

SC 2023-1392

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: LIMITING
GOVERNMENT INTERFERENCE WITH ABORTION

UPON REQUEST FROM THE ATTORNEY GENERAL FOR AN
ADVISORY OPINION AS TO THE VALIDITY OF AN INITIATIVE
PETITION

**REPLY BRIEF OF FLORIDA CONFERENCE OF CATHOLIC
BISHOPS IN OPPOSITION TO THE INITIATIVE**

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ARGUMENT

The Initiative to Limit Government Interference with Abortion is Invalid.

The Sponsor's Answer Brief fails to respond to the majority of the points raised in the Conference's Initial Brief. In the limited instances where the Sponsor's Answer Brief mentioned the Conference's arguments that the ballot title and summary were misleading and failed to disclose the true scope of the proposed amendment, the Sponsor's reply was that the issue or concern could be resolved through subsequent litigation.

For example, by way of responding to the Conference's argument that the proposed amendment would effectively prohibit all state regulation of abortion pre-viability, the Sponsor's Answer Brief says the concerns "are not germane to this Court's review," and can be addressed in subsequent litigation. Answer Br. of Floridians Protecting Freedom, Sponsor, 52. Similarly, in its response to Opponents' arguments that the ballot title and summary are vague and misleading, the Sponsor again argues that any such ambiguities can be resolved through subsequent litigation. Answer Br., 29-30. In short, the Sponsor asks that this Court ignore the obvious

deficiencies in the ballot title and summary now and allow the proponents to litigate the broad scope and impacts of the proposed amendment later. The Conference respectfully suggests that this would be avoiding the Court's obligation to ensure that voters are adequately apprised of the broad scope of the proposed amendment and its impact on existing statutes that provide critical safeguards to pregnant women and girls.

A. The Ballot Title Misleadingly Suggests that the Amendment "Limits" Government Interference with Abortion When It Bans All Regulation Before Viability.

The Answer Brief concedes that the ballot title and summary must be read together. Answer Br., 24. However, the Answer Brief then argues, without citation to any authority, that the Conference improperly compares the ballot title against the ballot summary. Answer Br., 24 n.5. The inconsistency between the ballot title and summary is of critical importance because the ballot title is the first piece of information the voter will read regarding the proposed amendment. The use of the word "limit" in the ballot title is misleading because it implies there will remain some area within which the government will be able to regulate abortion. However, the plain language of the proposed amendment leaves no such area for

pre-viability abortions because it bans all laws that “prohibit, penalize, delay or restrict abortion before viability.” Therefore, the proposed amendment is affirmatively misleading and should not be placed on the ballot.

B. The Ballot Language Fails to Advise Voters that the Amendment Would Leave Abortion Providers and Clinics Performing Abortions Before Viability Largely Unregulated.

The Answer Brief argues that the Opponents mischaracterize what the proposed amendment would do. However, rather than directly address Opponents’ concerns about the devastating impact the proposed amendment would have upon the State’s ability to regulate abortion providers, the Answer Brief merely quotes the language of the proposed amendment and states voters will not be misled by its language. Answer Br., 51.

In a fallback argument, the Answer Brief states: “Opponents’ fears about the Proposed Amendment’s potential application are not germane to this Court’s review” and questions regarding the scope of its impact on the State’s ability to regulate abortion must “be ‘left to subsequent litigation, should the amendment pass.’” Answer Br., 52 (quoting *In re Advisory Op. to the Att’y Gen. re Med. Liab. Claimants*

Comp., 880 So. 2d 675, 679 (Fla. 2004)). However, the amendment at issue in that case was much narrower. The Court stated: “The proposed amendment has a limited scope because it involves contractual fee agreements between attorneys and clients, which do not inherently involve the executive or legislative branches.” *Id.* at 678.

Before approving a proposed amendment for placement on the ballot, this Court must ensure that the ballot title and summary satisfy the statutory clarity requirements of section 101.161(1), Florida Statutes. Indeed, “it is this Court’s ‘responsibility . . . to determine whether the language of the title and summary, as written, misleads the public.’” *Id.* at 679 (quoting *Med. Liab. Claimant’s Comp.*, 880 So. 2d at 679); see also *Advisory Op. to the Att’y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998 (finding “the proposed amendment violates this basic principle because the language is overly vague.”)). The Answer Brief fails to demonstrate that the ballot title and summary do not mislead voters as to the scope of the proposed amendment.

C. The Ballot Language Fails to Provide Fair Notice of Its Impact on Other Statutory Protections.

The Answer Brief does not address the failure of the ballot language to advise voters that the proposed amendment would effectively repeal a number of statutory protections, including: (a) a ban on partial-birth abortions unless necessary to save the life of the mother (section 390.0111(5), Florida Statutes); (b) a ban on post-viability abortions unless two physicians certify that termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition (or one physician so certifies, in the case of a medical emergency) (section 390.01112(1), Florida Statutes); (c) detailed requirements to ensure the pregnant woman's voluntary and informed consent before an abortion is performed (section 390.01113, Florida Statutes); and (d) consent from a parent or legal guardian before performing an abortion on a minor (section 390.01114(5), Florida Statutes).

While existing law is quite clear on what a physician must find and certify before performing a post-viability abortion, the proposed

amendment is extremely vague as to what showing, if any, would be made before a post-viability abortion is allowed “to protect the patient’s health, as determined by the patient’s healthcare provider.”

The Opponents’ briefs argue that the proposed amendment is vague because it fails to define the terms “health” and “healthcare provider” for purposes of the amendment. *See, e.g.*, FCCB Initial Br., 24. In response, the Sponsor claims on page 47 of the Answer Brief that this Court has previously approved use of those words in ballot summaries “without additional definition.” However, the cases cited are distinguishable. For example, the ballot title at issue in *Advisory Opinion to the Attorney General re: Protect People, Especially Youth, from Addiction, Disease & Other Health Hazards of Using Tobacco*, 926 So. 2d 1186 (Fla. 2006), stated the amendment would help “protect people, especially youth, from addiction, disease, and other health hazards of using tobacco.” *Id.* at 1190. And the ballot initiative in *In re Advisory Opinion to the Attorney General re Patients’ Right to Know about Adverse Medical Incidents*, 880 So. 2d 617, 618 (Fla. 2004), stated that the phrases “health care facility” and “health care provider” had the meaning given in general law related to a patient’s rights and responsibilities. Further, the amendment

pertained to requesting records from a health care facility or provider who had already provided care to the patient. *See id.* at 618-19. Thus, in both cases, the meaning of the terms was clear from the context in which they were used.

While the Answer Brief describes Opponents' concerns about the degree to which the proposed amendment would allow post-viability abortions as "fantastical," the Sponsor makes no attempt to clarify whether "patient's health" includes the patient's mental health or well-being, or to clarify whether "healthcare provider" includes psychologists, mental health counselors, nurses, chiropractors, etc. Answer Br., 53. Given the Sponsor's failure to explain or define the terms "health" or "healthcare provider," Opponents' concerns are not "fantastical," but quite real. In this case, the ballot title and summary fail to advise voters of the true meaning and immense ramifications of the proposed amendment.

CONCLUSION

Because the ballot title and summary of the proposed amendment violate the statutory clarity requirements of section 101.161(1), Florida Statutes, this Court should preclude its placement on the ballot.

November 15, 2023

Respectfully submitted,

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