IN THE SUPREME COURT OF FLORIDA
CASE NO: SC2023-1392

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

ANSWER BRIEF OF FLORIDA DOCTORS IN SUPPORT OF THE INITIATIVE

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IDENTITY AND INTEREST OF THE FLORIDA DOCTORS

The individuals listed in Appendix A ("Florida Doctors") are each licensed medical doctors in the State of Florida who support the citizen initiative "Limiting Government Interference with Abortion" (No. 23-07) (the "Proposed Amendment"). As interested persons under Fla. R. App. 9.510(c)(1), the Florida Doctors submit this Answer Brief in response to the Initial Brief filed by the Attorney General of Florida.

The Florida Doctors have a collective 1,221 years of practice experience in the fields of obstetrics, gynecology, and women's health. They write to explain the clear and established use of the term "viability" in medical practice and how—contrary to the Attorney General's argument—the use of that term in the ballot summary of the Proposed Amendment is not vague or misleading.

TEXT OF THE PROPOSED BALLOT SUMMARY

Ballot Title: Amendment to Limit Government Interference with Abortion

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.

Proposed Amendment: New Section, Amendment to Limit Government Interference with Abortion 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 necessary to protect the patient's health, as determined by the patient's healthcare provider.

SUMMARY OF ARGUMENT

The effect of the Proposed Amendment is clear: it will "[l]imit[] government interference with abortion" by protecting healthcare providers' ability to make medical decisions that are in the best interests of their patients. Florida voters who support "[l]imiting government interference with abortion" will vote in favor of the Proposed Amendment, and those who oppose will vote against. Whether to enact the Proposed Amendment is a decision properly left to the people, and this Court "must not address the merits or wisdom of the Initiative." *Adv. Op. to the Att'y Gen. re All Voters Vote in*

Primary Elections for State Legislature, Governor, & Cabinet, 291 So. 3d 901, 904–05 (Fla. 2020).

Use of the term "viability" does not render the Proposed Amendment vague or misleading. As described more fully below, viability is an established medical term referring to the ability of a fetus to survive outside the uterus. That medical understanding is fully consistent with the ordinary meaning of the term,[1] and fully consistent with decades of Florida law that has uniformly used viability to refer to the stage of fetal development associated with survival outside the uterus.[2]

The Attorney General's brief argues that viability is vague because voters might not be able to determine precisely when viability occurs. *E.g.*, AG Br. at 18-19. However, voters are not being

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[1] *See, e.g.*, *Viability*, MERRIAM-WEBSTER DICTIONARY (last visited Nov. 2, 2023), https://www.merriam-webster.com/dictionary/viability #citations (defining viability as "the capability of a fetus to survive outside the uterus").

[2] *See, e.g.*, ch. 79-302, § 5, Laws of Fla. (codified at § 390.001(5), Fla. Stat. (Supp. 1988), *renumbered* § 390.011(5)); ch. 2014-137, Laws of Fla. (codified at § 390.011, Fla. Stat.(2014)); *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989) (plurality op.) ("Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures.") (discussed *infra* at Section II.C).

asked to determine when viability occurs in a given pregnancy—instead, they are being asked whether they support leaving that determination to healthcare providers. Unlike legislative measures that would ban abortion at a certain gestational age, the Proposed Amendment plainly and unambiguously seeks to "[l]imit government interference with abortion" by prohibiting laws that would supplant healthcare providers' training, experience, and medical judgment.

The term viability is not vague to the healthcare providers who will be responsible for implementing it. Rather, it is at the foundation of obstetric treatment and care. Healthcare providers routinely assess and determine viability, and discussions about viability are pivotal to the doctors' and patients' decisions regarding the course of treatment. It is not possible, nor is it mandated, that a 75-word ballot summary provide a nuanced explanation of each and every way in which this medical standard might be applied to an individual patient's care. *Adv. Op. to Att'y Gen. re Rts. of Elec. Consumers regarding Solar Energy Choice*, 188 So. 3d 822, 831 (Fla. 2016) ("While the ballot title and summary must state . . . the chief purpose of the measure, they need not explain every detail or ramification of the proposed amendment.") (quotation omitted). However,

healthcare providers are trained to make individualized viability determinations and communicate them to their patients using this well-understood medical term.

The ballot summary puts Florida voters on fair notice of the contents of the Proposed Amendment and does not mislead the public. Accordingly, this Court should approve the Proposed Amendment for placement on the ballot.

ARGUMENT

I. Legal Standard.

A proposed ballot initiative must be approved for public vote where it "provide[s] fair notice of the content of the proposed amendment." *Id.* at 830-31 (quotation omitted); § 101.161, Fla. Stat. The Court "applie[s] a deferential standard of review to the validity of a citizen initiative petition" and is reluctant to "interfere with the right of self-determination for all Florida's citizens to formulate their own organic law." *Adv. Op. to the Att'y Gen. re All Voters Vote in Primary Elections for State Legislature, Governor & Cabinet*, 291 So. at 905 (quotation omitted). As such, this Court has repeatedly held that its "duty is to uphold the proposal unless it can be shown to be clearly and conclusively defective." *In re Adv. Op. to Att'y Gen. re Limits or*

Prevents Barriers to Loc. Solar Elec. Supply, 177 So. 3d 235, 246 (Fla. 2015) (quotation omitted). This is a "high threshold." *Id.*; *see also id.* at 241–42 (noting that this Court "abide[s] by the principle that sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of this State" (internal quotations and citations omitted)).

In assessing whether a proposed ballot title and summary is "clearly and conclusively defective" under Section 101.161, the Court considers only two questions: (1) whether the ballot title and summary fairly inform the voters of the chief purpose of the amendment; and (2) whether the language used "misleads the public." *See, e.g.*, *Adv. Op. to Att'y Gen. re Rts. of Elec. Consumers regarding Solar Energy Choice*, 188 So. 3d at 831. "In addressing these two issues, the Court *must not* address the merits or wisdom of the Initiative." *Adv. Op. to the Att'y Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, & Cabinet*, 291 So. 3d at 904–05 (emphasis added). Moreover, "[w]hile the ballot title and summary must state in clear and unambiguous language the chief purpose of the measure, they need not explain every detail or ramification of the proposed amendment." *Adv. Op. to Att'y Gen. re*

Rts. of Elec. Consumers regarding Solar Energy Choice, 188 So. 3d at 831 (quotation omitted).

II. The Ballot Title and Summary Provide Fair Notice that the Proposed Amendment Will Protect Healthcare Providers' Ability to Determine Whether a Fetus Is Capable of Surviving Outside the Uterus.

The ballot title and summary are not misleading to the public. The Proposed Amendment notifies the electorate of the decision to be made and thus meets the requirements to be placed on the ballot for public vote. *See*, *e.g.*, *id.*, 188 So. 3d at 830–31 (ballot initiative must be approved for public vote where it "provide[s] fair notice of the content of the proposed amendment" (quotation omitted)).

The use of the word "viability" does not render the Proposed Amendment vague or misleading. The Florida medical community understands that viability refers to the capacity of a fetus to survive outside the uterus, and this understanding is a key principle at the foundation of obstetric practice and patient care. Healthcare providers are trained and adept at making viability determinations for an individual fetus. The ballot initiative makes clear to the public that the healthcare providers will make those determinations, which will then guide patient decision-making.

As set out in Section II.C below, the medical community's interpretation of the term viability is also consistent with decades of Florida law establishing that viability means the point in time when a fetus is able to survive outside the uterus. *E.g., In re T.W.*, 551 So. 2d at 1194 (plurality opinion); ch. 79-302, Laws of Fla. (codified at § 390.001, Fla. Stat. (Supp. 1988), *renumbered* § 390.011). The Proposed Amendment does not tread any new ground or risk misleading Florida voters, and therefore should be approved for placement on the ballot.

A. Viability is the capacity of a fetus to survive outside the uterus, as determined by a healthcare provider.

In training and clinical practice, healthcare providers learn and understand that viability marks the time at which a fetus can survive outside of the uterus. As explained below, healthcare providers learn this common meaning of viability in their medical training, and they reinforce that meaning in interactions with patients and other clinicians. Textbooks, medical journals, and other medical references similarly reinforce the definition, which enables providers to create and execute treatment plans that best protect and promote the health of their patients.

Medical dictionaries consistently define "viability" as "the ability of a fetus to survive ex utero." *Viability*, HISTORICAL DICTIONARY OF MEDICAL ETHICS (Laurence B. McCullough, 2018); *see also, e.g.*, *Viable*, MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS AND NURSING (2012) ("[c]apable of living; denoting a fetus sufficiently developed to live outside of the uterus"); FARLEX PARTNER MEDICAL DICTIONARY (2012) (same). Consistent with these definitions, medical textbooks describe viability in the context of a fetus's survivability. *See, e.g.*, Robert Romero et al., *The diagnosis and management of preterm labor with intact membranes, in* CLINICAL MATERNAL-FETAL MEDICINE 1.1 (edited by Hung N. Winn et al., 2nd ed., 2012) ("[A] nonviable infant is so immature that there is no likelihood of survival in the extrauterine environment despite all medical support.").

This medical understanding of viability—which is reinforced through textbooks, journals, training, and clinical practice—is fully consistent with the ordinary meaning of the term which would be known to a typical Florida voter without any medical training. For example, the American Heritage Dictionary defines "viable" as "[c]apable of living outside the uterus. Used of a fetus or newborn." *Viable*, AMERICAN HERITAGE DICTIONARY (5th ed., 2022). Merriam-

Webster's Dictionary concurs, defining "viability" as "the quality or state of being viable: such as the capability of a fetus to survive outside the uterus." *Viability*, MERRIAM-WEBSTER DICTIONARY (last visited Nov. 2, 2023), https://www.merriam-webster.com/dictionary/viability.

The Attorney General argues that the term viability is misleading because of an alternative definition not used in the context of abortion. The Court has recognized that context matters in evaluating whether a summary misleads the public. *See In re: Advisory Opinion To The Attorney General Re Patients' Right To Know About Adverse Medical Incidents*, 880 So.2d 617, 623 (Fla. 2004). Here, the ballot summary expressly references abortion and in this context, viability is well understood to mean the ability of a fetus to survive outside the uterus.

Put simply, the Florida medical community—like the Florida electorate generally—understands the term viability refers to the time when a fetus is capable of survival outside the uterus, as determined by the patient's healthcare provider. Use of this well-established and commonly-understood term does not risk misleading Florida voters.

B. Viability is an essential element of obstetric treatment and care.

This shared understanding of viability is not simply an academic matter. Rather, discussions about viability routinely inform healthcare providers' and patients' decision making when determining an appropriate treatment plan. Healthcare providers already often make the viability determinations contemplated by the Proposed Amendment.

Healthcare providers, including those represented in this brief, make decisions about the appropriate treatment for a patient based on extensive training, and those decisions necessarily include a viability assessment in order to determine the appropriate plan for treatment. For example, medical training and research materials refer to viability—understood as the ability of the fetus to survive outside the uterus—to distinguish among potential treatments. *See, e.g.*, Lopez, C.E., et al., *The Management of Pregnant Trauma Patients: A Narrative Review* (2023) ANESTHESIA & ANALGESIA, 136 (5), pp. 830-40 (recommending treatment plans for pregnant trauma patients that highlight particular considerations for patients approaching the point of viability); Wang, A., Saad, A.F., Hemorrhagic Stroke in

Pregnancy, (2023) Clinical Obstetrics and Gynecology, 66 (1), 223-30 (recommending treatment plan for strokes in pregnancy, accounting for different strategies or clinical care if the fetus has reached viability).

For this reason, medical training in the field of obstetrics includes standard evaluations of viability and the methods for making a viability determination. *See, e.g.*, Robert Romero et al., *The diagnosis and management of preterm labor with intact membranes, in* CLINICAL MATERNAL-FETAL MEDICINE (edited by Hung N. Winn et al., 2nd ed., 2012) (using viability, defined by multifaceted medical determinations, as a guidepost for instruction on preterm labor). By learning and understanding how to assess viability, healthcare providers are equipped to exercise their discretion to develop appropriate and well-informed care plans for their pregnant patients. In turn, patients can make their own care decisions based on their providers' advice. *See* George Graham and Stephanie Bakaysa, *Preterm premature rupture of membranes, in* EVIDENCE-BASED OBSTETRICS & GYNECOLOGY 399 (Errol R. Norwitz et al., 1st ed., 2019) ("The gestational age at which intervention on behalf of the fetus occurs is generally based on . . . a discussion between the patient,

obstetrician, and neonatologist. Survival estimates for the baby that take into consideration gestational age, estimated fetal weight, corticosteroid administration, plurality, and fetal sex can aid in this discussion.").

Viability determinations are carefully considered medical decisions that help to define appropriate care for both the pregnant patient and the fetus. For instance, when a pregnant patient's life is endangered, determining whether the fetus has reached viability allows healthcare providers to obtain informed consent and craft a plan of care. *See id.* (where it is possible that a fetus is viable and the patient "is a candidate for intervention, then she should be admitted or transferred to a center that can provide both the obstetric and neonatal expertise to care for the mother and a preterm baby"); Joshua A. Copel & Thomas R. Moore, *Performing and Documenting the Fetal Anatomy Ultrasound Examination, in* CREASY AND RESNIK'S MATERNAL-FETAL MEDICINE 252 (Robert Resnik et al., 8th ed., 2019) (stating that ultrasounds conducted "prior to fetal viability" can help identify "important structural abnormalities that may significantly alter neonatal prognosis and management"). Accordingly, in obstetric clinical practice, healthcare providers—and their patients—

understand viability to mean the ability of a fetus to survive outside the uterus, a determination that forms the foundation for other elements of care.

The Attorney General suggests that the Proposed Amendment is vague and misleading because voters might not be able to discern precisely where viability falls on the gestational timeline. *E.g.*, AG Br. at 16–23. This assertion is a straw man: when viability is at issue, gestational age alone does not, and cannot, dictate viability. Accordingly, the Attorney General's criticism is misguided—voters are not being asked to establish a bright line rule for viability.

As with all medical decisions, healthcare providers make individualized and shared decisions for and with each patient. Although some medical guidelines give approximate gestational ages at which viability might have been reached, viability determinations take into account numerous specialized evaluations to determine whether the particular fetus has reached viability.[3] The exact point of viability thus can vary from patient to patient. That does not mean, however, that the term is vague or lacks clarity. *E.g.*, AG Br. at 16-

[3] In some instances, for example early in a pregnancy, gestational age will be the most significant factor in determining viability.

23. Rather, it reinforces that medical decisions require the judgment of a healthcare provider based on established methods of practice.

For example, a viability determination can allow for early delivery where continuing pregnancy would be dangerous for either or both the patient and the fetus. *See* George Graham and Stephanie Bakaysa, *Preterm premature rupture of membranes, in* EVIDENCE-BASED OBSTETRICS & GYNECOLOGY 399 (Errol R. Norwitz et al., 1st ed., 2019) ("Evaluation of maternal and fetal status is necessary to determine which patients are candidates for expectant management and those patients for whom delivery is indicated. The diagnoses of cord prolapse and significant placental abruption are obstetric emergencies which necessitate immediate delivery of the viable fetus."). In emergency contexts, healthcare providers are trained to establish "an accurate gestational age and fetal viability" prior to providing care. *Id.*

Viability determinations can also have implications for long-term care. For example, providers need to evaluate whether an unintended pregnancy loss occurs before or after viability because the distinction informs how healthcare providers care for patients after pregnancy loss and "calculate recurrence risk and plan

preventive approaches to a subsequent pregnancy." *Spontaneous abortion*, HISTORICAL DICTIONARY OF MEDICAL ETHICS (Laurence B. McCullough, 2018). Making a viability determination thus can impact future pregnancies and treatment plans.

In the Florida Doctors' experience, their patients share their clinical understanding of the term viability: the capacity of the fetus to survive outside the uterus. Because the ordinary and clinical meanings of the term are the same, it is equally clear to voters in the context of the ballot summary and the Proposed Amendment language.

C. The shared understanding of viability as referring to a fetus's ability to survive outside the uterus is consistent with decades of Florida law.

The well-settled understanding of viability as the ability to survive outside the uterus is shared not only by Florida's healthcare providers and patients, but also by Florida legislators, judges, and executive branch officials. The common medical and public understanding of viability described above has been incorporated into decades of Florida medical and abortion law. Indeed, Florida law has used viability as a touchstone for determining providers' obligations in providing abortion care for nearly *45 years*.

The term viability has been used in Florida law since 1979 and has always referred to the stage of fetal development associated with survival outside the uterus.

The Florida Medical Practice Act, enacted in 1979, established the healthcare provider's duty to provide a certain standard of care in terminations performed "during viability" and defined viability expressly as "that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb." Fla. Laws ch. 79-302 at 1615 (codified at Fla. Stat. § 390.001(5), *renumbered* § 390.011(5) (Fla. Laws. ch. 97-151 (1997))). In 1989, this Court held that "[v]iability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures." *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989).[4] In the decades since, Florida's abortion jurisprudence has been consistent in defining viability with reference to survival outside

[4] Justice Ehrlich, concurring, would have adopted the *Roe v. Wade* definition of viability as when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 551 So. 2d at 1198 (quoting 410 U.S. 113, 163 (1973)). Under either definition, viability hinges on survival *ex utero*.

the uterus. *See, e.g.*, *Burton v. Florida*, 49 So. 3d 263, 265–66 (Fla. 1st DCA 2010) ("The Legislature has defined 'viability' as 'that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb.' No presumption of viability is provided in the statute."). The Legislature adopted the Court's definition from *In re T.W.* in 2014: "'Viable' or 'viability' means the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures." Fla. Laws ch. 2014-137 (codified at Fla. Stat. § 390.011). The new Section 390.01112 applied to situations in which "the physician determines that, in reasonable medical judgment, the fetus has achieved viability." *Id.* § 390.01112(1).[5] Florida law has never used the term "viability" in the context of pregnancy to refer to anything other than the stage of fetal development associated with survival outside the uterus.

[5] Florida's regulations referring to a "viable fetus" similarly refer to a fetus that has reached the pertinent stage of fetal development. *See* Fla. Admin. Code r. § 59A-9.027 (requiring abortion clinics to have equipment and services for treating "the patient or a viable fetus" when necessary); *id.* § 59A-9.029 (requiring clinics to maintain records of incidents resulting in serious injury "to a patient or a viable fetus").

Importantly, the Attorney General's recently-filed brief in another case before this Court reveals that her office in fact shares the uniform understanding of viability as a legal term referring to the ability of a fetus to survive outside the uterus. *See* Answer Brief on Merits, *Planned Parenthood of Sw. & Cent. Fla. v. State*, Nos. SC22-1050, SC22-1127, 2023 WL 2816885 (Fla. Mar. 29, 2023). In *Planned Parenthood of Southwest and Central Florida v. State*, the Attorney General argues that this Court should overrule *In re T.W.* and uphold a 15-week abortion ban. The circuit court, relying on *T.W.*, held that the state's interests in protecting unborn life and preventing fetal pain do not become compelling until viability. In response, the Attorney General argues that the "notion that the State's interest in protecting life and preventing pain vanishes simply because an unborn child cannot survive without help is grievously wrong." *Id.* at *55. That brief accepts that viability under Florida law refers to survival outside the uterus, and nowhere suggests that the long-standing legal standard is vague because it relies on viability.

Put simply, Florida healthcare providers and their patients have long understood that statutes, regulations, cases, and other government policies using viability in the context of pregnancy are

referring to the ability of a fetus to survive outside the uterus. For decades, the Florida medical community has operated in a national and local legal landscape in which viability has both medical, legal, and much broader public significance. Florida healthcare providers and their patients—many of whom are Florida voters—readily understand the meaning of viability in law and in medical practice and therefore will readily understand the ballot summary language and the Proposed Amendment.

CONCLUSION

For all of the foregoing reasons, the initiative should be approved for placement on the ballot.

Respectfully submitted this 10th day of November, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of November, 2023, a true and correct copy of the foregoing document was filed in the Florida e-Filing portal, which was served on all counsel of record.

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CERTIFICATE OF COMPLIANCE

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 3,767 words.

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