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SC23-1392

IN THE SUPREME COURT OF FLORIDA

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

UPON REQUEST FROM THE ATTORNEY GENERAL FOR AN ADVISORY OPINION AS TO THE VALIDITY OF AN INITIATIVE PETITION

ANSWER BRIEF OF LAW PROFESSORS & INSTRUCTORS IN SUPPORT OF THE INITIATIVE

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IDENTITY AND INTEREST OF SUPPORTERS

The law professors and instructors listed below are all committed to the rule of law, the separation of powers in state government, and the fundamental individual freedoms and liberties enshrined in the Declaration of Rights of the Florida Constitution, which begins with the foundational premise that "[a]ll political power is inherent in the people." Art. I § 1, Fla. Const., and the concomitant right of the people "to instruct their representatives, and to petition for redress of grievances." Art. I § 5, Fla. Const. The constitutional initiative process, which is at the core of this matter, is a critical element to protecting these inalienable rights. Art. IX § 3, Fla. Const.

These professors have focused their professional attention in training new lawyers on the meaning, history, and application of constitutional principles, including how those principles are tested by high-profile, contentious political matters. Each has an interest in ensuring that the constitution is properly interpreted and fairly applied, particularly regarding critical measures of democratic engagement by the people and the protection of individual rights and liberties from abridgement by the government. They support the Initiative at issue because they believe that the opposition is an

attempt to circumvent and undermine those inviolable constitutional rights.

Supporters: Robert F. Williams, Distinguished Professor of Law Emeritus, Rutgers Law School, Director of the Center for State Constitutional Studies, Rutgers Law School; Lundy Langston, Professor of Law, Florida A&M University College of Law; Rhonda Reaves, Professor of Law, Florida A&M University College of Law; Robert H. Abrams, Professor of Law, Florida A&M University College of Law; Patricia Broussard, Professor of Law, Florida A&M University College of Law; William Henslee, Professor of Law, Florida A&M University College of Law; Mark Dorosin, Associate Professor of Law, Florida A&M University College of Law; Quinn Yeargain, Assistant Professor of Law, Widener University Commonwealth Law School; Eunice Caussade-Garcia, Associate Instructor, Florida A&M University College of Law; Kim Crag-Chaderton, Instructor, Florida A&M University College of Law; Denise Cespedes, Instructor, Florida A&M University College of Law; Ali Tal-Mason, Instructor, Florida A&M University College of Law.

STATEMENT OF THE CASE AND FACTS

In the wake of the Supreme Court decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) and subsequent legislation adopted in Florida to restrict access to abortion and reproductive rights, advocates organized to draft a proposed constitutional amendment to reaffirm and protect those rights. The text of the proposed amendment states:

> 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.

In September, the Amendment to Limit Government Interference with Abortion secured the required number of signatures required by § 15.21 of the Florida Statutes to trigger the Attorney General to petition this Court on October 9, 2023, for an advisory opinion on the validity of the initiative petition. On October 20, 2023, this Court issued a briefing schedule in this matter. Pursuant to that schedule, initial briefs (in opposition to the petition) were submitted on October 31, 2023; answer briefs in support of the petition are due on November 10, 2023.

SUMMARY OF ARGUMENT

In Florida, "[a]ll political power is inherent in the people." Art. I, § 1, Fla. Const. "The people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be." John Locke, *Two Treatises of Government* 193 (Thomas I. Cook ed., Hafner Publishing Co. 1947). As such, the grant to the Legislature of "[t]he legislative power of the state," Art. III, § 1, Fla. Const., "did not transfer from the people to the [Legislature] all of the legislative power inhering in the former," but instead, "only 'such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their constitution[.]'" *Ellingham v. Dye*, 99 N.E. 1, 4 (Ind. 1912) (quoting *McCullough v. Brown*, 19 S.E. 458, 468 (S.C. 1894)).

Floridians have several different avenues for exercising their political rights. First, they elect a Senate and House of Representatives, which are jointly vested with the power to make laws, Art. III, §§ 1, 7–8, Fla. Const, and a Governor with the power to sign those laws into effect, *id.* § 8. Second, where Floridians disagree with the content of these laws, or when they wish to push

policymaking in a different direction, they can exercise another power—namely, the power to initiate a constitutional amendment.

The initiative power serves a dual role in state constitutional law. It serves as a "check and balance against legislative and executive power," as the Florida Supreme Court has recognized. *See, e.g.*, *Browning v. Fla. Hometown Democracy, Inc.*, 29 So.3d 1053, 1063 (Fla. 2010). It also allows states, via voters, to respond to federal actions—which is a cornerstone of the United States' federal system.

While unchecked "direct democracy" can produce undesirable results in other states, Floridians have used their initiative power responsibly—and have repeatedly imposed voluntary limits on their own powers. In 1972, Florida voters ratified a constitutional amendment that expressly imposed a single-subject limitation on initiated amendments. Art. XI, § 3, Fla. Const. They likewise ratified amendments in 1994 and 2006, respectively, that raised the threshold for ratification of amendments—to two-thirds for any measure imposing a new state tax, *id.* § 7, and to sixty percent for all amendments, *id.* § 5(e).

In this vein, the Amendment to Limit Government Interference with Abortion (the "Amendment") is a prototypical state

constitutional amendment. In keeping with the U.S. Supreme Court's observation that "the people of the various States may evaluate" the "competing interests" in abortion regulation "differently," *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022), and Justice Kavanaugh's conclusion that "the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process," *id.* at 2305 (Kavanaugh, J., concurring), the Amendment seeks to allow Floridians the opportunity to strike a Florida-specific balance.

Across the country, voters have used the "democratic process" to "evaluate the competing interests and decide how best to address" the issue of abortion. *See id.* Abortion was one of the most important issues to voters in the 2022 elections and, across the country, gubernatorial and legislative elections produced state governments that adopted new policies—more permissive and more restrictive—on abortions. Voters in four states so far—California, Michigan, Ohio, and Vermont—have added abortion-rights provisions to their state constitutions. *See* Cal. Const. art. I, § 1.1 (amended 2022), Mich. Const. art. I, § 28 (amended 2022); Ohio Const. art. I, § 22 (amended 2023); Vt. Const. ch. 2, art. 22 (amended 2022). In two other states,

voters rejected amendments that would have established that their state constitutions did *not* recognize any right to abortion. And in 2024, voters across the country will similarly have an opportunity to weigh in on the legal status of abortion within their states.

If the court embraces the Attorney General's novel argument against the legality of the amendment, it would adopt an onerous and contextless interpretation of Art. XI, § 3, that would be devoid of the intent of the framers of the 1968 Constitution. It runs afoul of the people's well-established and accepted usage of the constitutional amendment process—both in Florida and in other states—as a check on legislative power, to respond to court decisions with which they disagree, and to regulate abortion itself.

ARGUMENT

I. The people's initiative power serves as a check on the Legislature's plenary powers and should be construed broadly, not narrowly.

At the time of the Founding, state legislatures were the most powerful branches in state governments. Robert F. Williams & Lawrence Friedman, *The Law of American State Constitutions* 280–81 (2d ed. 2023). But a populist reaction to legislative abuses of power

and corruption in the mid-nineteenth century resulted in the adoption of new state constitutions and constitutional provisions that significantly curtailed the power of state legislatures—and brought them into coequal status with the other branches. *Id.* at 284.

Such far-reaching changes were possible at the state level because state constitutions are more democratic—and more amenable to structural changes—than the federal constitution. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 881–87 (2021). As the nineteenth century continued, legislatures were increasingly seen as influenced by powerful corporate interests and unresponsive to the will of the people. Accordingly, one of the most significant changes of the early twentieth century was the widespread adoption of direct democracy powers, which allows voters to initiate statutes and constitutional amendments of their own design, and to refer laws proposed by the legislature onto the ballot.

The development of the initiative power in Florida parallels the development of similar powers of direct democracy powers nationwide. The Florida Legislature, like all other state legislatures, is vested with plenary, not enumerated, power. *Fla. House of*

Representatives v. Florigrown, LLC, 278 So.3d 935, 939 (Fla. 2019) (quoting *Charlotte Harbour & N. Ry. Co. v. Welles*, 82 So. 770, 773 (Fla. 1919)). As such, the primary function of the Florida Constitution is to establish the limits of legislative power, especially regarding encroachments on the individual rights and liberties of Floridians. *See Chiles v. Phelps*, 714 So.2d 453, 458 (Fla. 1998).

The Florida Constitution contains several significant limitations on the Legislature's power, but one of the most significant is the initiative power held by the people of Florida. The power to initiate constitutional amendments was adopted as part of the 1968 Constitution in response to pent-up frustrations with the Legislature. Over the last 60 years, the contours of the initiative power have shifted, but its core idea remains—that Floridians, endowed with "[a]ll political power" of the state, Art. I, § 1, Fla. Const., should have the opportunity to "amend[] their fundamental organic law," which "provides an additional check and balance against the legislative and executive power[.]" *Browning*, 29 So.3d at 1063.

A. **The development of the initiative power in Florida.**

The power to initiate constitutional amendments was created with the adoption of the Florida Constitution in 1968. Nearly a

decade prior, the Constitutional Advisory Committee, organized in 1957, had recommended the creation of an initiative process, but the Florida Legislature stymied those plans. Mary E. Adkins, *Making Modern Florida: How the Spirit of Reform Shaped a New Constitution* 23–24 (2016). At the time, the Legislature was elected from grossly unequal districts and was resistant to popular input, and the adoption of an initiative would erode the Legislature's power. *See id.*

Under the 1968 Constitution, the initiative power was comparatively narrow. The Constitution "reserved to the people" the "power to propose amendments to any section of this constitution by initiative." Art. XI, § 3, Fla. Const. (1968). As the Florida Supreme Court explained in *Adams v. Gunter*, this power contained several limitations. 238 So.2d 824, 831 (Fla. 1970). First, because voters were limited to modifying a single "section" of the constitution at a time, any "such amendment if approved" must "be complete within itself and not substantially affect other provisions of the Constitution or require further amendments thereof." *Id.* Second, though Art. XI, § 3, did not *expressly* include a single-subject limitation, the court nonetheless implied one, requiring that any approved amendment "relate to one subject." *Id.*

In response to the court's decision in *Adams*, the Legislature placed an amendment onto the ballot in 1972 that proposed the elimination of the single-section limitation and substituted for it a single-subject limitation. *Constitution Change Bill Goes to People for Vote*, Tampa Bay Times, Mar. 17, 1972, at 10-B. The measure passed and incorporated the core of the present language of Article XI, § 3, into the Florida Constitution:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith.

Art. XI, § 3 (1972).

Twenty-two years later, an initiated amendment created an exception to the single-subject limitation, allowing "those [measures] limiting the power of government to raise revenue" to cover multiple subjects. Art. XI, § 3, Fla. Const. (1994). Separately, an initiated amendment in 1994 and a legislatively referred amendment in 2006 raised the threshold for amending the constitution. The 1994 amendment provided that an amendment proposing any "new state tax or fee" must be approved by a two-thirds of Florida voters. *Id.* § 7. And the 2006 amendment provided that *all other* amendments,

regardless of content, must be approved by sixty percent of voters. *Id.* § 5(e).

B. The initiative power should be construed broadly.

The creation and subsequent evolution of the initiative power demonstrates the broad reach that the power was intended to have. At the time that Floridians were debating the merits of adopting an initiative process, much of the momentum in favor of direct democracy had faded. Manning J. Dauer & William C. Havard, *The Florida Constitution of 1885—A Critique*, 8 U. Fla. L. Rev. 1, 30–31 (1955). However, the decision to include an initiative power in the 1968 Constitution centered the people of Florida in the constitutional amendment process. When the Florida Supreme Court interpreted the scope of the initiative power too narrowly, the Legislature successfully rewrote the provision in 1972 to *expand* the electorate's power; the people themselves effected a narrow change in 1994 that further expanded their own power.

This history reflects the long-standing view that the people's initiative power is meant to be construed broadly. The Florida Supreme Court has repeatedly noted that "[t]he fundamental object to be sought in construing a constitutional provision is to ascertain

the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it." *Browning*, 29 So.3d at 1063 (quoting *Gray v. Bryant*, 125 So.2d 846, 852 (Fla. 1960)). In the context of "the initiative-petition method of amending the Florida Constitution," the Court has interpreted this as a "conferred fundamental right," which acts *as a check*" on legislative and executive power. *Id.* (emphasis in original). That check cannot be meaningfully exercised if the government can manipulate or circumscribe that fundamental right.

II. Voters have routinely used their power of direct democracy to respond to constitutional decisions with which they disagree.

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebemann*, 285 U.S. 252, 311 (1932) (Brandeis, J., dissenting).

The federal system of government established by the U.S. Constitution is built on respect for the power of state governments to chart their own courses. *See* U.S. Const. amend. X. States have historically experimented with variations on the individual rights and

liberties encapsulated in the U.S. Constitution. In that context, as the Florida Supreme Court has recognized, "the United States Constitution generally sets the 'floor'—not the 'ceiling'—of personal rights and freedoms." *See State v. Horowitz*, 191 So.3d 429, 438 (Fla. 2016).

Within this framework—in which states are able to be *more* protective of individual rights and liberties—there is substantial room for dialogue among courts, legislatures, and electorates. While "most Americans have come to view the national constitution as the primary, if not sole, protection for their rights," the "original state constitutions preceded the United States Constitution, and many of the protections of the Bill of Rights were based on similar provisions in state constitutions." Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 773 (2021). Accordingly, where the U.S. Supreme Court protects a right at a certain level, state courts are free to interpret their own constitutions to protect the same right at a *higher* level.

But these decisions do not exist in a vacuum. While the independent development of a state constitution is a permissible prerogative of state supreme courts in interpreting their state laws,

those interpretations did not always meet with the approval of voters. While amending the U.S. Constitution is challenging, *see* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 Cal. L. Rev. 2005, 2013–16 (2022), state constitutions are substantially more democratic and, as such, are far easier to amend, and this is aided in large part by the initiative process, Bulman-Pozen & Seifter, *supra*, at 881–87. If a state legislature or an electorate disagrees with a court's decision, proposing a constitutional amendment to overturn the decision is entirely possible—and has been repeatedly done. *See* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 Rutgers L.J. 983, 1009–16 (2007).

Voters themselves can (and do) ratify changes to their state constitutions that protect their civil rights and liberties at a higher level than that established by the U.S. Supreme Court, their state supreme court, or state legislature. In the last several decades, voters have ratified amendments—initiated by citizen groups or referred by state legislatures alike—that have added increased protections of individual rights related to private property, religious expression, gun ownership, and privacy to their state constitutions.

States' experiences in both of these areas—in which voters have *reversed* state supreme court decisions that extended more protection to individual rights and have *expanded* the protection of rights beyond the judiciary's recognition—demonstrate that the Amendment to Limit Government Interference with Abortion is in keeping with this dialogue. Specifically, the Amendment would provide voters with the chance to expand the protection of abortion rights beyond the U.S. Supreme Court's recognition in *Dobbs*.

A. As state courts have developed independent interpretations of rights, voters have ratified constitutional amendments that have modified or reversed those decisions.

During the era of the Warren and Burger courts, there was an ebb and flow between the states and the federal judiciary over whether state actions in criminal prosecutions violated the protections afforded by the Fourth, Fifth, and Sixth Amendments. The Warren Court's decisions in these areas strengthened the rights of criminal defendants and prisoners; the Burger Court subsequently pulled back on the furthest reaches of these rights.

Beginning in the 1970s, many scholars and judges began urging litigants to bring their rights- and liberties-based claims in

state court rather than federal court—with the hope that independent state constitutional adjudication would yield different results. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 51 (2018). Justice William Brennan was a leading advocate of this effort, which became known as "New Judicial Federalism," and he famously referred to state constitutions as a "font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

While many state supreme courts have interpreted their constitutions' protections of individual rights and liberties in tandem with analogous federal protections, others have adopted bespoke interpretations that are keyed to the specific texts of their constitutions or their states' unique histories. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1504–20 (2005). The "local conditions and traditions" of different states can and should affect state courts' "interpretation of a constitutional guarantee and the remedies imposed to implement

that guarantee." Sutton, *supra*, at 17–18. "State constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history." *Id.* at 17.

The litigation of rights and liberties in state courts, relying on state constitutional grounds, prompted state courts to consider anew the specific meaning of their state constitutional texts. In doing so, many courts interpreted their constitutions' guarantees of rights and liberties differently than the U.S. Supreme Court did in contexts involving the rights of criminal defendants and prisoners, members of the LGBT community, and abortion rights. However, where voters disagreed with these decisions, they countered them with constitutional amendments that modified the meaning of the provisions at issue.

1. Criminal procedure rights

During the early days of New Judicial Federalism, much of the state constitutional litigation focused on the rights of criminal defendants. Williams & Friedman, *supra*, at 151–52. Many states, relying on their states' specific constitutional texts and unique histories, interpreted their protections against unreasonable

searches and seizures or of criminal trial procedures that pushed beyond the U.S. Supreme Court's interpretations of analogous protections. *See generally* Sutton, *supra*, at 62–83.

Florida's Bill of Rights has historically reflected this kind of state-specific focus. Under the 1968 Constitution, Art. I, § 12, provided a protection against, *inter alia*, "unreasonable searches and seizures" and the "unreasonable interception of private communications." In *State v. Sarmiento*, for example, the Florida Supreme Court held unconstitutional a "warrantless, electronic interception by state agents of a conversation between [the] defendant and an undercover police officer in [the] defendant's home." 397 So.2d 643, 644, 645 (Fla. 1981). The Court acknowledged that the police conduct at issue in the case would likely be permissible under the Fourth Amendment, *id.* at 645, but suggested that the Florida Constitution "provide[d] [citizens] with more protection from governmental intrusion than that afforded by the United States Constitution," adopting an independent interpretation of Art. I, § 12. *Id.* at 645.

In response to the Court's ruling, the Legislature proposed a constitutional amendment that would limit the Florida Constitution's

protection against searches and seizures and restrict it to conformity with the U.S. Supreme Court's interpretation of the Fourth Amendment. *See* Eric Rieder, *Anti-Crime Forces Target Rule on Illegal Evidence*, Miami Herald, Aug. 9, 1982, at 1-D, 2-D. The amendment was ratified at the 1982 election and appended, to the existing protections, an interpretative limitation:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Art. I, § 12, Fla. Const. (1982).

The ratification of the 1982 amendment demonstrates that, when a state court determines that the state constitution protects a right that the U.S. Constitution does not, voters can play a role in determining whether that decision should be maintained. Shortly after the ratification, Chief Justice Burger highlighted this very scenario, noting that

> when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement. The people of

> Florida have now done so with respect to Art. I, § 12, of the State Constitution[.]

Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring) (emphasis in original).

Florida's experience is fairly typical. The individual rights guaranteed in state constitutions have frequently persuaded state courts to deviate from the U.S. Supreme Court's interpretations of analogous protections. *See, e.g.*, *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986). And where state courts' interpretations go beyond what voters support, voters have ratified amendments that have struck a different balance. Dinan, *supra*, at 1010–16.

Voters have also ratified constitutional amendments that have incorporated entirely new conceptions of rights, and which have, in turn, affected the interpretation of other rights. *See* Bolick, *supra*, at 771. Victims' rights amendments, which are frequently referred to as "Marsy's Law" amendments, provide victims of crimes with a panoply of rights that necessarily affect the rights of criminal defendants and prisoners. The practical effect of these amendments has been to constrain state courts' development of defendants' rights in a manner that extends beyond the U.S. Supreme Court's recognition of

analogous rights. *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985); *see also* Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 Hastings Const. L.Q. 95 (1993) (describing the adoption of a victims' rights amendment in California and its effect on the interpretation of the California Constitution). In so doing, voters' ratification of amendments—proposed either by the initiative process or by state legislatures themselves—have reflected the unique development of state-specific rights. Where a court goes further than the electorate is comfortable with in extending a right, the process of voter engagement in constitutional development allows for a check on that court and for the democratic process to play out.

2. LGBT rights

The development of LGBT rights at the state level is yet another example in which an interplay between state courts and electorates demonstrates the significance of direct democracy in constitutional development. After the U.S. Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which affirmed the constitutionality of Georgia's statutory ban on "sodomy," state courts began examining how privacy rights and equality guarantees applied in the LGBT

context. Several states struck down their bans on sodomy on state constitutional grounds, for example. *See, e.g.*, *Jegley v. Picado*, 80 S.W.3d 332, 350–53 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 21–22 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112, 121–22 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 258–62 (Tenn. Ct. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487, 491–99 (Ky. 1992).

States also began to consider the constitutionality of statutory restrictions on marriage equality. In 1993, the Hawaii Supreme Court held that the state statute that restricted access to marriage to heterosexual couples constituted sex-based discrimination under the Hawaii Constitution and was subject to strict scrutiny review. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (citing Haw. Const. art. I, § 5). The court's decision prompted several years of legislative deliberations—but ultimately yielded a legislatively referred constitutional amendment that expressly gave the legislature the power to define marriage under state law, Haw. Const. art. I, § 23 (amended 1998), which effectively mooted the case, *Baehr v. Miike*, 1999 Haw. LEXIS 391, at *7 (Haw. Dec. 9, 1999).

The Supreme Court's decision in *Lawrence v. Texas*, 538 U.S. 1102 (2003)—which overturned *Bowers* and struck down state bans on "sodomy"—also inspired additional litigation over marriage equality. In the decade following the Court's decision in *Lawrence*, state supreme courts in California, Connecticut, Iowa, Massachusetts, and New Mexico struck down their states' bans on gay marriage on state constitutional grounds. *Griego v. Oliver*, 316 P.3d 865, 880–81 (N.M. 2013); *Varnum v. Brien*, 763 N.E.2d 862, 895–96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441–53 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 414 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

California's experience with marriage equality, however, is illustrative of how voters can play a role in pulling back a court decision that extends the scope of rights. The California Supreme Court's 2008 decision striking down the ban on marriage equality came *after* advocates had successfully placed an amendment—Proposition 8—on the ballot that same year that proposed to define marriage as "between a man and a woman," but *before* voters had a chance to ratify or reject the amendment. Later that year, the Court's

decision was fresh on the minds of voters, and Proposition 8 narrowly passed, overturning the Court's decision, Cal. Const. art. I, § 7.5 (2008); *Strauss v. Horton*, 207 P.3d 48, 78 (Cal. 2009). Voters around the country also hastened to amend their constitutions to define marriage as between one man and one woman, effectively preempting any state supreme courts from deciding the question another way.

B. In response to U.S. Supreme Court or state court rulings that limit the protection of rights, voters have ratified constitutional amendments that have *expanded* their state constitutions' protection of those same rights.

The flip side of state constitutional independence is that, where courts take a *narrow* view of rights and liberties, legislatures and voters can collaborate (or voters can act independently) to expand those same rights. In the last several decades, voters in states around the country have ratified state constitutional amendments that have increased the protections of individual rights and liberties beyond the narrower interpretations of state and federal courts.

1. Eminent domain

One of the most prominent examples of engaged direct democracy has been the nationwide response to the U.S. Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005).

In *Kelo*, the Court held that the "public use" requirement in the Takings Clause of the Fifth Amendment did not prohibit a government from making a private-to-private transfer for the purpose of economic development. *Id.* at 487–90.

The response from the states was immediate. Most states adopted new laws that barred private-to-private transfers in eminent domain proceedings, and electorates in several states ratified constitutional amendments that expressly forbade the practice. Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* 157–60 (2015); Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. Colo. L. Rev. 651, 673–76 (2008).

In Florida, for example, where 88% of voters disagreed with the Court's decision in *Kelo*, Somin, *supra*, at 140, the legislature adopted a series of statutory changes that severely limited the state and local governments' eminent domain powers. *See* Somin, *supra*, at 140; Ch. 2006-11, Laws of Fla. And in 2006, the legislature referred to voters a constitutional amendment that added a new stipulation to the eminent domain power:

> Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural

> person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.

Art. X, § 6(c), Fla. Const. (2006). The amendment passed with 69% of the vote.

2. Religious liberty

Judicial decisions on religious liberties—as well as state government actions that impact religious activities—have also prompted the ratification of amendments expanding state constitutional protection of religious liberty and expression. In *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court adopted a new test for evaluating burdens on religious exercise under the First Amendment. Under the Court's previous decisions, such burdens were evaluated under strict scrutiny. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). But in *Smith*, the Court adopted a new test, holding that where a burden is "neutral" and "of general applicability," it is constitutional under the First Amendment. 494 U.S. 872, 886 n.3 (1990).

In response to the decision in *Smith*, Congress passed the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993), which reinstituted the strict-scrutiny standard. But the

Court struck down RFRA's application to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997), prompting state legislatures to adopt their own RFRA analogs, Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 474–79 (2010). Moreover, states have long had their own versions of religious-liberty protections, which some state courts have interpreted independently from the First Amendment. Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 Val. U. L. Rev. 353, 362–66 (2004).

Electorates in several states also considered amendments that proposed the expansion of religious-liberty protections in their state constitutions. In 1998, Alabama voters ratified an amendment that expressly incorporated a RFRA-level strict-scrutiny standard into the state constitution, Ala. Const. art. I, § 3.01(5)(b) (1998), and in 2012, Missouri voters adopted a substantial expansion of their Bill of Rights' protection of religious conduct, Mo. Const. art. I, § 5 (2012). Voters in Arkansas and North Dakota rejected similar measures in 2022 and 2012, respectively.

A similar state constitutional expansion of religious liberty has taken place in the past several years, as a response to restrictions on

in-person activities during the COVID-19 pandemic. Though the U.S. Supreme Court largely rejected state and local limits on in-person attendance at houses of worship, *see, e.g.*, *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 66–67 (2020), voters in Louisiana and Texas responded to the pandemic-era restrictions by adopting broad rights to attend in-person religious services.[1]

3. Gun rights

The U.S. Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), established that the Second Amendment to the U.S. Constitution protected an individual right to "keep and bear arms," and that this right was incorporated to the states via the Fourteenth Amendment. Prior to this point, however, the Second Amendment had not played a meaningful role in regulating the constitutionality of restrictions on gun ownership.

[1] La. Const. art. XII, § 17(A) (2023) ("The freedom to worship in a church or other place of worship is a fundamental right that is worthy of the highest order of protection."); Tex. Const. art. I, § 6-a (2021) ("This state or a political subdivision of this state may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship, in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief.").

State constitutions, however, have long had provisions parallel to the Second Amendment, many of which have used similar phrasing. *See* David B. Kopel, *What State Constitutions Teach about the Second Amendment*, 29 N. Ky. L. Rev. 827 (2002) (collecting provisions). As state regulations on firearm ownership were challenged in state court, several state supreme courts upheld the restrictions. *See, e.g.*, *State v. Friel*, 508 A.2d 123, 125 (Me. 1986); *Kalomidos v. Vill. of Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984) *State v. Beorchia*, 530 P.2d 813 (Utah 1974); *see generally* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev. 1113 (2010) (collecting cases). Many of the state supreme court rulings that upheld restrictions relied on context in the existing constitutional provisions themselves that connected gun ownership to membership in a militia or for common defense, *Friel*, 508 A.2d at 125 (citing Me. Const. art. I, § 16); *Beorchia*, 530 P.2d at 814 (citing Utah Const. art. I, § 6).

In response to many of these rulings, voters ratified amendments that expanded their state constitutions' protection of the right to keep and bear arms. The changes that were proposed

and, in most states, ultimately adopted, removed the context that state courts had relied on and established an unqualified right to keep and bear arms.[2]

Voters in many other states adopted similar amendments, even after the Court's decision in *Heller* and *McDonald* clarified the scope of the right.[3] In many of these states, their constitutions did not previously contain a right to bear arms at all, Koppel & Cramer, *supra*, at 1122 n.51; in others, the new rights reflected an expansion beyond the Court's recognition, *e.g.*, Mo. Const. art. I, § 23 (2014) (providing that restrictions on the "right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms" is "subject to strict scrutiny"). These changes continued even after the Court significantly expanded the protection afforded by the Second Amendment in *New York State Rifle & Pistol*

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[2] Me. Const. art. I, § 16 (1987) ("Every citizen has a right to keep and bear arms and this right shall never be questioned."); Utah Const. art. I, § 6 (1984) ("The individual right of the people to keep and bear arms for security and defense *of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed*; but nothing herein shall prevent the Legislature from defining the lawful use of arms.") (emphasis added to reflect amendment).

[3] *E.g.*, Ala. Const. art. I, § 26 (2014); Alaska Const. art. I, § 19 (1994); Idaho Const. art. I, § 11 (1978); Kan. Const. Bill of Rts., § 4 (2010); La. Const. art. I, § 11 (2012); Neb. Const. art. I, § 1 (1988); Nev. Const. art. I, § 11 (1982); N.H. Const. pt. 1, § 2-a (1982); N.M. Const. art. II, § 6 (1986); N.D. Const. art. I, § 1 (1984); W. Va. Const. art. III, § 22 (1986); Wis. Const. art. I, § 25 (1998).

Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022), with Iowans ratifying an amendment later in 2022 that established the "fundamental individual right" "to keep and bear arms," Iowa Const. art. I, § 1a (2022).

III. Voters have routinely used their power of direct democracy to "evaluate the competing interests and decide how best to address" the issue of abortion.

While the issue of abortion was only formally "return[ed] . . . to the people's elected representatives" in 2022, the people and their elected state representatives have had a long-running dialogue over how best to regulate access to abortion. *Roe v. Wade* and its progeny represented one way of evaluating the constitutionality of abortion restrictions and how to strike the appropriate balance. A combination of state supreme courts, legislatures, and voters struck a variety of other balances.

Voters have ratified and rejected constitutional amendments related to abortion regulation. Depending on the state and the sponsor, these measures might have sought to *expand* access to abortion or to restrict it. But a common thread through these several decades of proposed amendments has been the consistency with which voters have used the "democratic process" to weigh in on "how

best to address" the issue of abortion. *Cf. Dobbs*, 142 S. Ct. at 2305. In that light, the Amendment to Limit Government Interference with Abortion is in keeping with a nationwide debate, which has taken place in state legislatures *and* at the ballot box, over the fundamental right of privacy, bodily integrity, and access to abortion.

Drawing on their power to interpret their own state constitutions to protect the fundamental rights of residents, many state supreme courts have interpreted the texts of their constitutions in a manner that recognized a right to abortion. *See, e.g.*, *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968–69 (Alaska 1997); *Women of the State v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995); *Armstrong v. State*, 989 P.2d 364, 373–74 (Mont. 1999); *In re T.W.*, 551 So.2d 1186, 1193 (Fla. 1989); *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461, 491–92 (Kan. 2019); *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658, 663–64 (W. Va. 1993); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000).

Several of these decisions, especially in socially conservative states, prompted state legislatures to propose constitutional amendments to reverse the decisions. State legislatures in Kansas,

Tennessee, and West Virginia proposed nullifying rulings in those states by clarifying that their state constitutions contained no right to abortion. Voters in Tennessee and West Virginia ratified these amendments in 2014 and 2018, respectively, Tenn. Const. art. I, § 36 (2014); W. Va. Const. art. VI, § 57 (2018), while voters in Kansas rejected the proposed measure in 2022.

In several other states *without* state supreme court decisions on the question of abortion, voters were likewise presented with constitutional amendments that would have precluded their court from finding any such right. Alabamians and Louisianans ratified these amendments in 2018 and 2020, respectively, Ala. Const. art. I, § 36.06(c) (2018); La. Const. art. I, § 20.1 (2020), and Kentuckians rejected its proposed amendment in 2022. Similarly, voters in Massachusetts (1992), Massachusetts (1986), Oregon (1990), and Rhode Island (1986) rejected proposed *bans* on abortion, and voters in Mississippi and North Dakota rejected "fetal personhood" amendments that would have functionally outlawed abortion in 2011 and 2014, respectively.

In other states, voters considered amendments that proposed to *add* an express recognition of abortion rights into their state

constitutions. In 2022, Californians and Vermonters approved legislatively referred amendments that added such a right to their constitutions, Cal. Const. art. I, § 1.1; Vt. Const. ch. 2, art. 22, and Michiganders ratified an initiated amendment to similar effect, Mich. Const. art. I, § 28. Earlier this month, Ohio voters ratified an initiated constitutional amendment that added an abortion-rights provision to the state constitution's bill of rights. Ohio Const. art. I, § 22.

But outside the legality of abortion itself, voters have played a significant role in determining the parameters of the right to abortion. After *Roe v. Wade*, the U.S. Supreme Court held that the right to abortion did not invalidate the Hyde Amendment, and that states were not required to fund medically necessary abortions. *Harris v. McRae*, 448 U.S. 297, 317–18 (1980). Several state supreme courts, however, reached a different conclusion under their state constitutions, frequently relying on their equal rights amendments. *See* Linda Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protections for Abortion Rights Through State Constitutions*, 15 Wm. & Mary J. Women & L. 469, 501–10 (2009).

Voters in Arkansas and Colorado ratified amendments to their state constitutions that barred the use of public funds for abortions,

Ark. Const. amend. art. LXVIII (1988); Colo. Const. art. V, § 50 (1984), effectively precluding their state supreme courts from reaching a similar conclusion. Similar amendments were proposed but ultimately rejected in Florida (2012) and Oregon (1986 and 2018).

Though the U.S. Supreme Court eschewed *per se* declarations that parental notification or consent requirements were unconstitutional, *e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), some state supreme courts reached alternative results. In 1989, for example, the Florida Supreme Court struck down the state's parental-notification requirement, concluding that the state constitution's explicit right to privacy extended further than was held at the time. *T.W.*, 551 So.2d at 1196. But in 2004, voters overwhelmingly ratified an amendment to the Florida Constitution that clarified that (1) seemingly tethered a minor's right to privacy to the U.S. Supreme Court's interpretation of the U.S. Constitution and (2) allowed "the Legislature . . . to provide by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy." Art. X, § 22, Fla. Const. (2004). Similar amendments were rejected by California voters in 2005 and 2006.

Here, too, voter engagement with abortion regulation demonstrates the active use of the "democratic process" to which Justice Kavanaugh referred in *Dobbs*. Voters have engaged with judicial decisions, including *Dobbs* itself, by evaluating amendments that have set out to achieve a variety of purposes. Not all of these measures—in either direction—have been successful. But given the seriousness of the topic, all have reflected meaningful engagement by voters on the issue.

CONCLUSION

In Florida, "[a]ll political power is inherent in the people." Art. I, § 1, Fla. Const. That power includes the right to amend the constitution through the initiative process. Art. IX, § 3, Fla. Const. The initiative power serves a check on a recalcitrant legislature and provides an avenue to establish and enhance individual rights and liberties beyond the base levels established by the federal government. The ability to meaningfully exercise the constitutional tools of "direct democracy" is even more critical when gerrymandered electoral districts and voter suppression policies make the legislature even less accountable to the people.

In the wake of the *Dobbs* ruling repealing federal constitutional protection for reproductive rights, voters turned to state constitutions and their direct democracy provisions to reaffirm and restore those rights. In every state where abortion access and reproductive freedom has been put on the ballot, voters overwhelmingly approved those measures. This reality is what the Attorney General's petition seeks to prevent. The Court should reject this attempt to undermine the rights of the people and to subvert both the intent and express language of this vital constitutional process. The petition should be rejected and the Limiting Government Interference with Abortion amendment placed on the ballot.

Respectfully submitted this the 10th day of November, 2023

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CERTIFICATE OF COMPLIANCE WITH RULE 9.045

I certify that this petition complies with the font (Bookman Old Style 14-point) and word-count requirements. This filing contains 7415 words (including sections permitted to be excluded).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been furnished to the following counsel of record on November 10, 2023 by filing the document with service through the e-Service system (Fla. R. Gen. Prac. & Jud. Admin. 2.516(b)(1)).

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