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SC23-1392

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF FLORIDA VOTERS AGAINST EXTREMISM, PC IN OPPOSITION TO THE INITIATIVE

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SUMMARY OF REPLY

The Initial Brief of Opponent Florida Voters Against Extremism ("FVAE") identified a variety of legal defects in the proposed "Amendment to Limit Government Interference with Abortion" (the "Proposed Amendment"), including its ballot title and summary. Floridians Protecting Freedom's (the "Sponsor") Answer Brief ("AB") only confirms that the Proposed Amendment fails to comply with article XI, section 3 of the Florida Constitution and section 101.161 of the Florida Statutes.

The Sponsor has no answer for FVAE's argument that the title "Limit Government Interference with Abortion" is inflammatory political rhetoric that has no place on a ballot. Nor does the Sponsor rebut FVAE's argument that the ballot title and summary are misleading and fail to clearly and unambiguously provide voters fair notice of the proposal's chief purpose—to broadly legalize abortion up until and during birth. And the Sponsor fails to meaningfully rebut FVAE's argument that the Proposed Amendment violates the Florida Constitution's single-subject requirement by lumping multiple subjects in the same proposal, engaging in logrolling, and

substantially performing or altering the functions of all three branches of government.

For the reasons set forth below, in addition to those in FVAE's Initial Brief, this Court should issue an advisory opinion finding the Proposed Amendment invalid and prohibiting it from being placed on the ballot.

ARGUMENT

I. The Sponsor fails to rebut that the Ballot Title and Summary are misleading and do not clearly provide voters fair notice of the Proposed Amendment's chief purposes.

FVAE's Initial Brief demonstrated (at 10–21) that the Proposed Amendment's ballot title and summary are misleading in several respects and fail to clearly and unambiguously provide fair notice to voters of the proposal's chief purposes. Given that voters are entitled to a ballot summary that provides "fair notice of the content" of a proposed amendment so that voters "will not be misled as to its purpose, and can cast an intelligent and informed ballot," *Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citation omitted), the defective ballot title and summary here render the initiative invalid. The Sponsor's contrary arguments are unpersuasive.

A. The Sponsor fails to refute that the Ballot Title's phrase "government interference with abortion" is a classic example of impermissible political rhetoric.

As explained in FVAE's Initial Brief (at 7–9), the term "government interference with abortion" is a classic example of impermissible political rhetoric, used by pro-abortion activists to evoke emotion and condemnation. In response, the Sponsor contends that the term "interference" is "neutral and descriptive." AB 27 note 6. That is wrong.

Just like this Court found that the title of the initiative "Save Our Everglades" was misleading because it implied that the Everglades was in danger and needed to be "saved" by the proposed amendment, *In re Advisory Opinion to the Att'y Gen.-Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994), so too is the phrase "government interference with abortion" misleading and inflammatory. It implies that the State of Florida is perniciously interfering with a woman's decision to have an abortion and that women are forbidden to have abortions unless the amendment frees them from the State's "interference." Such politically charged rhetoric is wholly inappropriate for a citizen initiative. Further, the Proposed Amendment's text clearly shows that the purpose of the amendment

is to allow all pre-viability abortions, and all post-viability "health"-dependent abortions, not simply to "limit" government interference. Consequently, "[a] voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment." *Save Our Everglades*, 636 So. 2d at 1341.

The Sponsor's reliance (at 27 note 6) on *In re Advisory Opinion to the Atty. Gen. re Patients' Right To Know About Adverse Med. Incidents*, 880 So. 2d 617 (Fla. 2004), is misplaced. That case did not address emotionally charged ballot language such as "government interference with abortion" and thus has no applicability here. To the extent that the Sponsor tries to equate the term "restricts" from *Patients' Right To Know* with "government interference with abortion," the subject-matter dissimilarities between an initiative that sought to permit healthcare patients to obtain information about adverse medical incidents and the termination of human life in this case negate any possible factual analogy.

Supporters Former Republican Elected Officials' separate attempt (at page 14 of their brief) to analogize the inflammatory "interference" with the benign "protect" in *Advisory Opinion To Att'y Gen. re Fla. Marriage Prot. Amend.*, 926 So. 2d 1229 (Fla. 2006), is

unpersuasive. There, this Court specifically analyzed prior cases involving the term "protect," and consistent with precedent, concluded that it was "unable to discern the logic as to how the application of essentially the same term could be acceptable in one case and unacceptable in another." 926 So. 2d at 1239 (cleaned up). FVAE does not argue that the Proposed Amendment's use of the term "protect" is inflammatory. Nor are the words "interference" and "protect" synonymous. The holding in *Fla. Marriage Prot. Amend.*, therefore, is inapplicable.

In short, the Sponsor and its Supporters have no good answer for FVAE's argument that the phrase "government interference with abortion" is analogous to slogans such as "bans off my body," in that both inflame and arouse a visceral response. Such political rhetoric has no place on the State's official ballot, and thus the Proposed Amendment should be stricken.

B. The Ballot Title and Summary fail to disclose the Proposed Amendment's chief purpose: to legalize abortion as a matter of state law and enshrine it as a constitutional right.

This Court has made clear that "the gist of the constitutional accuracy requirement is simple: A ballot title and summary cannot

either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000). The Proposed Amendment fails both requirements. As FVAE explained in its Initial Brief (at 10), the Proposed Amendment has two overarching purposes: (1) the legalization of unrestricted abortion as a matter of state constitutional law for any reason up until viability, and (2) the legalization of unrestricted abortion—even possibly during birth—for whatever reason so long as an undefined and self-appointed "healthcare provider" deems it "necessary" for the woman's undefined "health." Contrary to the Sponsor's contention, the Proposed Amendment's "principal goal" is far from "plain." AB 25.

The Sponsor accuses FVAE of trying to "transform the 'chief purpose' requirement into an obligation to disclose all theoretical legal effects of a proposed amendment." AB 25. In the Sponsor's view, FVAE's concerns about the Proposed Amendment's true effect "are not germane to this Court's review." AB 51. That argument fails to appreciate this Court's analysis. "In evaluating an amendment's chief purpose, a court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself, such as the amendment's *main effect*." *Armstrong*,

773 So. 2d at 18 (emphasis added); *accord Detzner v. League of Women Voters of Fla.*, 256 So. 3d 803, 809 (Fla. 2018) ("Because section 101.161(1) requires a ballot summary to state 'the chief purpose' of the proposed amendment, we look to objective criteria, like the amendments' main effect to determine whether a ballot summary complies with the statute."). In this case, "the main *effect*" of the Proposed Amendment "is simple, clear-cut, and beyond dispute" *Armstrong*, 773 So. 2d at 18 (emphasis added)—to legalize abortion on demand for any reason up until viability, and then also up until birth, so long as it is deemed "necessary" for the woman's undefined "health" by a self-appointed "healthcare provider."

Despite the Proposed Amendment's clear and undeniable main effect of enshrining a broad right to unregulated abortion in the Florida Constitution, the ballot title and summary simply state that the proposal would merely "limit government interference with abortion." Yet "[n]owhere in the summary … is this effect mentioned-or even hinted at." *Armstrong*, 773 So. 2d at 18. Indeed, the fundamental problem here, as in *Armstrong*, is that "[t]he main effect of the amendment is *not* stated anywhere on the ballot." *Ibid.* "The burden of informing the public should not fall only on the press and

opponents of the measure—the ballot title and summary must do this." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). Given that the accuracy requirement in article XI, section 5, functions as a "truth in packaging" law for the ballot, *Armstrong*, 773 So. 2d at 13, the misleading Proposed Amendment should not be placed on the ballot.

C. The Ballot Title and Summary falsely state that the Proposed Amendment merely "limits government interference" with abortion.

As the text of the initiative makes clear, a second chief purpose of the Proposed Amendment is the enactment of a constitutional right to abortion so long as a "healthcare provider" deems it "necessary" to "protect" the woman's "health." As FVAE argued in its Initial Brief (at 11), expansive and undefined terms such as "necessary," "health" and "healthcare provider" would permit abortions for virtually any reason, at any stage, by any person holding themselves out to be a "provider."

The Sponsor counters that such concerns are "speculation" and "irrelevant to this Court's inquiry." AB 34, 45. That is wrong. Although the ballot title and summary "need not explain every detail or ramification of the proposed amendment," *Advisory Op. to Att'y*

Gen. re Prohibiting Pub. Funding of Political Candidates' Campaigns, 693 So. 2d 972, 975 (Fla. 1997), they nevertheless "must be accurate," *Advisory Op. to Att'y Gen. re Protect People, Especially Youth, from Addiction, Disease, & Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1194 (Fla. 2006). As this Court has stated, "[a] proposed amendment *must be removed* from the ballot when the summary does not accurately describe the scope of the text of the amendment, because it has failed in its purpose." *Detzner*, 256 So. 3d at 808 (emphasis added).

Here, the Proposed Amendment is breathtaking in scope. Its purpose is to legalize all abortions before viability and any abortion post-viability so long as it is deemed "necessary" by any undefined "healthcare provider" to protect the woman's unspecified "health." Such an effect far exceeds the Proposed Amendment's stated purpose of merely "limit[ing]" "government interference with abortion." Indeed, the Proposed Amendment is similar to the ballot summary in *Advisory Opinion to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, & Other Restrictions*, 320 So. 3d 657 (Fla. 2021). Just like that initiative, which falsely told voters that the proposed amendment limits the use of recreational

marijuana, *see* 320 So. 3d at 668, the Proposed Amendment here falsely tells voters that the amendment would merely "limit" government "interference" with abortion, when, in fact, it would abolish *all* government restrictions except arguably for the parental-notification law. "Ballot language may be clearly and conclusively defective either in an affirmative sense, because it misleads the voters as to the material effects of the amendment, or in a negative sense by failing to inform the voters of those material effects." *Dep't of State v. Florida Greyhound Ass'n, Inc.*, 253 So. 3d 513, 520 (Fla. 2018). Because the Proposed Amendment is both affirmatively and negatively defective, it should not be placed on the ballot.

D. The Ballot Title and Summary fail to disclose other significant aspects of the Proposed Amendment.

As explained in FVAE's Initial Brief (at 15–18), the ballot summary for the Proposed Amendment fails to disclose to voters the numerous critical and intended legal effects of the amendment. For example, an undisclosed legal effect is the removal of the State's police power to protect life and regulate healthcare. The summary also fails to disclose that the amendment would strip elected state legislators of their power to protect preborn life and pass prenatal

healthcare laws. And the Proposed Amendment would conflict with federal law, including the Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531(a).

The Sponsor tries mightily to wave these concerns away, but its efforts fall flat. For example, the Sponsor disregards the Proposed Amendment's conflict with the federal Partial-Birth Abortion Ban Act, contending that past amendments "have interacted with federal law in a variety of ways." AB 55. But the case that the Sponsor cites in support, *In re Advisory Opinion to Atty. Gen. re Limits or Prevents Barriers to Loc. Solar Elec. Supply*, 177 So. 3d 235 (Fla. 2015), is inapposite given that it did not address federal preemption or supremacy issues. In any event, a constitutional amendment that would enshrine the right to dismember near-term babies in violation of a federal criminal law is vastly different from a proposed amendment about solar electricity.

Equally meritless is the Sponsor's reliance on *Advisory Opinion to the Att'y Gen. re Raising Florida's Minimum Wage*, 285 So. 3d 1273 (Fla. 2019). As with *Solar Elec. Supply*, that case did not involve federal preemption or supremacy issues. Nor would raising the minimum wage violate a federal criminal law. By contrast, the

Proposed Amendment would authorize as a matter of state constitutional law conduct that would violate the federal Partial-Birth Abortion Ban Act.

Because the ballot title and summary do not advise voters of these critical and intended legal effects of the amendment, they are deficient, and thus the Proposed Amendment should be stricken.

II. The Sponsor confirms that the Proposed Amendment violates the Florida Constitution's single-subject requirement.

Along with the defects in the Proposed Amendment's ballot title and summary, FVAE also demonstrated (at 23–28) that the proposal violates the single-subject requirement by lumping in one amendment multiple subjects that are logically separable. This Court evaluates compliance with the single-subject requirement by determining whether the initiative: (1) engages in "logrolling" of distinct subjects; or (2) substantially alters or performs the functions of multiple branches of state government. *See Save Our Everglades*, *supra*, 636 So. 2d at 1339. The Proposed Amendment engages in both prohibited practices, and each provides an independent ground for the Court to deny ballot placement.

A. The Proposed Amendment addresses multiple subjects in a single initiative and engages in logrolling.

FVAE's Initial Brief described (at 26) how the Proposed Amendment violates the single-subject requirement by addressing at least two distinct and logically separable subjects: (1) prohibiting laws restricting abortion "before viability" and (2) prohibiting laws restricting abortion when the woman's "healthcare provider" determines that terminating the pregnancy is "necessary to protect the patient's health." As it stands, the proposal is a hodgepodge of significant provisions that would result in the type of "precipitous and cataclysmic change" to Florida's Constitution that the single-subject provision is intended to thwart. *Save Our Everglades*, 636 So.2d at 1339.

The Proposed Amendment engages in "logrolling" of these distinct subjects. As explained in FVAE's Initial Brief (at 24–25), several scenarios exist in which a voter would be forced to vote for aspects of the Proposed Amendment that he or she does not support in the "all or nothing" fashion that the single subject requirement safeguards against. *Adv. Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 566 (Fla. 1998).

Other than repeated conclusory statements that the Proposed Amendment has a "logical and natural oneness of purpose," the Sponsor does not meaningfully address FVAE's single-subject arguments. AB 13–14. The Sponsor instead resorts to confusing the legal standard, arguing that the "all or nothing" proposition foreclosed by this Court's decisions, *see Health Care Providers*, 705 So. 2d at 566, is not the correct "inquiry." AB 15. The Sponsor is mistaken.

Like the proposed amendment in *Health Care Providers*, which impermissibly combined two distinct subjects by (1) banning limitations on health care provider choices imposed by law, and (2) prohibiting private parties from entering into contracts that would limit health care provider choices, *see* 705 So. 2d at 566, the Proposed Amendment here constitutionalizes two types of abortions—(1) elective pre-viability abortions, and (2) purportedly health-dependent abortions post-viability, up until birth (which, as demonstrated, is a virtually limitless proposition). The amendment thus impermissibly "forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the [abortion] issue in an 'all

or nothing' manner." *Id*. As a consequence, the Proposed Amendment engages in prohibited logrolling.

The Sponsor's reliance (at 16) on *Fla. Marriage Prot. Amend.*, *supra*, 926 So. 2d at 1229, is unavailing. In that case, this Court found that when the phrase challenged by the opponents was "read in context and connection with the proposed amendment as a whole," it was clear that it "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Id*. at 1234 (cleaned up). Thus, the Court held that the proposed amendment "does not impermissibly force voters to approve a portion of the proposal which they oppose to obtain a change which they support." *Id*.

Here, by contrast, the Proposed Amendment presents voters with an all-or-nothing choice between pre-viability and post-viability abortions. These types of abortions are vastly distinct, each with their own set of ethical, medical, and legal complexities. Thus, the voter is not merely being asked to vote on the singular subject of whether the government should be "limited" in interfering with abortion; instead, the voter is being asked to approve two controversial types of abortions, each fit for its own separate ballot initiative—not logrolled

into a single ballot. *Cf. Detzner*, *supra*, 256 So. 3d at 814 (Lewis, J., concurring) ("[B]undling controversial issues into an amendment containing a widely popular issue to trick the voters is precisely the type of misleading language expressly forbidden under [§ 101.161(1)].").

B. The Proposed Amendment substantially alters or performs the functions of multiple branches and levels of state and local government.

Finally, the Proposed Amendment violates the single-subject requirement by substantially altering the functions of multiple branches and levels of government in a single initiative proposal. As FVAE explained in its Initial Brief (at 28–30), the proposal would not only alter and perform functions of the State's executive and legislative branches but dramatically change the function of the judicial system as well. Yet again, the Sponsor fails to meaningfully engage with FVAE's legal arguments. Instead, the Sponsor simply contends that all the Proposed Amendment would do is require the government to comply with the Florida Constitution. AB 20. Such a simplistic view shows the danger of the Proposed Amendment.

Like the proposed amendment in *Save Our Everglades*, which established a trust for restoration of the Everglades and provided for

funding and operation of the trust, the Proposed Amendment "implements a public policy decision of statewide significance and thus performs an essentially legislative function." 636 So. 2d at 1340. The proposal also substantially performs the function of the executive branch by reshaping the duties and obligations of the Florida Department of Health, which is responsible for regulating healthcare providers. *See generally* § 458.331, Fla. Stat. And the proposal dramatically changes the State's judicial system as it applies to enforcing and prosecuting physicians who perform illegal abortions.

Indeed, it is difficult to comprehend how the Sponsor could argue that the Proposed Amendment does not usurp the functions of the three branches of government when the very text of the amendment positively bars those branches from "prohibit[ing], penalize[ing], delay[ing], or restrict[ing] abortion." Each of those verbs denotes specific actions taken by specific branches of government. For example, the legislative branch is authorized to "prohibit" conduct by enacting criminal and civil laws; the executive and judicial branches are authorized to "penalize" citizens through fines and imprisonment; and the judicial branch is authorized to "delay"

or "restrict" conduct through injunctions or other equitable remedies. Each set of those proscribed actions implicates the powers of a separate branch of government, yet they are all lumped together in one amendment. In sum, the Proposed Amendment alters or performs functions of each branch of government and thus falls far short of meeting the single-subject requirement.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in FVAE's Initial Brief, the Court should strike the deceptive, misleading, and chaos-inducing initiative from the ballot.

Dated: November 15, 2023

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to all counsel of record by filing the document with service through the e-Filing system pursuant to Fla. R. Gen. Prac. & Jud. Admin. 2.516(b)(1).

Dated: November 15, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman Old Style font, in compliance with Fla. R. App. 9.045(b) and 9.210(a)(2) and contains 3,353 words.

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