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

ATTORNEY GENERAL'S INITIAL BRIEF

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STATEMENT OF THE CASE

The text of the Amendment to Limit Government Interference with Abortion, Serial No. 23-07, states as follows:

> **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.

App. 5. It would be an entirely new section in Article I of the Florida Constitution.

The accompanying ballot summary, 49 words in length, would state 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.

App. 5.

SUMMARY OF ARGUMENT

In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court overruled its "egregiously wrong" decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and returned the "profound moral issue" regarding the legality of abortion to the

place where it belongs: "the people's elected representatives." 142 S. Ct. 2228, 2240, 2243 (2022). Florida's legislature has taken up the mantle and enacted the Heartbeat Protection Act, which, with certain exceptions, would prohibit physicians from performing abortions on babies more than six weeks past gestation. § 4, ch. 2023-21, Laws of Fla. (Apr. 13, 2023). Pending the outcome of *Planned Parenthood of Southwest & Central Florida v. State*, No. SC2022-1050 (Fla.), in which this Court has already received briefing and heard oral argument, this law would amend another one passed a year earlier that drew the line at fifteen weeks. § 4, ch. 2022-69, Laws of Fla. (Apr. 14, 2022).

Abortion proponents have waged a war on two fronts to prevent either law from taking effect. First, they have urged this Court not to follow the U.S. Supreme Court's lead in *Dobbs* and instead to retain precedents that have interpreted the Florida Constitution in ways as egregiously wrong as were *Roe* and *Casey*. *See* Brief for Petitioner at 40, *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. SC2022-1050 (filed in this Court Feb. 27, 2023). Second, they have proposed an amendment to the Florida Constitution using a misleading ballot summary to trick voters into freezing in place a legal

framework that conceals the amendment's potentially sweeping legal effects, thereby mooting the outcome of the *Planned Parenthood* appeal to this Court. *See* App. 5.

This effort to hoodwink the Florida electorate should be rebuffed, lest Florida proceed down the same path it did after the 1980 amendment adding Article I, Section 23 to the Florida Constitution. The ballot summary there stated only that the amendment would create a "right of privacy" in the Constitution, with scant indication to voters that they might be approving a right to abortion, and repeated assurances from proponents of the 1980 amendment that it would protect informational privacy only. Within a decade, proponents of the 1980 amendment who had disclaimed that the amendment affected decisional autonomy at all—never mind abortion—were advocating that it protected all manner of personal decisions, including abortion. *See* Brief for Respondent at 16–22 & n.27, *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. SC2022-1050 (filed in this Court Mar. 29, 2023). This Court then ruled that the 1980 amendment did protect abortion, to an even greater extent than did the U.S. Supreme Court's rulings in *Roe* and *Casey*. *See In re T.W.*, 551 So. 2d 1186, 1191–92, 1195 (Fla. 1989);

N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 620–22, 634–36 (2003).

The ballot summary here is part of a similar overall design to lay ticking time bombs that will enable abortion proponents later to argue that the amendment has a much broader meaning than voters would ever have thought. It hides behind an uninformative parroting of the text of the amendment to veil from voters its potentially expansive scope. The ballot summary thus contravenes one of the important prerequisites for an amendment initiative to go on the ballot: that the ballot summary explain to voters "the chief purpose of the measure" in "clear and unambiguous language." § 101.161(1), Fla. Stat.

The ballot summary fails this requirement in multiple ways. First, it conveys that the amendment would continue to allow the Legislature to restrict abortion after "viability." The problem is that some voters will read "viability" as *Roe* and *Casey* used the term—as referring to a baby "potentially able to live outside the mother's womb," *Roe*, 410 U.S. at 160. Others will understand "viability" in the more traditional clinical sense—as referring to a pregnancy that, but for an abortion or other misfortune, will result in the child's live

birth. This ambiguity is no small interpretive quibble; "viability" in the *Roe*/*Casey* sense occurs much later than in the traditional clinical sense. And polling shows that the stage of pregnancy at which abortion becomes illegal is crucial to whether voters approve of particular restrictions on abortion.

Second, the ballot summary does not explain whether the "patient's health" (a precondition under the amendment for post-viability abortions) encompasses only physical health or also mental health. With some support in the U.S. Supreme Court's now-discarded 1973–2022 abortion jurisprudence, abortion advocates have long advocated that "health" in this context encompasses both physical and mental health. The latter concept of health, while by no means trivial, is also susceptible to expansive interpretation and could be used to justify a much larger number of abortions. Here again, voters deserve to be made aware of the possibility that the health exception could be made essentially to swallow the rule.

The failure to define "viability" and "health" is exacerbated by a third feature of the ballot summary—failure to make clear that the "healthcare provider" may well have license to determine not only whether an abortion is "necessary to protect the patient's health"

but also whether the baby has reached "viability." This is because of a comma in the ballot summary before the phrase "as determined by the patient's healthcare provider." Under some interpretive canons employed by lawyers and judges, that placement could cause the phrase to modify both "before viability" and "when necessary to protect the patient's health." But voters are unlikely to be aware of the potentially enormous syntactic significance of this comma and thus to be aware that healthcare providers could have unreviewable discretion to determine in every case what "viability" means and whether an otherwise healthy baby lives or dies.

Finally, the ballot summary does not define the term "healthcare provider" itself. Voters may assume it means a physician, as preserving the doctor-patient relationship is part of the common rhetoric used to justify the legality of abortion. But the term could apply to nearly any staff involved in some way in caring for the patient at a medical facility or abortion clinic. A wide range of personnel, perhaps not even medical professionals, could effectively be determining the scope of amendment's application.

These shortfalls cause the ballot summary to fail in its essential function of explaining "the chief purpose of the measure" in

"clear and unambiguous language." § 101.161(1), Fla. Stat. But the ballot summary also fails this function in the opposite way, by overselling the right it would provide in two critical respects. First, it states that "[n]o law shall prohibit, penalize, delay, or restrict abortion before viability" (arguably "as determined by the patient's healthcare provider"). App. 5. In other words, the summary promises the voter that pre-viability abortion will be free of legal consequence. That is simply untrue. Abortion would remain subject to federal law, which preempts any conflicting state law. Art. VI, ¶ 2, U.S. Const. Congress would remain free regardless of the amendment to restrict or even ban abortion. Indeed, partial-birth abortions currently violate federal law at any stage of the pregnancy, pre- or post-viability. 18 U.S.C. § 1531.

The ballot summary also states that "[n]o law shall prohibit, penalize, delay, or restrict abortion . . . when necessary to protect the patient's health, as determined by the patient's healthcare provider." App. 5. This explanation runs into conflict with the same statute as above. The federal partial-birth abortion statute has an exception, but only for when the partial-birth abortion is "necessary to save the life of a mother." 18 U.S.C. § 1531(a). Thus, a pre-

viability partial-birth abortion performed to protect health but not life would remain illegal even after the amendment. It is therefore highly misleading to tell voters that "[n]o law," full stop, "shall prohibit, penalize, delay, or restrict abortion before viability," when in fact federal law still could, and indeed currently does, restrict abortion before viability.

For all these reasons, the initiative fails to explain "the chief purpose of the measure" in "clear and ambiguous language," § 101.161(1), Fla. Stat., and does not belong on the ballot.

LEGAL STANDARD

Section 16.061, Florida Statutes, provides that "[t]he Attorney General shall, within 30 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, petition the Supreme Court, requesting an advisory opinion regarding" three possible issues: (1) "the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution" (i.e., the requirement that the amendment "embrace but one subject and matter directly connected therewith"); (2) "whether the proposed amendment is facially invalid under the

United States Constitution"; and (3) "the compliance of the proposed ballot title and substance with s. 101.161."

The Attorney General is chiefly concerned here with the third of these requirements: compliance with § 101.161. That statute codifies the standard for reviewing ballot titles and summaries of proposed constitutional amendments. Any measure submitted to the vote of the people must include a ballot title "not exceeding 15 words in length, by which the measure is commonly referred to or spoken of," § 101.161(1)(d), Fla. Stat., and a ballot summary, "not exceeding 75 words in length," explaining "the chief purpose of the measure" in "clear and unambiguous language," *id.* § 101.161(1).

This Court thus "consider[s] two questions" in assessing compliance with § 101.161(1): "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voters of the chief purpose of the amendment; and (2) whether the language of the ballot title and summary, as written, will be affirmatively misleading to voters." *Adv. Op. to Att'y Gen. re: Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions*, 320 So. 3d 657, 668 (Fla. 2021) ("*Regulate Marijuana Similar to Alcohol*") (quoting *In re Adv. Op. to Att'y Gen. re Use*

of Marijuana for Certain Medical Conditions, 132 So. 3d 786, 797 (Fla. 2014) ("*Medical Marijuana I*")); *see also Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010).

The Court has said that this review should be "deferential," and that it will invalidate an initiative "only if it is shown to be 'clearly and conclusively defective.'" *Regulate Marijuana Similar to Alcohol*, 320 So. 3d at 667. But the question should simply be whether the summary violates either of these statutory requirements, not whether it does so "clearly." Far from undermining Floridians' right to "formulate 'their own organic law,'" *Adv. Op. to Att'y Gen. re: All Voters in Primary Elections for State Legislature, Governor, and Cabinet*, 291 So. 3d 901, 905 (Fla. 2020), careful judicial analysis of a ballot summary reinforces democracy by ensuring that the people are fully informed before changing Florida's governing charter. *See Medical Marijuana I*, 132 So. 3d at 819–20 (Canady, J., dissenting) (noting that the people's "right to vote on constitutional amendments" is "subverted when the voters are presented a misleading ballot summary"). It anchors the initiative process more securely in the true will of the people.

The Court need not revisit its standard of review here, however, because the Amendment to Limit Government Interference with Abortion initiative is clearly and conclusively defective and would fail even under that more deferential standard.

ARGUMENT

The Florida Constitution "reserve[s] to the people" the enormously consequential power to amend the State's governing charter through the citizen-initiative process. Art. XI, § 3, Fla. Const. Because "voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment" and "vote based *only* on the ballot title and the summary," "an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution." *In re Adv. Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653–54 (Fla. 2004) ("*Homestead Tax Exemption*"). This Court has thus characterized the statute regulating the form of the ballot title and summary, § 101.161(1), as a "codification of the accuracy requirement implicit in article XI, section 5 of the Florida Constitution." *Detzner v. League of Women Voters*, 256 So. 3d 803, 807 (Fla. 2018) (quoting

Adv. Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 902 So. 2d 763, 770 (Fla. 2005)). "The accuracy requirement in article XI, section 5, functions as a kind of 'truth in packaging law' for the ballot." *Armstrong v. Harris*, 773 So.2d 7, 13 (Fla. 2000). Absent that informational safeguard, the Constitution becomes "not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas." *Homestead Tax Exemption*, 880 So. 2d at 654.

The ballot title and summary must also be complete; they must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Adv. Op. to Att'y Gen.—Fee on Everglades Sugar Production*, 681 So. 2d 1124, 1127 (Fla. 1996). An "accurate *and* informative" title and summary are necessary to "make certain that the 'electorate is advised of the true meaning, *and ramifications*, of an amendment.'" *Detzner*, 256 So. 3d at 808 (quoting *Adv. Op. to Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994)) (emphasis added). "A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the

amendment's true effect. *Armstrong*, 773 So. 2d at 16 (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Absent complete and accurate information about the amendment's purpose and effect, "voter approval would be a nullity." *Id.* at 12.

The ballot summary for the "Amendment to Limit Government Interference with Abortion" fails these requirements several times over. It consists of two sentences and 49 words, not even availing itself of the full 75 allotted by § 101.161(1). Instead of explaining the effect of the amendment in any useful manner, the first sentence merely restates the primary clause of the amendment, without the slightest elucidation as to what that clause would mean. As will be explained next, the unenlightening first sentence both understates and overstates the potential legal effects of the amendment. "[L]awmakers who are asked to consider constitutional changes, and the people who are asked to approve them, 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 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)) (emphasis added). The ballot summary fails in both respects; it hence falls far short of

enabling voters to "cast an intelligent and informed ballot." *Everglades Sugar Production*, 681 So. 2d at 1127.

I. The ballot summary vastly understates the potentially sweeping scope of the amendment, by failing to explain what "viability," "health," or "healthcare provider" means, and by not disclosing that a "healthcare provider" might have power to determine when a baby is viable.

"A ballot title and summary need not explain every detail or ramification of the proposed amendment, . . . [b]ut they nevertheless must be accurate." *Regulate Marijuana Similar to Alcohol*, 320 So. 3d at 668 (quotations omitted). In particular, "[a] proposed amendment must be removed from the ballot when the summary does not accurately describe the scope of the text of the amendment." *Id.* (quoting *Detzner*, 256 So. 3d at 808). The ballot summary here does nothing to warn voters of the amendment's potentially sweeping scope. This is for several reasons. First, the undefined term "viability" has two dominant understandings, one of which would permit abortions much later in the pregnancy than the other. Abortion advocates, fueled by the U.S. Supreme Court's now-defunct rulings in *Roe* and *Casey*, have consistently urged the later meaning. In addition, the undefined term "health" could mean physical only or mental as well; abortion advocates again have

pushed for the latter. And under an arcane canon of statutory interpretation, the ballot summary suggests that "healthcare providers"—a term itself not defined or limited to medical professionals—could have unilateral authority to determine whether a baby is "viable" and whether an abortion is necessary to protect the mother's "health."

While the Attorney General does not concede that these aggressive interpretations would be correct, abortion proponents are certain to argue that they are, and they have been successful in an orchestrated long-term program of packing broad misinterpretations into similarly open-ended legal concepts—ranging from the "penumbras of the Bill of Rights," *Roe*, 410 U.S. at 152, to "a realm of personal liberty" in the Due Process Clause, *Casey*, 505 U.S. at 847, to the "right of privacy" in Article I, Section 23 of the Florida Constitution, *T.W.*, 551 So. 2d at 1190–92; *N. Fla. Women's Health*, 866 So. 2d at 634–36. The potential misinterpretations of the amendment would allow a healthcare provider to render nearly any abortion restriction a practical nullity. Yet they are nowhere addressed in the ballot summary. Voters have a right to be aware of

the potential for this kind of mischief, should they approve the amendment.

It does not matter that the ballot summary essentially replicates the text of the amendment. When the meaning of a term is unclear, this Court has ruled that the ballot summary must explain it, even if the term is lifted straight from the text of the amendment. *See, e.g.*, *Armstrong*, 773 So. 2d at 15. The drafters of a ballot summary cannot hide behind opaque legalese that conveniently copies opaque legalese from the amendment and then claim to have explained to voters "the chief purpose of the measure" in "clear and unambiguous language." § 101.161(1), Fla. Stat. If the meaning of amendment text is not discernible as a matter of common understanding, the ballot summary must supply the deficiency. The ballot summary is all the voter has, upon entering the polling booth, to understand what a "yes" or "no" vote will mean.

A. The ballot summary does not explain whether "viability" refers to a baby healthy enough to come to term or to a baby able to survive outside the womb.

Even abortion advocates acknowledge that the term "viability" has multiple meanings. The American College of Obstetricians and Gynecologists—which baldly states that abortion "is essential for

people's health, safety, and well-being," Am. Coll. of Obstetricians & Gynecologists, *Abortion Is Essential Health Care*, https://www.acog.org/advocacy/abortion-is-essential (last visited Oct. 31, 2023)—admits that "[t]he concept of viability of a fetus is frequently misrepresented or misinterpreted based on ideological principles." Am. Coll. of Obstetricians & Gynecologists, *Facts Are Important: Understanding and Navigating Viability*, https://tinyurl.com/2ks3yxcj (last visited Oct. 31, 2023). "While there is no single formally recognized clinical definition of 'viability,'" they say, "the term is often used in medical practice in two distinct circumstances." *Id.* "In the first, 'viability' addresses whether a pregnancy is expected to continue developing normally." This means that, "[i]n early pregnancy, a normally developing pregnancy would be deemed viable, whereas early pregnancy loss or miscarriage would not." *Id.* In the second common medical usage, "'viability' addresses whether a fetus might survive outside of the uterus." *Id.* "Later in pregnancy, a clinician may use the term 'viable'" in this second sense "to indicate the

chance for survival that a fetus has if delivered before it can fully develop in the uterus." *Id.*[1]

In *Roe* and *Casey*, the U.S. Supreme Court chose the latter of these two clinical understandings to define the scope of the abortion right. *See Casey*, 505 U.S. at 870 (defining "viability" as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman" (citing *Roe*, 410 U.S. at 163)).[2] But many voters—uninitiated into the U.S. Supreme

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[1] *See also* Elizabeth Chloe Romanis, *Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States*, 7 J. L. & Biosciences, at 8–10 (Oct. 2020), https://doi.org/10.1093/jlb/lsaa059 (describing the "multitude of approaches" among states to defining viability); Maria Serenella Pignotti, *The Definition of Human Viability: A Historical Perspective*, Acta Pædiatrica, at 3 (Oct. 2009), https://tinyurl.com/5cj2tua3 ("There is a great deal of misunderstanding about the concept of viability in the lay public and also amongst politicians. . . . We could probably state that the definition is inherently impossible because it is too variable from one individual to another and from one community to another[.]").

[2] In *T.W.*, this Court defined viability even more generously to the abortion right, as "that point in time when the fetus becomes capable of *meaningful life* outside the womb through *standard medical measures*. 551 So. 2d at 1194 (emphasis added); *see id.* at 1198 (Ehrlich, J., concurring) ("The *Roe* definition allows the use of any

Court's orphic abortion jurisprudence circa 1973–2022—will understand "viability" in the ballot summary to have the first meaning. This dichotomy in understanding could play a significant role in whether voters approve the amendment. Under the first definition, a baby could be viable at a very early stage of pregnancy, if there are no indications that the baby will be miscarried or stillborn. Under the second definition, a baby might not achieve viability until roughly 26 weeks past gestation. *See* E. Gkiougki et al., *Periviable Birth: A Review of Ethical Considerations*, 25 Hippokratia 1, 1 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8877922/ ("Most neonates born at or above 26 weeks of gestation have, with active intervention, a high likelihood of survival, while below 22 weeks are virtually nonviable."). And some voters may understand babies in the so-called "periviable" stage (between 22 and 26 weeks)

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medical technology that could allow the fetus to develop to live a meaningful life outside the mother's womb. Once we accept that the point of 'viability' is that point at which some type of medical technology may be used, I frankly do not understand how or why we would differentiate between different medical measures, whether currently considered 'standard' or 'extraordinary,' as long as they enable the fetus to survive outside the womb and develop to live a *meaningful life*.").

to be "viable" because they do have a chance of survival outside the womb.

Polling indicates that the stage of pregnancy at which abortion becomes illegal matters greatly to voters. "A majority of U.S. adults say how long a woman has been pregnant should be a factor in determining whether abortion should be legal." Pew Research Ctr., *Americans' Views on Whether, and in What Circumstances, Abortion Should Be Legal* (May 6, 2022), https://tinyurl.com/mr39v6p2 (last visited Oct. 31, 2023). A recent Gallup poll found that "about two-thirds of Americans say it should be legal in the first trimester (69%), while support drops to 37% for the second trimester and 22% for the third." Gallup, *Where Do Americans Stand on Abortion?* (July 7, 2023), https://tinyurl.com/t9ejcyc2 (last visited Oct. 31, 2023). "Majorities oppose abortion being legal in the second (55%) and third (70%) trimesters." *Id.*

In short, the ballot summary's regurgitation of the primary clause of the amendment does nothing to explain to the voter what "viability" means. It does not warn the voter that the amendment might be considerably more protective of late-term abortions than would at first appear.

The same problem caused this Court to strike one of the ballot summaries in its *Advisory Opinion to the Attorney General re People's Property Rights Amendments*, 699 So. 2d 1304 (Fla. 1997) ("*Property Rights*"). The proposal there would have changed the initiative process for constitutional amendments in Article XI, Section 3, allowing proposed amendments to cover multiple subjects if the amendments would "require full compensation be paid to the *owner* when government restricts use (except *common law nuisances*) of private real property causing a loss in the fair market value, which *in fairness* should be borne by the public." 699 So. 2d at 1307 (emphasis added). The ballot summary copied this language nearly verbatim, explaining that the proposal would allow amendments to cover multiple subjects if the amendments would "require full compensation be paid to the *owner* when government restricts use (excepting *common law nuisances*) of private real property causing a loss in fair market value, which *in fairness* should be borne by the public." *Id.* (emphasis added).

This Court said that that ballot summary did not satisfy § 101.161(1), because it did not define "owner," "common law nuisance," or "in fairness." 699 So. 2d at 1308–09. It did not matter

that those terms also appeared in the text of the amendment itself. Among other things, this Court said it was "unclear if 'owner' is restricted to people who own the property or also to corporate entities." *Id.*. In other words, it was possible the amendment would have much broader application than some voters might have assumed. The same is true to an even greater extent of the word "viability" in the ballot summary here.

To similar effect is this Court's ruling in *Askew*. In *Askew*, the proposed amendment would have amended Article II, Section 8(e), as follows:

> (e) No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before <u>any state</u> ~~the~~ government body or agency<u>, unless such person files full and public disclosure of his or her financial interests pursuant to subsection (a),</u> ~~of which the individual was an officer or member~~ for a period of two years following vacation of office.

421 So. 2d at 153. The ballot summary restated the new text in the amendment almost word for word:

> Prohibits former legislators and statewide elected officers from representing other persons or entities for compensation before any state government body for a period of 2 years following vacation of office, *unless they file full and public disclosure of their financial interests*.

Id. (emphasis added). This Court nevertheless enjoined placement of the amendment on the ballot. "The problem," this Court said, "lies not with what the summary says, but, rather, with what it does not say." *Id.* at 156. The summary failed to disclose an existing, "complete two-year ban on lobbying before one's agency," irrespective of whether the former officer had disclosed their financial interests. *Id.* at 155. In other words, as this Court would later explain, "[a]lthough the ballot summary [in *Askew*] faithfully tracked the text of the proposed amendment, the summary failed to explain that the amendment would supersede an already existing constitutional provision that imposed an absolute two-year ban on lobbying by former legislators (i.e., regardless of financial disclosure)." *Armstrong*, 773 So. 2d at 15.

The voter could have sought out the underlying text of the amendment in *Askew* prior to the election and thereby ascertained that it was actually liberalizing the lobbying restriction. That did not cure the infirmity in the ballot summary. Again, all the voter sees upon entering the election booth is the ballot summary. Here, even a diligent voter who does search out the amendment text before voting will remain uncertain what "viability" means. The ballot

summary in this case thus presents an even stronger basis for invalidation.

B. The ballot summary does not explain whether the "patient's health" encompasses only physical health or mental health as well.

The ballot summary provides no explanation of when an abortion could be considered "necessary to protect the patient's health." Florida's current abortion statute has a carefully circumscribed health exception, allowing abortions after 15 weeks (6 weeks if the recent amendment becomes effective) to "avert a serious risk of [imminent] substantial and irreversible physical impairment of a major bodily function of the pregnant woman *other than a psychological condition*." § 390.0111(1)(a), (b), Fla. Stat. (emphasis added). Abortion advocates have long contended, however, that "health" in this context should be read to encompass both physical and mental health. There is some support for this more aggressive interpretation in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), the less-heralded companion case to *Roe*, which interpreted the word "health" as encompassing "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." Emotional or psychological health, while by no means trivial,

are capacious concepts and could be used to justify a much larger number of abortions than might appear on the face of the ballot summary.

For example, a 1999 article published by the Guttmacher Institute, a prominent advocate of abortion, urged that "[p]rochoice and mental health advocates should join together to educate policymakers about the importance of maintaining parity in the abortion context"—i.e., ensuring that health exceptions to abortion restrictions covered mental as well as physical health. Cynthia Dailard, *Abortion Restrictions and the Derive for Mental Health Parity: A Conflict in Values?*, Guttmacher Report on Public Policy at 14 (June 1999), https://tinyurl.com/vxd7vjtt. The article dismissed concerns expressed by some that "the health exception can be defined 'as just about anything,' including a psychological crisis caused when a teenager realizes that she 'won't fit into a prom dress' or 'hates being "fat."'" *Id.* at 5 (quoting advertisement of National Conference of Catholic Bishops). "The mental health exception is also critical," this article said, "because it has been the aegis under which most abortions in cases of severe fetal abnormality have been justified." *Id.*

Some states have express exceptions to their abortion restrictions for mental health or fetal abnormality. *See, e.g.*, § 26-23H-3(6), Ala. Code ("mental health"); § 16-34-2-1(a)(A)(ii), Ind. Code ("lethal fetal anomaly"); § 146C.1(4)(d), Iowa Code ("fetal abnormality"). Florida's current abortion statute allows abortions for "fatal fetal abnormality," § 390.0111(1)(c), Fla. Stat., but it does so in a provision separate from the health-of-the-mother exception, which as noted does not cover a "psychological condition," *id.* §§ 390.0111(1)(a), (b). Voters thus might assume that the ballot summary's failure to mention either mental health or fetal defects means the proposed amendment does not protect abortion in these circumstances. But abortion advocates can be expected to urge the broader meaning, arguing that "health" includes mental health, as determined by the healthcare provider, and that fetal defects pose a threat to the mother's mental health. Not defining "health" in the ballot summary means that "the voter is not informed as to what restrictions" might or might not apply "under the terms of the amendment." *Property Rights*, 699 So. 2d at 1309.

C. The ballot summary suggests that only physicians will qualify as "healthcare providers."

Another term the ballot summary does not explain is "healthcare provider" itself. Voters may assume it means a physician, as preserving the doctor-patient relationship is part of the common rhetoric used to justify the legality of abortion. *See, e.g.*, Jill Kalman & Stacey E. Rosen, *Abortion Rights Get to the Heart of the Doctor-Patient Relationship*, MedPage Today (June 28, 2022), https://tinyurl.com/mvrp3epw. But the term could apply to nearly any staff involved in some way in caring for the patient at a medical facility or abortion clinic. It leaves unclear whether the term would apply to physicians only, or physicians' assistants as well, or to nurses, or even to regular employees of a corporate "healthcare provider." The ballot summary thus does not inform voters about what kind of informed, professional judgment—if indeed it is professional at all—would be brought to bear in determining whether a baby is viable or whether continuing the pregnancy poses a threat to the mother's health.

D. The ballot summary does not explain that a "healthcare provider" might be able to decide both whether an abortion is "necessary to protect the patient's health" and whether a baby has reached "viability.

Finally, the placement of the last comma in the first sentence of the ballot summary amplifies the misleading effect of failing to define "viability," "health," or "healthcare provider." The first sentence 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." App. 5. That comma raises the prospect that the phrase "as determined by the patient's healthcare provider" will modify both "before viability' and "when necessary to protect the patient's health." Under one interpretive canon, "a qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) (collecting treatises); *accord Kasischke v. State*, 991 So. 2d 803, 812–13 (Fla. 2008). In other words, the comma could "cancel the last-antecedent canon," under which the adjectival phrase following a list ordinarily modifies only the last item in the list. Antonin Scalia & Bryan Gar-

ner, *Reading Law: The Interpretation of Legal Texts* § 23, at 161 (2012). Consequently, the "healthcare provider" might have license under the amendment to determine not only whether an abortion is "necessary to protect the patient's health" but also whether the baby has reached "viability." This latter potential consequence, while hugely significant, is largely hidden. It might license abortion providers effectively to determine the scope of the abortion right.

Voters cannot be expected to have immersed themselves in scholarly treatises on grammar and syntax or be familiar with the episodes in this Nation's legal history in which a comma, or want thereof, has carried with it such immense interpretive import. *See, e.g.*, *id.* at 162–64 & nn. 6–11; *O'Connor v. Oakhurst Dairy*, 851 F.3d 69, 70 (1st Cir. 2017). They will not suss out that the comma here might sneak into the amendment "legal loopholes so large" that healthcare providers "can, if they so choose, render" the remaining limitations in the amendment "illusory." *Adv. Op. to Att'y Gen. re: Stop Early Release of Prisoners*, 642 So. 2d 724, 727 (Fla. 1994). This obscurity will leave voters—to whom, again, polling shows the scope of the abortion right matters greatly—in the dark as to how much power the "healthcare provider" truly bears. The

ballot summary could have dispelled this misconception, at the expense of eight additional words, by explaining the circumstances in which abortion would be illegal in separate sentences: "No law shall prohibit, penalize, delay, or restrict abortion before viability. No law shall prohibit, penalize, delay, or restrict abortion ~~or~~ when necessary to protect the patient's health, as determined by the patient's healthcare provider." Or it could have confirmed the breadth of the exceptions with seven additional words: "No law shall prohibit, penalize, delay, or restrict abortion before viability, as determined by the patient's healthcare provider, or when necessary to protect the patient's health, as determined by the patient's healthcare provider." Either way, voters would know how much power healthcare providers would have under the amendment. But the ballot summary does neither, and so it hides this potentially far-reaching consequence of the amendment.

The ballot summary this Court struck down in its *Regulate Marijuana Similar to Alcohol* advisory opinion raised a similar concern. There, the ballot summary characterized the amendment as "regulat[ing] marijuana . . . for *limited* use and growing by persons twenty-one years of age or older." 320 So. 3d at 667 (emphasis

added). This Court found the use of the word "limited" to be misleading. "The ballot summary plainly [told] voters that the proposed amendment 'limit[s]' the personal use—i.e., consumption—of recreational marijuana by age-eligible persons. But the proposed amendment itself [did] not do so." *Id.* at 668. Rather, it established a "quantity *floor* below which an age-eligible person [could]not be prosecuted," and "authoriz[ed] the state and local governments to permit unlimited personal use of recreational marijuana." *Id.* The only sense in which the amendment might have imposed any limits was in allowing *private businesses* "to limit or prohibit the use of marijuana on their property." *Id.* The amendment thus "falsely t[old] voters that the proposed amendment limit[ed] the use of recreational marijuana," when in fact it "'d[id] no such thing.'" *Id.* (quoting *Adv. Op. to Att'y Gen. re Right to Competitive Energy Mkt. for Customers of Inv'r-Owned Utils.*, 287 So. 3d 1256, 1260–61 (Fla. 2020)).

The ballot summary here similarly presents the amendment as allowing restrictions on abortion after "viability" and thus as having limits. Even voters who understand "viability" in the more abortion-friendly *Roe*/*Casey* sense will assume the term imposes some limit on the scope of the abortion right. The ballot title—"Amendment to

Limit Government Interference with Abortion," App. 5 (emphasis added)—reinforces that inference. But in fact, the comma in the first sentence may effectively delegate to private parties—"healthcare providers"—the authority to determine "viability," just as the "limits" promised in the *Regulate Marijuana Similar to Alcohol* amendment were up to private businesses to determine on a case-by-case basis. The idea that the amendment "limit[s] government interference with abortion" could thus prove largely illusory.

The comma, in short, portends a potentially dramatic shift in lawmaking power from the legislature and the judiciary to private parties. Ordinarily, the legislature would have some authority to flesh out a term like "viability," through subsequent enactments that impose particular abortion restrictions. The judiciary would likewise have authority to interpret and apply the term to the restrictions that the legislature enacts. The ballot summary conceals the possibility that this may not be the case, and that "healthcare

providers" may have the power to override future abortion restrictions in every case with their own assessments of "viability."[3]

II. The ballot summary also overstates the scope of the amendment, by guaranteeing that "[n]o law" will restrict abortion in the circumstances stated, without mentioning the preemptive effect of federal law.

The ballot summary here is affirmatively misleading in the opposite direction as well: It "will not deliver to the voters of Florida what it says it will." *Stop Early Release*, 642 So. 2d at 727.[4] It promises both that "[n]o law shall prohibit, penalize, delay, or restrict abortion *before viability* . . . , as determined by the patient's healthcare provider," and that "[n]o law shall prohibit, penalize, delay, or restrict abortion . . . *when necessary to protect the pa-*

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[3] This unusual shift in regulatory power from the legislature and the judiciary to third parties also raises the concern that the proposal "*substantially alters* or *performs the functions of* multiple branches," in violation of the single-subject requirement in Article XI, Section 3. *Homestead Tax Exemption*, 880 So. 2d at 650 (quoting *Adv. Op. to Att'y Gen. re Fish & Wildlife Conserv. Comm'n*, 705 So. 2d 1351, 1353–54 (Fla. 1998)); *see also Property Rights*, 699 So. 2d at 1308.

[4] *See also Tax Limitation*, 644 So. 2d at 494 (summary falsely implying that there is "presently no cap or limitation on taxes in the constitution" is invalid); *Medical Marijuana I*, 132 So. 3d at 820 (Canady, J., dissenting) (ballot summary is fatally defective if voters "are potentially hoodwinked into believing that the amendment is consistent with . . . federal law").

tient's health, as determined by the patient's healthcare provider." App. 5. Neither is true. Federal law, mentioned nowhere in the ballot summary, would limit both types of abortions in circumstances the ballot summary does not disclose. The Court should strike the proposal from the ballot for this reason as well.

A. The ballot summary does not explain that partial-birth abortions will continue to be illegal before viability.

The first sentence of the ballot summary states: "No law shall prohibit, penalize, delay, or restrict abortion before viability . . . , as determined by the patient's healthcare provider." App. 5. This is not an accurate description of the effect of the amendment. Under federal law, partial-birth abortions will remain unlawful at any stage of the pregnancy, pre- or post-viability, unless necessary to save the life of the mother. 18 U.S.C. § 1531.[5] Within our federal system, a

[5] Subsection (a) of the federal statute provides in relevant part: "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." 18 U.S.C. § 1531(a)

state has no power to authorize its residents to participate in conduct that would constitute a federal crime. *See* art. VI, ¶ 2, U.S. Const.; *cf. United States v. Aquart*, 912 F.3d 1, 60 (2d Cir. 2018) ("[T]he authority to prescribe punishments for federal crimes is not a 'power[] that the Constitution reserved to the States.'" (quoting *United States v. Comstock*, 560 U.S. 126, 144 (2010)). A state may of course eliminate or reduce *state-law* penalties for conduct that is simultaneously regulated by state and federal law; but because federal-law penalties will remain even then, the conduct is unlawful. It is thus misleading to tell voters that "[n]o law," full stop, "shall prohibit, penalize, delay, or restrict abortion before viability."

The amendment suffers from the same defect as the ballot summary for the recent Adult Use of Marijuana initiative, which this Court ordered stricken from the ballot two years ago, *Adv. Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1180–81 (Fla. 2021) ("*Adult Use*"). There, the summary told voters the amendment would "[p]ermit[] adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason." *Id.* at 1179. "The summary's unqualified use of the word '[p]ermits'

strongly suggest[ed] that the conduct to be authorized by the amendment w[ould] be free of any criminal or civil penalty in Florida," when in fact a marijuana user would "remain exposed to potential prosecution under federal law—no small matter." *Id.* at 1180–81.

Likewise here, the unqualified phrase "[n]o law" strongly suggests that restrictions on pre-viability abortions will be free of penalty, civil or criminal. Unlike the ballot summaries this Court approved in its two opinions involving medical marijuana amendments, the ballot summary in this case makes no attempt to warn voters that the amendment will "not authorize violations of federal law," *Medical Marijuana I*, 132 So. 3d at 808, or that it does not "give immunity under federal law," *Adv. Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 475 (Fla. 2015) ("*Medical Marijuana II*"). A ballot summary may not "mislead voters regarding the interplay between the proposed amendment and federal law." *Medical Marijuana I*, 132 So. 3d at

808.[6] In particular, "[a] constitutional amendment cannot unequivocally 'permit' or authorize conduct that is criminalized under federal law," and any ballot summary "suggesting otherwise is affirmatively misleading." *Adult Use*, 315 So. 3d at 1181.

In short, a ballot summary cannot say that "no law shall prohibit, penalize, delay, or restrict abortion before viability," when in fact "some law" will. For this reason, the ballot summary in this case is both inaccurate and incomplete.

B. The ballot summary does not explain that partial-birth abortions will continue to be illegal after viability if they are unnecessary to protect the life of the mother.

The other half of the first sentence of the ballot summary promises in the alternative that "[n]o law shall prohibit, penalize, delay, or restrict abortion . . . when necessary to protect the patient's health, as determined by the patient's healthcare provider."

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[6] *See also id.* at 819 (Polston, C.J., dissenting) ("[W]hile ballot summaries are not required to mention the current state of federal law or a proposed state constitutional amendment's effect on federal law, they are required to not affirmatively mislead Florida voters by falsely implying the opposite of what that current state of federal law is."); *id.* at 820 (Canady, J., dissenting) (explaining that an initiative should be kept off the ballot where "the ballot summary seriously misrepresents the interaction of the proposed amendment with federal law").

App. 5. This health exception runs into conflict with the same federal statute as above. The federal partial-birth abortion statute allows partial-birth abortions only when "necessary to save the life of a mother." 18 U.S.C. § 1531(a). Thus, a post-viability partial-birth abortion performed to protect health but not life would remain illegal even after the amendment. Here again the ballot summary misleads as to the amendment's true effect.

CONCLUSION

The Limiting Government Interference with Abortion initiative should be stricken from the ballot.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman Old Style font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2), and contains 7,598 words.

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