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SC2023-1392

IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF OF SUSAN B. ANTHONY PRO-LIFE AMERICA IN OPPOSITION TO THE INITIATIVE

Alan Lawson
Florida Bar Number: 709591
Samuel J. Salario, Jr.
Florida Bar Number: 83460
Jason Gonzalez
Florida Bar Number: 146854
Caroline May Poor
Florida Bar Number:1018391

LAWSON HUCK GONZALEZ, PLLC
215 South Monroe Street,
Suite 320
Tallahassee, FL 32301
850-825-4334
alan@lawsonhuckgonzalez.com
samuel@lawsonhuckgonzalez.com
jason@lawsonhuckgonzalez.com
caroline@lawsonhuckgonzalez.com

Counsel for Susan B. Anthony Pro-Life America

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IDENTITY AND INTEREST OF OPPONENT

Susan B. Anthony Pro-Life America ("SBA Pro-Life America") is a non-partisan, not-for-profit organization named after the influential suffragette, who was also a fierce opponent of abortion. It seeks to honor the courageous spirit of Susan B. Anthony and other pro-life women leaders by supporting laws that protect innocent unborn children, opposing laws that promote abortion, and advocating on behalf of unborn children and their mothers.

The initiative here, misleadingly packaged as one that "limit[s] government interference with abortion," asks voters to approve a constitutional amendment containing as many as eight distinct bans on different types of abortion regulations. The effect of lumping them in a single initiative—an effect undisclosed to voters—is to prohibit virtually any statute, administrative rule, or judicial decision regulating abortion and to remove the subject from political debate. SBA Pro-Life America has a significant interest in opposing the initiative because if the Court allows it on the ballot and voters are misled to approve it, the lives and safety of unborn children and their mothers will be left unprotected in the regime of unregulated abortion the initiative will establish.

STATEMENT OF THE CASE AND FACTS

The Attorney General has petitioned for an advisory opinion concerning a citizen initiative titled "Amendment to Limit Government Interference with Abortion." If approved by the electorate, the proposed amendment will bar any branch of government from making or enforcing four distinct categories of abortion regulations—namely, those that "prohibit," "penalize," "delay," or "restrict" abortion. And it will do so with respect to two distinct objects of abortion regulation—namely, "abortion before viability" and "abortion . . . when necessary to protect the patient's health, as determined by the patient's healthcare provider" (thus encompassing post-viability abortion). By its terms, then, the proposed amendment asks voters to approve as many as eight separate prohibitions on abortion regulation, without ballot language disclosing to voters that the principal effect of the amendment is to invalidate all existing abortion regulation in Florida and make abortion available in virtually all circumstances and without any meaningful limitations.

This initiative does not arise in a vacuum. It follows both the United States Supreme Court's decision in *Dobbs v. Jackson*

Women's Health Organization, 142 S.Ct. 2228 (2022), which ended abortion's protected status under the federal Constitution, and subsequent revisions to Florida's abortion statutes, which the proposed amendment will by its terms invalidate. Because it is important to the arguments that follow, we briefly describe that context and then turn to the proposed amendment and accompanying ballot language.

I. *Dobbs* and current abortion regulation in Florida.

In its 2022 decision in *Dobbs*, the Supreme Court overruled its controversial decisions *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), holding that the federal Constitution does not recognize a right to abortion, and returning abortion regulation to the political process. The Court emphasized that abortion regulation is a matter of moral and social policy properly resolved by legislatures, not judges. *See* 142 S.Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."), 2277 ("Our decision returns the issue of abortion to those legislative bodies. . . .").

In reaching those conclusions, the Court emphasized that Americans hold varied and divergent opinions about whether abortion should be legal and, if abortion is to be permitted, under what circumstances and subject to what conditions:

> Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of different views about the particular restrictions that should be imposed.

Id. at 2240. The Court further explained that its decades-long effort to enshrine an abortion right in the Constitution did nothing to quell the public controversy over abortion and that notwithstanding *Roe* and *Casey*, "Americans continue to hold passionate and widely divergent views on abortion . . . ." *See Dobbs*, 142 S.Ct. at 2242.

As *Dobbs* noted, there remains the obvious disagreement over whether abortion should be legal at all. But more significantly here is that even among those who say abortion should generally be either legal or illegal, views are highly correlated to the specific

circumstances in which an abortion might be sought. *See, e.g.*, Harvard-Harris Poll at 41 (June 28-29, 2022)[1] (finding that only 10% of Americans support abortion on demand throughout pregnancy, with the balance supporting restrictions based on circumstances like time or rape/incest); Pew Research Center, *America's Abortion Quandary* (May 6, 2022)[2] (finding nearly two-thirds of Americans support at least some restrictions on abortion depending on when during pregnancy the abortion is sought or limited to instances of rape or incest).

To take one example, Americans' opinions about whether and when there should be restrictions on abortion vary widely. A recent NPR/PBS NewsHour/Marist poll found that some 42% of Americans say abortion should either never be permitted or should only be permitted in instances of rape, incest, or to save the life of the mother, 25% say abortion should only be allowed in the first three months of

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[1] Available at https://harvardharrispoll.com/wp-content/uploads/2022/07/HHP_June2022_KeyResults.pdf (last visited Oct. 31, 2023).

[2] Available at https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ (last visited Oct. 31, 2023).

pregnancy, 12% say abortion should only be allowed during the first six months of pregnancy, and 22% say abortion should be available at any time during the pregnancy. NPR/PBS NewsHour/Marist Poll at 12 (April 17-19, 2023)[3]; *see also* Harvard-Harris Poll, *supra* (describing similar viewpoints).

Opinion about abortion regulation in Florida is no exception to the variation and complexity of viewpoints that characterize the debate nationally. For example, a survey taken weeks after *Dobbs* was decided showed that Floridians were across the map on their views about abortion, but just 33% wanted to "pass a new law to protect abortion access." University of South Florida, *Florida Policy Survey* at 6 (July 2022).[4] A majority of those surveyed would protect unborn children from abortion at various points in pregnancy, *see id.*, and even those in favor of a new law to protect abortion access

[3]Available at https://maristpoll.marist.edu/wpcontent/uploads/2023/04/NPR_PBS-News-Hour_Marist-Poll_USA-NOS-and-Tables_0426_202304211458.pdf (last visited Oct. 31, 2023).

[4] Available at https://www.usf.edu/arts-sciences/departments/public-affairs/documents/news-items/spa-florida-policy-summer-survey-results-2022.pdf (last visited Oct. 31, 2023).

may not support a law that goes as far as the proposed amendment does.

Florida's regulatory scheme concerning abortion, substantially amended after *Dobbs* was decided, reflects the Legislature's deliberate consideration of the precise issues upon which public opinion is so sharply divided. *See* Ch. 2023-21, Laws of Fla.; Ch. 2022-69, Laws of Fla. It does not categorically ban abortion, but it does carefully regulate when, under what conditions, and subject to what limitations an abortion can be performed. *See generally* §§ 390.0111, .01112, Fla. Stat. (2023). For present purposes, four aspects of Florida's regulatory scheme for abortion are salient.

First, it regulates when during pregnancy an abortion may be performed. In particular, section 390.0111(1) prohibits abortion after the unborn child reaches the gestational age of 15 weeks, and section 390.01112(1) prohibits abortion after the unborn child attains viability. *See* §§ 390.0111(1), .01112(1). An abortion may be performed after 15 weeks and after viability, however, if (1) two physicians certify that it is "necessary to save the pregnant woman's life or avert a serious risk of imminent substantial and physical impairment of a major bodily function . . . other than a psychological

condition" or (2) one physician certifies "there is a medical necessity for legitimate emergency procedures for termination of pregnancy" and a second physician is not available for consultation. *Id.* Section 390.0111(1)'s prohibition on abortion after 15 weeks—but not section 390.01112(1)'s prohibition on abortions after viability—is subject to a third exception that applies when two physicians certify that the child has a fatal fetal abnormality. § 390.0111(1)(c).

Second, section 390.0111(5) prohibits partial-birth abortions, defined as one in which the unborn child is partially delivered before being killed. §§ 390.011(10), .0111(5)(a). Such abortions are permissible only to save the life of the mother, "provided that no other medical procedure would suffice for that purpose." *See* § 390.0111(5)(c).

Third, the Legislature has extensively regulated the manner and circumstances in which abortion may be performed. For example:

- *Who can perform abortion.* Only a licensed physician may perform an abortion. *See* §§ 390.011(11), .0111(2).
- *Required testing.* Before performing an abortion, the physician must perform tests to determine whether the unborn child has reached viability. *See* § 390.01112(2).

- *Informed consent.* At least 24 hours before the abortion, the physician must (1) inform the mother of the nature and risks of having or not having an abortion and the probable gestational age of the unborn child and (2) perform an ultrasound and make the images available to the mother. *See* § 390.0111(3). If the mother is the victim of rape, incest, domestic violence, or human trafficking, the information may be provided less than 24 hours before the abortion. *See* § 390.0111(3)(a)1.c.
- *Preservation of the life of the unborn child.* If an abortion is performed after the unborn child attains viability or in the third trimester, the physician must attempt, to the extent consistent with preserving the mother's life and health, to also preserve the life and health of the unborn child. *See* §§ 390.0111(4), .01112(3).
- *Public funds.* Abortion may not be performed using public funds, unless the pregnancy resulted from rape or incest, or the abortion is necessary to preserve the life or prevent serious and irreversible damage to the physical health of the mother. *See* § 390.0111(15).

- *Protections for objectors.* No person associated with a hospital or employed by a physician who states a religious or moral objection to abortion can be required to participate in an abortion or retaliated against for failing to do so. *See* § 390.0111(8).
- *Protections for minors.* A physician may not perform an abortion on a minor without first providing notice to and obtaining written consent from the minor's parents or legal guardian. *See* § 390.01114(3)-(5).

Fourth, the Legislature has delegated to the Agency for Health Care Administration (AHCA) the authority to develop and enforce rules "for the health, care, and treatment of persons in abortion clinics and for the safe operation of such clinics" and specified certain categories of rules the agency must develop. *See* §§ 390.011(3), .012(1). AHCA, in turn, has promulgated rules regarding licensure and inspection of abortion clinics, physical plant requirements for abortion clinics, and regulation of abortion clinic personnel and has extensively regulated the way second-trimester abortions may be performed. *See generally* Fla. Admin. Code. R.59.A-9.019, *et seq.*

The validity of some of these regulations under the privacy provision of article I, section 23 of Florida's constitution is uncertain. In *In re T.W.*, 511 So.2d 1186, 1193-94 (Fla. 1989), this Court held that the provision protects a right to abortion and that abortion regulations are subject to strict scrutiny, *see also Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258-61 (Fla. 2017) (holding that the 24-hour reflection period in section 390.0111(3) was substantially likely unconstitutional); *North Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 615 (Fla. 2003) (holding parental notice requirement unconstitutional). In *Planned Parenthood of Southwest and Central Florida v. State*, Case No. SC22-1050, however, the Court has been asked to recede from these precedents because, among other reasons, they are inconsistent with the original public meaning of article I, section 23, which protects only a right to individual privacy, not a right to decisional autonomy that embraces abortion. If the Court does so or otherwise approves the decision on review or discharges jurisdiction, amendments to sections 390.0111 and .0112 passed in 2023 will become effective. *See* §§ 4, 9, Ch. 2023-21, Laws of Florida. The amendment prohibits abortion after the unborn child reaches the gestational age of six

weeks, subject to exceptions to protect the mother from death or serious physical injury and when the pregnancy is the result of rape, incest, or human trafficking (and the unborn child is not more than 15 gestational weeks old). *See* §§ 4, Ch. 2023-21, Laws of Florida.

II. The proposed amendment and accompanying ballot language.

On October 9, 2023, the Attorney General petitioned this Court for an advisory opinion as to the validity of the proposed amendment. If approved by voters, the proposed amendment would amend the Declaration of Rights in article I to include a new provision as follows:

> **Limiting government interference with abortion.** Except as provided in Article X, Section 22 [parental notification], 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.

The proposed amendment reaches to two different categories of abortion and four different categories of abortion regulations—effectively constituting eight constitutional prohibitions on abortion laws. It begins with the operative words "no law shall," typically interpreted to preclude any source of legal authority—whether a statute, a rule adopted by an executive agency, or a judicial decree—

that is subject to the constitutional prohibition. *See, e.g., Lieberman v. Marshall*, 236 So. 2d 120, 127 (Fla. 1970) ("It is undisputed that the command that no law shall be passed also means that no order shall be issued and no regulation adopted in the name of the state which infringes on the liberty herein reserved to the people.").

That prohibition applies to two categories of abortion. First, it applies to "abortion before viability." The proposed amendment does not define "viability." The amendment's sponsor may intend the point at which an unborn child can survive outside the womb through standard medical measures. *See, e.g.*, § 390.011(15) (defining "viability" in these terms); *Dobbs*, 142 S.Ct. 2268-70 (discussing "viability" in similar terms). Although the viability of any unborn child is dependent on the circumstances of that pregnancy, *see Dobbs*, 142 S.Ct. at 2269, there appears to be consensus that, on average and at present, viability occurs around 23-24 weeks of gestational age, *see Webster v. Reproductive Health Servs.*, 492 U.S. 490, 515 (1989); *see also Fetal Development*, The Cleveland Clinic (March 3, 2021).[5]

[5] Available at https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth (last visited Oct. 31, 2023).

Second, the proposed amendment applies to "abortion . . . when necessary to protect the patient's health, as determined by the patient's healthcare provider"—which would include post-viability abortions. The terms "protect," "health," or "healthcare provider" are also undefined. The term "healthcare provider" may well reach past licensed physicians to nurse practitioners, physician assistants, midwives, psychologists, social workers, and physical therapists.[6] And "health" itself could reach any aspect of physical or mental

[6] *See, e.g.*, 29 C.F.R. § 825.125(a)-(b) (2023) (defining "health care provider" for purposes of the Family and Medical Leave Act); § 440.13(1)(g), Fla. Stat. (defining "health care provider" for workers compensation purposes as "a physician or any recognized practitioner licensed to provide skilled services pursuant to a prescription or under the supervision or direction of a physician. The term 'health care provider' includes a health care facility."); § 766.202(4), Fla. Stat. (defining "health care provider" under the medical malpractice statutes as "any hospital or ambulatory surgical center as defined and licensed under chapter 395; a birth center licensed under chapter 383; any person licensed under chapter 458 [medical practice], chapter 459 [osteopathic medicine], chapter 460 [chiropractic medicine], chapter 461 [podiatric medicine], chapter 462 [naturopathy], chapter 463 [optometry], part I of chapter 464 [nursing], chapter 466 [dentistry], chapter 467 [midwifery], part XIV of chapter 468 [orthodontics, prosthetics, and pedorthics], or chapter 486 [physical therapy]; a health maintenance organization certificated under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers").

health and has been interpreted by the Supreme Court to include emotional and familial health. *See, e.g.*, *Health*, *The American Heritage Dictionary of the English Language* (5th ed. 2022)[7] (defining "health" as "soundness, especially of body or mind"); *Doe v. Bolton*, 410 U.S. 179, 192 (1973), *abrogated by Dobbs*, 142 S. Ct. 2228 ("medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health").

In addition, the proposed amendment would ban four types of regulations with respect to abortion before viability and for the mother's health (including after viability). Words matter, and it is important to be clear about what each means in everyday English:

- *"prohibit"* – The word "prohibit" means "to forbid by authority" or "to prevent." *See Prohibit*, *The American Heritage Dictionary of the English Language* (5th ed. 2022); *see also Prohibit, Black's Law Dictionary* (11th ed. 2019). The

[7]Available at https://ahdictionary.com/word/search.html?q=health (last visited Oct. 31, 2023).

proposed amendment bans any law that forbids any abortion before viability or to protect the health of the mother.

- *"penalize"* – To "penalize" means to "subject (a person), to a penalty, especially for an infringement or regulation" or to "make (an action or a condition) liable to a penalty." *See Penalize*, *The American Heritage Dictionary of the English Language* (5th ed. 2022); *see also Penalize*, *Black's Law Dictionary* (11th ed. 2019). The proposed amendment thus bans any law that imposes a penalty upon a person for performing or causing any abortion before viability or to protect the health of the mother.
- *"delay"* – To "delay" something means to postpone that thing or "to cause [it] to be later or slower than expected or desired." *See Delay*, *The American Heritage Dictionary of the English Language* (5th ed. 2022). The proposed amendment prohibits any law that causes abortions to be deferred or performed later than desired, such as laws providing for reflection periods, informed consent requirements, and screening requirements. This would apply equally to elective abortions before viability and to any performed to protect the health of

the mother, which Florida laws presently accounts for by including statutory exceptions to complying with the laws in the event of a medical emergency.

- *"restrict"* – To restrict something means to "prevent or prohibit [it] beyond a certain limit or restriction." *See Restrict*, *The American Heritage Dictionary of the English Language* (5th ed. 2022). The law thus implicates any state regulation that would impose limits on the abortions before viability or to protect the health of the mother.

Turning to the ballot language, the seven-word ballot title for the initiative is "Amendment to Limit Government Interference with Abortion." The ballot summary is 49 words and reads as follows:

> 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.

The first sentence of the summary tracks the language of the proposed amendment and provides no further explanation as to what the amendment is intended to achieve or what its effects will be. The

second states that the parental notification provision of article X, section 22 of the Constitution is not implicated but provides no explanation of how, for example, the amendment would affect parental-consent requirements.

SUMMARY OF THE ARGUMENT

The primary effects of the citizen initiative are to make abortion on demand at any stage of pregnancy the law of Florida and invalidate the state's existing scheme of abortion regulation *writ large*. Its sponsor achieved that by lumping multiple separate proposals on abortion regulation into a single amendment to the Constitution, and then drafting ballot language that just repeats the text of the proposed amendment without telling voters anything about what the effect of the amendment is. The result is an initiative that violates the requirement of article XI, section 3 of the Constitution that a proposed amendment embrace only "one subject and matter directly connected therewith" and the requirement of section 101.161(1) that the ballot language clearly and honestly tell voters what the amendment actually does. It should not be permitted on the ballot.

With respect to the Constitution's single-subject requirement, a clearer case of logrolling is hard to imagine. The initiative's sponsor is doubtless aware that voters' opinions about whether, when, and subject to what limitations abortion should be permitted—if at all—are varied, conflicting, and strongly correlated to the specific circumstances in which an abortion might be sought. Yet, it drafted a Trojan horse of an amendment that unfairly requires voters to accept constitutional limits on abortion regulation they do not want in order to obtain constitutional limits they may want.

In the end, a proposal banning laws that prohibit abortion for the health of the mother is a different subject from a proposal that prohibits abortion before viability, which, in turn, is a different subject from a proposal that merely restricts either or both. By placing these distinct subjects in a single proposal, logrolling the electorate with them, and affecting abortion regulation at every level of government, the proposed amendment bears every hallmark of a single-subject violation under the text of article XI, section 3 and decades of precedents from this Court holding that such proposals have no place in our initiative process or on a ballot.

Making matters worse, the ballot title and summary fail to inform voters that the principal effect of an amendment rolling up these disparate proposals in a single package is the wholesale legalization of abortion—at any stage—in Florida. The initiative's sponsor could have drafted a ballot summary that clearly and candidly told voters that the amendment constitutionally protects abortion in almost all—if not all—circumstances. Instead, it chose a summary that does nothing more than repeat the text of the amendment and then coupled it with a title that misleadingly implies that the amendment merely "limits" unwanted government "interference" with abortion when it in fact bars it altogether.

Section 101.161(1) is a truth-in-packaging law for initiatives like this and requires a clear statement of the amendment's chief purpose and a truthful description of what it does. The initiative fails for this second statutory reason as well.

STANDARD OF REVIEW

This Court has traditionally measured whether an initiative petition is legally defective by reference to two independent requirements: (1) the single-subject requirement of article XI, section 3 of the Florida Constitution, which applies to the text of the

proposed amendment itself; and (2) the truth-in-packaging requirements of section 101.161, Florida Statutes, which apply to the ballot title and summary. *See Adv. Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So.3d 1176, 1179 (Fla. 2021). The first requirement—the rule that an initiative affects only a single subject—is a "rule of restraint" that protects the Constitution "from precipitous and cataclysmic change" caused by a single amendment embracing multiple topics. *See Adv. Op. to Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994). And the second requirement, which demands truth in packaging in the ballot language, ensures that voters "can cast an intelligent and informed ballot" by requiring "[a]n accurate, objective, and neutral summary of the proposed amendment." *Adult Use of Marijuana*, 315 So. 3d at 1180 (citations and quotations omitted).

ARGUMENT

The initiative petition in this case fails under each of the two requirements the law imposes.

I. The initiative violates the single-subject requirement of article XI, section 3 because it merges as many as eight separate subjects in a single package, engages in impermissible logrolling, and alters the functions of multiple branches of government.

In relevant part, article XI, section 3 of the Florida Constitution provides as follows:

> 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, except those limiting the power of government to raise revenue, *shall embrace but one subject and matter directly connected therewith.*"

Art. XI, § 3, Fla. Const. (emphasis added).

This Court has made plain that the "supremacy-of-text principle" governs the interpretation of the Florida Constitution. *See Adv. Op. to Gov. re Implementation of Amend. 4, the Voting Restoration Amend.*, 288 So. 3d 1070, 1078 (Fla. 2020). The actual words used in the Constitution—not the intentions or purposes of drafters or voters—are what matters, and "what [those words] convey, in their context, is what the text means." *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)).

Historically, however, the Court's interpretation of the one-subject provision of article XI, section 3 has not focused on "the objective meaning of the text" of that provision. *See id.* Instead, the Court's precedents have, for decades, looked to the "intent and purpose" of the single-subject rule, which the Court has said is for a proposed constitutional amendment to have "a logical and natural oneness of purpose," as measured by whether the amendment reaches multiple subjects, whether the amendment engages in logrolling, and whether the amendment affects multiple branches of government. *Fine v. Firestone*, 448 So. 2d 984, 990, 993 (Fla. 1984); *see also Adv. Op. to Atty Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet*, 291 So. 3d 901, 905 (Fla. 2020).

It would be more faithful to the supremacy-of-text principle for this Court to hold that—as used in article XI, section 3—(1) the word "one" really means just "one" and (2) the word "subject" means a distinct proposition that can be presented for an up or down vote. *See Subject*, *The American Heritage Dictionary of the English Language* (5th ed. 2022) (defining "subject" as "a person or thing

being dealt with"); *Subject, Merriam-Webster*[8] (defining "subject" as "something concerning which something is said or done"). That reading of the single-subject requirement is truer to the ordinary meaning of the text "one subject and matter directly connected therewith," as used in the context of a constitutional provision governing citizen initiatives submitted to voters that, as discussed further below, are unique among methods for amending the Constitution in that "the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing amendments." *Adv. Op. to Att'y Gen. re Amend. to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 891 (Fla. 2000).

This reading also has the virtue of rescuing courts and litigants from an unworkable test for determining whether a proposed amendment violates the single-subject requirement that there are no significant reliance justifications for maintaining. *See generally State v. Poole*, 297 So. 3d 487, 506 (Fla. 2020). An inquiry that hinges on a judge's ad hoc "conception of 'oneness'" is necessarily subjective

[8] Available at https://www.merriamwebster.com/dictionary/subject (last visited Oct. 31, 2023).

and subject to "change every time new members come onto th[e] Court." *Adv. Op. to Att'y Gen.—Ltd. Pol. Terms in Certain Elective Offs.*, 592 So. 2d 225, 231 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part). An inquiry founded on the ordinary meaning of the words "one subject" as used in the context of article XI, section 3 is not.

Measured by a standard founded in the text of the one-subject requirement, the proposed amendment fails. On its face, it at a minimum addresses two distinct propositions—one concerning abortion before viability and one concerning abortion for the health of the mother. But beyond that, it also addresses four different types of laws affecting those distinct topics. It is, in substance, an amendment addressing as many as eight different bans on a diverse range of abortion regulations. There is no ordinary understanding of the words "one subject and matter directly connected therewith" that embraces such an amendment.

Regardless of whether the Court interprets article XI, section 3 in accord with its text or with its past "oneness of purpose" precedents, the result is the same. Because the proposed amendment on its face has multiple purposes, engages in impermissible

logrolling, and affects multiple branches of government, it fails the single-subject test by either measure.

A. On its face, the proposed amendment embraces multiple different subjects.

The proponents of the initiative will doubtless claim that the proposed amendment deals only with the "one subject" of state power to regulate abortion. But this Court has in the past been skeptical of such assertions, holding that "enfolding disparate subjects within the cloak of broad generality does not satisfy the single-subject requirement." *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984); *see also Adv. Op. to Att'y Gen.—Restricts Laws Related to Discrim.*, 632 So. 2d 1018, 1020 (Fla. 1994) (quoting *Evans*).

That skepticism is well founded and should be brought to bear here. Initiative petitions are blunt instruments that can drastically alter the rights and obligations of citizens and government and cast those changes in constitutional concrete. *See Save Our Everglades*, 636 So. 2d at 1339 (describing the single-subject requirement as "a rule of restraint designed to insulate Florida's organic law"). Yet unlike everyday legislation and, indeed, unlike any other method for amending Florida's constitution, the initiative process lacks any of

the hallmarks of democratic discussion and compromise that provide insurance against seismic changes in constitutional law.

Citizen initiatives are drafted by a sponsor interested in a specific outcome and are presented to voters as written. They are *not* the product of public hearing and debate, are *not* the product of negotiation and compromise between competing interests, and are *not* the product of the fine-pen revision that accommodates opposing values in controversial policy decisions. *See Fine*, 484 So. 2d at 988. In sharp contrast, those important mediating functions—in which representation of varying interests in the outcome is ensured—are achieved through legislation by the people's elected representatives, and amendment proposals by the Legislature, the constitution revision commission, and a constitutional convention. *See* art. XI, §§ 1, 2, 4, Fla. Const. Given the inherent and unique limitations of the initiative process, this Court has required "strict compliance with the single-subject rule" and has been suspicious of broadly framed initiatives that work as Trojan horses to pack multiple distinct subjects into a single text. *See Race in Public Educ.*, 778 So. 2d at 891 (quoting *Fine*, 448 So. 2d at 989); *see also Adv. Op. to Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales*

Tax Exemptions and Exclusions Serve a Public Purpose, 880 So. 2d 630, 634 (Fla. 2004) ("Although FAIR argues that the proposed amendment deals with the single-subject of sales tax, in reality, the initiative . . . contains three disparate subjects.").

The proposed amendment here is a Trojan horse that accomplishes vastly different objectives bounded by vastly different considerations. To begin, take the two types of abortion the proposed amendment affects—abortion before viability and abortion to protect maternal health. The viability provision would ban any law prohibiting, penalizing, delaying, or restricting abortion before viability, regardless of the circumstances or the mother's reasons for seeking an abortion. It is, in effect, a constitutional guarantee of abortion at any time and for any purpose during the first 24 weeks of pregnancy. That subject of the proposed amendment presents the question of whether and to what extent the interests of a mother in terminating an pregnancy before the unborn child can survive on its own uniformly and in all cases trumps any interest of the unborn child or society in prohibiting, penalizing, restricting, or delaying such an abortion—*e.g.*, the unborn child's status as human life, the interest in avoiding pain to the unborn child, the interest in the ethics

and integrity of the medical profession. *See generally Dobbs*, 142 S.Ct. at 2311-12 (Roberts, J. concurring) (describing legitimate state interests militating against permitting abortion prior to viability).

The health provision, in contrast, bars any law that prohibits, penalizes, delays, or restricts abortion *at any time*—up to and including the moment of birth—so long as a "health care provider" says it is necessary to "protect" the mother's "health"—not life, but health. That distinct subject presents the very different question of whether a vague and generalized interest in the mother's "health" overrides any interests of the unborn child and society in prohibiting, penalizing, delaying, or restricting abortion *at any time*, up to and including the delivery of the child. It involves profoundly different moral and policy questions concerning the nature of human life (is an almost-born child human?), the nature of the health concern (physical or psychological, permanent or transitory, life-threatening or not?), and who decides or informs the judgment (a doctor, a midwife, a psychologist?), among others. It presents an entirely different subject than a question about whether abortion before viability should be allowed.

The proposed amendment's specification of four different types of abortion regulations only reinforces that there is no "oneness of purpose" to the proposed amendment. Manifestly, whether the law should "prohibit" an abortion prior to viability—*i.e.*, whether it should ban such abortions—involves moral and policy questions distinct from those governing whether the law should be able to "restrict" abortion prior to viability, such as by requiring that abortions be performed by a licensed doctor, requiring parental consent for minor abortions, or by regulating the place and way second-trimester abortions are performed. Likewise, whether the law should "delay" an abortion prior to viability—for example, by imposing a 24-hour informed consent period—involves different questions than does whether to "penalize" such an abortion—for example, by punishing the doctor who performs one in violation of a statute or regulation.

The point is that although, at a high level of generality, the proposed amendment is focused on abortion laws, its multiple different components have "substantial, yet disparate, impact[s]," *Fairness Initiative,* 880 So. 2d at 635, on what kind of abortion might be regulated, what parts of government might regulate it, and under what circumstances it might be regulated. It lacks the "necessary

oneness of purpose" this Court's precedents require. *See, e.g., Adv. Op. to Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 491 (Fla. 1994) (holding that initiative prohibiting constitutional amendments regarding taxes and fees absent a two-thirds vote violated the single-subject rule by combining both taxes and fees); *Fine*, 484 So. 2d at 990 (holding that initiative bearing on how the government revenue violated single-subject requirement by combining taxation, fees, and bonds in a single amendment).

B. The proposed amendment engages in impermissible logrolling.

This Court has repeatedly held that a proposed constitutional amendment violates the single-subject requirement when it engages in "logrolling," "a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." *Fairness Initiative*, 880 So. 2d at 633 (quoting *Save Our Everglades*, 636 So. 2d at 1339). The prohibition is based on the idea that "[a]n initiative proposal with multiple subjects, in which the public has had no representative interest in drafting, places voters with different views on the subjects

contained in the proposal in the position of having to choose which subject they feel most strongly about." *Fine*, 448 So. 2d at 988.

Plainly, voters have multifaceted and strong views about the categories of abortion laws the proposed amendment would ban. To start, take its twin bans on laws that "prohibit" abortion before viability and laws that "prohibit" abortion to protect the health of the mother. It is entirely predictable that many voters simultaneously hold the views (1) that abortion should be prohibited at some point before viability, and thus that they do not support an amendment categorically banning laws that prohibit pre-viability abortions and (2) that abortion should be permitted to protect the life or health of the mother, and thus that they do support an amendment banning laws that prohibit abortion in those circumstances. Yet, by cramming both subjects in a single amendment, the initiative forces those voters "to accept part of a proposal which they oppose," a ban on laws prohibiting abortion before viability, "in order to obtain a change which they support," a ban on laws prohibiting abortion to protect maternal health. *Fine*, 448 So. 2d at 993.

The logrolling problems grow by exponents when the four types of abortion laws the proposed amendment proscribes are thrown into

the mix. It is plausible that many voters would support an amendment banning laws that "prohibit" abortion before viability but oppose an amendment banning laws that "restrict" abortion before viability, thinking that such abortions should be available but only in limited circumstances like, as the Legislature determined, rape or incest or before 15 weeks' gestation.

Likewise, it is predictable that many voters could support an amendment banning laws that "delay" an abortion when the mother's "healthcare provider" says it is necessary, believing that delay might risk a mother's life, but oppose an amendment banning laws that "restrict" such an abortion, believing, as the Legislature does, that a health exception should only apply when life or irreversible physical injury is threatened. Or, voters could oppose an amendment banning laws that "delay" abortion before viability, believing, as the Legislature does, that something akin to a 24-hour informed consent period is necessary, while also supporting an amendment banning laws that "penalize" abortion to protect maternal health, believing that the criminal law is too much force for the problem. With the proposed amendment banning four distinct categories of laws affecting two distinct categories of abortion, there are at least 256

permutations—two to the eighth power—on how a voter might slice the onion in a world where all these separate subjects were presented separately instead of being shoehorned into a single initiative.

Under this Court's precedents, it is impermissible to thrust these Hobson's choices on the electorate. For example, in *Restricts Laws Related to Discrimination*, the Court was presented with an amendment that, in a single package, banned antidiscrimination laws that "create[], establish[] or recognize[] any right, privilege, or protection" based on traits other than "race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status." 632 So. 2d at 1019. The Court rejected the argument that the proposal dealt with the single subject of discrimination and held that it violated the single subject rule by "enumerat[ing] ten classifications of people . . . entitled to protection from discrimination if the amendment were passed." *Id.* at 1020. The Court explained:

> The voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. *Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote*

> *on the classifications listed in the amendment, defies the purpose of the single-subject limitation.*

Id. (emphasis added).

Similarly, in *Fairness Initiative*, a proposed amendment titled "Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose" required the Legislature to (1) review exemptions from the sales tax specified by statute, (2) to review exclusions from the sales tax that were not specified by statute (thereby creating a tax on exclusions the Legislature omitted from its review), and (3) to state a public purpose when it passed exemptions or exclusions to the sales tax. *See* 880 So. 2d at 634-35. Although the proposed amendment related entirely to the subject of sales taxation, the Court held that it engaged in logrolling and violated the single-subject requirement. *Id.* at 635. It explained that "[a] voter may support requiring the Legislature to periodically review tax exemptions . . . but oppose the actual creation of a broad sales tax on undefined services that are currently excluded. . . ." *Id.* And because the initiative "require[d] the voter to choose all or nothing among the three apparent effects of the

amendment," it "engage[d] in impermissible logrolling" and was invalid. *Id.* (marks and citations omitted).

The proposed amendment here is not different in any respect that matters. By packing two different categories of abortion and four different categories of regulations—all distinct subjects about which voters can and do feel differently—into a single measure, the proposed amendment engages in impermissible logrolling. *See also Save Our Everglades*, 636 So. 2d at 1341 (holding that amendment that provided for Everglades restoration with funding to be paid by the sugar industry "embodies precisely the sort of logrolling that the single-subject rule was designed to foreclose").

C. The proposed amendment alters the functions of multiple branches of state government.

Finally, the proposed amendment also contains the third hallmark of a single-subject violation: it "substantially alters or performs the functions of multiple branches of state government"—here, the legislative, executive, and judicial branches. *Adv. Op. to Att'y Gen. re Fish & Wildlife Conserv. Comm'n*, 705 So. 2d 1351, 1354 (Fla. 1998).

Initially, the proposed amendment "performs an essentially legislative function" because it "implements a public policy decision of statewide significance." *Save Our Everglades,* 636 So. 2d at 1340. As the Supreme Court recognized in *Dobbs*, whether, under what circumstances, and subject to what regulations abortion should be permitted or outlawed are basic public policy choices that quintessentially belong to legislatures. *See* 142 S.Ct. at 2243, 2277. The proposed amendment performs that function by (1) making a statewide policy choice that abortion before viability or for health reasons can *never* be prohibited, penalized, delayed, or restricted, (2) effectively striking sections 390.0111 and 390.01112 from the statute books, (3) decriminalizing abortions performed in violation of law, and (4) substantially restricting, if not eliminating altogether, the Legislature's authority to regulate the time, place, and manner in which abortions before viability or for the health of the mother are performed. "The exercise of these traditionally legislative functions is not even subject to the constitutional check of executive branch veto." *Save Our Everglades*, 636 So. 2d at 1340.

In addition, the proposed amendment substantially alters the functions of the executive branch. AHCA is an executive department

vested with authority to promulgate and enforce rules "for the health, care, and treatment of persons in abortion clinics and for the safe operation of such clinics." § 390.012(1); *see also* art. IV, § 6, Fla. Const. (placing departments in the executive branch); § 20.42 (creating AHCA as a department). The proposed amendment overruns a substantial swath of AHCA's rulemaking and enforcement territory by vastly restricting its ability to promulgate rules regulating abortion before viability or for the health of the mother. It calls its existing rules—particularly its extensive rules regarding when, how, and under what conditions second-trimester abortions may be performed—into serious question and limits its ability to make abortion safety regulations prospectively. It would, after all, be the rare regulation that does not, at a minimum, have the effect of "restrict[ing]" or "delay[ing]" the object upon which it operates. Under the proposed amendment, abortion providers will be virtually immune from enforcement of the law insofar as abortions prior to viability or for the health of the mother are concerned. *See Save Our Everglades*, 636 So. 2d at 1340 ("Because various other executive agencies have jurisdiction in this area, the constitutionally conferred

powers of the trustees would impinge on the powers of existing agencies.").

The proposed amendment also trenches on a traditionally judicial function. By placing the disparate subjects of rules that prohibit, penalize, delay, or restrict abortion before viability or for the mother's health outside the reach of the law, it limits the judiciary's traditional role of determining what the law is. Someday, for example, a court may be asked to determine whether state sanctioned partial-birth abortion, even when related to the mother's health, violates the partially born child's rights to due process under article I, section 9. Or perhaps a court will be asked whether compelled participation in an abortion procedure violates a public employee's right to religious freedom under article I, section 3. Under the proposed amendment, the courts' ability to decide those questions is cast into substantial doubt. *Cf. Save Our Everglades*, 636 So. 2d at 1340 (holding that a proposed amendment "renders a judgment of wrongdoing and de facto liability and thus performs a quintessential judicial function"); *Restricts Discrimination*, 632 So. 2d at 1020 ("[T]he proposed amendment encroaches . . . on the rulemaking authority of executive agencies and the judiciary.").

Accordingly, the proposed amendment substantially alters the functions of the legislative, executive, and judicial branches of state government. It thus violates the single-subject requirement of article XI, section 3. *See also Fine*, 448 So. 2d at 988 (stating that the single-subject rule ensures that citizens are presented only with "singular changes in the functions of our governmental structure").

II. The ballot title and summary violate the truth-in-packaging provisions of section 101.161(1) because they fail to disclose the amendment's chief purpose and mislead as to the amendment's primary effects.

Section 101.161(1) is a "truth in packaging law" for ballot initiatives. *See Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000). It requires (1) a title limited to fifteen words consisting of "a caption . . . by which the measure is commonly referred to or spoken of" and (2) a summary limited to 75 words that explains in "clear and unambiguous language . . . . the chief purpose of the measure." These requirements ensure that voters are not "misled as to the proposed amendment's purpose and can cast an intelligent and informed ballot." *Adv. Op. to Att'y Gen. re Prohibits Possession of Defined Assault Weapons*, 296 So. 3d 376, 380 (Fla. 2020) (cleaned up).

Under section 101.161, a ballot title and summary are defective, and cannot be placed on the ballot, if they either (1) fail to inform the voter, in clear and unambiguous terms, of the chief purpose of the amendment or (2) mislead the public. *See Adv. Op. to Att'y Gen. re Right to Competitive Energy Mkt. for Customers of Inv.-Owned Utilities*, 287 So. 3d 1256, 1260 (Fla. 2020). The ballot title and summary "may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Prohibits Possession*, 297 So. 3d at 380-81 (quotation omitted). The initiative here fails both prongs of the test.

A. The ballot title and summary fail to explain, in clear and unambiguous language, the chief purpose of the initiative.

The primary effect of the initiative here is to constitutionalize abortion on demand at all stages of pregnancy by sweeping virtually all existing abortion regulations away and drastically limiting the state's ability to adopt abortion regulation in the future. The ballot language, however, merely repeats the text of the amendment, which gives voters no hint that this is what it will accomplish.

"To conform to section 101.161(1), a ballot summary must state 'the chief purpose' of the proposed amendment." *Armstrong*, 733 So.

2d at 18. This requirement ensures that "the electorate is advised *of the true meaning, and ramifications*, of an amendment." *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 665 (Fla. 2010) (emphasis added); *see also Detzner v. League of Women Voters of Fla.*, 256 So. 3d 803, 807 (Fla. 2018) (same).

The "chief purpose" of a proposed amendment is the "principal or most important objective, goal, or end" of the amendment. *All Voters Vote*, 291 So. 3d at 907-08 (Lawson, J., concurring). To ascertain the "chief purpose" of an amendment, this Court looks to "objective criteria, like the amendment's main effect to determine whether a ballot summary complies with the statute." *Detzner*, 256 So. 3d at 809 (quoting *Armstrong*, 773 So. 2d at 18).

Measured by objective criteria, the chief purpose of the amendment is to make abortion on demand a constitutional right in Florida. The viability provision of the amendment bars any law that prohibits, penalizes, delays, restricts abortion before viability, effectively making abortion legal without exception—at least under current understandings of viability—at any time before the twenty-fourth week of pregnancy, or roughly the end of the second trimester.

In the third trimester, the "health" provision does the work. Without exception, it makes third-trimester abortion legal—and prohibits the state from prohibiting, penalizing, delaying, or restricting such an abortion—whenever any "healthcare provider" decides it is necessary to "protect" the "health" of the mother. Because the amendment makes the provider's decision all but unregulatable, it is fanciful to think that the amendment allows third-trimester abortions to be limited at all. Put differently, it is all but impossible to imagine a circumstance in which a woman who wants a late-term or partial-birth abortion will not be able to find a doctor, nurse, midwife, or other provider to say that the abortion is somehow necessary for the mother's physical or mental health. The horror story of the Kermit Gosnell abortion clinic says all any objective observer needs to know about the dangers of unregulated abortions. *See Abortion Doctor Kermit Gosnell Guilty of First Degree Murder*, ABC News (May 13, 2013).[9]

[9] Available at https://abcnews.go.com/US/abortion-doctor-kermit-gosnell-guilty-degree-murder/story?id=19168967 (last visited Oct. 31, 2023).

The collective effect of the proposed amendment's multiple prohibitions is to write any material regulations on abortion in Florida law out of the books. Gone is the Legislature's decision to restrict abortion after the first 15 (or six) weeks of pregnancy unless narrow exceptions related to prevention of death or serious injury are met; abortion before viability cannot be "prohibited." Gone is the Legislature's decision to prohibit partial-birth abortion unless necessary to save the mother's life; abortion for "health" reasons can't be "restricted." The same is true of the Legislature's decision to require doctors performing post-viability abortions to attempt to save the unborn child's life (it can't restrict abortions for health reasons), to require informed consent 24 hours prior to an abortion procedure (it can't delay an abortion), and to penalize doctors who violate abortion law (it can't penalize them). Its laws prohibiting public funding for abortion, protecting religious or moral objectors, and delegating rulemaking authority to AHCA are likewise on the chopping block (it can't restrict, delay, or penalize abortions).

Given the seismic effect of the proposed amendment on abortion in Florida, the problem here "lies not with what the summary says, but rather, with what it does not say." *Askew v. Firestone*, 421 So.

2d 151, 156 (Fla. 1982). The ballot title and summary give voters no indication that the broad legalization of abortion in the state is what the amendment accomplishes. It does not explain how or in what circumstances the amendment makes abortion legal, what abortions the term "viability" allows, what abortions the terms "health" or "healthcare provider" allow, or that the amendment would invalidate existing statutes and prevent future statutes that reflect considered judgments setting limits on abortion, judgments many voters agree with. *See, e.g.*, *Fish & Wildlife Conserv. Comm'n*, 705 So. 2d at 1355 ("[T]he proposed amendment . . . strips the legislature of its exclusive power to regulate marine life and grants it to a constitutional entity. The summary does not sufficiently inform the public of this transfer of power.").

On the contrary, all the average voter would take from the ballot title and summary is that government can't "interfere" with abortions early in pregnancy and when medical considerations call for it. He or she would have no idea that the broad and vague term "viability" might extend as far as the end of the second trimester or that the broad and vague terms "health" and "healthcare provider" could allow a late-term abortion based on a psychologist's assessment of a

mother's mental health. The average voter would not know that whether an unborn child is "viable" or "non-viable" would be determined by the "healthcare provider," an individual who may have a financial interest in the outcome who may be seeing the patient for the very first time on the day of the abortion. In sum, the ballot title and summary give no indication of either the broad constitutional guarantee of abortion on demand the proposed amendment creates or the array of laws it will upend. *See also Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998) ("When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it . . . must be stricken."); *Restricts Discrimination*, 632 So. 2d at 1021 ("Both the summary and the text of the amendment omit any mention of the myriad of laws, rules, and regulations that may be affected. . . .").

That the summary tracks the text of the amendment is of no legal moment. This Court has held that "it is not sufficient for a ballot summary to faithfully track the text of a proposed amendment." *Detzner*, 256 So. 3d at 811 (citing *Armstrong*, 773 So. 2d at 15); *see also Wadhams v. Bd. of Cty. Commr's of Sarasota Cty.*, 567 So. 2d 414, 416 (Fla. 1990) (holding that ballot summary that reproduced

the text of an amendment but "fail[ed] to contain an *explanatory statement* of the amendment" was defective). And voters should not have to divine the legal meaning of the text of a proposed amendment to understand what its chief purpose is. *See Detzner*, 256 So. 3d at 809-10 (stating that if a phrase that "is neither commonly nor consistently used, it cannot be commonly understood by voters"); *cf. Adult Use of Marijuana*, 315 So. 3d at 1183-84 (holding that the misleading implication that an amendment might affect both federal and state marijuana laws could not be remedied by voters' "common understanding and knowledge" of legal rules) (marks and citation omitted). Instead, voters "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." *Askew*, 421 So. 2d at 155 (quotation omitted).

On its face, the ballot language here fails to provide that fair notification and is thus clearly and conclusively defective.

B. The ballot title and summary are misleading to voters.

The ballot title and summary fail for the additional reason that they are misleading. Ballot language can be misleading "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." *Competitive Energy*, 287 So. 3d at 1260. Or, put more simply, ballot language "cannot either fly under false colors or hide the ball as to the amendment's true effect." *Detzner*, 256 So. 3d at 808 (quotation omitted). The ballot title and summary in this case do both for at least four reasons.

First, as described in the preceding section, the ballot title and summary "hide the ball" by packaging a constitutional guarantee of abortion on demand as a measured proposal that merely precludes a handful of regulations regarding two limited circumstances, which some voters might, at a high level of abstraction and without dissecting the amendment's text in the way that a lawyer or judge would, think is a good or at least acceptable idea. That alone should be enough to strike it from the ballot.

Second, the ballot title and summary use vague language to obscure the reach of the proposed amendment's ban on laws affecting abortion. The initiative's proponents could have honestly told voters that the amendment makes abortion legal in all circumstances up to 24 weeks and whenever a doctor, nurse, midwife, psychologist, or physical therapist says so. Instead, the language they chose masks

this effect by using vague terms like "viability," "health," and "healthcare provider" that are not explained and that hide the true scope of the initiative. *See, e.g.*, *Race in Public Educ*, 778 So. 2d at 899 (holding that ballot summary that failed to define vague key terms misled voters as to the full effect of the amendment).

Third, the ballot language misleads with respect to its effect on partial-birth abortion. On the one hand, it fails to disclose to voters that if adopted, partial-birth abortion will become legal in Florida with the approval of whoever qualifies as a "healthcare provider" and without material limitation. That omission matters because the amendment's authorization of partial-birth abortion is incontestably a "material effect" of the amendment, *Competitive Energy*, 287 So. 3d at 1260; substantial numbers of voters think partial-birth abortion is barbaric and ought to be prohibited. *See* Lydia Saad, *Americans Agree With Banning "Partial-Birth Abortion,"* Gallup (Nov. 6, 2023).[10]

And on the other hand, the ballot language fails to disclose that partial-birth abortion is prohibited under federal law unless

[10] Available at https://news.gallup.com/poll/9658/Americans-Agree-Banning-PartialBirth-Abortion.aspx (last visited Oct. 31, 2023).

"necessary to save the life of a mother whose life is endangered by a . . . condition caused by or arising from the pregnancy itself," § 18 U.S.C. 1531(a) (2023), which is much more restrictive than the "healthcare provider" standard in the proposed amendment and ballot language. Thus, the ballot language misleadingly implies that the proposed amendment would permit what the federal code expressly prohibits. *See Adult Use of Marijuana*, 315 So.3d at 1183 ("Because the summary affirmatively conceals the possibility that an individual could be prosecuted for conduct the amendment purports to permit or authorize, the summary is clearly and conclusively defective.") (cleaned up).

Fourth, the ballot language incorrectly implies that the amendment will not impact parental rights when their children seek abortions. Currently, Florida requires parental consent, with limited exceptions, before a physician can perform an abortion on a minor. *See* § 390.01114(3). If the proposed amendment passes, this statute will likely be another casualty. The loss of parental consent is obscured in the ballot language, which highlights that the proposed amendment will not change the constitutional right to parental notification—leading voters to assume that the right to parental

consent will be similarly untouched. This is notable as parental consent is broadly supported, even by those who otherwise support abortion. *See Most Voters Back Parental Notification for Minors' Abortions*, Rasmussen Reports (July 18, 2022)[11] (finding "60% in favor of requiring parental permission and just 29% against it").

Fifth, the title of the initiative—"limiting government interference with abortion"—is misleading. To begin with, the phrasing carries the emotionally and politically charged connotation of unwelcome engagement in a woman's autonomy. That violates this Court's longstanding precedent that the ballot title and summary are no place for "political rhetoric" and "emotional language" because they should "tell the voter the legal effect of the amendment and no more." *Save Our Everglades*, 636 So. 2d at 1341-42 (citation and quotation omitted); *see also Adv. Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) ("The use of the phrase 'provides property tax relief' constitutes political

[11]Available at https://rasmussenreports.com/public_content/politics/public_surveys/most_voters_back_parental_notification_for_minors_abortions (last visited Oct. 31, 2023).

rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment.").

Furthermore, the substance of the proposed amendment does far more than merely "limit" abortion regulation. It outlaws it in virtually all cases. By suggesting that the scope of the proposed amendment is substantially more measured than it in fact is, the ballot language "flies under false colors" relative to what the amendment actually does.

* * * * *

In sum, the ballot title and summary take a proposed amendment that impermissibly packages multiple subjects in a single proposal then conceals from voters—both through what the language says and does not say—that the chief purpose of the amendment is to legalize abortion in Florida in virtually all cases. The ballot title and summary do not allow voters to "cast an intelligent and informed ballot," and they violate the requirements of section 101.161(b). *Adult Use of Marijuana*, 315 So. 3d at 1180.

CONCLUSION

The initiative petition in this case violates both the one-subject requirement of article XI, section 3 and the truth-in-packaging

requirements of section 101.161(1). The Court should preclude its placement on the ballot.

Dated: October 31, 2023

Respectfully Submitted,

/s/ Samuel J. Salario, Jr.

Alan Lawson
Florida Bar Number: 709591
Samuel J. Salario, Jr.
Florida Bar Number: 83460
Jason Gonzalez
Florida Bar Number: 146854
Caroline May Poor
Florida Bar Number:1018391
LAWSON HUCK GONZALEZ, PLLC
215 South Monroe Street, Suite 320
Tallahassee, FL 32301
850-825-4334
alan@lawsonhuckgonzalez.com
samuel@lawsonhuckgonzalez.com
jason@lawsonhuckgonzalez.com
caroline@lawsonhuckgonzalez.com
michelle@lawsonhuckgonzalez.com
marsha@lawsonhuckgonzalez.com
stephanie@lawsonhuckgonzalez.com

Counsel for Susan B. Anthony Pro-Life America

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed with the ePortal website and served on October 31, 2023, to the following:

Cord Byrd
Secretary of State
Florida Department of State
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399-0250
joseph.vandebogart@dos.myflorida.com

Ron DeSantis
Governor, State of Florida
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399-0001
ryan.newman@eog.myflorida.com

Kathleen Passidomo
President, Florida Senate
Senate Office Building
404 S. Monroe St.
Tallahassee, FL 32399-1100
carlos.rey@flsenate.gov

Courtney Brewer
P.O. Box 3441
Tallahassee, FL 32315-3441
cbrewer.law@gmail.com

Counsel for Floridians Protecting Freedom, Inc.

Paul Renner
Speaker, Florida House of Representatives
420 The Capitol
402 S. Monroe St.
Tallahassee, FL 32399-1300
david.axelman@myfloridahouse.gov

Nathan A. Forrester
Senior Deputy Solicitor General
Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
nathan.forrester@myfloridalegal.com

Hélène Barthélemy
Daniel B. Tilley
Nicholas L.V. Warren
Michelle Morton
ACLU Foundation of Florida
4343 W. Flagler St., Suite 400
Miami, FL 33134
hbarthelemy@aclufl.org
dtilley@aclufl.org
nwarren@aclufl.org
mmorton@aclufl.org
courts@aclufl.org

Counsel for Floridians Protecting Freedom, Inc.

/s/ Samuel J. Salario, Jr.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.210(a)(2) because it was prepared using Bookman Old Style 14-point font and the word count is 10,051.

/s/ Samuel J. Salario, Jr.