SC16-381

In the Supreme Court of Florida

GAINESVILLE WOMAN CARE, LLC, *ET AL.*,
Petitioners,
v.
STATE OF FLORIDA, *ET AL.*,
Respondents.

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
CASE NO.: 1D15-3048

Brief of Amici Curiae American College of Pediatricians and American Association of Pro-life Obstetricians and Gynecologists

In Favor of Respondents

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IDENTITY AND INTEREST OF AMICI CURIAE

The American College of Pediatricians ("ACPeds") is a national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. The College is committed to advocating for children at all stages of development, from conception to young adulthood; engendering the honest interpretation of scientific pediatric research, without deference to current political persuasions; and encouraging and supporting sound, ethical scientific research in all aspects of healthcare for infants, children, and adolescents. The College's members have extensive experience in treating adolescents and young women who have been affected by abortion and have studied the long-term effects of the procedure. The College believes that Florida's 24-hour waiting period is critically necessary to protecting the health and well-being of young women and respectfully submits this Amicus Curiae brief to aid the Court's analysis.

The American Association of Pro-life Obstetricians and Gynecologists ("AAPLOG") is an organization whose purpose is to affirm the unique value and dignity of individual human life in all stages of growth and development. AAPLOG is extremely concerned about the potential long term adverse consequences of abortion on women's future health and is committed to educating abortion-vulnerable patients, the general public, pregnancy center counselors, and

medical colleagues regarding the medical and psychological complications associated with induced abortion, as evidenced in the scientific literature. AAPLOG members have reviewed and continue to review data from around the world regarding abortion-associated complications to provide a realistic appreciation of abortion-related health risks. AAPLOG respectfully submits some of that research to this Court to provide it with critical information pointing to the necessity for the 24-hour waiting period which is the subject of this case.

SUMMARY OF THE ARGUMENT

Florida has acted in the best interest of women, and particularly vulnerable women and girls, by adding a 24-hour waiting period to its Informed Consent law. Including such a period of reflection before choosing a decision that is fraught with uniquely personal long-term consequences comports with the state's obligation to protect the health and welfare of its citizens as well as precedent from the United States Supreme Court and this Court. The waiting period ensures that a woman's choice of whether to have an abortion is, in fact, informed and deliberate.

ARGUMENT

I. THE UNIQUE PERSONAL, PHYSICAL, PSYCHOLOGICAL AND ECONOMIC IMPLICATIONS OF ABORTION REQUIRE THE REASONED AND REFLECTIVE DECISION-MAKING PROVIDED BY THE 24-HOUR WAITING PERIOD.

Enactment of HB633 is in keeping with this Court's affirmation that "[t]he decision whether to obtain an abortion is fraught with specific physical,

psychological, and economic implications of a uniquely personal nature for each woman." *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). Recognizing that "[t]he Florida Constitution embodies the principle that '[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy, [and that a] woman's right to make that choice freely is fundamental,'" *id*,[1] the Legislature strengthened the existing informed consent law to include a 24-hour waiting period. Fl. Stat. §390.0111(3)(a)(1). Such periods of reflection before undergoing an abortion have been upheld by the United States Supreme Court. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 885 (1992).

> The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24–hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

Id.

[1] Citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

Indeed, as this Court said in upholding the prior version of §390.0111(3)(a)(1), there is no legitimate reason why physicians performing abortions and women obtaining abortions should be less concerned about informed consent than are physicians and patients in other circumstances. *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006).

> Under the doctrine of informed consent, a physician has an obligation to advise his or her patient of the material risks of undergoing a medical procedure. *See Thomas v. Berrios*, 348 So.2d 905, 907 (Fla. 2d DCA 1977). Unless a person knows the risks and dangers of such a procedure, "a 'consent' does not represent a choice and is ineffectual." *Bowers v. Talmage*, 159 So.2d 888, 889 (Fla. 3d DCA 1963).

Id. at 118. "The termination of a pregnancy is unquestionably a medical procedure and we conclude that, as with any other medical procedure, the State may require physicians to obtain informed consent from a patient prior to terminating a pregnancy." *Id.*

In fact, "abortion is more than a mere 'medical procedure.' It is an act that raises profound moral and sociological questions."[2]

> Just as other medical issues, such as terminating life support, genetic research, and disclosure of positive HIV results to others, are not made solely within the physician-patient relationship, but rather within parameters dictated by the state, so the state permissibly may intrude upon that relationship over the issue of abortion.[3]

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[2] Susan Oliver Renfera, Randal Shaheen & Michael Hegarty, *The Woman's Right To Know: A Model Approach To The Informed Consent Of Abortion*, 22 LOY. U. CHI. L.J. 409, 420 (1991).

[3] *Id.*

Furthermore, abortion is unlike other medical procedures in ways that militate in favor of a period of reflection. First, the physician-patient relationship consists of one or merely a few visits all aimed toward a particular goal, *i.e.* obtaining an abortion, instead of a long-term intimate relationship that is fostered over months or years.[4] "Thus, the physician is unlikely to know much more about the woman's individual circumstances than would any member of the state legislature."[5]

In addition, "a clinic's economic survival depends upon women choosing abortions."[6] Consequently, abortion clinics have a strong economic incentive to encourage abortions, unlike a hospital or physician with a more diverse practice aimed at healing the patient.[7] "Further, physicians who provide abortions are likely to be isolated from their professional peers and to feel ostracized and defensive about their work. Such individuals may well lack the objectivity necessary to see that the patient makes a fully informed choice."[8]

Consequently, abortion informed consent statutes such as Section 390.0111(3)(a)(1) help ensure that "the woman exercises her right to choose whether to have an abortion in a knowing and fully informed manner."[9]

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4 *Id.* at 430.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at 437.

> The information necessary to that decision includes not only the medical and emotional risks inherent in the abortion procedure, but also the physiological characteristics of the life that is within her. The abortion decision is both medical and moral and cannot be made knowingly without consideration of the life of the fetus; for if there is one thing on which both pro-life and pro-choice advocates agree, it is that the fetus represents at least a potential human life. It would be a strange result indeed if the state could not constitutionally require the woman to consider objective information relevant to that life as part of her abortion decision.[10]

The standard of care for non-emergency surgery is to wait at least 24 hours after providing informed consent before performing elective surgery in order to give the patient appropriate time for reflection.[11]

> It should be remembered that consent itself is a process of information exchange rather than an individual event and is best obtained as a two-stage process. Patients should be made aware of the consequences of not intervening as well as all the alternatives to the treatment that is being proposed, the advantages and the risks and complications. Patients should have time for reflection before committing; therefore, consent is best not performed exclusively on the day of surgery.[12]

A birth mother in Florida must wait 48 hours before she may consent to her child being adopted. Fla. Stat. Ann. § 63.082. It is eminently reasonable, therefore, for a pregnant woman to wait 24 hours before ending the life of her child.

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[10] *Id.*

[11] Roger Kirby *et. al., Increasing importance of truly informed consent: the role of written patient information* 112 BJU Int 715-16 (2013). Available at: http://onlinelibrary.wiley.com/doi/10.1111/j.1464-410X.2012.11787.x/pdf.

[12] *Id.*

II. ABORTION'S SIGNIFICANT LONG TERM HEALTH RISKS REQUIRE REFLECTIVE DECISION MAKING EMBODIED IN THE 24-HOUR WAITING PERIOD.

The propriety of the 24-hour waiting period is particularly evident in light of the significant and substantial health risks associated with induced abortion, including higher rates of suicide, mental illness, substance abuse, breast cancer, subsequent premature births and post-traumatic stress. These risks are particularly acute for adolescents, whose immature bodies and minds are particularly vulnerable to trauma.

Furthermore, in the 43 years since *Roe*, the Supreme Court has consistently re-affirmed that the states' interest in protecting the health and safety of their residents extends to pregnant women seeking abortions, upholding regulations such as recordkeeping and confidential reporting, *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 81 (1976), and informed consent regulations that include a 24-hour waiting period, *Casey*, 505 U.S. at 885. In adopting the same waiting period found constitutional in *Casey*, the Florida Legislature has properly exercised its duty to protect the health and safety of women and girls facing unplanned pregnancies.

A. Abortion Is Linked To Significant and Substantial Mental Health Problems, Particularly in Adolescents.

Hundreds of studies conducted over the past several decades have shown statistically significant associations between abortion and subsequent

psychological problems.[13] A few recent studies have claimed to have proven that abortion does not pose a more serious risk of future psychological problems than does carrying an unintended pregnancy to term.[14] However, a comprehensive, systematic review of studies conducted between 1995 and 2009 casts "serious doubt" on the conclusions reported in the recent studies "and suggest[s] that there are in fact some real risks associated with abortion that should be shared with women as they are counselled prior to an abortion decision."[15]

> Overall, the results revealed that women who had undergone an abortion experienced an 81% increased risk of mental health problems, and nearly 10% of the incidence of mental health problems was shown to be directly attributable to abortion. The strongest effects were observed when women who had had an abortion were compared with women who had carried to term and when the outcomes measured related to substance use and suicidal behavior.[16]

ACPeds researchers point out that higher suicide rates are a well-known association of induced abortion.[17] "Studies in California and Finland showed a 2.5

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13 Priscilla K. Coleman, *Abortion and mental health: quantitative synthesis and analysis of research published 1995–2009*, 199 THE BRITISH JOURNAL OF PSYCHIATRY 180 (2011).

14 *Id.*

15 *Id.* at 183.

16 *Id.*

17 Patricia Lee June, MD, FCP, *Induced Abortion: Risks That May Impact Adolescents, Young Adults, and Their Children*, AMERICAN COLLEGE OF PEDIATRICIANS 6 (February 2015) https://www.acpeds.org/the-college-speaks/position-statements/health-issues/induced-abortion-risks-that-may-impact-adolescents-young-adults-and-their-children (last viewed July 22, 2016).

to 7 times higher suicide rate in the years after abortion than after childbirth."[18] "Women who gave birth had half the suicide rate of those who had not been pregnant."[19]

> A 1985 study by researchers at the University of Minnesota of 3636 rural high school students found that a girl was 10 times more likely to commit suicide if she had undergone an abortion within the preceding 6 months than if she had not. Girls with a lifetime history of abortion were about 6 times more likely to have attempted suicide compared with those who had no history.[20]

"Pregnancy resulting in birth is associated with a lower suicide risk while pregnancy resulting in abortion is associated with an increased risk."[21]

Of particular relevance to this Court's analysis, studies on suicide rates between 1987-2003 in states that passed parental notification and consent laws regarding abortion "show an 11% to 21% drop in the suicides of those affected by the laws (15- to 17-year-old girls), but not in those unaffected (15- to 17-year-old boys and girls 18 and over.)."[22] "While such descriptive studies cannot prove causality, they strongly suggest a high correlation between abortion and suicidal behavior."[23]

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18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*

The psychological problems associated with abortion are particularly pronounced in teens and young women. A longitudinal study following women who had abortions between the ages of 15 and 25 over the course of 25 years found that "in young women, exposure to abortion was associated with a detectable increase in risks of concurrent and subsequent mental health problems."[24] "The study estimates suggested that those who were not pregnant or those becoming pregnant but not having an abortion had overall rates of mental disorders that were between 58% and 67% of those becoming pregnant and having an abortion."[25] Researchers concluded that "the present research raises the possibility that for some young women, exposure to abortion is a traumatic life event which increases longer-term susceptibility to common mental disorders."[26]

These findings, along with numerous other studies documenting the negative effects of abortion show the fallacy of the American Psychological Association's ("APA") "consensus" that risk of psychological harm is "low … the percentage of women who experience clinically relevant distress is small and appears to be no greater than in general samples of women of reproductive age."[27] That so-called "consensus" contradicts the APA's own findings that adolescents are a high risk

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[24] David M. Fergusson, L. John Horwood & Elizabeth M. Ridder, *Abortion in young women and subsequent mental health,* 47 JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY 16, 22 (2006).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 22-23.

group for mental health problems after abortion.[28] Teens exhibit a majority of the 17 risk factors identified by the APA in its report on mental health and abortion,[29] showing that adolescents are recognized to be at much higher risk of mental health problems compared to adult women who abort. Florida's 24-hour waiting period appropriately addresses the increased risk by giving young women a time of reflection that might prevent long-term mental health consequences arising from a rushed decision.

The need for such a period of reflection is also particularly evident in light of research finding a significant number of post-abortive women, and particularly young women, suffering from symptoms similar to post-traumatic stress disorder (PTSD), a phenomenon researchers call post-abortion psychological distress ("PAD").[30] Women experience stress responses upon confirmation of an unintended pregnancy and the responses continue as the pregnancy progresses.[31] Those who advocate for abortion claim that women are relieved of the stress when they have an abortion.[32] However, in fact, for at least one-third of women the

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[28] American Psychological Association, *Report of the Task Force on Mental Health and Abortion* (2008), www.apa/org/pi/wpo/mental-health-abortion-report.pdf.

[29] *Id.*

[30] Wanda Franz & David Reardon, *Differential Impact of Abortion On Adolescents and Adults*, 4 OPEN JOURNAL OF OBSTETRICS AND GYNECOLOGY, 944 (2014) http://www.scirp.org/journal/ojog

[31] *Id.* at 947.

[32] *Id.*

psychological distress worsens and becomes acute, chronic or latent PAD.[33] "Many women experience an eight- to twelve-year delay in PAD, where distress from an earlier abortion is awakened by a subsequent pregnancy, or other stressful event."[34] Adolescents are apt to have greater psychological stress following the abortion than are adult women.[35] This is attributable to the fact that adolescents are still developmentally immature in various respects, and this immaturity affects sexual decision-making and their ability to make decisions about abortion.[36]

Neuroscience confirms that adolescents are developmentally limited in their ability to make complex decisions, particularly in an emergency situation.[37] A longitudinal study of adolescent brain development by the National Institute of Mental Health (NIMH) showed that the area of the brain involved in critical thinking and decision-making does not reach full maturity until the early to mid-twenties.[38] In addition, the emotion and pleasure-reward centers are also immature and poorly connected to the critical thinking portion of the brain. This means that

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33 *Id.*

34 *Id.*

35 Wanda Franz & David Reardon, *Differential Impact of Abortion On Adolescents and Adults*, 27:105 ADOLESCENCE 161, 167 (1992)

36 *Id.* at 162.

37 Jane Anderson, M.D., *Parental Involvement and Consent for a Minor's Abortion*, AMERICAN COLLEGE OF PEDIATRICIANS 1 (May 2016) https://www.acpeds.org/the-college-speaks/position-statements/parental-involvement-and-consent-for-a-minors-abortion *citing* Jay N. Giedd, M.D. *Structural magnetic resonance imaging of the adolescent brain*. 1021 ANN NY ACAD SCI. 77-81(2004).

38 *Id.*

in the heat of the moment, adolescent decision-making can be overly influenced by emotions, because their brains rely more on the limbic system (the emotional seat of the brain) than the more rational prefrontal cortex.[39]

> Given the developmental needs of the adolescent, counseling should take seriously the adolescent's desire to find an alternative solution to her problem pregnancy. If she expresses strong reservations about the abortion, she is at risk for later problems. In addition, counselors must recognize that adolescents may not adequately process the information given to them about the abortion. They may be confused and feel that they have not received sufficient information to make a decision. For this reason, they should be provided with very concrete information and be helped to think through all the implications of the decision. Abortion clients should be encouraged to avoid rushing into a decision without careful analysis of all possible options.[40]

In other words, teens experiencing an unintended pregnancy should be provided with sufficient time for reflection before being compelled to make a decision.

Such waiting periods have already proven to be beneficial to women's mental health.[41] One researcher found that waiting periods reduced suicide among women age 25 to 64 by about 10 percent.[42] He theorized that "waiting periods induce added reflection on the part of a woman seeking an abortion. This added

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39 *Id.* citing Jay N. Giedd, M.D. *The teen brain: Primed to learn, primed to take risks*, THE DANA FOUNDATION (2013) https://www.dana.org /news/cerebrum/detail.aspx?id=19620.

40 Franz & Reardon, ADOLESCENCE, *supra* note 35, at 170.

41 Jonathan Klick, *Mandatory Waiting Periods For Abortions And Female Mental Health*, 16 HEALTH MATRIX 183, 207 (2006).

42 *Id.* at 199.

reflection presumably causes a woman to have less regret after having an abortion, decreasing the incidence of depression and ultimately of suicide."[43]

> Thus, interventions that inform and counsel a pregnant mother regarding the resolution of her unplanned pregnancy could significantly improve the welfare of women. The reduction in suicides represents only a lower bound of the benefits of these interventions, since presumably there are a number of women in this situation who have regret and suffer depression because of it without rising to the suicide threshold. Waiting periods and counseling would likely benefit these individuals too.[44]

Consequently, mandatory waiting periods, such as the 24-hour period adopted by the Florida Legislature, "represent public policies that generate large welfare gains for women faced with unwanted pregnancies."[45]

B. Abortion is Linked to Significant, Long-Term Physical Health Problems, Especially for Adolescents.

These welfare gains are realized not only with respect to mental health, but also physical well-being, as a period of reflection offers women time to consider the physical consequences, both short and long-term of the abortion decision. "The health risks associated with induced abortion, when compared with childbirth, are significant and substantial and can include higher long-term mortality rates from suicide and other violent causes, as well as elevated mortality rates due to natural

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43 *Id*. at 203.
44 *Id*. at 205.
45 *Id*. at 207.

causes. There are increased risks of breast cancer and subsequent premature births among post-abortive women."[46]

Chemical and surgical abortions both pose immediate risks to women's health. When mifepristone is used for chemical abortions it poses risks for fatal sepsis and vaginal hemorrhage requiring transfusion.[47] It also frequently causes incomplete abortions and therefore is usually combined with misoprostol, which in failed abortions has been associated with skull, facial, and limb defects.[48] Surgical abortions pose the general risks of the use of anesthesia as well as specific risks for uterine perforation, cervical lacerations, hemorrhage, infection, retained intrauterine tissue, cervical incompetence, bowel perforation peritonitis, and pelvic pain.[49]

Besides these immediate physical complications, abortion also poses risks for long-term complications, including a significantly higher risk of a woman dying in the years after an induced abortion than in the years after giving birth.[50] One study found that induced abortion is the fifth leading cause of maternal mortality in the United States.[51]

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46 Patricia Lee June, *supra* note 17, at 5.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 8.

51 Byron Calhoun, *Systematic Review The maternal mortality myth in the context of legalized abortion* 80 THE LINACRE QUARTERLY 264 (2013).

Women who have abortions also face increased risk for breast cancer, as has been demonstrated through advances in medical diagnostics and multiple epidemiologic studies over the past 30 years.[52] Abortion impedes the natural maturation process in the breast which greatly increases the probability that a woman will develop breast cancer.[53] Among those most at risk of developing breast cancer after an abortion are teenagers, who have received almost half of all first induced abortions between 2006 and 2010.[54] Again, this points to the need for informed consent, including time for deliberation and reflection, before choosing a surgical procedure that will elevate breast cancer risk, a leading cause of cancer death in women.[55]

III. WAITING PERIODS PROTECT WOMEN, MINORITIES AND ADOLESCENTS FROM EXPLOITATION AND ABUSE.

For more than 30 years, consumer advocates fought hard to ensure that health care professionals are required to explain to patients the nature, benefits, and risks of most significant surgical and chemical procedures.[56] As detailed above, the

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52 Patricia Lee June, *supra* note 17, at 6-7.

53 Angela E. Lanfranchi, M.D., & Patrick Fagan, *Breast Cancer and Induced Abortion: A Comprehensive Review of Breast Development and Pathophysiology, the Epidemiologic Literature, and Proposal for Creation of Databanks to Elucidate All Breast Cancer Risk Factors*. 29 ISSUES IN LAW AND MEDICINE 3 (2014)

54 *Id.* at 3-4

55 *Id*. at 112.

56 Michele Jackson, *Should We Accept Denial of Our Right to Informed Consent about Abortion?* NATIONAL RIGHT TO LIFE NEWS 23 (April 8, 1999).

psychological and physical consequences of abortion require that it be subject to rigorous and detailed informed consent requirements. This is particularly important for adolescents and also for women vulnerable to victimization, including minorities.[57]

> As black people, we ought to be cautious of any group that wants to deny people's access to informed consent and waiting periods before life altering surgical and chemical procedures. We should recall noteworthy times when American health care professionals betrayed the trust and privilege society has given them by irreparably harming innocent citizens. In the early 1900s, many who favored eugenics were bent on curtailing the birthrates of the "unfit," including Black Americans. For several decades, peaking in the 1970s, government sponsored family planning programs coerced Black women into being sterilized. Thus, our history teaches us that informed consent and waiting periods help protect us from abuse from the medical community and preserve our right to make informed choices. It is critical that African American women know about the potential consequences of abortion.[58]

Informed consent, including a period of reflection, is also critically important to victims of domestic violence and human trafficking. A comprehensive survey of sex trafficking survivors showed that as well as suffering from significant rates of physical and mental health disorders, victims were subjected to coerced abortions.[59] "One victim noted that 'in most of [my six abortions,] I was

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57 *Id.*

58 *Id.*

59 Laura J. Lederer and Christopher A. Wetzel, The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities 23 ANNALS OF HEALTH LAW 61, 73-74 (2014).

under serious pressure from my pimps to abort the babies.'"[60] "Another survivor, whose abuse at the hands of her traffickers was particularly brutal, reported 17 abortions and indicated that at least some of them were forced on her."[61] Similar coercion is inflicted upon victims of intimate partner violence.[62] Providing a 24-hour waiting period before performing an abortion provides these women with an opportunity to seek protection from their abusers as opposed to facilitating the abusers' desires to quickly "get rid of the problem" so that the victim can return to being trafficked or abused. An extra 24 hours could mean freedom for the mother and life for her baby. It is eminently reasonable, even compelling, for the Legislature to offer women that opportunity.

CONCLUSION

Florida's legislature acted in the best interest of women and girls when it amended the informed consent law to include a 24-hour period of reflection. HB633 complies with United States Supreme Court and this Court's precedents that recognize the unique nature of the abortion decision and the need for deliberative and informed decision making. More importantly, the 24-hour waiting period protects the health, safety and welfare of the most vulnerable of Florida

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60 *Id.*

61 *Id.*

62 Ann M. Moore, Lori Frohwirth & Elizabeth Miller, *Male reproductive control of women who have experienced intimate partner violence in the United States,* 70 SOCIAL SCIENCE & MEDICINE 1737 (2010).

citizens and provides an opportunity for those victimized by trafficking or abuse to seek protection.

For these reasons, Amici respectfully request that this Court uphold the 24-hour waiting period law.

Dated: August 1, 2016.

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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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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 1st day of August, 2016, to the following:

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