SC16-381

IN THE SUPREME COURT OF FLORIDA

Case No. SC16-381
Lower Case No. 1D15-3048

GAINESVILLE WOMAN CARE, LLC, *et al.*,
Petitioners,

v.

STATE OF FLORIDA, *et al.*,
Respondents.

Discretionary Proceeding to Review the Decision of the
First District Court of Appeal

BRIEF *AMICI CURIAE* Of CONCERNED WOMEN FOR AMERICA AND THE NATIONAL LEGAL FOUNDATION, Supporting Respondents

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STATEMENT OF INTEREST OF *AMICI CURIAE*

As stated in the accompanying motion, the interests of your *Amici* are as follows:

Concerned Women for America (CWA) is the largest public policy women's organization in the United States, with half-a-million members throughout all 50 states. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. For over 30 years, CWA has actively promoted legislation, education, and policymaking consistent with its philosophy, lending a voice to conservative women in the culture, the legislatures, and the courts. Through its grassroots organization, CWA advocates for traditional virtues that are central to America's cultural health and welfare. Among CWA's seven core issues are protecting the sanctity of human life, throughout every stage of development, and the defense of the family, which requires strong support for mothers and their children.

The National Legal Foundation (NLF) is a public interest law firm that has litigated constitutional cases in federal and state courts throughout the United States since 1985, including a number of cases before the Supreme Court of the United States, including *Lefemine v. Wideman*, 133 S.Ct. 9 (2012) (per curiam), and *Board of Educ. of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990). The NLF believes its experience and perspective will assist the Court in deciding this case.

Furthermore, the NLF and its donors and supporters, including those in Florida—like CWA—are dedicated to preserving the sanctity of life, and often work with CWA, either as its counsel or as a co-*amicus* in pursuing this goal.

SUMMARY OF THE ARGUMENT

The Plaintiffs-Petitioners (collectively, "Abortion Providers") have it upside down. They base their argument on the assertion that Florida law is even more favorable to, and allows even less restriction on, abortion than does federal law. But the law of Florida is that unborn children are human beings and have the same rights as all other natural persons under the Florida Constitution ("Constitution," as distinct from the United States Constitution). This has been true since the founding of the State.

As demonstrated by both the 2004 amendment to the Florida Constitution concerning abortion and the State's statute regulating abortion, this treatment of the unborn as persons was not altered by the "right to privacy" provision added to the Constitution in 1980. Thus, a woman's abortion right in Florida is only as broad as her federal right, and no broader. To the extent prior decisions of this Court have indicated to the contrary, those holdings have been rejected by the People of Florida in a later amendment to the Constitution, and that should now be recognized by this Court, as the First District properly did below. *State of Florida v. Gainesville Woman*

Care, LLC, 187 So. 3d 279, 282 (Fla. 1st DCA 2016). Nor did those repudiated decisions on which the Abortion Providers rely get resuscitated by the proposed constitutional amendment concerning abortion that was not adopted in 2012.

ARGUMENT[1]

In a long line of decisions, the Supreme Court of the United States has firmly established that, while the States may not prohibit or unduly restrict abortion in certain situations, the States do not have to support or encourage abortion and may favor and facilitate childbirth instead. For example, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Supreme Court upheld Missouri's prohibition the use of public employees or facilities to perform abortions. In *Williams v. Zbaraz*, 448 U.S. 358 (1980), the Supreme Court found constitutional the State's statute forbidding the use of public funds for abortion (except to save the mother's life). *See also Harris v. McRae*, 448 U.S. 297 (1980) (upholding similar federal law). And in *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court upheld a similar funding prohibition in Connecticut and ruled that States may encourage childbirth over abortion. *See also Poelker v. Doe*, 432 U.S. 519 (1977) (upholding municipal policy against performing abortions in public hospitals); *Beal v. Doe*, 432 U.S. 438 (1977) (upholding State's restriction of Medicaid funds for abortion).

[1] Your *Amici* adopt the Respondents' statement of the standard of review.

Florida stands in this tradition. Its law favors childbirth and tolerates abortion only to the extent required by federal law as interpreted by the Supreme Court.

I. Prior to *Roe v. Wade*, Florida Considered an Unborn Child a Person.

When the Supreme Court announced its holding in *Roe v. Wade*, 410 U.S. 113 (1973), the laws of this State criminalized abortion, except in certain limited situations. Ch. 72-196, at 608-611, Laws of Fla. (making abortion a felony except to save the life of the mother, in cases of rape, incest, or severe birth defects). Florida did so because it considered a fetus a human being, an unborn child, a person. It had made that explicit for over 100 years, and *Roe* did not change that, other than by making some of the State's restrictions on abortion unenforceable. For example, the 1868 codification expressly provided that the unborn was a *child*:

> The willful killing of an unborn quick *child*, by any injury to the mother of such *child* which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.
>
> Every person who shall administer to any woman pregnant with a quick *child* any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such *child*, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such *child* or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Ch. 1637, subc. 3, §§ 10, 11, Laws of Fla. 1868 (emphasis added); *see also* WestlawNext's Historic Notes to now-repealed §§ 782.10, Fla. Stat. (dealing with

abortion) & 797.01 (dealing with willful killing via injury causing miscarriage) (tracing both statutes from the 1868 enactments, through amendments in 1892, 1906, 1920, 1927, and 1971).

Of course, it is now known to any high school biology student (or junior high sex ed student) that a unique human being, a *person*, begins biological life at conception. That has been indisputably scientifically since the early 1800's. *See, e.g.*, Horatio Storer, *On Criminal Abortion in America* (1860); C. Morrill, *The Physiology of Women* 318-19 (1868). Sybil Shainwald, a scholar with impeccable pro-abortion credentials, has recently documented that, between 1821 and the 1840s, States began to criminalize both pre- and post-quickening abortions and that, from the 1850s forward, the emphasis shifted from concerns about the health of the mother to the need to protect the unborn. Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20 Wm. & Mary J. Women & L. 123, 131-36, 171 (Shainwald is past-chair of the National Women's Health Network and has testified before the FDA and Congress, id. at 123, n.a1). Shainwald further documented that this shift—and the accompanying development of laws banning abortion at all stages of pregnancy—was due to the efforts of the American Medical Association and various individual physicians in spreading the then-recent scientific confirmation that a new human life begins at conception. *Id*. at 134-36; *see also* Clarke D. Forsythe & Keith Arago, Roe

v. Wade *& The Legal Implications of State Constitutional "Personhood" Amendments*, 30 Notre Dame J.L. Ethics & Pub Pol'y 273, 277-84 (2016); Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* 125ff. (2006).

Thus, that a unique human life began at conception was well known when the Florida adopted its territorial Constitution in 1838 in anticipation of statehood. Article I, §8, provided that "no freeman shall be . . . in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land." By limiting this provision in 1838 to only "freemen," Florida was distinguishing between persons slave and free. The 1885 Constitution did away with that distinction. It expanded these freedoms to *all* persons, providing in Article 1, §12, "*No person* shall be . . . deprived of life, liberty or property without due process of law . . . ." (emphasis added). In 1885, the 1868 statute identifying the victim of an abortion as an unborn *child*, a *person*, was in effect, and it fully demonstrates that the adopters of the 1885 Constitution did not intend to put unborn children in the class to which slaves were previously relegated, i.e., without the right to life.

The current, 1968 Constitution, as originally adopted, reiterated this protection for all persons in Article I, §2, as follows: "*All natural persons, female and male alike*, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty . . . . No person shall be deprived of any right because of . . . physical disability." (emphasis added). Similarly, in Article I, §9, the

present Constitution reads, "*No person* shall be deprived of life, liberty or property without due process of law . . . ." (emphasis added). In 1968, the Florida statute criminalizing abortion still referred to the victim of the procedure as a *child*. *See, supra*, WestlawNext's Historic Notes. Thus, it is clear that unborn human beings were considered persons with both "basic" and "due process" rights as prescribed under Florida law when *Roe* was decided in 1973.

This conclusion is also apparent from a straightforward interpretation of the text of the 1968 Constitution. "All natural persons, female and male alike," include unborn persons; unborn persons are human and are either female or male. Words like "all" and "any" are fully inclusive and include the totality of the class. *See UCF Athletics Ass'n Inc. v. Plancher*, 121 So. 3d 1097, 1111 (Fla. 5th DCA 2013), *approved in part, quashed in part*, 175 So. 3d 724 (Fla. 2015) ("'All' means '[t]he whole amount, quantity, extent . . . [t]he entire number of; the individual constituents of, without exception . . . [e]very . . . [a]ny whatever . . . [t]he greatest possible . . . [e]verything; the totality. . . every one of; the whole of; as much as . . . [w]hole being, entirety, totality . . . .'" (citation omitted; alterations in original). *State, Agency for Health Care Admin. v. PCA Family Health Plan, Inc.*, 695 So. 2d 737, 738 (Fla. 1st DCA 1996) ("The plain meaning of *any* . . . does not permit the inclusion of some . . . and the exclusion of other[s] . . . ." (citations and internal quotation marks omitted)); *Perry v. State*, 174 So. 2d 55, 58 (Fla. 1st DCA 1965) ("the adjective

'any', generally mean[s] 'of whatever kind' . . . ."); *accord Boyle v. United States*, 556 U.S. 938, 943-44 (2009) ("obviously broad"; "ensures . . . a wide reach"); *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) (*any* is "sweeping"; "of whatever stripe"); *Salinas v. United States*, 522 U.S. 52, 56-57 (1997) (*any* is "expansive, unqualified").

II. Florida Has Limited *Roe*'s Application to the Degree Possible.

While recognizing that it is constrained by the United States Constitution as interpreted by the Supreme Court of the United States, the Florida Legislature has passed multiple restrictions on the exercise of the federal abortion right, both to protect the health and welfare of mothers and viable fetuses and to make sure that the momentous step of aborting a child is taken by the mother with full understanding of relevant knowledge and due deliberation. Title 390 of the Florida Statutes, which addresses abortion, is replete with such regulation, and its purpose is obvious: in Florida, abortion, while a federal right, is not favored.

In particular, title 390 in two instances reiterates that the victims of abortion are *human beings*. Thus, in § 390.0111(1), Fla. Stat. (emphasis added), the Legislature provides,

> No termination of pregnancy shall be performed *on any human being in the third trimester of pregnancy* unless one of the following conditions is met:
>
> (a) Two physicians certify in writing that, in reasonable medical judgment, the 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.
>
> (b) The physician certifies in writing that, in reasonable medical judgment, there is a medical necessity for legitimate emergency medical procedures for termination of the pregnancy to save the *pregnant woman*'s life or avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the *pregnant woman* other than a psychological condition, and another physician is not available for consultation.

It is obvious that the reference of the Legislature to *any human being* in this instance is not to the mother, but to the child in her womb. The same statute in subsections (a) and (b) refer to the mother as the *pregnant woman*, but not when referring to her child, which could be either male or female, and thus the neutral term *human being* is used. *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 127 (Fla. 2016) ("legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended . . . .") (internal quotation marks and citations omitted); a*ccord*, *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2412 (2006) ("We normally presume that, where words differ as they differ here, [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion.").

Similarly, in § 390.0112(1), Fla. Stat. (emphasis added), the Legislature referred again to the victim of the abortion, the fetus, as a *human being*, in contradistinction to the mother as *the pregnant woman*:

> No termination of pregnancy shall be performed *on any human being* if the physician determines that, in reasonable medical judgment, the fetus has achieved viability, unless:
>
> (a) Two physicians certify in writing that, in reasonable medical judgment, the 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
>
> (b) The physician certifies in writing that, in reasonable medical judgment, there is a medical necessity for legitimate emergency medical procedures for termination of the pregnancy to save the *pregnant woman*'s life or avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the *pregnant woman* other than a psychological condition, and another physician is not available for consultation.

See also § 390.0111(12), Fla. Stat. (protecting infants born alive after an attempted abortion), *id*. (15) (restricting use of public funds for abortion). Together, these statutes reflect that Florida law continues to regard an unborn child as a natural person. *See also id*. §§ 775.021 & 782.09, Fla. Stat. (fetal homicide provisions defining *unborn child* as "a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb").

These provisions not only specify that a fetus is a person under Florida law, but provide examples of the restrictions the State has placed on its exercise to make sure that the license to kill the unborn child is not extended any further than necessary by the United States Constitution as interpreted by the Supreme Court of the United States. It is pellucid, then, that abortion rights under Florida law are not intended to be broader than required by the Supreme Court.

III. This Court's Overbroad Reading of the Constitution's 1980 Privacy Provision was Rejected by Constitutional Amendment in 2004.

Ignoring the law and history cited above, the Abortion Providers pin their argument that the abortion license is broader in Florida than federally on the fact that the People of Florida in 1980 added in Article I, §23, a "right of privacy": "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." From this language, the plaintiffs argue that the People of Florida intended to adopt the federal right to abortion and expand it beyond that granted by the Supreme Court of the United States pursuant to the federal constitution. Indeed, this Court in *In re T.W.*, 551 So.2d 1186 (Fla. 1989), and *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612 (Fla. 2003), largely adopted this argument. However, the People of Florida rejected this expansive reading by adopting another amendment to the Constitution in reaction to the *North Florida Women's Health* decision the year after its issuance, effectively overruling it, as noted by the First District in this case. *Gainesville Woman Care*, 187 So. 3d at 282. Thus, this Court should recognize that its prior reading of the privacy provision was mistaken and now rejected.

In 2004, the People added Article X, §22, to the Constitution. It speaks specifically to abortion and the prior overreach of the Court when interpreting the right of privacy provision:

> **Parental notice of termination of a minor's pregnancy.—**The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

As is obvious from its face, the People of Florida in 2004 added this section to the Constitution to overturn this Court's decisions in *T.W.* and *North Florida Women's Health* by doing two, related things: (1) to affirm, but also to constrict, a minor's right to abort to that as defined by the United States Constitution as interpreted by the Supreme Court of the United States; and (2) to establish that, for purposes of Florida law, it is permissible to make sure the minor has an understanding of the significance of taking her baby's life and counsel from those closest to her. In other words, the People repudiated the view pushed here by Abortion Providers that the "right of privacy" added in 1980 disallows restrictions on abortion unless there is a compelling state interest, especially those intended to assure that abortions are taken after due deliberation.

Second, the privacy rights of the mother under the Constitution, when properly interpreted, cannot be viewed in isolation so as to ignore the competing, basic rights of her child. Indeed, the "right of privacy" section expressly provides that it is inapplicable when it conflicts with the basic rights of another. The "right of privacy" in Article I, §23, is specifically limited to "*except as otherwise provided*"

in the Constitution. The Constitution "otherwise provides" that *all natural persons* have the right to life. Art. I, §1, Fla. Const. The Florida Legislature has reiterated what medical science and logic (and longstanding Florida law) also say: that unborn persons are human beings and part of the class of "all natural persons." *See* §§ 390.0111(1), 390.0112(1), Fla. Stat. Indeed, the Supreme Court of the United States, while basing its decision in *Roe* in 1973 on a "right to privacy," effectively repudiated that rationale in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and replaced with a substantive "liberty interest" rationale. Simply put, the right of privacy does not sanction the killing of another human being, including an unborn child.

Moreover, the Constitution gives special attention to the basic rights of disabled persons, providing that no person is to be denied the right to enjoy life because he is disabled. Fla. Const. Art. I, § 2, Fla. Const. Although society may be used to thinking of the disabled in terms of those already born, in reality, the unborn are prototypical of this category. They have no ability to take care of themselves and, thus, are "dis-abled." Without protection of their basic rights, they are in the same status as slaves were under the 1838 Constitution. Any privacy rights of the mother are limited by the "except otherwise provided" basic rights of the disabled to enjoy life.

The People of Florida, acting both by Constitutional amendment and by the Legislature, have repudiated this Court's expansive reading of the "right to privacy" provision of the Constitution. This State's law, as it always has, continues to recognize an unborn child as a natural person and accords the fetus the basic rights of life and liberty. This Court should expressly recognize that its contrary precedent has now been superseded.

IV. The Failed 2012 Constitutional Amendment Did Not Promote Abortion.

The Abortion Providers (Opening Br. 17 n.5) take solace in the defeat of a proposed constitutional amendment in 2012 that dealt with abortion, claiming that, by rejecting it, the People "reasserted their will" in support of an abortion right broader than the federal right. That conclusion is wholly unwarranted.

It is obviously faulty logic to prove anything by what was *not* adopted. Even if the proposed amendment had only presented the issue of whether the abortion license in Florida should be no greater than the federally required license (which it did not), its defeat would not have meant that the People had rejected that proposition. Many could have voted against it as duplicative of the current state of the law or for a multitude of other, extraneous reasons.

But, with respect to the 2012 proposition, the amendment's text was not nearly that clear-cut. The proposed amendment addressed multiple issues—a prohibition on state funding of abortion, a prohibition on state funding of health care coverage

that includes coverage for abortion, six exceptions to the above, the interaction between the state and federal constitutions, and the overruling of court decisions.[2] This multiplicity may have either confused voters or drawn "no" votes from those opposed to any of the provisions, including those opposed to various exceptions.

No effect in this case can be given to the rejection of the 2012 proposed amendment. It did not cleanly present the issue involved here, it never became law, and it is simply impossible to know why it was voted down.

CONCLUSION

Under Florida law, from its inception as a State to the present, an unborn child has been considered a *human being*, a *natural person* invested with basic, inalienable rights of life and liberty. The "right to privacy" provision adopted in the Constitution in 1980 did not change that basic law or grant a broader abortion license than the

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[2] The full text of the Division of Elections summary states:

> This proposed amendment provides that public funds may not be expended for any abortion or for health-benefits coverage that includes coverage of abortion. This prohibition does not apply to an expenditure required by federal law, a case in which a woman suffers from a physical disorder, physical injury, or physical illness that would place her in danger of death unless an abortion is performed, or a case of rape or incest. This proposed amendment provides that the State Constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution. With respect to abortion, this proposed amendment overrules court decisions which conclude that the right of privacy under Article I, Section 23 of the State Constitution is broader in scope than that of the United States Constitution.

http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82. The amendment itself was 18 lines long.

Supreme Court of the United States requires under its interpretation of the United States Constitution. When this Court held otherwise, the People reacted with a further amendment to the State's Constitution that overturned those rulings. This Court should recognize in this case that its prior precedent is no longer valid and affirm the Legislature's 24-hour waiting period provision, which has the salutary purpose of making sure a woman duly deliberates and has the opportunity to seek appropriate counsel before killing her child.

Respectfully submitted,

this first day of August, 2016

/s/ David C. Gibbs III

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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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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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