SC2023-1392

In the Supreme Court of Florida

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

ON PETITION FOR AN ADVISORY OPINION
TO THE ATTORNEY GENERAL

ATTORNEY GENERAL'S REPLY BRIEF

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November 15, 2023

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ARGUMENT

Their briefs in support of the Amendment to Limit Government Interference with Abortion, Serial No. 23-07, confirm what the Attorney General had suspected: the sponsor and its supporters in this case unapologetically seek to defend the amendment on grounds that would produce the near-equivalent of abortion on demand in the State of Florida. The ballot title and summary, however, conceal those convulsive effects, describing the amendment as "limit[ing]" rather than eviscerating government interference with abortion, and parroting without explication the central—yet ambiguous—operative terms of the amendment: "viability," "health," and "healthcare provider." Contrary to the proponents' suggestions, this is not mere nitpicking. Those ambiguities go to the heart of what the amendment would do. They will mislead voters into thinking that the amendment, which the sponsor contends would effectively prevent any abortion restrictions, in fact is far more limited.

Ironically, the only real "limit" that the sponsor concedes would remain on the procurement of abortions in Florida is one mentioned nowhere in the ballot summary—the federal statute that restricts the performance of partial-birth abortions to life-

threatening circumstances. *See* Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531. But the ballot summary states, without qualification, that "[n]o law shall prohibit, penalize, delay, or restrict abortion" in the circumstances stated in the summary. In fact, federal law will. The ballot initiative is thus defective both "in an affirmative sense, because it misleads the voters as to the material effects of the amendment," and "in a negative sense by failing to inform the voters of those material effects." *Dep't of State v. Fla. Greyhound Ass'n*, 253 So. 3d 513, 520 (Fla. 2018).

I. The ballot title and summary state that "[n]o law" will restrict abortion in the circumstances stated when in fact federal law will continue to do so.

The ballot summary states that "[n]o law" will restrict abortion in the circumstances set forth in the amendment. In point of fact, some federal law will restrict abortions—namely, the Partial-Birth Abortion Ban Act. That is a problem because, borrowing this Court's language in *Advisory Opinion to Attorney General re Adult Use of Marijuana*, "[t]he summary's unqualified use of the [phrase "no law"] strongly suggests that the conduct to be authorized by the amendment will be free of any criminal or civil penalty in Florida."

315 So. 3d 1176, 1180–81 (Fla. 2021) ("*Adult Use*"). That is not true, rendering the summary "affirmatively misleading." *Id.* at 1181.

The sponsor denies that it has any duty to address this contradiction, because "[t]his Court has . . . never required that a ballot summary inform voters as to the current state of federal law and the impact of a proposed state constitutional amendment on federal statutory law as it exists at this moment in time." *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 808 (Fla. 2014) ("*Medical Marijuana I*"). In so arguing, the sponsor ignores this Court's repeated admonition that "we have certainly never concluded—or suggested—that a summary may affirmatively 'mislead voters regarding the interplay between the proposed amendment and federal law.'" *Adult Use*, 315 So. 3d at 1180 (quoting *Medical Marijuana I*, 132 So. 3d at 808). That is the precise problem in this case. If voters were so readily prepared, as the sponsor claims, to infer that "[n]o law shall prohibit, penalize, delay, or restrict abortion" means "[n]o *state* law shall prohibit, penalize, delay, or restrict abortion," the ballot summary in *Adult Use* also would not have been defective. The ballot summary there stated that the amendment "[p]ermits adults 21 years or older to

possess, use, purchase, display, and transport" a certain amount of marijuana. The overarching federal law in that case, the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, is no less familiar to voters than the Partial-Birth Abortion Ban Act. But it was not enough to cure the affirmatively misleading nature of "[t]he summary's unqualified use of the word '[p]ermit.'" The ballot summary here is similarly unqualified: "No law shall . . . ."

The sponsor points out finally that "this Court has never required a ballot summary to exhaustively ponder the ways in which Congress's commerce power, or the detailed regulations of the U.S. Department of Energy, or Health and Human Services, or Homeland Security, for example, might bear in some way upon the ultimate effects of a ballot measure." FPF Br. 57–58. No one is saying the sponsor should have packed a comprehensive treatment of the meaning of the Partial-Birth Abortion Ban Act into the 75 words allotted by § 101.161(1), Florida Statutes, for the ballot summary. One additional word (out of the 26 left over from what the sponsor chose to include in the ballot summary) would have done the trick: "No <u>state</u> law shall . . . ." That single word also would have addressed the possibility that Congress would in the future enact

further preemptive legislation restricting the practice of abortion. Saying "[n]o law" without the slightest qualification makes the ballot summary affirmatively misleading. Confronting this problem in no way portends an "onerous federal-law-identification requirement" that is not "workable." FPF Br. 58.

II. The ballot title and summary do not disclose just how broad the amendment could be in practical application.

Aside from telling voters something about the proposed amendment that is affirmatively false, the ballot summary fails to disclose the material effects, and thus the "chief purpose of the measure." § 101.161(1), Fla. Stat.

A. A ballot summary must explain open-ended terms in the text of a proposed amendment when those terms bear a wide range of meaning that would dramatically change the amendment's "material effects."

To comply with Florida law, a ballot title and summary must, "in clear and unambiguous language, fairly inform the voters of the chief purpose of the amendment." *Adult Use*, 315 So. 3d at 1180. The "chief purpose" of an amendment is determined by its "main effect," which in turn is determined by the amendment's text. *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000); *see also Fla. Greyhound Ass'n*, 253 So. 3d at 521 ("a reviewing court analyzes

the text of a proposed amendment to determine its legal significance"). Ballot language that "fail[s] to inform the voters of those material effects" is "clearly and conclusively defective" and therefore must be stricken. *Fla. Greyhound Ass'n*, 253 So. 3d at 520; *see also Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 620, 622 (Fla. 1992) (striking an amendment where the ballot language "[told] the voter nothing about the actual change to be effected"); *Armstrong*, 773 So. 2d at 21 ("the ballot language in the present case is defective for what it does not say"); *Advisory Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803–04 (Fla. 1998) (striking proposed amendment where the ballot language "simply state[d] that the proposed amendment affects the powers of the Secretary of State," when in fact it "would substantially impact" the powers of the Secretary of State).

The sponsor leans on the truism that ballot language "is not required to explain every detail or ramification of the proposed amendment." *Am. Airlines*, 606 So. 2d at 620. That misses the point. No amendment will ever be entirely free of ambiguity; constitutional text always requires some explication and interpretation by the legislature, executive, and judiciary. But more is required when

an amendment's central operative terms—here, "viability," "health," and "healthcare provider"—bear such a wide range of meaning as to leave to conjecture what will be the "main effect" of the amendment. Amendment text of that breadth requires further explanation in the ballot summary so that voters can understand the amendment's "chief purpose." Otherwise voters could approve, or disapprove, the amendment despite sharply different understandings of what the amendment will do.

This means that sponsors cannot draft indeterminate amendment text—where the "chief purpose" of the amendment is anybody's guess—and then hide behind mere repetition of that indeterminate text to claim that the ballot summary is not misleading. As the sponsor's supporters acknowledge, "unchecked 'direct democracy' can produce undesirable results." Law Profs.' Br. 5. To allow the citizens' initiative process to do its essential work of resisting the accumulation of power in the hands of a few, *see id.* at 9, voters must at minimum have clear information about the "chief purpose" of what they are approving. Otherwise the electorate can be led unwittingly into delegating the enormously consequential

task of determining that "chief purpose" to the very government elites they are supposed to be constraining.

It is thus not always a virtue that the amendment text and ballot summary are, as the sponsor emphasizes in this case, "*effectively identical*." FPF Br. 30. Tracking the language of the amendment is fine when the amendment text itself is transparent about its "chief purpose" and "material effects." But a "lack of definition" of key terms in the amendment text becomes problematic when it "create[s] uncertainty as to the actual effect of the proposed amendment[]." *Advisory Op. to Att'y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1237 (Fla. 2006). In *Advisory Opinion to the Attorney General re People's Property Rights Amendments*, for instance, where the ballot summary largely tracked the text of the proposed amendment, the Court held that "the lack of the definition of the term 'owner' is misleading." 699 So. 2d 1304, 1309 n.2 (Fla. 1997); *see also id.* at 1309 (relying on the fact that the summary did not define "common law nuisance" or "loss in fair market value"). In other words, the summary was defective for failing to clear up voter confusion about the meaning of a key operative term of the amendment.

The sponsor acknowledges that there was a "potential chasm" in the *Property Rights* ballot summary between "the operative legal meaning of the term" and "voters' understanding of it" but asserts that "no such chasm" appears here. FPF Br. 38. That is anything but the case. The sponsor and its supporters have made clear their intentions to argue, in litigation that is certain to ensue upon enactment of this amendment, for a maximalist understanding of the key terms in the amendment text and ballot summary: "viability," "health," and "healthcare provider." They have furthermore made clear their intention to argue that the "healthcare provider"—who in the abortion context stands to profit directly from the practice being regulated—will have unchecked power to deploy those maximalist understandings. The result could be a significantly more abortion-friendly legal regime—approaching abortion on demand—than the ballot title and summary suggest. Voters deserve better information about what might be in store should they approve the amendment.

The other cases cited by the sponsor are also consistent with this understanding. In *Advisory Opinion to the Attorney General re: Voter Control of Gambling in Florida*, the unexplained ambiguity in the proposed amendment went to whether the amendment would

apply retroactively—a question beyond the amendment's chief purpose. 215 So. 3d 1209, 1215–16 (Fla. 2017). In *Marriage Protection*, the Court held that the terminology "substantial equivalent" was "frequently used and understood by the common voter" and thus did not need to be defined. 926 So. 2d at 1237. In *Advisory Opinion to the Attorney General re the Medical Liability Claimant's Compensation Amendment*, the Court likewise implied that any ambiguities in the meaning of "medical liability" were immaterial, and that the "precise meaning of the term" could be cleaned up in "subsequent litigation, should the amendment pass." 880 So. 2d 675, 679 (Fla. 2004). And in *Department of State v. Hollander*, any perceived ambiguity in the term "victims" went at most to an ancillary question about whether corporate entities would receive victims' protections but would not have affected the average voter's support for the amendment. 256 So. 3d 1300, 1311 (Fla. 2018).[1]

[1] The sponsor also cites three other cases (FPF Br. 30–31) in which there was not even a question about the ambiguity of the language shared by the amendment and ballot summary. *See Advisory Op. to Att'y Gen. re Citizenship Requirement to Vote in Florida Elections*, 288 So. 3d 524, 529–30 (Fla. 2020); *Advisory Op. to Att'y Gen. re: Raising Fla.'s Minimum Wage*, 285 So. 3d 1273, 1277 (Fla.

Those cases cannot stand for any categorical rule that tracking the proposed amendment insulates a summary from accuracy review. Section 101.161 requires that the ballot summary be a "clear and unambiguous" "explanatory statement" of the amendment's chief purpose. § 101.161(1), Fla. Stat. If significant ambiguities in the proposed amendment prevent voters from understanding what the amendment would actually do, the plain language of the statute requires that the ballot summary clarify those ambiguities. This is all the more true when the language in question is a professional term of art, such as "viability."

B. The ballot summary here fails to narrow the wide range of meaning that could attach to the most critical terms in the amendment: "viability," "health," and "healthcare provider."

1. Viability. The proposed amendment and ballot summary purport to enshrine a right to abortion "before viability." App. 5. As one of the sponsor's supporters itself has explained, however, "there is no single formally recognized clinical definition of 'viability,'" and "the term is often used in medical practice in two distinct circumstances":

2019); *Advisory Op. to Att'y Gen. re: Voting Restoration Amendment*, 215 So. 3d 1202, 1208 (Fla. 2017).

> In the first, "viability" addresses whether a pregnancy is expected to continue developing normally. In early pregnancy, a normally developing pregnancy would be deemed viable, whereas early pregnancy loss or miscarriage would not.
>
> In the second, "viability" addresses whether a fetus might survive outside of the uterus. Later in pregnancy, a clinician may use the term "viable" to indicate the chance for survival that a fetus has if delivered before it can fully develop in the uterus.

Am. Coll. of Obstetricians & Gynecologists ("ACOG"), *Facts Are Important: Understanding and Navigating Viability*, https://tinyurl.com/2ks3yxcj (last visited Nov. 15, 2023). Neither the sponsor nor ACOG shows how the ballot summary's unmodified use of the term "viability" conveys to voters which of these radically distinct meanings the word carries.

Pointing to dictionary definitions, the sponsor contends that "[t]here is no ambiguity around the meaning of viability," FPF Br. 36–37, and that "[v]oters would simply . . . understand" the meaning that is most conducive to procuring an abortion. FPF Br. 42–43. But those definitions only confirm what ACOG said in its article: "viability" has at least two meanings. The sponsor leads with a definition of "viable" as "capable of living, *esp*: having attained such form and development as to be normally capable of surviving out-

side the mother's womb." FPF Br. 36 (quoting *Merriam-Webster's Collegiate Dictionary* 1392 (11th ed. 2003)). In other words, "viable" has a broader understanding—"capable of living," whether or not dependent on another person. Capacity to survive outside the womb is but one example of this understanding. *See also* "Viability," *Webster's Third New International Dictionary* 2548 (1993) ("the ability to live, grow, and develop," including but not limited to when a fetus has "attained such form and development of organs as to be normally capable of living outside the uterus"); "Viability," *Webster's New International Dictionary* 2839 (2d ed. 1947) ("ability to live, grow, and develop"; (1) "[c]apable of living" *or* "born alive and with such form and development of organs as to be normally capable of living"; (2) "[c]apable of growing or developing"); "Viability," *Oxford English Dictionary* ("OED") 588 (2d ed. 1989) ("capacity for living"; "the ability to live under certain conditions"). Contrary to the sponsor's suggestion, that sense of "viability" is no more workable than the technical, lawyerly sense of the term the sponsor insists will be obvious to ordinary voters, which equally would turn on an individualized assessment by a "healthcare provider." FPF Br. 43; *see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2270

(2022) (observing that the sponsor's definition of "viability" "makes no sense" in part because it is "not really a hard-and-fast line," as it depends on the facts of each pregnancy).

Finally, the Florida Doctors in Support of the Initiative wrongly accuse the State of having conceded earlier this year in *Planned Parenthood v. State* that "viability" always means the point when the baby is able to survive outside the womb. *See* Fla. Drs.' Br. 19. In the part of the brief cited by the Florida Doctors, *see* Br. of Resp't at 55, *Planned Parenthood of Sw. & Cent. Fla. v. State*, Nos. SC2022-1050, SC2022-1127 (Fla., filed in this Court Mar. 29, 2023), the State was responding to the circuit court's ruling that "the State's interest in protecting potential life does not become compelling until after viability," based on the definition of "viability" used by the circuit court. Order Granting Pls.' Mot. for Emergency Temporary Inj. at 54–55, 58, *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022-CA-921 (Fla. 2d Cir. Ct. July 5, 2022). The State did not say that that definition was the only one possible or that the State's interest in protecting unborn life should in any way turn on that definition.

2. "Health" and "healthcare practitioner." The same indeterminacy attends the terms "health" and "healthcare provider." AG Br. 24–27. Regarding "health," the sponsor and its supporters do not appear to take issue with the possibility that "health" could extend to the considerably more capacious "mental" as well as physical well-being. As to the term "healthcare provider," the sponsor asserts without explanation that context will somehow clarify that the term applies only to those exercising professional judgment. Voters may be misled into believing that is the case, but it is unclear how "context" would confirm that reading. FPF Br. 46. In any event, even limiting the term to healthcare professionals does not restrict the category to licensed physicians, as many voters will likely assume.

C. The ballot summary does not explain that a "healthcare provider" might be able to decide both whether an abortion is "necessary to protect the patient's health" and whether a baby has reached "viability."

The ballot summary raises the possibility that the "healthcare provider," however defined, will determine the meaning not only of "health" but also of "viability" in the proposed amendment. AG Br. 28–33. The sponsor acts as if this consequence is nothing about

which a voter might be concerned because, under existing law, the physician already determines whether a fetus has achieved viability, as that term is defined by statute. FPF Br. 50. That obfuscates the point. What the ballot fails to disclose is that the "healthcare provider," under one reading of the amendment, could not only apply the law but also determine the *content* of the law. That is, the healthcare provider might determine not whether a given practice satisfies a legal standard imposed by the State but what practices are legal to begin with—in essence serving as their own regulators. On that understanding, there would be no room to prosecute a doctor who performs an abortion on a baby with a gestational age of 39 weeks, because the State would have no license to second-guess the physician's representation that the baby was not viable. In effect, the healthcare provider would exercise unreviewable discretion to regulate whether the provider itself may perform an abortion, free of legal constraint.

That brings into sharper relief the concern the Attorney General noted in her initial brief: that the amendment could be read to effectuate a dramatic shift in lawmaking power—from the government to the private commercial interest that stands to profit from

the very practice whose legality that interest gets to determine. *See* AG Br. 32–33. In other words, even assuming the State would retain some capacity to regulate who qualifies as a "healthcare provider" for purposes of the amendment—an understanding that is anything but clear—the sponsor proposes that the meanings of the main two terms that might "limit" the practice of abortion would be determined by the healthcare provider and not by the State.

Ordinarily, the legislature or executive would have some authority to flesh out the meaning of open-ended terms like "viability" and "health," through post-amendment legislation or rule-making. The judiciary would also have authority to interpret and apply those terms to any abortion restrictions that the legislature enacts or to prosecutions that the executive might bring under those restrictions. But if "healthcare providers" can determine for themselves whether an abortion is necessary to the mother's "health" or whether a baby has reached "viability," very little, if any, of the power to enact, prosecute, or adjudicate laws restricting abortion will be left to the three branches of government. This precipitous shift in lawmaking power should be made explicit to the voters. The ballot summary fails to do so.

* * * * *

If this Court disagrees that the amendment will have these effects, the Attorney General respectfully requests that the Court make clear in its opinion that it interprets the amendment not to give abortion providers the unreviewable license to determine such things as whether a law "restrict[s]" abortion, when a baby is "viable," and what constitutes "health," and that the legislature, executive, and judiciary retain their traditional constitutional roles in providing content to these terms and in enforcing and adjudicating them.

CONCLUSION

The Limiting Government Interference with Abortion initiative should be stricken from the ballot.

Respectfully submitted,

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November 15, 2023

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I certify that this brief was prepared in 14-point Bookman Old Style font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2), and contains 3,574 words.

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