SC22-1050, SC22-1127

In the Supreme Court of Florida

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA ET AL.,
Petitioners,

v.

STATE OF FLORIDA ET AL.,
Respondents.

On Petition for Discretionary Review from the First District Court of Appeal
DCA No. 1D22-2034

BRIEF OF AMICUS CURIAE NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES IN SUPPORT OF RESPONDENTS

Jordan E. Pratt
Christine K. Pratt
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW #1410
Washington, D.C. 20004
(972) 941-4444
[redacted]

Counsel for Amicus Curiae National Institute of Family and Life Advocates

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IDENTITY AND INTEREST OF AMICUS CURIAE [1]

The National Institute of Family and Life Advocates ("NIFLA") is a nonprofit organization that provides legal counsel, education, and training to more than 1,700 pregnancy centers and medical clinics nationwide. In 2018, NIFLA won a pivotal victory at the United States Supreme Court, which upheld the free-speech rights of life-affirming pregnancy centers. *See Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

NIFLA has an interest in this case because its outcome will directly bear on NIFLA's work protecting, educating, and equipping life-affirming pregnancy centers in Florida. NIFLA believes that the judicial creation of abortion "rights" sparks conflicts with the freedom of speech and the free exercise of religion, a breakdown in political discourse over the abortion issue, and acts of violence against life-affirming pregnancy centers, such as the recent attacks against

[1] Counsel for Amicus Curiae authored this brief in its entirety. No party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund the preparation or submission of this brief. No person—other than Amicus Curiae, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

centers in the State of Florida. NIFLA therefore has a critical interest in this case, which offers this Court an opportunity to correct its erroneous precedents, return the abortion issue to the democratic process, and allow the State to begin healing from the damage that this Court's errors have caused.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For nearly fifty years, on the barbaric practice of abortion, the Supreme Court of the United States wrested from the American people their most sacred political right—the right to democratic self-government—and forced them to tolerate one of the most severe invasions of personal rights imaginable—the taking of innocent and defenseless human life. It did so through an "egregiously wrong and deeply damaging," *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022), judicial amendment to a Constitution that nowhere mentions abortion but instead "secure[s] the Blessings of Liberty to . . . our Posterity" and repeatedly places a premium on human life. In its Fifth, Eighth, and Fourteenth Amendments, the federal Constitution guarantees that the government may not take human life without ample judicial process and may not inflict cruel and unusual punishments for crimes. It defies all reason to claim

that the same Constitution—which makes no reference to abortion—*requires* the government to *allow* the taking of *innocent* human life.

The U.S. Supreme Court finally admitted its error and returned to the people the sacred political right that it seized from them in *Roe v. Wade*. This case presents the question whether this Court should do likewise with respect to its own abortion precedents misconstruing the Florida Constitution. *See, e.g.*, *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989). It surely should. As the State explains, this Court's abortion precedents give article I, section 23 of the Florida Constitution a reading that radically departs from the meaning it bore to the legislators who proposed it and the public who ratified it. Thus, under this Court's approach to *stare decisis*, "the proper question becomes whether there is a valid reason *why not* to recede from that precedent." *Poole v. State*, 297 So. 3d 487, 507 (Fla. 2020).

This Court has every reason to recede from its abortion precedents, which are not only "egregiously wrong," *Dobbs*, 142 S. Ct. at 2265, but also have proven "deeply damaging," *id.*, to the State.

At the most obvious level, this Court's errors have led to the destruction of countless pre-born human lives, even under circumstances where *Roe* permitted life-protective policies. *Compare, e.g.*, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 885 (1992) (joint op.) (upholding a 24-hour informed-consent period, and noting that "[e]ven the broadest reading of *Roe* . . . has not suggested that there is a constitutional right to abortion on demand"), *with Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1247 (Fla. 2017) (directing reinstatement of temporary injunction against Florida's 24-hour informed-consent period). But at a deeper level, judicial bypass of the democratic process has prompted a breakdown in our political discourse over the abortion issue, placed abortion "rights" on a collision course with constitutionally guaranteed liberties of speech and religious exercise, and ultimately led to violence against life-affirming pregnancy centers, including at least three centers in Florida.

This Court should follow the U.S. Supreme Court's lead, return abortion to the democratic process, and allow the State to begin healing from the damage that this Court's erroneous abortion precedents have caused.

ARGUMENT

I. Judicial Creation of Abortion "Rights" Has Generated Needless Conflicts with the Freedom of Speech and the Free Exercise of Religion.

A. Emboldened by erroneous abortion precedents, government repeatedly has used abortion "rights" as a justification to suppress or compel the speech of pro-life Americans in ways that would be unthinkable in almost any other context.

In *National Institute of Family & Life Advocates v. Becerra*,[2] 138 S. Ct. 2361 (2018) ("*NIFLA*"), for example, the U.S. Supreme Court confronted a California statute that targeted life-affirming pregnancy centers ("LAPCs"), required them to post notices about the availability of free or low-cost abortion services, and required many of them to state that they were not licensed medical facilities. *Id.* at 2368. The law further required LAPCs to list a phone number that women could call to obtain a state-subsidized abortion. *Id.* The statute's transparent targeting of pro-life citizens was underscored by the statements of its proponents. The law's author observed that LAPCs

[2] Amicus was the lead named plaintiff in *NIFLA*.

often are affiliated with NIFLA and called their existence in California "unfortunate." *Id.*

The statute's conflict with the First Amendment was stark and straightforward. The Court began its analysis by noting that, as a "content-based regulation of speech" that "compel[s] individuals to speak a particular message," the licensed notice requirement was presumptively unconstitutional and subject to strict scrutiny. *Id.* at 2371. The Court held that the requirement failed even intermediate scrutiny, as the State had ample means to make the public aware of its abortion services beyond compelling pro-life persons and businesses to advertise them on the State's behalf. *Id.* at 2375–76. The Court then held that the unlicensed notice requirement targeted a narrow range of speakers—pro-life speakers who assist pregnant women—and burdened their protected speech without any plausible justification. *Id.* at 2376–78.

The Court's holdings in *NIFLA* were standard First Amendment fare. Few would contend that the government may compel Alcoholics Anonymous to advertise the State's ABC liquor stores or private colleges to advertise the State's public universities. Yet, when it came to the judicially created right to abortion, California readily ignored

this basic First Amendment limitation and compelled its pro-life citizens to advertise the State's abortions.

California's cavalier treatment of the freedom of speech in *NIFLA* is merely one episode in the "abortion distortion" saga that has followed the judicial invention of abortion rights. Another episode occurred in this Court's and the U.S. Supreme Court's pre-*Dobbs* "buffer law" cases. In *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 676 (Fla. 1993), for example, this Court unanimously approved—in its entirety—a Florida circuit court's detailed and intrusive injunction that severely restrained the speech of pro-life demonstrators in public rights of way. On certiorari, a sharply divided U.S. Supreme Court affirmed in part and reversed in part, upholding some portions of the injunction but reversing others that it deemed too restrictive of the demonstrators' speech. *See Madsen v. Women's Health Center*, 512 U.S. 753, 776 (1994).

As Justices Scalia, Kennedy, and Thomas observed, the entire injunction that this Court rubber-stamped constituted a content-based regulation of speech in a traditional public forum—a "judicial creation of a 36-foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly,

and association," plus "a noise prohibition, applicable to that group and that group alone[.]" *Id.* at 785 (Scalia, J., dissenting). In short, "[t]he entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion." *Id.* The majority's disregard of basic and firmly-established speech jurisprudence led the dissenting justices to lament that "[t]oday the ad hoc nullification [abortion] machine claims its latest, greatest, and most surprising victim: the First Amendment." *Id.*

The abortion distortion of long-settled speech precedents continued in *Hill v. Colorado*, 530 U.S. 703 (2000). There, the Court upheld a Colorado statute that imposed an abortion clinic buffer zone against approaching within 8 feet of persons without their consent for the purpose of passing a leaflet, displaying a sign, or engaging in oral protest, education, or counseling. *Id.* at 707, 735. As Justices Scalia and Thomas explained, in labeling the statute a content-neutral "place" restriction on speech, the majority gave Colorado's law "the benefit of the 'ad hoc nullification machine' that the Court has set into motion to push aside whatever doctrines of constitutional

law stand in the way of" abortion. *Id.* at 741 (Scalia, J., dissenting). In truth, the statute's restriction on oral communications "is obviously and undeniably content-based," because "[w]hether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—depends entirely on *what he intends to say* when he gets there." *Id.* at 742. Plainly put, "it blinks reality to regard this statute . . . as anything other than a content-based restriction upon speech in the public forum." *Id.* at 748. In his own dissenting opinion, Justice Kennedy agreed. *Id.* at 765 (Kennedy, J., dissenting).

Fourteen years later, the Court began to retreat from *Madsen*'s and *Hill*'s failure to protect pro-life speech on the same terms that the Court employs to protect virtually all other kinds of speech. *See McCullen v. Coakley*, 573 U.S. 464 (2014). And finally, just this past term, the Court expressly recognized what the dissenting justices in *Madsen* and *Hill* warned: judicial invention of abortion "rights" has "distorted First Amendment doctrines," among other important legal doctrines, and that distortion provides a strong basis for overruling erroneous abortion precedent. *Dobbs*, 142 S. Ct. at 2275–76 & n.65 (citing *Madsen* and *Hill*). This Court likewise should acknowledge the

distorting impact of its own erroneous abortion precedents—including this Court's blunt disregard of the First Amendment in *Operation Rescue*, which went a bridge too far for even the *Madsen* majority—and should likewise acknowledge that the abortion distortion provides a strong basis for overruling those precedents.

B. The free exercise of religion has been yet another casualty of the abortion distortion. Time and again, emboldened by judicial creation of abortion "rights," government has attempted to coerce pro-life Americans to violate or set aside their deeply held religious beliefs about the sanctity of human life.

For example, despite the protections of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), the federal government has coerced Catholic nuns, Christian businesses, and faith-based Florida retirement communities to purchase—or facilitate the acquisition of—insurance coverage for abortifacient contraception. *See, e.g.*, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Christian & Missionary Alliance v. Burwell*, No. 2:14-cv-580, 2015 WL 437631 (M.D. Fla. Feb. 3, 2015). And the State of New York went a step further, promulgating a rule that forces most employers—

including many religious ones—to directly cover abortions in their employee health insurance plans. *See Roman Catholic Diocese of Albany v. Tullo*, 185 A.D.3d 11 (N.Y. Sup. Ct. 2020), *certiorari granted, judgment vacated*, 142 S. Ct. 421 (2021).

In its latest salvo against rights of conscience in the abortion context, the federal government recently issued a "guidance" document that reinterprets the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd ("EMTALA") to require virtually all the nation's hospitals to perform abortions, even when doing so would violate state law. *See Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022). While the guidance remains preliminarily enjoined from enforcement in Texas and against the members of two organizations, *id.* at *31, it continues in force elsewhere. *See* Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss, Centers for Medicare & Medicaid Services (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf. And remarkably, the guidance makes no mention of RFRA's protection for religious hospitals that object to abortion, just as it makes no reference to the various provisions of federal

appropriations law that prohibit expenditures of federal funds on abortions. *Texas*, 2022 WL 3639525, at *30 & n.24. It thus suggests that hospitals religiously opposed to abortions must nonetheless perform them, on pain of forfeiting federal funds.

In just about any other context, it is difficult to imagine the government compelling its religious citizens to subsidize, assist in the procurement of, or directly perform acts that their faith regards as gravely immoral. But "the abortion right recognized in this Court's decisions is used like a bulldozer to flatten legal rules that stand in the way." *June Medical Servs., LLC v. Russo*, 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting). This Court should take notice of that reality as it revisits its own erroneous abortion precedents that, like their now-discarded federal counterparts, have needlessly endangered religious liberty.

II. Judicial Creation of Abortion "Rights" Has Prompted a Breakdown in Political Discourse and Led to Violence Against Life-Affirming Pregnancy Centers.

Justice Scalia once warned against the folly that a court "armed with neither constitutional text nor accepted tradition, can resolve [the] contention and controversy" surrounding abortion "rather than be consumed by it." *Stenberg v. Carhart*, 530 U.S. 914, 965 (2000)

(Scalia, J., dissenting). The events following the leak and subsequent issuance of the *Dobbs* decision prove the prophecy of the late Justice's prose.

In the days following the unprecedented leak of Justice Alito's draft majority opinion in *Dobbs*, dozens of life-affirming pregnancy centers came under attack. *See* Jessica Chasmar, *More than 100 Pro-Life Orgs, Churches Attacked Since Dobbs Leak*, Fox News (Oct. 20, 2022), https://www.foxnews.com/politics/100-pro-life-orgs-churches-attacked-dobbs-leak. Across the country, pro-abortion extremists painted threatening messages on their walls, broke their windows, and even firebombed their buildings. *See, e.g.*, Valerie Richardson, *Pro-Life Pregnancy Center Refuses to Fold After Firebombing*, Washington Times (Aug. 31, 2022), https://www.washingtontimes.com/news/2022/aug/31/pro-life-pregnancy-center-refuses-fold-after-fireb/. Vandals targeted many NIFLA-affiliated centers. Their crime? Daring to provide life-affirming care to their communities.

At least three Florida life-affirming pregnancy centers suffered attacks. Emblazoned on their walls was a transparent threat: "If abortions aren't safe, neither are you." Legal actions have been filed

to bring the perpetrators to justice. *See* Press Release, "Attorney General Ashley Moody Takes Action Against Antifa and Jane's Revenge Members Vandalizing Florida Crisis Pregnancy Centers," Florida Office of the Attorney General (Mar. 30, 2023), http://www.myfloridalegal.com/newsrel.nsf/newsreleases/C475540A70B103F185258982005D7DBA; Press Release, "First Liberty Institute Files Lawsuit Against Jane's Revenge," First Liberty Institute (Mar. 30, 2023), https://firstliberty.org/media/first-liberty-institute-files-lawsuit-against-janes-revenge/. But the chilling effect of the attacks—and their damage to the democratic process—will long outlast the spray paint and shattered glass.

These attacks against centers that provide free services to pregnant women in crisis are symptomatic of a breakdown in our political discourse. And the cause of that breakdown isn't difficult to discern. For nearly fifty years, this Court and the U.S. Supreme Court lifted abortion out of voters' hands. Consequently, generations of Florida's abortion proponents have had neither an incentive nor any meaningful opportunity to practice the most vital art in a democratic society: persuasion. Having grown accustomed to courts handing them victories that neither their constitutions nor their

legislatures crafted, is it at all surprising that some Florida abortion proponents would turn to force instead of reason when those victories finally began to crumble?

Amicus has no illusion that this disintegration in our political discourse can be reversed overnight. But Amicus respectfully submits that, rather than perpetuate the breakdown, this Court should free the State to seek the healing and equilibrium that only the people themselves—acting through their elected representatives—can achieve, and that their constitutions permit them to pursue.

CONCLUSION

This Court should approve the decisions below.

Dated: April 6, 2023

Respectfully submitted,

/s/ Jordan E. Pratt

Jordan E. Pratt
Florida Bar # 100958
Christine K. Pratt
Florida Bar # 100351
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW #1410
Washington, DC 20004
(972) 941-4444
[redacted]

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the Florida Supreme Court by using the State's e-filing portal, and that the foregoing was electronically served on all parties through the e-filing portal on April 6, 2023.

Dated: April 6, 2023 */s/ Jordan E. Pratt*

CERTIFICATE OF COMPLIANCE

I hereby certify, under Florida Rule of Appellate Procedure 9.045(e), that this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Bookman Old Style font and contains 2,758 words.

Dated: April 6, 2023 */s/ Jordan E. Pratt*