

SC2023-1392

IN THE SUPREME COURT OF FLORIDA

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

**ANSWER BRIEF OF AMERICAN COLLEGE OF OBSTETRICIANS
AND GYNECOLOGISTS**

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INTEREST OF PARTY

The American College of Obstetricians and Gynecologists (ACOG) is the nation's leading group of physicians providing evidence-based obstetric and gynecologic care. With more than 62,000 members, ACOG maintains the highest standards of clinical practice and continuing education of its members; strongly advocates for equitable, exceptional, and respectful care for all women and people in need of obstetric and gynecologic care; promotes patient education; and increases awareness among its members and the public of the changing issues facing patients and their families and communities. ACOG has appeared as amicus curiae in courts throughout the country. ACOG's briefs and medical practice guidelines have been cited by numerous authorities, including the U.S. Supreme Court, which recognize ACOG as a leading provider of authoritative scientific data regarding childbirth and abortion.¹

¹ See, e.g., *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Stenberg v. Carhart*, 530 U.S. 914, 932-936 (2000) (quoting ACOG brief extensively and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the abortion procedure at issue); *Hodgson v. Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing ACOG in assessing disputed parental notification requirement); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG in discussing "accepted medical standards" for

ACOG works hard to promote accurate clinical understandings of medical terms and procedures and to advance quality, evidence-based medical care. To that end, ACOG provides tools that clinicians, policy makers and the public use to understand the range of medical options available and support the clinician-patient relationship.

Because ensuring access to the full spectrum of essential reproductive healthcare is critical to ACOG’s mission and the health of our communities, ACOG opposes political and ideological interference into the practice of medicine and encourages approaches to policy issues that steer clear of such interference. ACOG’s Statement of Policy on Legislative Interference acknowledges that while the “government serves a valuable role in the protection of public health and safety and the provision of essential health services,” “[l]aws and regulations that veer from these functions and unduly interfere with patient-physician relationships are not appropriate.”²

the provision of obstetric-gynecologic services, including abortions); *see also Gonzales v. Carhart*, 550 U.S. 124, 170- 171, 175-178, 180 (2007) (Ginsburg, J., dissenting) (referring to ACOG as “experts” and repeatedly citing ACOG’s brief and congressional submissions regarding abortion procedure).

² *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship* (ACOG 2021),

SUMMARY OF THE ARGUMENT

ACOG is filing this brief because the Florida Attorney General cites to ACOG guidance in support of a claim that is inconsistent with that guidance. Specifically, the Attorney General asserts that ACOG’s publication “Facts Are Important: Understanding and Navigating Viability”³ supports her claim that the term “viability” in the ballot summary of the Amendment to Limit Government Interference with Abortion, Serial No. 23-07 (“Amendment”), is confusing or misleading to voters. See Brief at Part I.A. In fact, the ballot summary contains “clear and unambiguous language,” § 101.161(a), Fla. Stat.; the word viability is not a vague or ambiguous term. Both the U.S. Supreme Court and the State of Florida have used the term in connection with abortion for more than five decades in a way that is widely understood by clinicians, courts, and the public to mean the point in a pregnancy where a fetus may be expected to survive outside of the uterus.

<https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship>.

³ *Facts are Important: Understanding and Navigating Viability* (ACOG), <https://www.acog.org/advocacy/facts-are-important/understanding-and-navigating-viability>.

While the meaning of the term viability is clear, a determination of when viability exists is a nuanced topic that is navigated by trained clinicians based on their experience, medical expertise, and informed judgment to help patients make informed decisions for their pregnancy and their individual health. This is true because many factors contribute to whether a particular pregnancy has reached the point of viability.

Unfortunately, the term viability is increasingly misrepresented in the current battles on abortion based on ideological principles rather than sound science or accurate medicine. ACOG's guidance on viability addresses the fact that opponents of abortion are using the term in inappropriate ways intended to limit access to essential reproductive health care. Indeed, this case provides a clear example of the reasons that ACOG published its guidance and opposes political interference in the practice of medicine based on ideology.

ACOG urges the Court to reject the Attorney General's use of medical guidance in a way that is inconsistent with that guidance.

ARGUMENT

From a scientific perspective, access to the full spectrum of medical care is critically important for people's health, safety, and

well-being. The health and well-being of people and communities are threatened when health care professionals are unable to provide medical care that patients need, free from political interference based on ideological principles. Reproductive health care, including abortion, is essential health care, and one-quarter of all women of reproductive age in the United States will have an abortion in their lifetime.⁴ People access abortion care for a myriad of reasons, including personal circumstance, in cases of rape and incest, and in the event of a wide range of obstetric complications. Abortion is not only common, but also incredibly safe.⁵

ACOG's publication, "Facts Are Important: Understanding and Navigating Viability," was developed after the U.S. Supreme Court's

⁴ R.K. Jones & J. Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 112 No. 9 Am. J. of Pub. Health 1284, 1288 (2022).

⁵ See, e.g., Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States* 10 (2018) ("NASEM, Safety and Quality of Abortion Care") ("The clinical evidence clearly shows that legal abortions in the United States—whether by medication, aspiration, D&E, or induction—are safe and effective. Serious complications are rare."); *The Dangerous Threat to Roe v. Wade*, 381 New England J. Med. 979, 979 (2019) ("Access to legal and safe pregnancy termination ... is essential to the public health of women everywhere."); *Abortion Policy* (ACOG May 2022), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy>; Soc'y for Maternal-Fetal Med., *Access to Abortion Services* (June 2020).

decision in *Dobbs v. Jackson Women’s Health* dramatically changed the landscape of abortion access. The document reflects ACOG’s longstanding conclusion, backed by decades of research, that political interference into the practice of medicine is harmful to people and communities.⁶ It also reflects the fact that the concept of viability is being misused to argue that gestational age bans that limit abortion are reasonable or appropriate. They are not.⁷ Gestational age bans are arbitrary and not supported by science or medicine,⁸ and gestational age is only one factor health care professionals consider when estimating viability. Bans on abortion care often overlook unique patient needs, medical evidence, individual facts in a given case, and the inherent uncertainty of outcomes in favor of

⁶ See *supra* note 2.

⁷ See *supra* note 3 (“Fetal viability depends on many complex factors, of which gestational age is only one. While gestational age may be helpful in predicting the possible chance that the fetus would survive at time of delivery, many other factors also influence viability, such as sex, genetics, weight, circumstances around delivery, and availability of a neonatal intensivist health care professional. Even with all available factors considered, it still isn’t possible to definitively predict survival. While some fetuses delivered during the perivable period can survive, they may also experience significant morbidity and impairment.”).

⁸ See, e.g., Michelle Rodrigues, *The Absurd Pregnancy Math behind the ‘Six-Week’ Abortion Ban*, *Scientific American* (Sep. 4, 2021), <https://www.scientificamerican.com/article/the-absurd-pregnancy-math-behind-the-six-week-abortion-ban/>.

defining viability solely by gestational ages. As a result, ACOG strongly opposes policymakers defining viability or using viability as a basis to limit access to evidence-based care.⁹

The Attorney General’s assertion that voters will be misled by the ballot summary’s use of the word “viability” is belied by the decades of use of the term in connection with abortion legislation and jurisprudence. In the context of abortion, “viability” unambiguously references the point in pregnancy when a fetus might survive outside the uterus (a determination that is appropriately left to the trained, patient-centered judgment of a clinician based on the specific facts of a specific pregnancy). Indeed, it’s a term that the U.S. Supreme Court felt was unambiguous enough to use for nearly five decades in its jurisprudence related to abortion. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2241 (2022) (“‘viability,’ i.e., the ability to survive outside the womb”). And it has been enshrined in Florida statute for decades. § 390.011(15), Fla. Stat (defining “viable” as “the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical

⁹ *See supra* note 3.

measures”).

This definition has also long been used by the medical and research communities in the context of regulation of abortion. *See, e.g.,* Amicus Curiae Brief of ACOG, American Medical Association et al. at 12, *Dobbs*, 142 S. Ct. (No. 19-1392) (“Viability is the capacity of the fetus for prolonged survival outside of the woman’s uterus.”); *id.* at 7-8 (calling viability “the line [the Supreme Court drew] and long honored due to its significance as the point in pregnancy at which fetal life can be medically sustained outside the pregnant person’s body”); *see also* Amici Curiae Brief of 547 Deans, Chairs, Scholars and Public Health Professionals, The American Public Health Association, et al. at 8 n.6, *Dobbs*, 142 S. Ct. (No. 19-1392) (“Pre-viability abortion is generally understood to mean termination of pregnancy at a point at which survival outside the uterus is impossible or extremely unlikely.”).

Clinicians who provide ob-gyn care are familiar with and consider the factors that go into predicting whether a pregnancy has reached viability every single day and understand what “viability” means when used in laws that regulate abortion. Patients and the public understand what it means in this context as well.

ACOG’s publication, “Facts Are Important: Understanding and

Navigating Viability,” states that the concept of viability should not be misused to limit access to essential reproductive healthcare. While viability is a nuanced determination that should be navigated by trained clinicians based on their experience, expertise and judgment, it should not be misused for political purposes. Inaccurate use of medical terms, including viability, by “policy makers[] can prevent patients from receiving essential health care grounded in evidence and science.”¹⁰

For decades, ACOG has affirmed the right of medical professionals to provide reproductive healthcare without governmental interference. ACOG’s guidance opposing restriction of access to healthcare does not negate the clear and unambiguous terminology in the ballot summary or change the meaning that the term “viability” has had for decades in the context of the regulation of abortion. This Court should reject the Attorney General’s attempt to usurp ACOG’s guidance to keep the ballot initiative from Florida voters – a clear example of the “concept of viability of a fetus [being] misrepresented or misinterpreted based on ideological principles.”¹¹

¹⁰ *Supra* note 3.

¹¹ *Supra* note 3.

CONCLUSION

ACOG urges the Court to reject the Attorney General's use of ACOG guidance in a way that is inconsistent with that guidance.

Respectfully submitted,

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