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SC2023-1392

IN THE SUPREME COURT OF FLORIDA

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

# INITIAL BRIEF OF NATIONAL CENTER FOR LIFE AND LIBERTY IN OPPOSITION TO THE INITIATIVE

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## IDENTITY OF OPPONENT

The National Center for Life and Liberty ("NCLL") is a Christian ministry that serves to protect and defend the Bible-based values upon which our nation was founded, including, relevant here, issues of life.[1] One of the key tenants of NCLL's ministry is promoting the belief that the most fundamental right of a person, at any stage, is life itself. NCLL submits this brief in opposition to the initiative.

## STATEMENT OF THE CASE AND FACTS

Pursuant to Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General has petitioned this Court for an advisory opinion as to the validity of an initiative petition entitled "Limiting Government Interference with Abortion" (the "Proposed Amendment"). This Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const.

The relevant text of the Proposed Amendment, which would add an additional section to Article I of the Florida Constitution, is as follows:

> Limiting government interference with abortion.— Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when

[1] See National Center for Life and Liberty, *About*, https://www.ncll.org/about (last visited October 26, 2023).

> <u>necessary to protect the patient's health, as determined by the patient's healthcare provider.</u>

The ballot title for the Proposed Amendment is "Amendment to Limit Government Interference with Abortion" and includes the following ballot summary:

> No law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider. This amendment does not change the Legislature's constitutional authority to require notification to a parent or guardian before a minor has an abortion.

This Court issued its order establishing a briefing schedule. NCLL submits this brief as an interested party in opposition to the Proposed Amendment.

## SUMMARY OF ARGUMENT

Following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, recognizing that the United States Constitution does not provide a federal constitutional right to abortion, this issue has been returned to the States, allowing them to regulate abortion however the respective legislatures deemed fit. The Proponent seeks to remove this issue from the Legislature's purview entirely and handcuff the State from imposing *any*

restriction on abortion and abortion providers, regardless of how reasonable or necessary such restriction.

The Proposed Amendment is facially unconstitutional since it irreconcilably conflicts with federal law prohibiting certain pre-viability abortions. Further, the Proposed Amendment fails since its ballot title and summary are not clear and unambiguous and affirmatively hides from voters the extent to which this Proposed Amendment would eliminate the Legislature's ability to enact common sense, well-accepted restrictions on abortion services and providers.

This court should strike the Proposed Amendment.

## ARGUMENT

Article IV, Section 10, Florida Constitution requires the Attorney General to "request the opinion of the justices of the Supreme Court as to the validity of any initiative petition" and permit "interested persons to be heard" on the petition. Art. IV, § 10, Fla. Const. Section 16.061 explains the Attorney General's petition must request this Court's opinion on three topics:

> [1] regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution, [2] whether the proposed amendment is facially invalid under the United States Constitution, and

> [3] the compliance of the proposed ballot title and substance with s. 101.161.

§ 16.061(1), Fla. Stat. (2023).

The Proposed Amendment is fatally flawed since the Proposed Amendment conflicts with federal law and because the ballot title and summary are affirmatively misleading. This Court should strike this Proposed Amended from being placed on the ballot.

## I. THE PROPOSED AMENDMENT IS FACIALLY INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

In order to succeed on a facial constitutional challenge, the challenger must show "no set of circumstances exists in which the [challenged provision] can be constitutionally valid." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018). The Court looks only at the text of the challenged provision and does not apply the provision to any particular facts. *Id.* In this case, the text of the Proposed Amendment must be evaluated in light of the strict command of the U.S. Constitution that all state laws are subservient to conflicting federal law. Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State

> shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art. VI.

This section—known as the Supremacy Clause—explicitly proclaims the definitive hierarchy of law within the United States, with state law submitting to its federal counterpart. In other words, "the Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

This Court is obligated, pursuant to section 16.061(1), to issue an advisory opinion determining "whether the proposed amendment is facially invalid under the United States Constitution." This Court should hold the Proposed Amendment is facially unconstitutional because it is in direct conflict with federal law, and thus the Supremacy Clause, which offends the very notion of this nation's constitutional structure.

### A. The Supremacy Clause Operates to Invalidate Any State Law that is Preempted by Federal Law

It is axiomatic that if there is conflict between federal law and state law, federal law prevails. And this preemption can be express or implied. *Georgia Latino All. for Human Rights v. Governor of*

*Georgia*, 691 F.3d 1250, 1262 (11th Cir. 2012). "States unquestionably do retain a significant measure of sovereign authority . . . however, only to the extent that the Constitution has not divested them of their original powers . . ." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)). This type of analysis is a facial analysis of a state enactment's compliance with the U.S. Constitution. If state law is preempted, then the state law is void because the Supremacy Clause is the "inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law." *Swift & Co. v. Wickham*, 382 U.S. 111, 122, n. 18 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965).

### B. Federal Law Unambiguously Prohibits the Conduct the Proposed Amendment Purports to "Permit"

Congress enacted the Partial Birth Abortion Ban Act of 2003 (18 U.S.C. § 1531) to outlaw the "troubling and tragic" circumstance of partially delivering a "live boy or girl, and a sudden, violent end of that life." Statement By President George W. Bush Upon Signing S. 3, 39 Weekly Compilation of Presidential Documents 1540 (Nov. 5, 2003). The Partial Birth Abortion Ban prohibits physicians from

intentionally performing "partial-birth abortion[s]," as defined, unless "necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury. The Act defines "partial-birth abortion" as any abortion in which the abortion provider:

> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus;

18 U.S.C. § 1531(b)(1).

The United States Supreme Court explained in *Gonzalez v. Carhart*, the statute prohibits the "intact Dilation and Evacuation" ("intact D & E") procedure. 550 U.S. 12, 136—41 (2007). In this procedure, the cervix is dilated, and the doctor extracts nearly the entire baby while the baby is still alive in a way conducive to pulling out the baby's entire body prior to completing the abortion. *Id.* at 136—37. The Court addressed a few ways this process can occur, in each of the ways described, the end result is the crushing of the baby's skull while it is still alive and partially delivered. *Id.* at 138–

40. The Supreme Court explained the Act was designed to prohibit any abortion that occurs in this manner and held that the Act applies "both previability and postviability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id.* at 147.

The Proposed Amendment purports to ban any law that "prohibit[s], penalize[s], delay[s], or restrict[s] abortion before viability" setting up an inherent, irreconcilable conflict between the Proposed amendment and federal law. There is a positive conflict between the Partial Birth Abortion Ban's absolute prohibition on the use of this barbaric method of abortion and the Proposed Amendment's purported efforts to prohibit any restriction on abortion. Both things cannot be true at once.

Congress' decision to preempt these state laws to the contrary, pursuant to the Supremacy Clause, is the supreme law of the land. U.S. Const. art. VI. It logically follows that if the U.S. Constitution mandates state law subservience, then a state enactment (including a state constitutional amendment) that contradicts federal law facially violates the Supremacy Clause of the United States Constitution. Based on this alone, the Proposed Amendment should be stricken from the ballot.

## II. THE BALLOT TITLE HIDES FROM VOTERS THE TRUE EXTENT OF THE EFFECT OF THE PROPOSED AMENDMENT

This Court has noted its review of a petition initiative does not "address the merits or wisdom of the proposed amendment," but, rather, is a determination of whether the initiative complies with Florida law. *Advisory Op. to the Att'y Gen. re Raising Florida's Minimum Wage*, 285 So. 3d 1273, 1275 (Fla. 2019) (quoting *Advisory Opinion to Att'y Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Hum. Embryo*, 959 So. 2d 210, 212 (Fla. 2007)). This Court is tasked with determining whether the proposed amendment: (1) "embrace[s] but one subject and matter directly connected therewith"; and (2) includes a ballot title and summary in compliance with the requirements of section 101.161(1), Florida Statutes. *Id.* (internal citations omitted). The "clear and unambiguous" summary of the amendment's "chief purpose" requires "'that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.'" *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) (quoting *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)). A ballot summary must give "fair notice" of the proposed change and such summary may not be vague, misleading, or contradict the text

of the proposed amendment. *Raising Florida's Minimum Wage*, 285 So. 3d at 1275 (internal citations omitted).

The summary may not omit material facts regarding the purpose or effects of the proposed amendment. *Advisory Opinion to Atty. Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citing *Advisory Opinion to the Atty. Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1355 (Fla. 1998) and *Advisory Opinion to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994)). Nor may the summary mislead voters. *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (noting this Court would invalidate a ballot initiative if "the language of the title and summary, as written, misleads the public."); *Advisory Opinion to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 975–76 (Fla. 2009) (rejecting from placement on the ballot a proposed amendment that had a defective ballot summary which was misleading and omitted material facts).

A proposed amendment's summary may not "fly under false colors" or "hide the ball" as to the amendment's true effect. *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000) (quoting *Askew*, 421 So. 2d at 156). "A proposed amendment must be removed from the ballot when

the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose." *Roberts v. Doyle*, 43 So. 3d 654, 659 (Fla. 2010) (internal citations omitted). The summary "must also be accurate and informative." *Id.* (citing *Advisory Opinion to Atty. Gen. re Term Limits Pledge*, 718 So. 2d at 803); see also *Advisory Opinion to the Atty. Gen.* re *Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (holding that a summary may be "misleading not because of what it says, but what it fails to say.").

In this instance, the ballot title and summary of the Proposed Amendment are outright misleading and fail to give voters "fair notice" of the true effect of the Proposed Amendment since it hides from voters the true effects of the Proposed Amendment.

This Court has previously rejected proposed amendments that mislead voters in an attempt to lure voters into voting favorably for that proposal. For instance, this Court rejected a proposed amendment that attempted to modify then-current legislative proscriptions on lobbying by former officeholders. *Askew*, 421 So. 2d at 156. The summary told voters it would "[p]rohibit[] former legislators and statewide elected officers from representing other persons or entities for compensation before any state government

body for a period of 2 years following vacation of office, unless they file full and public disclosure of their financial interests." *Id.* at 153. Hidden from the voters, however, was the fact that such lobbying was already prohibited under Florida law. *Id.* at 155. In fact, by voting in favor of the proposed amendment, voters would be gutting the prohibition on lobbying by former officeholders by introducing a very easy task (submission of a financial disclosure) in order to evade entirely the two-year ban. *Id.* at 153; 155—56. This Court rejected such sleight-of-hand and determined the summary was "so misleading to the public" that the proposed amendment must be removed from the ballot. *Id.* at 156.

Similarly, in *Casino Authorization, Taxation and Regulation*, the summary told voters the proposed amendment "prohibits casinos unless approved by the voters . . . who may authorize casinos on riverboats, commercial vessels, within existing pari-mutuel facilities and at hotels." 656 So. 2d at 467. The text of the amendment, though, provided something quite different; it permitted voters to authorize casinos "within pari-mutuel facilities"; "on board stationary and non-stationary riverboats and U.S. registered commercial vessels"; and at "transient lodging establishments licensed by the state." *Id.* at 468.

This Court noted the glaring discrepancies between what the summary promised voters and what the proposed amendment actually delivered. The summary promised voters it would only allow gambling at "hotels"; yet, the amendment provided for gambling to be permitted by voters at "transient lodging establishments licensed by the state," which has a far broader definition. *Id.* at 467–69. The amendment also misled voters regarding the use of "riverboats" and "commercial vessels" by expanding the definition in the text of the amendment to also include such vessels while "stationary." *Id.* at 469. This Court held the summary was misleading since it "suggests that the amendment is necessary to prohibit casinos in this state." *Id.* Such was simply not true. This summary, by *omission*, failed to inform voters of the current state of the law. *Id.* By not giving voters this critical information, voters may have been felt compelled to vote *for* the amendment thinking they were prohibiting casinos; but by voting yes were providing a means to do the opposite.

The Proposed Amendment has a fatal flaw. The Proposed Amendment's Ballot Title falsely indicates it will only "*limit* government *interference* with abortion." Compared with the text of the Proposed Amendment, the language of the amendment itself

would outright prohibit ***any*** regulation or abortion or abortion providers, not simply "limit" government "interference" with abortion.

The word limit means to "to establish or keep within specified bounds." The American Heritage Dictionary of the English Language, Fifth Edition, LIMIT. The use of this word was designed to lure voters into believing the Proposed Amendment was a reasonable restriction on the Legislature, implying that abortion regulations would be "within specified bounds." Instead, the Proposed Amendment pivots and enacts an absolute ban on any restriction, regardless of how reasonable. The drafters of the Proposed Amendment intentionally chose not to use a more accurate description such as "eliminate," which would accurately reflect the Proposed Amendment's intent to "[t]o get rid of; remove" any restriction on abortion services. The American Heritage Dictionary of the English Language, Fifth Edition, ELIMINATE.

This Proposed Amendment would also prohibit any regulation by the state as to medical providers. Of course, the primary entity responsible for regulation of medical providers in the state of Florida is the Board of Medicine (§ 458.307, Fla. Stat.) who is tasked with "ensur[ing] that every physician practicing in this state meets minimum requirements for safe practice" and that providers that do

not meet those minimum standards are prohibited from practicing medicine in this state. § 458.301. The Proposed Amendment contains a thinly-veiled attack on the Board of Medicine's ability to regulate abortion providers. While the Proposed Amendment prohibits any legislative "restriction" on abortion pre-viability, it provides no notice to voters in its title or summary that such would also prohibit reasonable regulations by the Board of Medicine, including health-and-safety regulations like the admitting-privileges requirement the Supreme Court considered in *June Med. Services L. L. C. v. Russo*, 140 S. Ct. 2103, 2121, 207 L. Ed. 2d 566 (2020), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022).

In *June Medical Services*, the Court considered a Louisiana statute the required abortion doctors to have admitting privileges at a nearby hospital. *Id.* The Supreme Court, pre-*Dobbs*, upheld the district court's determination that the law was unconstitutional as it impressively restricted access to abortion. *Id.* at 2122–24. It is these same health-and-safety type regulations that would be wiped out by the enactment of the Proposed Amendment. And it would do so without any notice, much less "fair notice," to voters about the extent of the Proposed Amendment's reach.

Finally, the Proposed Amendment provides no notice to voters about the conflict it creates between state and federal law. Federal law undeniably prohibits the barbaric intact D & E form of abortion that occurs both in previability and postviability abortions. Of course, the Proposed Amendment cannot authorize or immunize violations of federal law. Yet, the Proposed Amendment purports to invalidate any law that restricts abortion in any way, including these barbaric intact D & E abortions.

The Proposed Amendment simply fails to provide "fair notice" to voters of the implications of this amendment. The Proposed Amendment should not be permitted to be placed on the ballot.

## CONCLUSION

This Court should find the proposed amendment facially unconstitutional pursuant to the Supremacy Clause of the U.S. Constitution. This Court should also determine the Proposed Amendment fails to accurately provide notice to the voters of its content. This Proposed Amendment should be stricken from the ballot.

DATED: October 31, 2023

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2023, I filed the foregoing using the Florida Courts E-Filing Portal, which will electronically serve all counsel of record, including:

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and word count requirements of Fla. R. App. P. 9.045(b) and 9.210(a).

*/s/ Jeremy D. Bailie*
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