged law implicate an individual's right of privacy?"). We are therefore required to presume irreparable harm, and because we held in *Green* that is the sole question for injunctive relief in the right-to-privacy context, we must grant Appellees' motion to vacate.

Precedent also bars us from relying on Appellants' supposed lack of standing to assert the personal right of privacy that individual patients could assert. Similar institutional parties have successfully asserted exactly those rights in many earlier cases.

We expressly held in another abortion-regulation case that such plaintiffs had standing to assert the privacy interests of their patients. *State v. N. Fla. Women's Health & Counseling Servs.*, 852 So. 2d 254, 259–60 (Fla. 1st DCA 2001), *quashed on other grounds*, 866 So. 2d 612 (Fla. 2003). We analyzed fully the third-party standing issue, concluding as follows: "We reject the state's contention that none of the plaintiffs has standing to raise the rights of pregnant minors." 852 So. 2d at 260. Although the Florida Supreme Court quashed our decision on the merits, the successful petitioners in that supreme court proceeding were the same institutional plaintiffs whose standing we upheld. *See N. Fla. Women's Health*, 866 So. 2d at 615 (listing parties).

With respect to standing in the abortion-regulation context, the *North Florida Women's* decisions do not stand alone in Florida jurisprudence. *See also, e.g.*, *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 115 (Fla. 2006) (involving petitioners Presidential Women's Center and Center for Reproductive Rights); *Gainesville Woman Care, LLC*, 210 So. 3d at 1244 (listing as petitioners Gainesville Woman Care, LLC; Center for Reproductive Rights; and Medical Students for Choice); *State v. Presidential Women's Ctr.*, 707 So. 2d 1145, 1145 (Fla. 4th DCA 1998) (listing as appellees the plaintiffs below, "Presidential Women's Center, Michael Benjamin, M.D., North Florida Women's Health and Counseling Services, Inc., The Birth Control Center of Tallahassee and The Feminist Women's Health Center on Behalf of themselves and their patients, Jane Doe").

The same is true for other jurisdictions' treatment of the standing issue in the abortion-regulation context, not least of all the United States Supreme Court. *See June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2118 (2020) ("We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations."); *see also SisterSong Women of Color Reproductive Just. Collective v. Kemp*, 472 F.Supp. 3d 1297, 1318–21 (N.D. Ga. 2020) (explaining "decades of precedent recognize abortion providers' ability to raise claims to protect their patients' fundamental right to access abortion"); *Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F.Supp. 3d 1075 (D. Ariz. 2016) (analyzing standing of abortion doctors and abortion providers and finding standing); *Planned*

Parenthood Se., Inc. v. Bentley, 951 F.Supp. 2d 1280, 1282–85 (M.D. Ala. 2013) (finding providers and physicians had standing "on behalf of themselves, their staff, and their patients" because "plaintiffs" faced felony charges for violating abortion statute and "federal courts routinely recognize an abortion provider's standing to assert the claims of its patients").

In short, the majority's injection of the standing issue is both wrong and irrelevant to the injunctive-relief analysis as we ourselves stated it in no uncertain terms in *Green*. At this procedural juncture, I believe precedent compels us to reverse the trial court's order refusing to vacate the automatic stay. I would certify this order to the Florida Supreme Court for its immediate resolution under Florida Rule of Appellate Procedure 9.125(a) (encompassing "any order or judgment of a trial court that has been certified by the district court of appeal to require immediate resolution by the supreme court because the issues pending in the district court of appeal are of great public importance or have a great effect on the proper administration of justice throughout the state"). *See, e.g.*, *Non-Parties v. League of Women Voters of Fla.*, 150 So. 3d 221–22 (Fla. 1st DCA 2014) (certifying under Rule 9.125(a) "two orders requiring a nonparty to produce certain documents for use in a lawsuit challenging the constitutional validity of the 2012 legislative plan apportioning Florida's congressional districts"); *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115 (Fla. 2014) (accepting jurisdiction of the order we certified in *Non-Parties* under Rule 9.125(a), and resolving case on its merits).

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