SC2023-1392

IN THE SUPREME COURT OF FLORIDA

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

ON PETITION FOR AN ADVISORY OPINION
TO THE ATTORNEY GENERAL

BRIEF OF FORMER FLORIDA REPUBLICAN ELECTED OFFICIALS IN SUPPORT OF THE INITIATIVE

MATTHEW A. GOLDBERGER, Fla. No. 119897
Matthew A. Goldberger, P.A.
1555 Palm Beach Lakes Blvd., Suite 1400
West Palm Beach, FL 33401

AADIKA SINGH*
JOSHUA A.ROSENTHAL*
Public Rights Project
490 43rd Street, Unit #115
Oakland, CA 94609

Counsel for Current and Former Florida Republican Elected Officials

**Pro hac vice motions forthcoming*

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IDENTITY AND INTERESTS OF SUPPORTERS

Supporters are former Florida Republican elected officials deeply committed to democracy. A full list of supporters is listed in the attached Appendix. We write to express our view that Initiative 23-07 meets minimal constitutional and statutory requirements and that this Court should facilitate its presentation to the people. As elected and community leaders, we have a distinct obligation to protect and promote Floridians' rights to define the shape of our government.

Although we have a range of opinions regarding the Initiative, we file this brief in support of it because we respect the authority of the people to engage directly in our democracy and believe the Initiative petition to meet minimal requirements. We express our views with the greatest humility and deference to the people. This humility is grounded in our experience serving Florida's people as elected representatives. From that experience, we understand that while public hearing and deliberation is essential for developing complex governmental functions, some decisions about rights must be fundamental and decided by the people themselves. This is especially true for an issue as controversial as abortion. The

ballot-initiative process is the most legitimate way to establish a contested right because every eligible Floridian has the opportunity to weigh in directly. This Court should promptly facilitate this measure.

STATEMENT OF THE CASE

This case concerns a proposed amendment to the Florida Constitution to limit government interference with abortion. The full text of the proposed amendment states:

> SECTION __. Limiting government interference with abortion.—Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider.

The ballot title for the proposed amendment states: "Amendment to Limit Government Interference with Abortion."

The full text of the ballot summary states:

> 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.

SUMMARY OF ARGUMENT

In Dobbs v. Jackson Women's Health Org., the United States Supreme Court returned the issue of abortion "to the people and their elected representatives." 142 S. Ct. 2228, 2259 (2022). We, as current and former Republican elected representatives, believe that here in Florida, where our people enjoy a unique power to amend the state constitution, lawmakers and judges should allow the people to exercise that power without undue encumbrance.

We take no position ourselves on the abortion issue. Some of us are ideologically opposed to abortion. Others believe that government interference with very private medical decisions should be extremely limited. But we all believe that Floridians themselves should decide directly what the political branches are permitted to do in this area.

We urge the Florida Supreme Court to determine that the initiative petition is compliant with constitutional and statutory requirements and thus allow Floridians to decide how their state's law will address abortion.

ARGUMENT

I. The Florida Supreme Court Properly Limits its Review to a Deferential Analysis of Whether an Initiative is "Clearly and Conclusively Defective."

The power of the people to decide for themselves what their fundamental law should be is so valued in Florida that courts exercise extreme restraint before blocking citizen initiatives from reaching Floridians. Florida is in fact one of just sixteen states where citizens can directly initiate an amendment to the state's constitution.[1] This ultimate political power is enshrined in Article XI, Section 3,[2] which was "adopted to bypass legislative and executive control and to provide the people of Florida a narrow but direct voice in amending their fundamental organic law." *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1063 (Fla. 2010). It thus "provides an additional check and balance against legislative and executive power." *Id.*

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[1] National Conference of State Legislators, Initiative and Referendum States, Mar. 15, 2023, https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states.

[2] The provision states: "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people." Art. XI, § 3, Fla. Const.

To respect this power, judicial review of citizen-initiated amendments is limited. "The Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). This is because the Court is properly "reluctant to interfere with the right of self-determination for all Florida's citizens to formulate their own organic law." *In re Advisory Op. to Att'y. Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 476 (Fla. 2015) (citations omitted) ("*Med. Marijuana II*").

This Court's duty is to uphold the proposal unless it can be shown to be "clearly and conclusively defective." *Advisory Opinion To Atty. Gen. re Right To Treatment & Rehab.*, 818 So. 2d 491, 494 (Fla. 2002). This deficiency can take one of only two forms: (1) if the proposed amendment embraces more than a single-subject, Art. XI, § 3, Fla. Const.; and (2) if the language of the ballot title and summary are not clear and unambiguous, 101.161(1), Fla. Stat. For each, the Court adopts a "deferential standard of review." *In re*

Advisory Opinion to Atty. Gen. re Limits or Prevents Barriers to Loc. Solar Elec. Supply, 177 So. 3d 235, 241 (Fla. 2015).

Rather than respect the power of the voters to decide this state's fundamental law, the Attorney General seeks to impose a far higher bar on the Initiative than "clearly and conclusively defective." She suggests that this Court apply a non-deferential review, simply considering "whether the summary violates either of these statutory requirements, not whether it does so 'clearly.'" *See* A.G. Br. at 10. This less-deferential standard of review would purportedly support direct democracy by "ensuring that the people are fully informed." *Id.* Yet this Court's prevailing standards have served as effective safeguards to the ballot for years, rejecting clearly misleading ballot measures, while trusting the people of this State to take their electoral responsibilities seriously.

The AG's proposal would interfere "with the right of self-determination for *all* Florida citizens" and their sovereignty. *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 796 (Fla. 2014) ("Med. Marijuana I"). And the AG's view does not comport with the expansive direct

democracy that states like Florida allow by resolving technical and procedural doubts in favor of the ballot sponsors. *See, e.g.*, *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 899 (Alaska 2003). We urge this Court to reject the Attorney General's effort to limit the people's power.

II. The Proposed Amendment Concerns a Single Subject.

Contrary to Opponents' Susan B. Anthony Pro-Life America ("SBA") and Florida Voters Against Extremism ("FVAE") unfounded contentions, the proposed amendment concerns a single subject, and there is no reason to adopt a new test for the single-subject rule. Because there is only one subject, the proposed amendment does not "logroll" and appropriately affects other branches of government. It thus satisfies the minimal requirement to be forwarded to the people.

A. SBA's Proposed New Standard for the Single-Subject Rule is Unjustified.

Opponent SBA presses for a novel and unjustified test for whether an initiative satisfies the single-subject rule: that an initiative presented for amendment must constitute one "distinct proposition that can be presented for an up or down vote." SBA Br.

at 23. While SBA presents this test as deriving from the constitutional text, it both bears little relationship to the actual constitutional text. There is a difference between a policy addressing a particular "subject," and one that presents a single "proposition." More significantly, SBA ignores the full constitutional text, which permits a petition to address "matter directly connected" to the single subject. Art. XI, § 6, Fla. Const. There is no basis for this Court to adopt a new test and ignore the decades of jurisprudence interpreting the single-subject rule. Applying those decades of jurisprudence, this petition satisfies the single subject rule.

B. Because the Proposed Amendment Addresses a Singular Purpose There is No "Logrolling."

The initiative petition satisfies the constitutional requirement that it "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. On its face, it concerns just one subject: abortion. The proposed amendment would prevent government interference with abortion, with certain exceptions.

This Court has repeatedly allowed ballot measures that address multiple related facets of a subject. In *Marriage Protection*

Amendment, the proposed amendment both defined marriage as "the legal union of only one man and one woman" and prohibited "the substantial equivalent thereof," i.e. civil unions or domestic partnerships. A*dvisory Opinion To Att'y Gen. re Fla. Marriage Prot. Amend.*, 926 So. 2d 1229, 1232 (Fla. 2006). Although opponents contended that the definition of marriage and prohibition on substantial equivalents were separate subjects, this Court recognized that they were mere facets of the underlying "singular subject of whether the concept of marriage and the rights and obligations traditionally embodied therein." *Id.* at 1234.

Nor does the exposition of a complex regulatory plan to satisfy an affirmative goal render that prohibition or goal any less of a "single subject." Consider the permissible amendment seeking to establish a constitutional right to own or lease solar equipment to generate electricity for personal use. *Solar Elec. Supply*, 177 So. 3d at 241. That ballot measure was composed of four subparts addressing both government regulation and private contracts, with extensively defined terms, all of which the court recognized as aspects of a single dominant plan. *See id.* at 828.

Likewise, this Court approved a detailed limit on the use of various kinds of nets for catching saltwater finfish, shellfish, or other marine animals. *Limited Marine Netting*. See *Advisory Opinion to Att'y Gen.--Ltd. Marine Net Fishing*, 620 So. 2d 997 (Fla. 1993). This Court determined that it had just one purpose—to protect certain types of marine life from unnecessary overfishing—even though it also provided some exemptions and penalties. *Id.* at 999. And this Court twice found a "logical and natural oneness of purpose" in a medical-marijuana amendment that established a regulatory regime for medical marijuana while also removing criminal penalties and providing for related immunities. *Med. Marijuana I 132 So. 3d 796*; *Med. Marijuana II* 181 So. 3d 471.

Here, the proposed amendment retains a much stronger "logical and natural oneness of purpose" than the complex regulatory regimes this Court has previously approved. *Med. Marijuana I.,* 132 So. 3d at 796. It involves the creation of an express constitutional right, and "addresses the related ability of State and local governments to regulate that right." *Solar Energy,* 188 So. 3d at 829.

Because there is only one subject at issue in the proposed amendment, opponents' assertions of "logrolling" make little sense. The voter is merely being asked to vote on the singular subject of whether the government should be permitted to prohibit, penalize, delay, or restrict abortion early in the gestational term or when necessary to protect the patient's health.

C. The Proposed Amendment Merely "Affects" Branches of Government, Consistently with Single-Subject Limits.

The petition's effect on various branches of government is consistent with its nature: the establishment of a new protection of individual rights. In the hierarchy of laws, the state constitution *is* supreme, and Article XI, Section 3 grants the people the "narrow but direct" power to amend their "fundamental organic [constitutional] law" and limit the lawmaking authority and "control" of the other branches. *Browning*, 29 So. 3d at 1063. The amendment impacts the other branches of government "only in the general sense that any constitutional provision does" by requiring compliance with a new constitutional rule. *See Advisory Opinion to Atty. Gen. re Rts. of Elec. Consumers regarding Solar Energy Choice*, 188 So. 3d 822, 830 (Fla. 2016); *Fish & Wildlife Conserv. Comm'n*,

705 So. 2d at 1354 (noting that a ballot measure does not violate the single-subject rule when it merely "affects" multiple branches of government). As in *Solar Energy*, this proposed amendment "does not require any of the branches of government to perform any specific functions." *Id.* It simply limits the regulatory authority of those branches to the extent of conflict with the constitutional right. *See id.*

As former lawmakers, we frequently navigated constitutional restraints on our lawmaking power. For example, we would not pass laws that clearly violate the First Amendment or any other provision of the state or federal constitutions. It is no extraordinary restraint for lawmakers to have to navigate other laws and constitutional rights, and we welcome the input of the people in the lawmaking process, including through ballot measures. Because here in Florida, the people are the ultimate holders of political power. *See* Art. I, § 1, Fla. Const. ("All political power is inherent in the people.").

III. The Proposed Ballot Title is Appropriately Neutral

As a hail-mary to disqualify this ballot petition, FVAE further contends that the phrase "government interference with abortion" is inappropriately political and inflammatory. It is difficult to determine what more neutral phrase FVAE would propose to label the subject of this petition. If "protect" in the context of a marriage amendment is not impermissible political or emotional rhetoric, then "interference" certainly is not. *See Marriage Protection Amendment*, 926 So.2d at 238. The proposed amendment here seeks to limit government prohibitions, penalties, delays, or restrictions on abortion before viability or when necessary to protect the patient's health. It is unreasonable to characterize the current title as inflammatory, let alone "clearly and conclusively" so.

* * *

CONCLUSION

Because the amendment comprises just one subject—abortion—and its ballot summary is not misleading, this Court should not strike the Initiative from the ballot. Whether one supports abortion is irrelevant, the constitutionally protected

citizens' initiative process should move forward and the initiative should reach the people, as the U.S. Supreme Court in *Dobbs* suggested, so that the people themselves can decide the issue.

This is the power reserved to the people by the Florida Constitution, and it should not be thwarted here. The initiative readily informs Floridians what they are voting for and does not affirmatively mislead them. Thus, this Court must not strike it and prevent Floridians from having their individual voices heard on this weighty moral and medical issue. The people should decide, as the Florida Constitution provides.

Respectfully submitted,

/s/ Matthew A. Golderberger
Matthew A. Goldberger, Fla. No. 119897
Matthew A. Goldberger, P.A.
1555 Palm Beach Lakes Blvd., Suite 1400
West Palm Beach, FL 33401

AADIKA SINGH*
JOSHUA A.ROSENTHAL*
Public Rights Project
490 43rd Street, Unit #115
Oakland, CA 94609

**Pro hac vice motions forthcoming*

Dated: November 10, 2023

APPENDIX – List of Supporters

Jennifer Carroll
Former Lieutenant Governor of Florida
Former Florida State Representative

Paula Dockery
Former Florida State Senator
Former Florida State Representative

Dennis L. Jones
Former Florida State Senator
Former Florida State Representative
Former Speaker Pro Tempore of Florida

Raymond Pilon
Former Florida State Representative
Former County Commissioner, Sarasota County

Juan-Carlos Planas
Former Florida State Representative

Elizabeth Benac
Former County Commissioner, Manatee County

Misty Servia
Former County Commissioner, Manatee County

Carolyn Whitmore
Former County Commissioner, Manatee County
Former Mayor, Holmes Beach
Former City Commissioner, Holmes Beach

Alice Burch
Former Mayor, Miami Shores
Former Vice Mayor, Miami Shores
Former Council Member, Miami Shores Village

Mayra Lindsay
Former Mayor, Village of Key Biscayne

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman Old Style font, in compliance withFlorida Rule of Appellate Procedure 9.210(a)(2), and contains 2,356 words.

/s/ Matthew A. Golderberger
Matthew A. Goldberger, Fla. No. 119897
Matthew A. Goldberger, P.A.
1555 Palm Beach Lakes Blvd., Suite 1400
West Palm Beach, FL 33401

Dated: November 10, 2023

CERTIFICATE OF SERVICE

I, Matthew A. Goldberger, HEREBY CERTIFY that a true and correct copy of the foregoing was filed Electronically with the court via the Florida E-Filing Portal, which provides notice to all parties.

/s/ Matthew A. Golderberger
Matthew A. Goldberger, Fla. No. 119897
Matthew A. Goldberger, P.A.
1555 Palm Beach Lakes Blvd., Suite 1400
West Palm Beach, FL 33401

Dated: November 10, 2023