SC2023-1392

IN THE SUPREME COURT OF FLORIDA

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

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

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INTRODUCTION

The initiative is invalid because it logrolls voters with up to eight unrelated bans on abortion regulations while misleading them to think the collective effect of those prohibitions—the legalization of abortion on demand and elimination of government authority to regulate abortion in ways voters support—is a measured proposal to "limit" unwarranted "interference" with abortion.

No proponent of the proposed amendment disputes that:

- The two separate categories of abortion it reaches—abortion before viability and abortion on a healthcare provider's say-so—present distinct moral and policy issues. (IB.28-29).[1]
- The four verbs it uses to identify the categories of regulation it bans—prohibit, penalize, delay, and restrict—have different meanings and invalidate different laws. (IB.29-30).
- Voters can and do feel differently about the two categories of abortion it reaches and the four types of regulations it invalidates. (IB.4-7, 32-34).

[1] Our initial brief is cited "IB.__," the Sponsor's brief "SB.__," the former elected officials' brief "FEB.__," and the law professors' brief "LPB.__."

- Its primary effects are to create a state-level right to abortion on demand and invalidate any material abortion regulations, including partial birth abortion restrictions and parental consent laws. (IB.44-45).

That no proponent contests these facts is proof the amendment violates the one-subject requirement of the Constitution and the accuracy requirements of section 101.161(1), Florida Statutes (2023).

ARGUMENT

I. The amendment impermissibly bundles multiple unrelated bans on abortion regulation and violates the one-subject requirement.

Whether measured under the Court's oneness-of-purpose cases or the text and context of article XI, section 6, the amendment fails the one-subject requirement.

A. The proposed amendment fails under this Court's oneness-of-purpose precedents.

On oneness-of-purpose, the Sponsor's brief did what we said it would: claim the amendment's disparate provisions have a "singular purpose" of "limiting government interference with abortion." (SB.16). The Sponsor fails to acknowledge, however, that that "enfolding disparate subjects within the cloak of a broad generality does not

satisfy the single-subject requirement." *Adv. Op. to Att'y Gen.—Restricts Laws Related to Discrim.*, 632 So. 2d 1018, 1020 (Fla. 1994) (quoting *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984)). Nor does it state a principle that justifies drawing lines at any level of abstraction a sponsor thinks saves an amendment. The amendment fails under any measure this Court's cases consider.

1. The amendment bans multiple logically unrelated categories of abortion regulation.

As the Sponsor observes, an amendment has a "oneness of purpose" when its provisions are "logically viewed as having a natural relation or connection as component parts or aspects of a single dominant plan or scheme." *Fine v. Firestone*, 488 So. 2d 984, 990 (Fla. 1984) (quotation omitted). While that formulation has been criticized for inviting ad hoc judgments about "oneness," *see Adv. Op. to Att'y Gen.—Limited Political Terms in Certain Elect. Offices*, 592 So. 2d 225, 231 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part), the Court has repeatedly applied it in a manner that requires each provision of an amendment to directly imply the need for its other provisions if the amendment is to function. *See, e.g.*, *Adv. Op. to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legis. and*

Cong'l Dist's., 926 So. 2d 1218, 1225 (Fla. 2006) (provisions establishing redistricting commission and single-member districts not "directly related"); *Adv. Restricts Laws*, 632 So. 2d at 1020 (amendment addressing ten categories of discrimination not related to single subject of discrimination); *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984) (amendment limiting three kinds of revenue not related to single subject of "government revenue"). That is the "natural relation or connection" the Court's precedents evidence.

For proof, look at the cases the Sponsor emphasizes most. In its *Medical Marijuana* opinions (SB.17-18), the Court sustained amendments that (1) decriminalized marijuana as a treatment for medical conditions and (2) allowed doctors to prescribe it, caregivers to administer it, and dispensaries to sell it as a medical treatment. *See Adv. Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conds.*, 181 So. 3d 471, 473-75, 477 (Fla. 2015) (*Medical Marijuana II*); *Adv. Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conds.*, 132 So. 3d 786, 791-94, 796 (Fla. 2014) (*Medical Marijuana I*). Obviously, sparing a patient from penalty for *using* a medicine is meaningless unless the patient can also *gain access* to that medicine.

Decriminalizing marijuana as a medical treatment directly implied allowing distribution to make the treatment effective.

Likewise, in *Adv. Op. to Att'y Gen. re Fla. Marriage Protection Amendment* (SB.16-17), the amendment stated "[i]nasmuch as marriage is a legal union of only one man and one woman … , no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." 926 So. 2d 1229, 1232 (Fla. 2006). Limiting legal recognition of "marriage" to same-sex unions directly implied the same limitation on recognition of the "substantial equivalent" of marriage because the limitation on marriage would have been ineffective otherwise. *See id.* at 1234 (amendment addressed "the concept of marriage and the rights and obligations traditionally associated therein").

So too in *Adv. Op. to Att'y Gen. re Rights of Elec. Consumers re Solar Energy Choice* (SB.18-20), where the amendment (1) created a right to own or lease solar energy equipment and (2) preserved government regulatory power to protect health, safety, and welfare and to prevent cross-subsidies. 188 So. 3d 822, 826 (Fla. 2016). Creating a right insulating commercial conduct from regulation directly implied specifying the pre-existing governmental authority

that would be preserved notwithstanding that new right. "[T]he provisions represent two sides of the same coin."[2] *Id.* at 828.

None of this is true here. Nothing about an amendment banning laws regulating abortion before viability implies it *should also* ban laws regulating abortion whenever during pregnancy a healthcare provider says so. Each ban is complete on its own and does not need the other to work. And far from being "two sides of the same coin," each involves distinct questions about (1) different interests of a woman in obtaining an abortion and (2) different interests of society in regulating abortion at different times. (IB.28-29).

Same thing with the various regulations the amendment bars. (IB.30). An amendment banning laws prohibiting pre-viability abortions (*i.e.*, forbidding them outright) works regardless of whether it *also* bans laws delaying them (*e.g.*, an informed-consent period) or restricting them (*e.g.*, allowing them up to 15 weeks). To say these disparate provisions are a single subject just because they all involve

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[2] That is the same relationship described by the Sponsor's characterization of amendment provisions as "guidelines" or "elements," as evidenced in the cases the Sponsor string-cites. (SB.14, 19). To call a provision a guideline or element denotes another provision it implements—*i.e.*, one implies the other.

"limiting government interference with abortion" licenses the Sponsor to sweep the multiple unconnected things (each significant) the amendment does under a rug of abstraction.

2. The amendment engages in impermissible logrolling.

The amendment logrolls voters with an all-or-nothing choice among varied abortion-regulation bans voters have different opinions about. (IB.31-36). A voter could, for example, agree with banning laws prohibiting pre-viability abortions while disagreeing with banning laws restricting abortions on a healthcare provider's say-so, perhaps thinking partial-birth abortion is barbaric.

The Sponsor says logrolling voters isn't a problem because the prohibition against logrolling applies to "unrelated" provisions and the provisions here are all "relate[d]" to abortion. (*See* SB.15-16). But as shown, trying to generalize the problem away is unavailing.

Furthermore, this Court has never held logrolling is okay so long as a sponsor stretching for the most abstract description of an amendment says all its provisions relate to that description. On the contrary, "[w]here separate provisions of a proposed amendment are an aggregation of dissimilar provisions designed to attract support of

diverse groups to assure its passage, the defect is not cured by either application of an over-broad subject title or by virtue of being self-contained." *Evans*, 457 So. 2d at 1354 (cleaned up).

That is why, in *Restricts Laws*, an amendment "identifying ten classifications of people … entitled to protection from discrimination" impermissibly logrolled voters even though it was nominally about the single subject of discrimination: voters were "asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions." 632 So. 2d at 1020. That is why, in *Adv. Op. to Att'y Gen.—Save Our Everglades*, an amendment providing for Everglades restoration and for the sugar industry to pay for it impermissibly logrolled voters even though it was nominally about Everglades restoration: voters "sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup." 636 So. 2d 1336, 1341 (Fla. 1994). And that is why, in *Adv. Op. to Att'y Gen. re Fairness Initiative Requiring Legis. Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose*, an amendment requiring the Legislature to evaluate and justify sales tax exemptions and exclusions impermissibly logrolled voters even though it was nominally about sales taxation: It "require[d] the voter to choose all

or nothing among the three apparent effects of the amendment." 880 So. 2d 630, 635 (Fla. 2004).

The Sponsor's argument requires the Court to disregard these and other precedents. *See also Adv. Op. to Att'y Gen. re Indep. Nonpartisan Commission to Apportion Legis. and Cong. Dists.*, 926 So. 2d 1218, 1225 (Fla. 2006); *Fine*, 448 So. 2d at 990-91. It shouldn't. Although the amendment is nominally about abortion, it logrolls by calling for an all-or-nothing vote on up to eight bans on abortion regulations voters feel differently about.

3. The amendment substantially alters multiple functions of government.

The Sponsor argues the amendment does not *substantially* alter government functions because Legislature retains its "prime function" of making laws, the executive of executing laws, and the judiciary of deciding disputes. (*See* SB.20-21). Whether an amendment divests multiple branches of their overall constitutional functions can't be the dividing line: No amendment—short of one rewriting the Constitution—would cross it.

Unsurprisingly, the Sponsor's authorities don't come close to its proposed test. The Sponsor's primary case, *Adv. Op. to Att'y Gen. re*

Right to Treatment and Rehabilitation, was a "no-frills amendment" providing individuals facing a first or second offense for possessing or purchasing controlled substances could choose treatment instead of punishment. 898 So. 2d 491, 492, 496 (Fla. 2002). It did not deny Legislature's authority to criminalize drug offenses, did not deny the executive's authority to prosecute drug crimes, and involved the judiciary in the "quintessential judicial functions" of imposing and supervising the treatment option. *See id.* at 496. The amendment in *Solar Energy* was also non-invasive: It curtailed some authority over non-utility solar providers, while expressly preserving authority to protect health, safety, and welfare and to prevent cross-subsidies. *See* 188 So. 3d at 829. What mattered was *not* that these amendments refrained from transferring some branches' "primary functions" elsewhere (SB.22); what mattered was that the amendments were minor intrusions on any branch's power.[3]

Not even close here. The collective effect of the amendment's multiple provisions is to bar any branch of government from

[3] *Adv. Op. to Att'y Gen.—Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993) (SB.21) does not even mention whether the amendment there affected multiple government functions.

regulating abortion in any material way: no legislation, no execution, no adjudication of questions it forecloses. (IB.36-40). Indeed, although the Sponsor promises each branch will retain its "prime function" if the amendment passes, it stops conspicuously short of specifying *any* power *any* branch will retain over abortion.

The amendment's substantial alteration of the government's functions regulating abortion further proves it lacks the "oneness of purpose" this Court's precedents demand. *See, e.g.*, *Save Our Everglades*, 636 So. 2d at 1340; *Evans*, 457 So. 2d at 1354.

B. The amendment fails under the objective meaning of the one-subject requirement.

Given the foregoing, the Court need not consider whether the oneness-of-purpose test is consistent with article XI, section 3. If it does, it should hold that the one-subject requirement refers to a discrete proposition that can be presented to voters for a single up or down vote. (IB.25).

The former elected officials criticize this as inconsistent with the constitutional text (FEB.8-9)—they omit any textual defense of the oneness-of-purpose test—but ignore the context in which the one-subject requirement appears. *See Adv. Op. to Gov. re Implementation*

of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020). The context is that legislation (statutes) and constitutional amendment by initiative (changing organic law) are significantly different things.

Fine makes this clear. It held that the text "one subject and matter *properly* connected therewith" in article III, section 6 regarding legislation is different from and broader than "one subject and matter *directly* connected therewith" in article XI, section 3 regarding citizen initiatives. 448 So. 2d at 988-89. It recognized that legislation and initiatives are contextually different because legislation results from deliberative processes, while initiatives are take-it-or-leave-it propositions. *See* 484 So. 2d. at 990. And it illustrates how, although the 1972 amendment adding the one-subject requirement to article XI, section 6 liberalized an earlier requirement that an initiative affect only one section of the Constitution, it doesn't allow citizens to do what legislation does by constitutional initiative. *See id.* at 989, 991.

The professors overlook important context when they treat Article XI, section 6 like a legislative power. (*See* LPB.11). Unlike other states, Florida's Constitution does not provide for direct legislation by citizens. *See generally Ariz. St. Legis. v. Ariz. Indep.*

Redist. Comm'n, 576 U.S. 787, 793-94 (2015) (discussing history of direct legislation). In Florida, "legislative power [is] vested in a legislature" and citizens may only propose "the revision or amendment of any portion or portions *of this constitution*" and only if it embraces "but one subject and matter directly connected therewith." Art. III, § 1, art. XI, § 3, Fla. Const. (emphasis added).

The oneness-of-purpose test varies from that constitutional text and context by enabling legislation in the guise of constitutional amendment and risking the Constitution becoming a code. "One" and "oneness" are not synonyms. Nor are "subject" and "purpose." Read in context, "one subject" means a single proposition susceptible to a single up-or-down vote—the only choice a voter makes—and "matter directly connected therewith" means ancillary details necessary for it to function. The amendment here fails that test. (IB.25).

II. The ballot title and summary violate section 101.161(1) because they do not disclose the amendment's chief purpose and mislead as to its primary effects.

The Sponsor doesn't deny the main effects of the amendment—the best measure of its "chief purpose"—are to legalize abortion on demand and eliminate the State's power to regulate abortion in any material way. The ballot language fails to state that purpose. Instead,

it starts with a misleading political slogan in the title and follows with a summary misleading voters to believe the amendment's consequences are far less dramatic than they are.

A. The ballot language fails to clearly and unambiguously state the amendment's chief purpose.

The Sponsor claims the chief purpose of the amendment is to limit government interference with abortion and that the purpose is stated in the ballot title. (SB.25). Problem is, the text of the amendment doesn't match the Sponsor's claimed purpose.

Examined objectively, the amendment's main effects, and therefore its chief purpose, are to legalize abortion on demand for virtually any reason up to the point of birth and eliminate any regulation in the way. *See Detzner v. League of Women Voters of Fla.,* 256 So. 3d 803, 809 (Fla. 2018) (determining the "chief purpose" requires considering the amendment's "main effect"); *see also Adv. Op. to Atty Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet,* 291 So. 3d 901, 907-08 (Fla. 2020) (Lawson, J., concurring). If it passes, the State will have no meaningful power to regulate abortion from conception through viability (around 24 weeks), and to birth if a "healthcare provider"

approves. As previously shown, the healthcare-provider limitation is no limitation at all. (IB.43).

Identifying these consequences is not a "parsing of the amendment's effects better left to subsequent litigation." (SB.27). It is saying what the text of the amendment does. These primary effects are plain to a law-trained reader—although *not* an ordinary voter—and are confirmed by the Sponsor's inability to point to any material abortion regulation that might survive if the amendment passes. The Sponsor's request to postpone considering these consequences for later litigation is just a hope that if voters are hoodwinked into voting yes, they will be baked in the cake.

The Sponsor says the ballot summary just "mirrors the language of the amendment" (SB.25) but ignores this Court's precedent holding that a summary tracking the language of an amendment without telling ordinary voters—not law-trained specialists—of "the amendment's true meaning" fails to state its "chief purpose." *Detzner*, 256 So. 3d at 807. Where, as here, "voters will simply not be able to understand the true meaning and ramifications of the revision," the ballot language fails. *Id.* at 810.

The Sponsor writes this off as nitpicking that requires sponsors to draft an "exhaustive explanation and interpretation" of every implication of an amendment. (SB.25-26). But disclosing that the main effect of the amendment is legalization of abortion at any point for any reason is not nitpicking: "[B]allot summaries which do not adequately define terms … and do not adequately describe the general operation of the proposed amendment must be invalidated." *Adv. Op. to Atty. Gen. ex rel. Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 899–900 (Fla. 2000). The cases upon which the Sponsor relies all involved opponents demanding a summary disclose ancillary details and downstream effects of an amendment and are easily distinguished. (*See* SB.26-27).[4] Abortion-on-demand through the displacement of

[4] *See Adv. Op. to Att'y Gen. Re: Voter Control of Gambling*, No. SC16-778, 2017 WL 1409673 (Fla. Apr. 20, 2017) (rejecting "complaint that the summary and title do not detail every possible effect the Initiative could have on gaming in Florida and on tribal lands"); *Adv. Op. to Att'y Gen. re Ltd. Casinos*, 644 So. 2d 71, 75 (Fla. 1994) (rejecting argument that summary must disclose the number of casinos authorized, the location and number of existing pari-mutuel facilities, and that one casino must be placed in a specific location); *Adv. Op. to Att'y Gen. re Stds. For Establishing Legis. Dist. Boundaries*, 2 So. 3d 175, 186 (Fla. 2009) (noting that 75-word limit precludes divulging "the complete details" of an amendment); *Adv. Op. Att'y. Gen. re: Prohibiting Pub. Funding of Pol. Candidates'*

the State's regulatory power is not an ancillary detail or downstream effect; it is the undisclosed chief purpose of the initiative.

B. The ballot language misleads as to the amendment's effects.

The ballot language misleads voters in multiple respects.

Scope and effect. The ballot language misleads voters that the amendment merely "limits interference" with abortion when it virtually eliminates all State authority over it. To a voter, a proposal to "limit" abortion regulation is far narrower than a proposal to eliminate the State's power over abortion. *Compare Limit*, Merriam-Webster Dictionary[5] (defining "limit" as "to restrict the bounds or limits of"), with *Eliminate*, Merriam-Webster Dictionary[6] (defining "eliminate" as "to put an end to or get rid of"). The title's representation to voters that that the amendment only "limits" the government's power—coupled with its charged rhetoric about

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Campaigns, 693 So. 2d 972, 975–76 (Fla. 1997) (rejecting argument that summary for amendment prohibiting use of public funds for campaigns needed to divulge it would invalidate laws allowing use).

[5] https://www.merriam-webster.com/dictionary/limit (last visited Nov. 12, 2023).

[6] https://www.merriam-webster.com/dictionary/eliminate (last visited Nov. 12, 2023).

unwarranted "interference"—misleadingly describes an amendment that actually divests the State of authority on the topic. *Cf. Adv. Op. to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, & Other Restrictions*, 320 So. 3d 657, 668 (Fla. 2021) (holding statement that amendment would "limit" marijuana misleading when amendment allowed unlimited use).

Furthermore, the summary misleadingly frames guaranteed abortion-on-demand as a measured legalization of two limited types of abortion. A layperson will not deconstruct the amendment's text to understand its consequences. And although the Sponsor again points to the summary's repetition of the amendment's language (SB.30-31), that does not transform language that misleads into language that is complete and honest. *See Wadhams v. Bd. of Cnty. Comm'rs of Sarasota Cnty.*, 567 So. 2d 414, 418 (Fla. 1990).

Parental consent laws. The ballot language also misleads voters about the amendment's effects on parental consent laws voters support. *See Most Voters Back Parental Notification for Minors'*

Abortions, Rasmussen Reports (July 18, 2022).[7] The Sponsor highlights that the summary "clarifies that parental-notification requirements for minors seeking abortion would *not* be affected." (SB.52-53). But that is a classic half-truth that "omits material facts necessary to make the summary not misleading." *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992) (quotation omitted). By assuring voters parental *notification* laws are untouched, the summary misleads them to think parental *consent* requirements—now in the same statute—are undisturbed. *See* § 390.01114. The Sponsor does not deny the amendment bars laws requiring parental consent to a minor's abortion. If a law requires consent first, it "delays" and "restricts" a minor's abortion.

Partial birth abortion. The ballot language misleads about partial birth abortion in two ways. First, by burying the material consequence of legalizing partial birth abortion in vague language about abortion for "health" reasons, the summary misleads voters to think the amendment does not touch on the subject at all. Partial

[7] https://www.rasmussenreports.com/public_content/politics/public_surveys/most_voters_back_parental_notification_for_minors_abortions (last visited Nov. 12, 2023).

birth abortion has long been prohibited in Florida, leading voters to assume that it does not occur here. *See* § 390.0111(5), Fla. Stat. (1998). The ballot language does not tell voters the amendment bans prohibiting, penalizing, delaying, or restricting it.

Second, for those who get that partial birth abortion is in play, the summary conceals that such abortions are, except in circumstances narrower than those in the amendment, prohibited by federal criminal law. *See* 18 U.S.C. 1531(a), (b)(2) (2022). Relying on *Medical Marijuana I*, the Sponsor argues the summary need not explain the conflict with the federal ban, but it misreads that decision. (SB.59). In *Medical Marijuana I*, the summary stated that the amendment "[a]pplie[d] only to Florida law" and warned it did "not authorize violations of federal law." 132 So. 3d at 808. The summary here omits any mention of a conflict with federal criminal law and thus "affirmatively conceals the possibility that an individual could be prosecuted for conduct that the amendment purports to permit or authorize." *Medical Marijuana II*, 315 So. 3d at 1183 (cleaned up).

* * * * *

Neither the 15-word limit on the title nor the 75-word limit on the summary prevented the Sponsor from providing a clear and

honest statement about what the amendment does. *See* § 101.161(1), Fla. Stat. (2023). Accurate language within those limitations might have read like this:

> **Ballot Title**: Amendment Establishing Right to Abortion on Demand and Eliminating Substantive Abortion Regulation
>
> **Ballot Summary**: Prohibits State or local government from regulating abortion before 24 weeks gestational age and, additionally, up to birth if a physician or other healthcare provider deems it necessary to protect health. Does not affect federal law on partial birth abortion or authorize such abortions in violation of federal law. Does not affect Legislature's power to require parental notification before a minor's abortion but does affect its power to require parental consent.

Instead, the Sponsor chose a seven-word title and 49-word summary that repeats the amendment's text without explaining what it does, that uses political rhetoric to conceal its scope, and that misleads about its consequences. It cannot now inveigh that the initiative-power requires that voters be misled to cast ballots the way it prefers.

CONCLUSION

For the foregoing reasons, the Court should not permit the initiative on the ballot.

Dated: November 15, 2023

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CERTIFICATE OF SERVICE

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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 3,998.

/s/ Samuel J. Salario, Jr.