SC22-1050, SC22-1127

In the Supreme Court of Florida

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA ET AL.,
Petitioners,

v.

STATE OF FLORIDA ET AL.,
Respondents.

On Petition for Discretionary Review from
the First District Court of Appeal
DCA No. 1D22-2034

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1989, this Court held that Florida's state constitutional right of privacy—Article I, Section 23—establishes a broad right to abort unborn life. *In re T.W.*, 551 So. 2d 1186, 1192–93 (Fla. 1989). That ruling was "egregiously wrong from the start." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). Abortion has never been "'private' in the ordinary usage of that word." *Roe v. Wade*, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting). It is, as Judge Henry Friendly said, "the antithesis of privacy."[1] Far from a hidden thought whispered in the confines of the home, the effects of abortion ripple throughout society, from the women who endure it, to the medical staff who perform it, to the unborn lives extinguished by it. By envisioning abortion as a "private" act, *T.W.* made the same fundamental error the U.S. Supreme Court committed in *Roe*, acknowledged in *Casey*,[2] and repudiated in *Dobbs*.[3]

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[1] A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J. L. & Pub. Pol'y 1035, 1038 (2006).

[2] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 853 (1992) (plurality op.) (redefining the federal abortion right as a liberty interest rather than a privacy right).

[3] 142 S. Ct. at 2271.

Petitioners ask this Court to perpetuate that error by wielding Section 23 to strike down HB5, a 15-week abortion law permitting all but the most belated and gruesome forms of abortion. That is quite backward. The Court should instead realign its precedents with Section 23's original meaning, which has nothing to do with abortion, and return the issue to Florida's elected representatives.

Section 23 speaks of the "right to be let alone" and freedom "from governmental intrusion" into "private life." Those words, dating from Justice Brandeis in 1890 to the Tampa Tribune in 1980, protected informational solitude, not decisional autonomy. That, after all, is how most ordinary people understand "privacy," not in the specialized sense of the word—favored by the cognoscenti steeped in *Roe* and its progeny—that includes all manner of personal decisions. It was, in fact, not lost on Section 23's framers that activists might misappropriate those words to constitutionalize controversial issues like intimate relations and drug use. They thus took care to explain that decisional autonomy was "not what they had in mind at all." App. 6. Section 23's goal instead was to keep "Big Brother" in check.

But even if Section 23 could be stretched to encompass some aspects of decisional autonomy, it would not include—in Petitioners'

breathtakingly capacious phraseology—freedom from "*any* unwelcome interference or impediment." Init. Br. 49. It certainly would not provide a right to cause harm, including to unborn life. Ordinary speakers in the years preceding the amendment rarely used its language to describe abortion. Section 23's chief Senate sponsor disclaimed that it had anything to do with abortion. Many legislators both voted for Section 23 and sponsored a "right-to-life" amendment to the federal constitution. *Roe*'s lawyerly vision of privacy would have been foreign to the ordinary voters in 1980 who ratified Section 23.

Should this Court nonetheless retain the core of its abortion precedents, it should still uphold HB5. "Before the right of privacy attaches," Petitioners must establish a "reasonable expectation of privacy," *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990), which here would mean a reasonable expectation of obtaining an abortion even after 15 weeks' gestation. Yet as Chief Justice Roberts explained in his concurring opinion in *Dobbs*, 142 S. Ct. at 2310–11, 15 weeks provides ample time to obtain an abortion. And even if HB5 implicated Section 23, it would survive any level of scrutiny. The State has a compelling interest in protecting life throughout pregnancy, particularly in its later stages.

Finally, the First District correctly held that Petitioners may not obtain an injunction to prevent irreparable harm to their nonparty patients and that they have failed to assert irreparable harm to themselves. Petitioners also lack third-party standing to assert their patient's legal claims. The Court should approve the decisions below.

BACKGROUND[4]

I. Legal background

In 1980, the people of Florida amended the Florida Constitution to add a "Right of privacy":

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const.

The amendment emerged from a thorough legislative process. In 1967, the U.S. Supreme Court had declared in a wiretapping case that the federal constitution does not preserve a general "right to be let alone"; protection for that right is instead "left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350–51

[4] For the Court's convenience, the State's appendix contains all historical materials cited in this brief.

(1967). Ten years later, Florida's first Constitution Revision Commission (CRC) took up that mantle.[5] Concerned about dwindling informational privacy in an increasingly digital age, *e.g.*, App. 43–44 (discussing informational-privacy threats), the CRC held hearings throughout the State and compiled a list of potential proposals based on the public's comments, Steven J. Uhlfelder, *The Machinery of Revision*, 6 Fla. St. U. L. Rev. 575, 579 (1978); App. 181–83. Among the proposals considered were an amendment prohibiting abortion, an amendment guaranteeing a right to abortion, and an amendment guaranteeing a right to privacy. App. 182–83.

The CRC did not act on the specific proposals to prohibit or protect abortion. But it referred the privacy proposal to its Committee on Ethics, Privacy and Elections. Gerald B. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla. St. U. L. Rev. 671, 723 (1978) (Cope 1978). There, members sought to differentiate their privacy proposal from then-existing federal privacy protections through "some other phraseology which has no federal analogue." App. 201.

[5] Art. XI, § 2, Fla. Const. (describing the CRC, which proposes state constitutional amendments).

The final version of the proposal thus read: "Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." App. 242. Florida voters, however, rejected that proposal along with others the CRC included in an omnibus amendment.

Just over a year later, concerns about protecting informational privacy resurfaced. In January 1980, this Court held that neither the federal nor the Florida constitution protected a general right to "disclosural privacy"—the right to prevent the government from publicly disclosing private information. *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 638–39 (Fla. 1980). Around the same time, the Legislature entertained a joint resolution to re-propose the privacy amendment to the Florida Constitution. A House Committee on Governmental Operations staff analysis of this joint resolution highlighted *Shevin* and the lack of "disclosural privacy" protections under current law as justifications for doing so. App. 220.

Presented with largely the same proposed privacy amendment—except with the caveat that it would not affect access to public records and meetings—the voters adopted Section 23.

Nearly a decade later, this Court construed Section 23 to "implicat[e]" a "woman's decision of whether or not to continue her pregnancy." *T.W.*, 551 So. 2d at 1192. Under *T.W.*, the Court has subjected abortion regulations to strict scrutiny. *See Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017).

II. Factual and procedural history

A. In 2022, Florida enacted HB5. Ch. 2022-69, Laws of Fla. (2022). The statute prohibits abortions if "the gestational age of the fetus is more than 15 weeks," subject to certain exceptions for maternal health and fatal fetal abnormalities. § 390.0111(1), Fla. Stat.[6]

Petitioners—several abortion clinics and an abortion doctor, ROA 11—facially challenged HB5 under Section 23 and sought temporary injunctive relief. ROA 408–90. They asserted that the law violated the constitutional rights of their patients. ROA 1596–98, 1608.

In defending the law, the State demonstrated that HB5 leaves unregulated most abortions in Florida, 94% of which occurred in the first trimester in 2021. ROA 915. It also showed that the unborn can

[6] Gestational age is "calculated from the first day of the pregnant woman's last menstrual period." § 390.0111(7), Fla. Stat.

feel pain as early as 14–20 weeks' gestation, ROA 1120–21, and that encouraging women to have abortions at an earlier stage of pregnancy advanced women's health because later-term abortions are more dangerous, ROA 929, 1182–88, 1192–1200.

After a hearing, the circuit court enjoined the State from enforcing HB5. ROA 8–75.

B. The State appealed, triggering an automatic stay. ROA 5–7; *see* Fla. R. App. P. 9.310(b)(2). Petitioners moved to vacate the stay, but the circuit court denied the motion. ROA 1549–52.

Petitioners then moved to vacate the automatic stay in the First District. That court, too, denied relief. ROA 2392–402. It held that Petitioners could not "obtain temporary injunctive relief" because even if they could "assert the privacy rights of pregnant women" for standing purposes, they could not do so to show "irreparable harm." ROA 2396.

Petitioners invoked this Court's jurisdiction. ROA 2409–12. They also moved to vacate the automatic stay.

Meanwhile, the First District reversed the temporary injunction for the same reason it denied the motion to vacate: "[Petitioners] could not assert irreparable harm on behalf of persons not appearing

below." ROA 2421. Petitioners again invoked this Court's jurisdiction, ROA 2426–29, and moved for a stay pending review. This Court later denied Petitioners' motions and accepted jurisdiction in both cases.

ARGUMENT

A party seeking a temporary injunction must establish "(1) a substantial likelihood of success on the merits, (2) the unavailability of an adequate remedy at law, (3) irreparable harm absent entry of an injunction, and (4) that the injunction would serve the public interest." *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1110 (Fla. 2021). This Court reviews "a trial court's factual findings on these elements for competent, substantial evidence" and "its legal conclusions de novo." *Id.*

Applying those standards, the First District correctly reversed the temporary injunction (and for the same reasons, correctly declined to vacate the automatic stay). HB5 is constitutional. Petitioners also lack irreparable harm and third-party standing.

I. HB5 is constitutional because Section 23 does not protect abortion, much less abortion after 15 weeks.

When this Court interprets a constitutional provision, it follows the "supremacy-of-text principle": What the words "convey, in their

context, is what the text means." *Advisory Op. to the Gov. re: Implementation of Amend. 4, the Voting Restoration Amend. (Amendment 4)*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)).

What the words convey is what "the voters would have understood" them to mean. *Id.* at 1084. Many sources can inform that understanding, including contemporaneous dictionary definitions, *id.* at 1078–79, traditional canons of construction, *id.* at 1080, and other courts' contemporaneous interpretations of similar language, *id.* at 1080–81. Primary-source materials from the drafting process, *Bush v. Schiavo*, 885 So. 2d 321, 329–31 (Fla. 2004), debates surrounding the provision in the relevant legislative bodies and the broader public, *id.*, and corpus-linguistics analyses, *e.g.*, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174–75 (2021) (Alito, J. concurring), may also illuminate a text's original meaning.

Those sources establish that Section 23 does not enshrine a right to abortion. Instead, voters understood it to protect informational privacy, like the disclosure of private facts. But even if voters had thought Section 23 stretched beyond informational privacy, they still would not have understood it to protect abortion, let alone

abortion past 15-weeks' gestation. And even if Section 23 extended to abortion, HB5 would not violate it, because there is no reasonable expectation of privacy in abortion after 15 weeks, and because HB5 survives any level of scrutiny.

A. The public understood Section 23 to protect informational privacy.

Courts have affixed the label "right of privacy" to "two very different" kinds of rights. *Dobbs*, 142 S. Ct. at 2267. In its traditional sense, the right protects informational privacy: the right to seclusion from the public, to be free from unwarranted surveillance, to avoid public disclosure of personal facts, and so on. *See, e.g.*, *Cason v. Baskin*, 20 So. 2d 243, 249 (Fla. 1944).

In the mid-20th century, some courts also began to equate privacy with decisional autonomy—"the right to make and implement important personal decisions without governmental interference." *Dobbs*, 142 S. Ct. at 2267. From the start, critics questioned whether that move made sense,[7] and it did not filter into the common lexicon.

[7] *E.g.*, Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1424 (1974) (decisional autonomy "is not at all what most people mean by privacy," which instead concerns "my freedom from official intrusion into my home, my person, my papers, my telephone").

Florida voters thus understood Section 23 to protect only informational privacy, not decisional rights like abortion. That follows from Section 23's plain text, the public's discourse, and the historical context in which Section 23 developed.

1. The plain meaning of Section 23 extends only to informational privacy.

a. Contemporaneous "dictionary definitions" generally "provide the popular and common-sense meaning of terms presented to the voters." *Amendment 4*, 288 So. 3d at 1078. Here, dictionaries defined the language presented to voters in informational-privacy terms.

The ballot summary explained that Section 23 would "creat[e] a constitutional right of privacy." App. 242. In 1980, popular dictionaries defined "privacy" as "[t]he condition of being secluded or isolated from the view of, or from contact with, others; Concealment; secrecy." *Privacy*, American Heritage Dictionary of the English Language (1st ed. 1969); *Privacy*, American Heritage Dictionary of the English Language (2d Coll. ed. 1982).[8] Those are informational-

[8] *See also Privacy*, Webster's New Int'l Dictionary (2d ed. 1957) ("State of being apart from the company or observation of others; seclusion"); *Privacy*, Webster's Third New Int'l Dictionary (1976) ("the quality or state of being apart from the company or observation of

privacy terms; they describe one's interest in seclusion and in keeping personal information secret. Oxford's English Dictionary exemplifies that usage, citing a bevy of 1970s publications that referred to "privacy" in the informational sense.[9]

The phrases "right to be let alone" and "free from governmental intrusion into the person's private life" bear a similar meaning. As a threshold matter, Petitioners rightly presume (at 48–50) that these phrases are synonyms that work in tandem. Dictionaries have long

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others"; "isolation, seclusion, or freedom from unauthorized oversight or observation").

[9] *Privacy*, Oxford English Dictionary (2d ed. 1989) ("**1970** R.K. KENT Lang *Journalism 106 Privacy, right of*, the right of a citizen not to have details of his life explored in the press . . . The right of privacy also prevents the use of a person's name or picture in an advertisement without his permission. **1975** R.H. RIMMER *Premar Experiments* III. 233 In the meantime, you can live in one of Premar's privacy rooms. **1976** *Billings* (Montana) *Gaz.* 27 June 5-D/5 (Advt.), There's also a large patio with privacy fence and a double attached garage, all on a nicely landscaped half acre. **1977** *Chicago Tribune* 2 Oct. XII. 21/1 (Advt.), Huge patio deck with privacy fence and decorator touches. **1978** I. MURDOCH *Sea* 375 When Titus appeared I decided to go outside to avoid interruption and ensure privacy.").

used both interchangeably,[10] as have privacy-law scholars[11] and courts.[12] That is why Section 23's original framers—members of the 1977–78 CRC—assumed that the phrases were synonymous.[13] In fact, the phrases must be read together so that Section 23 is not applied against private actors. Cope 1978 at 742 (drafters used term "free from governmental intrusion" to "limit[] the [otherwise uncabined] 'right to be let alone' by indicating that [S]ection 23 operates only against governmental intrusion"); *see also id.* at 732 (the terms "were considered to be synonymous").[14]

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[10] *E.g.*, *Let Alone*, Oxford English Dictionary (2d ed. 1989) ("To leave a person in *solitude*; to abstain from *interfering* with or paying attention to (a person or thing), abstain from doing (an action)" (emphasis added)).

[11] *E.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195–96 (1890) (describing the "right to be let alone" as barring "intrusion upon the domestic circle").

[12] *E.g.*, *Katz*, 389 U.S. at 350 & nn.5–6.

[13] App. 58–62.

[14] Petitioners therefore rightly do not argue that Section 23 "groups" together two distinct rights. *See* Adam Richardson, *The Originalist Case for Why the Florida Constitution's Right of Privacy Protects the Right to an Abortion*, Stetson L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187311.

In 1980, both these terms referred to informational privacy. The right to be "let alone," for example, meant the right to be "le[ft] in solitude," free from outside "interference" or "attention."[15] The latter phrase—"free from governmental intrusion" into "private life"—shared this meaning. "Intrusion" meant "[i]llegal entry upon or appropriation."[16] "Private" meant "[s]ecluded from the sight, presence, or intrusion of others," the chief example being "*a private bathroom*."[17] And "life" meant one's "activities, relationships, and interests collectively."[18] Combined, these words preserved a right to be free

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[15] *Let Alone*, Oxford English Dictionary (2d ed. 1989); *see also Let Alone*, Webster's Third New Int'l Dictionary (1976) ("to refrain from interfering with; leave undisturbed; to leave to oneself").

[16] *Intrusion*, American Heritage Dictionary of the English Language (1st ed. 1969); *Intrusion*, American Heritage Dictionary of the English Language (2d Coll. ed. 1982) (same); *see also Intrude*, American Heritage Dictionary of the English Language (1st ed. 1969) ("To interpose (oneself or something) without invitation, fitness, or leave."); *Intrude*, American Heritage Dictionary of the English Language (2d Coll. ed. 1982) (similar).

[17] *Private*, American Heritage Dictionary of the English Language (1st ed. 1969); *Private*, American Heritage Dictionary of the English Language (2d Coll. ed. 1982) (same).

[18] *Life*, American Heritage Dictionary of the English Language (1st ed. 1969); *see also Life*, American Heritage Dictionary of the English Language (2d Coll. ed. 1982) ("The physical, mental, and spiritual experiences that constitute a person's existence").

from "illegal entry upon or appropriation" of "secluded" "activities, relationships, and interests." Those terms apply most naturally to an individual's right to seclude himself from the government's gaze—a concept distinct from a "right to make and implement important personal decisions." *Dobbs*, 142 S. Ct. at 2267.

Section 23's context reinforces that it safeguards only informational privacy. *See Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 324 (Fla. 2022) ("Context is a primary determinant of meaning"; "proper interpretation requires consideration of 'the entire text'" (quoting Scalia & Garner at 167)). Its second sentence creates a carveout for Florida's public-records laws: Section 23 "shall not be construed to limit the public's right of access to public records and meetings as provided by law." That carveout underscores that Section 23 prevents public disclosure of private facts.

b. Construing Section 23 to cover only informational privacy also tracks "the public discourse." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2150 (2022). Though Petitioners cherry-pick from "contemporaneous news coverage" to claim that the 1977–80 public "identified the proposed amendment as" containing "the constellation" of decisional-autonomy rights protected under federal

law, Init. Br. 57–58, the overwhelming weight of media coverage reported that Section 23 secured informational privacy.[19]

Newspaper editorials colorfully described the amendment as preventing "government snooping,"[20] "big brotherism,"[21] and the realization of George Orwell's "1984."[22] "What personal information about all of us is stored here and there? Who has access to it? How can it be used or misused to interfere in our private lives?"[23]"Prompted by a computer-age concern that credit agencies, insurance companies, banks and government itself sometimes snoop too much into people's private lives," they said, "the right of privacy would assure citizens the right to be let alone from governmental intrusion."[24] The amendment was promised to "hinder encroachment

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[19] *See* App. 6–31 (compiling 1977–80 articles discussing Section 23 in informational-privacy terms); *see also District of Columbia v. Heller*, 554 U.S. 570, 615 (2008) (relying on historical newspaper editorials as evidence of public meaning).

[20] App. 7.

[21] App. 9; *see also* App. 7–8, 10.

[22] App. 10.

[23] App. 9.

[24] App. 11.

of personal rights by the state, especially in light of the advancement of electronic eavesdropping equipment and the proliferation of computers to keep all sorts of government and private records."[25]

Public remarks from Section 23's proponents reflected the same focus. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt."). Commissioner Moyle, a CRC sponsor, assured the people that Section 23 would "safeguard the public from the ever more sophisticated electronic devices which permit the commercial exploitation of data." App. 14. Then-Governor Reubin Askew, in urging ratification, said: "In this era of enemies lists, wiretapping, and computerized data banks, the need for constitutional acknowledgment of our privacy rights as individuals should be apparent." App. 15. "[R]ecognition of the right to be let alone," he asserted, was "essential" to "preserv[e] our most cherished freedoms" from this threat. *Id.*

Senator Gordon, the 1980 Senate sponsor of the amendment, claimed that the "right to be left alone" was needed "in the

[25] App. 12.

increasingly sophisticated world we live in with its wiretaps and excessive data collection." App. 16. "[T]his amendment says" to the government "stay out of your business." *Id.* Patricia Dore—a Florida State University Law Professor and key staff counsel to both the CRC and the 1980 Legislature—agreed: "[T]he proposed constitutional amendment would force the state to justify its actions when it sought information." App. 17.

Section 23's House sponsor, Representative Mills, was perhaps most adamant that the amendment was about informational privacy. Quipping that "[he]'d rather pass a privacy amendment in 1980 than after 1984," App. 17, Mills assured voters that Section 23's "goal" was "to provide individual and informational privacy," App. 19. "The bigger government gets, the more it tends to collect information on people." *Id.* Mills described Section 23's "central concern" as "limiting public access to computerized information that government collects about its citizens" and "mak[ing] sure that government collects no more information than it absolutely requires to serve the people." App. 17; *see also* App. 18 (supporters echoing Mills' characterization). As an example of what the amendment would invalidate, he cited a New York statute "requir[ing] that carbon copies of all

prescriptions be forwarded to local police departments." App. 21. And when asked whether the amendment might cover decisional-autonomy issues like sexual relationships or recreational drug use, Mills drew a clear line: "[I] would expect Florida courts to express a conservative view on the amendment's applicability." App. 20. "[T]he Supreme Court should be guided by the legislative history of the amendment and rule that it is aimed at 'informational privacy.'" App. 22.[26]

Some media reports on Section 23 did discuss decisional autonomy. But most merely quoted opponents stoking public fears about gay rights and legalized marijuana. *E.g.*, App. 6 (conservative opponents raising such objections). "[L]egislative opponents," however, "understandably tend to overstate [a law's] reach" "in their zeal to defeat" it. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976).

[26] *See also* App. 21 (Mills stating that the Legislature never discussed gay rights in proposing the amendment and "[t]he focus of the hearings was informational privacy"), 24 (Mills responding to concerns about the amendment's effect on decisional autonomy by saying it simply "was intended as a guarantee against . . . unwarranted government snooping").

It is instead "the sponsors that we look to." *Schwegmann Bros.*, 341 U.S. at 394. And Section 23's proponents emphasized to the public not only that the provision concerned informational privacy, but also that it did *not* concern decisional autonomy. "[T]hat's not what they had in mind at all," explained one article. App. 6. They "insist[ed]" that decisional autonomy "ha[d] nothing to do with their amendment." App. 25. Representative Mills complained that decisional-autonomy arguments "widely misinterpreted" Section 23, noting that the amendment was needed to protect rights currently "not found in the state constitution." App. 26.[27] Representative Kiser, a House co-sponsor, called claims that the amendment would

[27] Fifteen years after Section 23's enactment, Representative Mills would claim that "he introduced the privacy amendment with the intention of providing a basis for protecting both decisional and informational privacy rights." Jon Mills, *Sex, Lies, and Genetic Testing: What are Your Rights to Privacy in Florida?*, 48 Fla. L. Rev. 813, 825 n.42 (1996). But a secret intent revealed more than a decade later cannot override contemporaneous evidence of original meaning. *See Amendment 4*, 288 So. 3d at 1078 (refusing to consider "subjective intent" and instead looking to "the objective meaning of the constitutional text"); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. Rev. 1953, 2035–36 (2021) (when a sponsor dupes the electorate into accepting a given meaning for a term, that meaning should control over the sponsor's later-expressed contrary meaning).

implicate gay rights "garbage" and "completely off the wall." App. 6. Pat Dore disavowed attempts to "turn this into a homosexual rights amendment when it really is not." App. 27. And then-Florida Attorney General Jim Smith said: "We can only hope that the courts will interpret the amendment as a safeguard against unwarranted intrusion into private lives, as the Legislature intended, and not as a mandate to repeal the laws that protect society" like prohibitions on pornography and drugs. App. 28.

All in all, the weight of contemporaneous evidence shows that the public thought Section 23 covered informational privacy and nothing more.

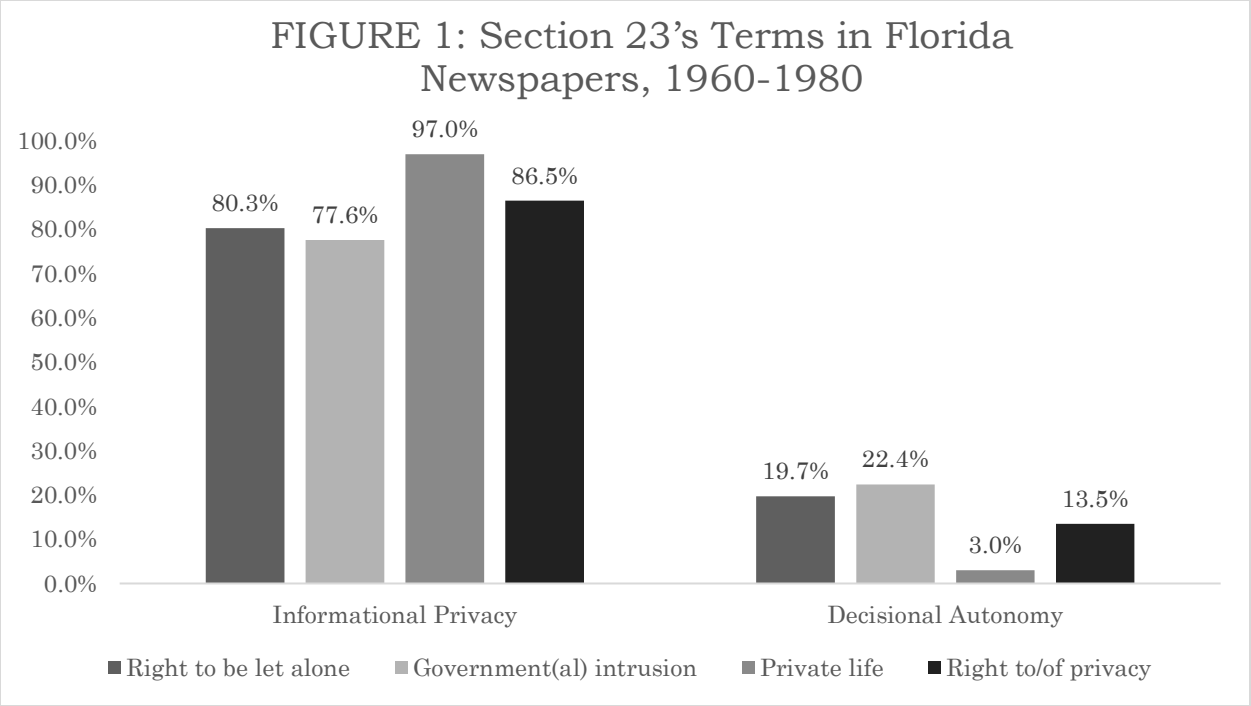
c. A corpus-linguistics analysis[28] corroborates that conclusion. The State examined a corpus of historical Florida newspapers (from

[28] "Corpus linguistics is an empirical approach to the study of language that uses large, electronic databases" of language gathered from sources like books, magazines, and newspapers. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 828 (2018) (footnote omitted). Because it offers "a consistent and replicable" way to "check" intuitions about phrasal meaning against a repository of ordinary usage, *Richards v. Cox*, 450 P.3d 1074, 1080 (Utah 2019), jurists increasingly use this approach to confirm original meaning, *e.g.*, *Duguid*, 141 S. Ct. at 1174 (Alito, J. concurring) (calling for a corpus-linguistic investigation); *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1160 (M.D. Fla. 2022) (Mizelle, J.) (using a corpus); *see also Parrish v. State Farm Fla. Ins.*

Newspapers.com) published between January 1, 1960, and November 3, 1980 (the day before the voters adopted the amendment). It searched that database for references to "right to be let alone," "government(al) intrusion," "private life," and "right to/of privacy."[29] As shown in Figure 1, the search revealed that the public overwhelmingly associated those phrases with informational privacy (i.e., concepts like disclosure of facts, government surveillance, and seclusion from others):

Co., No. SC21-172, 2023 WL 1830816, at *4 n.5 (Fla. Feb. 9, 2023) (same).

[29] The State's appendix links the articles surveyed. App. 243–84.



Of 152 references[30] to "right to be let alone," 122 linked the term to informational privacy (80.3%), while just 30 linked to decisional autonomy (19.7%). Of 143 references to "government(al) intrusion," 111 were to informational privacy (77.6%), while only 32 were to decisional autonomy (22.4%). Of 200 references[31] to "right to/of privacy," 173 connected those terms to informational privacy (86.5%),

[30] The State found 557 total references to "right to be let alone," but 415 matches were discarded as duplicates, irrelevant, or without enough information to categorize the result, such as newspapers printing the text of the amendment with nothing more.

[31] The State found thousands of results for articles referring to "right to/of privacy." It thus surveyed a random sample of 200 classifiable articles.

while just 27 concerned decisional autonomy (13.5%). And of 200 references[32] to "private life," 194 discussed informational privacy (97%), and six referred to decisional autonomy (3%).

Those statistics speak for themselves. In staggering numbers, people used the terms relevant to Section 23 to discuss informational privacy. References to decisional autonomy, in contrast, were rare. Nor is it likely that people used these terms to refer to both informational privacy *and* decisional autonomy. Just eight out of 143 articles (5.6%) connected "right to be let alone" with both senses, and none linked both concepts to the other three phrases. It is probable, then, that people in 1980 understood these terms to apply to only one conceptualization of privacy: informational privacy.

d. Petitioners' contrary analysis is unconvincing. They read Section 23 to forbid "*any* unwelcome interference" with an individual's "personal or intimate experiences, matters, activities, and relationships, *without qualification*." Init. Br. 49–51 (second emphasis added). That cannot be right. Incest, bestiality, assisted suicide, child

[32] The State similarly found thousands of results for articles referring to "private life." It again surveyed a random sample of 200 classifiable articles.

marriage, and consensual cannibalism could all be called "personal or intimate" acts.

Petitioners' plain-text analysis is also flawed. They use (at 48–50) "lexicographers' definitions of the individual words," *TE-TA-MA Truth Found.—Fam. of URI, Inc. v. World Church of the Creator*, 297 F.3d 662, 666 (7th Cir. 2002) (Easterbrook, J.), to define Section 23's critical phrase—right to be let alone. But people "use [and] understand" phrases "as a unit." *Id.* So understood, Section 23 concerns informational privacy.

2. The historical context in which Section 23 developed confirms that it protects only informational privacy.

Section 23's historical context supports the same conclusion. The provision's framers chose the phrases "right to be let alone" and "free from governmental intrusion" into "private life" because that language was "judicially interpreted" and the "subject of a substantial body of law." App. 134, 214–15. That body of law associated both phrases with informational privacy. *See Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) ("[I]f a word is obviously transplanted from another legal source. . . . it brings the old soil with it.").

a. These concepts trace to the seminal 1890 law-review article, *The Right to Privacy*, by Samuel Warren and Louis Brandeis. 4 Harv. L. Rev. 193. Prompted by media attacks on Warren's family[33] and other tales of the "press intruding into private affairs and publishing personal information,"[34] the authors posited a "right to be let alone" and free from "intrusion upon the domestic circle." 4 Harv. L. Rev. at 195–96. The right, however, "had little to do with the autonomy of an individual to make decisions . . . free from government control." 37 Rutgers L.J. at 990. It described a "different sort of privacy"—one "directed to keeping personal information from being exposed to the public, rather than to keeping decision-making within the control of an individual." *Id.*; *see* 4 Harv. L. Rev. at 195–96. To Warren and Brandeis, the "right to be let alone" and free from "intrusion" safeguarded against the publication of private facts. 4 Harv. L. Rev. at 195–96, 207–12.

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[33] Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy"*, 2008 Mich. St. L. Rev. 35, 42 (2008); *see also* App. 205 (Cope testifying that "Warren and Brandeis wrote their article out of irritation at the newspapers of the day").

[34] Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 Rutgers L.J. 971, 989 (2006).

Early cases recognizing those rights tracked this conceptualization,[35] which gained widespread acceptance throughout the country in the years before Section 23's enactment.[36] By 1977, the Restatement defined "the right to be let alone" to implicate "four distinct

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[35] *See, e.g.*, *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 71, 79–81 (Ga. 1905) ("legal right to be let alone" barred newspaper from publicizing plaintiff's photograph without permission); *Itzkovitch v. Whitaker*, 39 So. 499, 500 (La. 1905) (upholding order enjoining publication of photograph because "[e]very one who does not violate the law can insist upon being let alone (the right of privacy)"); *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. 1929) ("The right of privacy may be defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone."); *cf. also Henry v. Cherry & Webb*, 73 A. 97, 100, 109 (R.I. 1909) (declining to recognize right to be let alone but defining it as a right "to live a life of seclusion"); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902) (similar and characterizing the right as "founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers").

[36] *See, e.g.*, *Hinish v. Meier & Frank Co.*, 113 P.2d 438, 442–43 (Or. 1941) (collecting cases); *Gill v. Hearst Pub. Co.*, 253 P.2d 441, 443 (Cal. 1953); *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. 1942); *Bremmer v. J.-Trib. Pub. Co.*, 76 N.W.2d 762, 764 (Iowa 1956); *Martin v. Senators, Inc.*, 418 S.W.2d 660, 662–63 (Tenn. 1967); *Welsh v. Pritchard*, 241 P.2d 816, 819 (Mont. 1952); *Hamberger v. Eastman*, 206 A.2d 239, 241 (N.H. 1964); *Housh v. Peth*, 133 N.E.2d 340, 343 (Ohio 1956).

wrongs, whose only relation to one another is that each involves interference with the interest of the individual in leading, to some reasonable extent, a *secluded and private life, free from the prying eyes, ears and publications of others*." Restatement (Second) of Torts § 652A (Am. L. Inst. 1977) (emphasis added) (outlining the classic privacy torts: intrusion upon seclusion, public disclosure of private facts, false light, and misappropriation of name or likeness).

Florida authorities were to the same effect. In *Cason*, this Court acknowledged that the "right to be let alone" protected against public disclosure of private facts. 20 So. 2d at 248 (defendant's publication of personal details about plaintiff's life gave rise to claim for invasion of "right to be let alone" and free from "public gaze" (citing Warren & Brandeis)). From there, Florida courts applied the "right to be let alone" to cases about intrusion upon seclusion,[37] wiretapping,[38] and

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[37] *State v. Elder*, 382 So. 2d 687, 692 (Fla. 1980) (discussing "right of every person to be let alone" in an intrusion-upon-seclusion case); *State v. Tsavaris*, 382 So. 2d 56, 74 n.10 (Fla. 2d DCA 1980) (same); *Olivera v. State*, 315 So. 2d 487, 489 (Fla. 2d DCA 1975) (same).

[38] *Markham v. Markham*, 265 So. 2d 59, 61 (Fla. 1st DCA 1972) (discussing "right to be let alone" in a wiretapping case), *aff'd*, 272 So. 2d 813, 814 (Fla. 1973) ("The District Court has correctly

publication of private facts.[39] "The right of privacy," wrote the Third District, was simply "the right of an individual *to be let alone* and to live a life free from unwarranted *publicity*." *Harms*, 127 So. 2d at 717 (emphasis added) (citing *Cason*).

Similarly, both Florida's Attorney General and this Court opined in the years preceding Section 23 that the "right to be let alone" protects an electoral candidate's interest in keeping his name off the ballot. Then-Attorney General Richard Ervin—later a Justice of this Court—grounded his opinion on that question in "[t]he 'right of privacy' [which] has been defined as 'the right of an individual *to be left alone*, to live a life of *seclusion*, or to be free from unwarranted *publicity*.'"[40] This Court affirmed Justice Ervin's conceptualization of

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answered the question presented and its decision is adopted as the decision of this Court.").

[39] *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715, 717 (Fla. 3d DCA 1961).

[40] Fla. Att'y Gen. Op. 1960-171 (Oct. 11, 1960) (emphasis added), *aff'd by State ex rel. Burch v. Gray*, 125 So. 2d 876 (Fla. 1960), *as explained in Yorty v. Stone*, 259 So. 2d 146, 148–49 (Fla. 1972), https://tinyurl.com/bdfwfmcp.

privacy many times,[41] equating the "right to be let alone" with unwanted publication and intrusion upon seclusion.

This Court also linked the right to be let alone with informational privacy in the decision that prompted Section 23. *See Shevin*, 379 So. 2d at 636; App. 220 (House staff analysis citing *Shevin* in discussing the proposed amendment). There a government contractor moved to protect information belonging to interviewees from disclosure under Florida's public-record laws. In denying relief, the Court equated a person's "right to be let alone" with their "general right of privacy." *Shevin*, 379 So. 2d at 636. Then, because the Florida Constitution did not protect a person's "general . . . right of privacy," this Court held that the interviewees had no constitutional right to avoid disclosure under the public-records law. *Id.* at 639. In other words, the Court conceptualized the general right of privacy—another term for the right to be let alone—as an informational-privacy right.

Some non-Florida authorities preceding Section 23 did discuss the "right to be let alone" and "governmental intrusion" into private

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[41] *E.g.*, *Battaglia v. Adams*, 164 So. 2d 195, 197 (Fla. 1964); *see also Yorty*, 259 So. 2d at 148–49; *Pasco v. Heggen*, 314 So. 2d 1, 3–4 (Fla. 1975).

life in a decisional-autonomy sense. *E.g.*, Init. Br. 56–57. But their usages were in the minority and divorced from a long line of historical precedent using these terms in the informational usage.[42] That way of speaking did not carry over into common parlance. *Supra* 12–26.[43]

b. The framers grasped the legal history carried with the words they chose. App. 59 (Section 23's language "originated primarily in the Brandeis Law Review article, and . . . Katz versus US"); *see also* App. 43. And indeed, the CRC's deliberations highlight that they understood Section 23 to protect informational privacy.

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[42] *E.g.*, Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 466 (1980) (explaining how courts used "[p]rivacy" to "avoid such historically loaded legal terms as 'substantive due process' and 'liberty'").

[43] Petitioners also cite (at 53) post-1980 state-court decisions recognizing a right to abortion under those states' "privacy protections." But they omit that not all states have interpreted their constitutional privacy clauses that way. *See Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 757 (Ill. 2013) (state privacy clause did not protect abortion); *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 189 (Ariz. Ct. App. 2011) (declining to reach the issue but suggesting that abortion is unprotected). The Court should interpret Florida's constitutional provisions consistent with the understanding of "the framers and the voters" of Florida, *Brinkmann v. Francois*, 184 So. 3d 504, 509 (Fla. 2016), not of other jurisdictions, *e.g.*, *Burnett v. Am. Welding & Tank Co.*, 197 So. 458, 464 (Fla. 1940); *Coal. for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 404–05 (Fla. 1996).

In 1977, Commissioner Ben Overton—then-Chief Justice of this Court—"opened the constitution revision session" by "rais[ing] the issue" of informational privacy:

> Who, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operations distribution systems. There is a public concern about how personal information concerning an individual is used; whether it be collected by government or by business. The subject of individual privacy and privacy laws is in a new and developing stage. It is a problem that should be addressed.

App. 41.

Commissioner Moyle, a sponsor, told the CRC that Section 23 was a direct response to "Commissioner Overton's words." *Id.* Moyle explained that until the modern era, "the eyes and ears were the only instruments for physical surveillance. Penetration of the mind was possible only by torture or by compelled testimony. There was little record keeping about individuals." App. 42. "[T]echnological advances and the increasing interdependence of our society," however, had led to "growing concerns in our society about threats to privacy." App. 43. Section 23, said Moyle, would "assure[]" citizens that their "records do not form the basis for governmental intrusion." App. 46.

Commissioners supporting Section 23 expressed similar views of its reach. Commissioner Brantley, for instance, recounted government efforts to "surveil people" and collect extensive records about Florida citizens. App. 91–95. To prevent similar intrusions from "happen[ing] again in this state," he urged the CRC to enact Section 23. App. 96–97. Moyle later renewed Brantley's anecdote "about a department in Florida state government that tailed him and his wife and had files on them." App. 134. "That is governmental intrusion that we are talking about." *Id.*

Commissioner Spence also touched on "the right to be let alone." App. 82–83. He said the language was necessary because modern technology made it possible to obtain "a folder" of information containing "the greatest detail" about anyone with "just a couple of phone calls." App. 83. The right to be let alone was needed because "Big Brother is watching. . . . Big Brother is creeping in." *Id.*

Another part of the original proposal reveals that the CRC understood Section 23 to protect informational privacy. The CRC debated (and eventually rejected) a parallel provision that would have authorized the Legislature to grant citizens a right of privacy against private actors: "The legislature shall protect by law the private lives

of the people from intrusion by other persons." App. 45. That language paralleled the latter phrase of Section 23's first sentence, which protects against "governmental intrusion into [a] person's private life." Art. I, § 23, Fla. Const.

The parallel clause, Commissioner Moyle argued, was necessary because "private businessmen" had "compile[d] reams of personal information about their customers" with "few restrictions on [their] disclosure." App. 49–50; *see also* App. 75 (describing how personal information held by private businesses could be "disclos[ed], disseminat[ed], and everything else"). The clause would secure "storehouses of information" amassed by "banking," "consumer credit operations," and "insurance carriers." App. 47–48, 50. Commissioner Douglass, a co-sponsor, thought the provision necessary to protect individuals from "banks releasing their information or from newspapers invading their privacy improperly." App. 159. The year "1984 isn't too far off," Douglass said. App. 177.

Scholars assisting the CRC likewise suggested that Section 23 was an informational protection. Patricia Dore—General Counsel for the Declaration of Rights Committee—wrote a contemporaneous article discussing the amendment that focused on informational

privacy, not decisional autonomy. *See* Patricia A. Dore, *Of Rights Lost and Gained*, 6 Fla. St. U. L. Rev. 609, 650–57 (1978). And Gerald Cope—future Chief Judge of the Third District—began his testimony before the CRC by quoting Chief Justice Overton's opening statement on informational privacy. App. 203–04. "I think that pose[d] the issue very well," he said, before expanding on the importance of strong informational-privacy protections in modern society. App. 204–06.[44]

To be sure, some framers made a few references to decisional autonomy throughout the three-year ratification process.[45] A never-

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[44] Cope's testimony briefly mentioned decisional-autonomy cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See* App. 206. But his discussion of that view of privacy spanned just three sentences of his 10-page testimony, App. 203–12, and was never mentioned in the CRC's debates, App. 37–180.

Cope also touched on decisional autonomy in two articles discussing Section 23. Gerald B. Cope, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla. St. U. L. Rev. 631 (1977); Cope 1978. Most of his analysis, though, focused on informational privacy. And though Cope hypothesized that it was "theoretically possible" that Section 23 could have some effect on decisional autonomy, he also recognized that "the field [was] so thoroughly preempted [by federal law] that nothing remains on which a state privacy right could operate." Cope 1978 at 764 n.472. Voters would not likely have drawn from all this that Section 23 covered such a thoroughly preempted area.

[45] A staff-attorney memorandum for the 1977 CRC Ethics, Privacy and Elections Committee mentioned decisional autonomy and

cited "informal overview" appended to a staff analysis from the 1980 legislative session did as well. App. 221–22. But those remarks were almost invariably about what federal and other state courts had held, not what Section 23 would do. *See, e.g.*, App. 43. The few autonomy-related statements by framers concerning Section 23's meaning were again generally those of detractors sparking fears about things like legalizing marijuana. *E.g.*, App. 53–55. The sponsors, on the other hand, assured the CRC that Section 23 did not "protect[such] criminal activities," App. 55, and was "in no way intended to disrupt the police power of the state," App. 148.

c. Petitioners' contrary spin on history is unpersuasive. They first suggest that the framers understood Section 23 to protect both decisional autonomy and informational privacy. Init. Br. 55. But as detailed above, people rarely used Section 23's terms to describe both concepts. That explains why the framers barely mentioned decisional autonomy or connected it with Section 23. And when Section 23 was enacted, the Fourteenth Amendment's Due Process Clause was

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Roe, but only to discuss the compelling-interest standard. App. 193–94. It did not opine on the merit of decisional-autonomy cases, nor was this analysis cited in CRC debates.

already understood to protect many aspects of decisional autonomy (including abortion) from state infringement, *see Roe*, 410 U.S. at 152, and Florida's Due Process Clause was thought to extend at least as far as its federal counterpart.[46] To read Section 23 to duplicate existing constitutional protections would contradict basic principles of interpretation. *See Edwards v. Thomas*, 229 So. 3d 277, 285 (Fla. 2017) (courts should not construe provisions to contain "surplusage").

Even more, the evidence shows that the framers understood Section 23 to concern matters not already addressed by federal or state law. They were spurred to action by statements in informational-privacy cases like *Katz* and *Shevin*, which had explained that federal law did not protect a "general" right to informational privacy. *See* App. 220. The framers described Section 23 as filling that gap. App. 43 (Section 23 targeted threats of advancing technology not

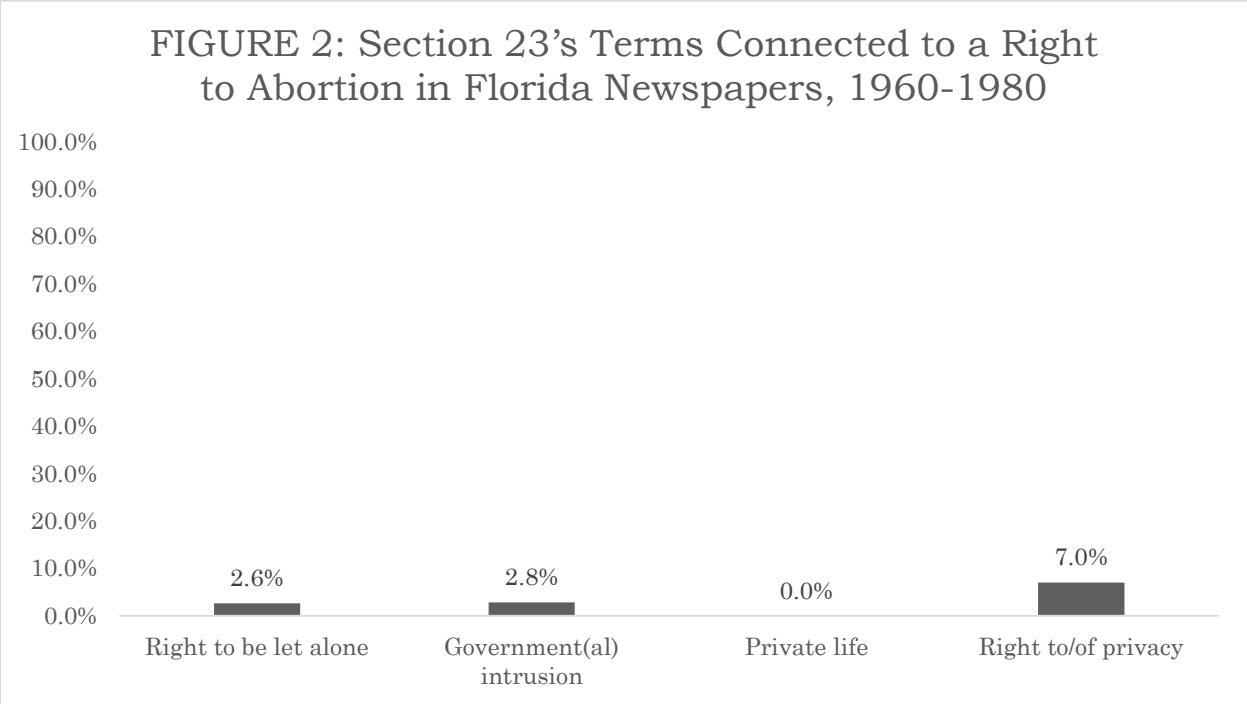
[46] App. 218–19 (Attorney General Robert Shevin explaining to the CRC that "Florida courts have implicitly interpreted due process under [Art. I, § 9, Fla. Const.] as co-extensive with the due process clause of the Fourteenth Amendment" and that "[t]he concept of due process also includes substantive due process"); *see also, e.g.*, *Baker v. State*, 377 So. 2d 17, 19 (Fla. 1979) (conjoining state and federal due process analyses).

addressed by federal law), 104 (Section 23 necessary to protect rights not protected by federal law). They thus chose "phraseology which has no federal analogue," App. 201, to make clear that the amendment charted a new course into yet-unprotected territory: informational privacy, *see* App. 43.

B. Even if Section 23 protects some aspects of decisional autonomy, it does not protect abortion.

At the very least, the public did not understand *abortion* to fall within Section 23's reach. Abortion "destroys" what many consider life and what even proponents of abortion call "potential life." *Dobbs*, 142 S. Ct. at 2258. It is thus "critically different from any other" putative decisional right. *Id.* at 2243. An ordinary voter would have understood a right to abortion as distinct from other asserted constitutional freedoms that do not involve extinguishing life. *See Roe*, 410 U.S. at 159 (abortion is "inherently different"); *Casey*, 505 U.S. at 852 (plurality op.) ("a unique act"). That commonsense intuition is confirmed here by the public's discourse, the framers' deliberations, the historical events surrounding the ratification process, and Florida's established principle that privacy does not extend to acts that harm others.

1. *The public discourse*. As already discussed, newspapers used Section 23's terms in the informational sense, and public officials pitched Section 23 as an informational-privacy protection. Few linked the provision's language to decisional autonomy. Even fewer, though, hinted that it implicated abortion. Our research has not revealed a single governmental proponent of the amendment who *ever* asserted to the public that Section 23 covered abortion. *See Schwegmann Bros.*, 341 U.S. at 394 ("It is the sponsors[']" views that count). And corpus-linguistics analysis shows that newspaper coverage linking abortion to privacy was hen's-teeth rare:



As shown in Figure 2, just four out of 152 references to the phrase "right to be let alone" connected it to a right to abortion (2.6%); four out of 143 references to "governmental intrusion" did so (2.8%); 14 out of 200 references to "right to/of privacy" did so (7%); and zero out of 200 references to "private life" did so (0%).[47] Of the articles linking these terms to an abortion right, most of the references were from gay-rights proponents advocating for an exceedingly broad conceptualization of privacy, *e.g.*, App. 29–30—a view the amendment's framers and proponents expressly rejected, *supra* 20–22.

Two other groups were notably silent on whether Section 23 covered abortion: pro-life and pro-choice advocates. Despite the vigorous debate over Section 23's effect on, for example, gay rights, *supra* 20–22, the record contains nary a peep from either side of the abortion debate about it. *See also* John Stemberger & Jacob Phillips, *Watergate, Wiretapping, and Wire Transfers: The True Origins of Florida's Privacy Right*, 53 Cumb. L. Rev. 1, 27 & n.201 (2023) (discussing lack of opposition from pro-life groups).[48] That silence is

[47] The State used the same search parameters it described in Section I.A.1.c.

[48] Available at https://tinyurl.com/5n7d29nu.

deafening: If anyone had imagined that Section 23 enshrined a right to abortion, surely those groups would have warred about it.

2. *The framers' deliberations*. The framers' deliberations lend feeble support for a right to abortion. As mentioned above, a paper appended to a legislative staff analysis discussed decisional autonomy, including abortion. App. 220–24. But again, that analysis simply reviewed federal and other states' law; it did not suggest that Section 23 codified a particular conception of privacy rights. *See supra* 36–37; *see also* 53 Cumb. L. Rev. at 28. A staff-attorney memorandum to a CRC committee also cited *Roe*, but only for its discussion of the compelling-interest standard, not its substantive merit. App. 193–94.

The historical record instead undercuts the notion that Section 23 says anything about abortion. For example, after soliciting suggestions from the public for constitutional amendments, the CRC created a list of potential amendments to consider based on the comments it received. App. 181–83. Three of those potential amendments were a right to abortion, a constitutional prohibition on abortion, and a right to privacy. *Id.* Although the CRC briefly considered whether to protect or prohibit abortion, it decided to do neither, taking up only

the right to privacy. 6 Fla. St. U. L. Rev. at 581 (explaining that the CRC considered every public proposal before referring only those deemed "priorit[ies]" to committees). The CRC thus considered abortion distinct from the privacy right.

That point is driven home by the sole reference to abortion during public hearings in the 1980 Legislature: Senator Gordon's statements that Section 23 does *not* cover abortion. *See* 53 Cumb. L. Rev. at 28–29 (detailing the statements). Responding to a direct question from Senator Dunn about whether the amendment would affect "the existing controversy involving right to life and abortion," Gordon replied: "I don't see that it has any effect on that." *Id.* When Dunn pressed him that the provision might trigger abortion litigation, Gordon doubled down: "No, I don't see that at all." *Id.* at 29.

A commentator has claimed that Senator Gordon was simply "confused" about Section 23's meaning.[49] Senator Gordon's response is no model of clarity—he did, for example, vaguely observe that Section 23 might protect "the privacy of one's sex life in one's home" in

[49] James W. Fox, *An Historical and Originalist Defense of Abortion in Florida*, Rutgers U. L. Rev., at 21 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224718.

some form. Fox at 20. What *is* clear is that Section 23's chief Senate sponsor, responding to a direct question about Section 23's reach, gave explicit assurance to the Senate—and the public—that it had nothing to do with abortion.

3. *Historical context*. Contemporaneous historical events further weaken the view that Section 23 covers abortion. For one example, pro-life legislators who had recently sought to safeguard unborn life nationwide nonetheless supported Section 23. During both the 1978 and 1979 legislative sessions, some legislators proposed calling for a constitutional convention to add a "right to life" amendment to the federal constitution. App. 228–33, 235, 239. Of those Senators and Representatives, 28 were present to vote on Section 23 a year later, and all but *one* voted for it.[50] It would be passing strange if these legislators voted both for a federal constitutional amendment restricting abortion and for a state constitutional amendment forever hampering them from doing the same through legislation.

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[50] *Compare* App. 237, *with* App. 235; *compare* App. 241, *with* App. 239. Although 29 of the right-to-life amendment's original sponsors participated in the Section 23 vote, Representative Kiser withdrew his name as an amendment co-sponsor. H.R. Journal, 11th Sess., at 163 (Fla. 1979).

The 1980 Legislature also had a recent history of restricting abortion. Two years before, it had passed a law prohibiting abortion clinics from performing the procedure without a license. § 797.03, Fla. Stat. (1978). And one year before, it had enacted a parental-notification law—the same law this Court invalidated in *T.W.* 551 So. 2d at 1195–96. The State was litigating the parental-notification law's validity when Section 23 was enacted. *See Scheinberg v. Smith*, 659 F.2d 476, 478–80 (5th Cir. Unit B 1981). It is implausible that the Legislature, in passing Section 23, overrode an abortion regulation it had enacted a year earlier. *See* Scalia & Garner at 327 ("Repeals by implication are disfavored.").[51]

4. *The harm principle*. Whatever else it may contain, a right of privacy does not include a right to cause harm. Citing John Stuart Mill's 1859 philosophical essay *On Liberty*, courts and commentators

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[51] Petitioners (at 44) cite a different piece of history—the voters' rejection of a 2012 amendment that would in part have aligned Section 23 with federal abortion precedent—to claim that overturning *T.W.* "would be to do, by judicial fiat, what Florida voters refused to do at the ballot box." But as Petitioners also concede (at 57 n.19), "subsequent developments" that occur "years later" "cannot affect the public understanding in 1980." An amendment rejected by an electorate in 2012 says little about an amendment ratified 30 years earlier.

have long qualified the right of privacy with the idea that it does not contain a right to cause harm. 37 Rutgers L.J. 971 at 992. Warren and Brandeis recognized that qualification from the start, defining their proposed right to apply when one "employ[s] himself in private in a manner very harmless" and "innocent." 4 Harv. L. Rev. at 202 n.1; *id.* at 201 n.1 (note: article contains multiple footnote 1s). Early judicial adopters followed suit. *See Pavesich*, 50 S.E. at 70 ("An individual has a right to enjoy life . . . provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy.").

This Court was no exception. It used the harm principle a decade before Section 23 to reject a privacy challenge to Florida's motorcycle-helmet law. *State v. Eitel*, 227 So. 2d 489, 491 (Fla. 1969). "[A]dmir[ing] John Stuart Mill's Essay on Liberty," the Court held that the law did not violate any privacy right because "the cyclist's right to be let alone is no more precious than the corresponding right of ambulance drivers, nurses and neurosurgeons" to avoid the risk in tending to the cyclist's injuries. *Id.* A few months later, the Court applied the harm principle again to reject a privacy challenge to Florida's marijuana ban. *Borras v. State*, 229 So. 2d 244, 246 (Fla. 1969).

Section 23 presumably retains the "old soil" of its common-law foundations. *Jackson*, 288 So. 3d at 1183.

The historical record also shows that both Section 23's framers and the public would have understood it to incorporate the harm principle. Commissioner Collins, for instance, asserted that any privacy-related provision should be phrased to "prevent serious harm to another person or to the government." App. 189. Gerald Cope, in his CRC testimony, quoted Mill's harm principle to "describe the relationship of the individual" to the "government" and "other members of society." App. 210–11; *see also* Cope 1978 at 722–23 n.303 (describing this testimony). And media discourse preceding the 1980 ratification confirmed a common understanding that "the proposal would not prevent government regulation of conduct proclaimed to be private but which also infringes on the rights, safety and health of others." App. 31.

Abortion does just that. It "is fraught with consequences for others." *Casey*, 505 U.S. at 852 (plurality op.). Most of all, it harms the "life or potential life that is aborted," *id.*, much like when "a gun . . . discharge[s] into another person's body," *id.* at 952 (Rehnquist, C.J., dissenting) (cleaned up); *see also Dobbs*, 142 S. Ct. at 2261

(explaining that "abortion has [the] effect" of "destroy[ing] potential life" (cleaned up)); ROA 1120–21 (State's expert testifying that a child can feel pain from an abortion at 14–20 weeks' gestation).[52]

It also harms the woman who must both endure the risks of the procedure, ROA 929, 1182–88, 1192–1200,[53] and "live with the implications of her decision," *Casey*, 505 U.S. at 852 (plurality op.); the ethical repute of "the persons who perform and assist in the procedure," *id.*; and "the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life," *id.*

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[52] The circuit court found that the unborn do not feel pain before 24–26 weeks. ROA 50–51. But that finding only concedes that abortion, at some point, causes harm. And even if the timing mattered, it is at least unclear whether the unborn feel pain before 24–26 weeks. ROA 1121, 1128–43. It is the Legislature's prerogative to decide which side of that scientific debate is most persuasive. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *cf. Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 786 (Fla. 2004).

[53] The circuit court was of the view that abortion is safe "at and after 15 weeks." ROA 64. But the circuit court also recognized that abortion risks harm to the mother and that those risks "increase with gestational age." ROA 63. In any event, the Legislature—not the circuit court—is best suited to resolve disputed medical issues like how abortion affects maternal health. *See Gonzales*, 550 U.S. at 163.

Indeed, even *Roe* acknowledged that abortion unavoidably harms. 410 U.S. at 154 ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.").

5. Petitioners nevertheless contend (at 54–55) that *Roe* so transformed our society that Florida voters must have understood privacy, consistent with *Roe*, to implicate the right to abortion.

That is wrong. Even if an ordinary voter in 1980 knew anything of *Roe*, few would have appreciated the *legal basis* for that decision—that a right to abortion had been rationalized as part of an amorphous right to privacy emanating from the "penumbras" of a cluster of dense constitutional texts. Laymen are not lawyers. *See Reed v. Ross*, 468 U.S. 1, 21 (1984) (Rehnquist, J., dissenting). Less than half of American voters can name a Supreme Court Justice,[54] let alone recite chapter-and-verse of the U.S. Reports. It is unlikely that the public, in ratifying Section 23, grasped the confounding legal alchemy that *Roe* used to concoct the federal abortion right. *Cf.*

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[54] Emily Birnbaum, *Poll: More than half of Americans can't name a single Supreme Court justice*, The Hill (Aug. 28, 2018), https://thehill.com/regulation/court-battles/403992-poll-more-than-half-of-americans-cant-name-single-supreme-court/.

Amendment 4, 288 So. 3d at 1081 (rejecting a construction that turned on "nuanced legal analysis" that contradicted the term's "natural and popular meaning").

And who could blame them? As *Roe*'s critics were quick to point out, abortion does not implicate "privacy" as that word is typically understood, *supra* 1, and *Roe*'s theoretical underpinnings split abruptly from years of precedent construing privacy in a narrower sense, *supra* 27–32. Even *Roe*'s supporters were confounded by its conception of privacy. No less an authority than Justice Ginsburg observed that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy." *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Laurence Tribe dubbed *Roe*'s definition "a misnomer." Laurence H. Tribe, *American Constitutional Law* 1352 (2d ed. 1988). And John Hart Ely famously called equating abortion with privacy a misguided effort to duck the discredited "substantive due process" doctrine. *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 937–43 (1973).

Most telling, the dissenters from *Roe*'s misbegotten privacy definition eventually won the day, well before *Dobbs*. Less than 20 years

after *Roe* reimagined privacy to include a right to abortion, *Casey* "abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause." *Dobbs*, 142 S. Ct. at 2271. If the U.S. Supreme Court in 1992 could not locate a right to abortion in a right of privacy in reaffirming the federal abortion right, it is inconceivable Florida voters did so in 1980 in ratifying a brand-new right of privacy.

One final point: If despite all these points, the Court believes it unclear whether Section 23 protects abortion, the default should be deference to the Legislature. The Legislature has authority to act "unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution." *Crist v. Fla. Ass'n of Crim. Defense Lawyers, Inc.*, 978 So. 2d 134, 141 (Fla. 2008) (cleaned up). The calibration of the weighty interests at stake is best suited to that branch, which has superior capacity to fine-tune in responding to shifting public mores and changing scientific advancements. At the barest of minimums, Section 23 does not clearly protect a right to abortion, and the matter should be left "to the people's elected representatives." *Dobbs*, 142 S. Ct. at 2243.

C. Even if Section 23 applies to abortion, it does not protect abortion past 15 weeks' gestation.

1. There is no reasonable expectation of privacy in obtaining an abortion past 15 weeks.

Should this Court maintain that some abortion restrictions can violate Section 23, it should not hold that HB5 is one of them. This Court has long held that "[b]efore the right of privacy attaches, 'a reasonable expectation of privacy must exist.'" *Stall*, 570 So. 2d at 260 (quoting *Winfield v. Division of Pari–Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)). "Determining 'whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation.'" *Id.* (cleaned up). Put another way, "[t]he extent of [an individual's] privacy right . . . must be considered in the context in which it is asserted." *Fla. Bd. of Bar Exam'rs re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983). Only after answering that "threshold question" does Section 23 demand that the statute satisfy heightened scrutiny. *Winfield*, 477 So. 2d at 547.

In *T.W.* and *North Florida Women's Health*, this Court appeared to follow that framework, rephrasing the threshold "reasonable expectation of privacy" question as whether the regulation imposed a

"significant restriction" on a woman's ability to terminate her pregnancy. *See N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 621 (Fla. 2003). But in *Gainesville Woman Care*, this Court ruled that "there is no threshold requirement that a petitioner must show by 'sufficient factual findings' that a law imposes a significant restriction on a woman's right of privacy before strict scrutiny applies." 210 So. 3d at 1256; *but see id.* at 1266 (Canady, J., joined by Polston, J., dissenting) (criticizing the majority for misapplying precedent). At minimum, this Court should recede from *Gainesville Woman Care* and hold that the reasonable-expectations test applies to abortion, like every other Section 23 case.

Applying that standard, a 15-week abortion restriction does not unsettle any "reasonable expectation" a woman might have in obtaining an abortion. As Chief Justice Roberts observed of a nearly identical regulation in his concurring opinion in *Dobbs*, HB5 "allows a woman three months to obtain an abortion, well beyond the point at which it is considered 'late' to discover a pregnancy." 142 S. Ct. at 2310–11. "Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation." *Id.* at 2315. "Almost all know by the end of the first trimester."

Id. And in Florida, 94% of all abortions occurred in the first trimester in 2021. ROA 915.

"Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman to decide for herself whether to terminate her pregnancy." *Dobbs*, 142 S. Ct. at 2315 (Roberts, C.J., concurring) (cleaned up). "[C]onsidering all the circumstances" in 2023, *Stall*, 570 So. 2d at 260, it is not "reasonable" to expect untrammeled choice to terminate a pregnancy after 15 weeks, barring exceptions for maternal health and fatal fetal abnormalities, which HB5 already provides. *See* § 390.0111(1)(a)–(c), Fla. Stat. For that reason, too, HB5 does not implicate Section 23.

2. HB5 survives any level of scrutiny.

Even if HB5 is subject to some form of heightened scrutiny, including strict scrutiny, the Court should still affirm.

Strict scrutiny is not "strict in theory, but fatal in fact." *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). Instead, the State may "justif[y]" a law by showing that it furthers a compelling interest via the least restrictive means. *Gainesville Woman Care*, 210 So. 3d at 1246. When the State makes such a showing, this Court has approved of regulations that implicate even the

broadest readings of Section 23. *E.g.*, *J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998); *Bar Exam'rs*, 443 So. 2d at 75.

The Legislature enacted HB5 to serve compelling interests: the prevention of fetal pain and protection of unborn life. ROA 65; *T.W.*, 551 So. 2d at 1190; *SisterSong Women of Color Reprod. Justice Collective v. Gov. of Ga.*, 40 F.4th 1320, 1326 (11th Cir. 2022). These purposes cut to the heart of the "sovereign right of the State to enact laws for the protection of lives, health, morals, comfort and general welfare." *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 884 (Fla. 1972); *see also* Init. Br. 38–39.

The circuit court relied on *T.W.* to conclude that those interests "do[] not become compelling until after viability." ROA 65. That reasoning, like *Roe*'s, "mistakes a definition for a syllogism." *Dobbs*, 142 S. Ct. at 2268 (quoting Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 4 (1973)). The notion that the State's interest in protecting life and preventing pain vanishes simply because an unborn child cannot survive without help is grievously wrong, and this Court should recede from it.

Petitioners maintain that Section 23 codified the proposition that the State cannot prohibit abortion before fetal viability. Init. Br. 38–39, 38 n.9. But no one—not the CRC, not the Legislature, and certainly not the average voter—would have thought that Section 23 contained the kind of granular standard of review that could have codified that rule.

Having established that HB5 advances a compelling interest, the State must show that it "serves or protects" that interest "through the 'least restrictive means.'" *Gainesville Woman Care*, 210 So. 3d at 1246. "[T]he more compelling the interest under the particular circumstances, the more leeway the State will be afforded." *J.A.S.*, 705 So. 2d at 1387. Here, HB5 forbids most abortions after 15 weeks because that is the only regulation that can advance the State's interest in preventing the harms that post-15-week abortions inflict on women and the unborn. *Supra* 47–49.

It is no answer to say that the Legislature could have written a less restrictive law to protect a different interest or the same interest less effectively. This Court has not rigidly applied means-ends scrutiny under Section 23 to disable the Legislature from protecting a state interest as compelling as unborn life. *See J.A.S.*, 705 So. 2d at

1387 (finding it not "unreasonable" for the state to have forbidden consensual sex between two minors under the age of 16 despite other "obvious means" of addressing the State's interest); *Winfield*, 477 So. 2d at 548. Nor does HB5 fail on account of under-inclusivity. That the Legislature took a substantial step toward protecting unborn life does not render that step unconstitutional because it was only a step. *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) ("[A] 'statute is not invalid under the Constitution because it might have gone farther than it did[.]'").

HB5 thus satisfies "even the highest standard" of scrutiny. *Bar Exam'rs*, 443 So. 2d at 74.

D. This Court's contrary abortion precedents are clearly erroneous and there is no reason to retain them.

For all these reasons, this Court's abortion precedent rests on a "clearly erroneous" interpretation of Section 23. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). The question then "becomes whether there is a valid reason *why not* to recede from that precedent." *Id.* None exists.

"The critical consideration" in determining whether to stand by an incorrect decision "ordinarily will be reliance." *Id.* "Traditional

reliance interests arise 'where advance planning of great precision is most obviously a necessity.'" *Dobbs*, 142 S. Ct. at 2276. But "getting an abortion is generally [an] 'unplanned activity,' and 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'" *Id.* "[R]eliance interests" are also "at their acme in cases involving property and contract rights," *Poole*, 297 So. 3d at 507, and this case involves neither.

T.W., much like *Roe*, rested on "exceedingly weak" reasoning, *Dobbs*, 142 S. Ct. at 2243, 2270, which later cases have uncritically accepted.[55] *T.W.* reasoned that the 1980 amendment "embraces more privacy interests . . . than does the federal Constitution." 551 So. 2d at 1192. From that, however, it does not follow that Section 23 extends beyond informational privacy and personal decisions that do not harm others to a right to destroy unborn life.

In arguing otherwise, *T.W.* offered little more than a citation to *Roe* and its progeny, as well as to Professor Laurence Tribe's 1988

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[55] *Renee B. v. Florida Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001) ("The right of privacy in the Florida Constitution protects a woman's right to choose an abortion"; no citation or further discussion); *N. Fla. Women's Health*, 866 So. 2d at 637 (similar); *Gainesville Woman Care*, 210 So. 3d at 1256 (similar).

treatise on federal constitutional law. *Id.* at 1192–93. But *Roe* has now been overturned and never made sense anyway. And Tribe in that treatise—in a passage *T.W.* did not bother to cite—rejected the notion that a right to abortion could be located in "privacy." *American Constitutional Law* at 1352.

T.W. has also proven unworkable. *See N. Fla. Women's Health*, 866 So. 2d at 637; *Dobbs*, 142 S. Ct. at 2272–75. The Legislature is best equipped to handle "deeply divisive societal controvers[ies]" like this one. *N. Fla. Women's Health*, 866 So. 2d at 638. Rather than allow the legislative process to unfold in response to new scientific and medical developments, this Court's abortion cases have disabled the State from preventing serious harm to women and children[56] and stifled democratic resolution of profoundly important questions touching on the treatment of unborn life, when an unborn child is capable of consciousness and pain, and what medical procedures affecting the procreative process are safe and appropriate to allow.

T.W. and cases applying it should be overturned.

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[56] ROA 929, 1182–88, 1192–1200 (State's evidence explaining how later-term abortion harms women), 1120–21 (State's evidence explaining how abortion causes fetal pain).

II. The First District correctly ruled that Petitioners have failed to establish irreparable harm.

Petitioners complain first that HB5 prevents them from aborting 15-week-old unborn children consistent with their "good-faith medical judgment." Init. Br. 22. But the authorities they cite (at 25) do not show that a physician suffers irreparable harm just because the State exercises its longstanding authority to set "appropriate standards for the practice of medicine." *State Bd. of Med. Exam'rs v. Rogers*, 387 So. 2d 937, 939 (Fla. 1980). Only one of those cases was applying the "irreparable harm" standard for injunctions, and in that case this Court concluded that an abortion law irreparably harmed patients—not providers. *Gainesville Woman Care*, 210 So. 3d at 1263–64.[57] Were Petitioners correct, the State would inflict irreparable harm on a doctor by telling her that she cannot prescribe heroin for a cold.

[57] In *Rogers*, this Court held that a regulator's enforcement action arbitrarily denied the physician his property interest in practicing his profession. 387 So. 2d at 939. And in *Tarantola v. Henghold*, the court of appeal determined that a contempt order prohibiting a physician from informing her patients about approved cancer treatments constituted material injury warranting certiorari jurisdiction. 233 So. 3d 508, 510 (Fla. 1st DCA 2017).

Petitioners also may not obtain an injunction solely to prevent irreparable harm to third parties. Petitioners rightly concede that, to sue, they must establish personal injury in fact, even though the constitutional right they are asserting belongs to others. Init. Br. 31; *see Collins v. Yellen*, 141 S. Ct. 1761, 1796 n.1 (2021) (Gorsuch, J., concurring in part) (court may only issue "a remedy that redresses the *plaintiffs*' injury-in-fact" (cleaned up)). It follows that "injuries to third parties" are "not a basis to find irreparable harm" warranting injunctive relief. *Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 326 (D.D.C. 2018); *accord 3299 N. Fed. Highway, Inc. v. Bd. of Cnty. Comm'rs of Broward Cnty.*, 646 So. 2d 215, 220 (Fla. 4th DCA 1994). Rather, "the moving party must establish that it will suffer irreparable harm because there is no adequate remedy at law." *Curvey v. Avante Grp., Inc.*, 327 So. 3d 401, 403 (Fla. 5th DCA 2021); *accord S. Fla. Limousines, Inc. v. Broward Cnty. Aviation Dep't*, 512 So. 2d 1059, 1061 (Fla. 4th DCA 1987). Alleged injury to Petitioners' patients does not suffice.

III. Petitioners lack third-party standing.

Generally, only litigants whose privacy rights are implicated by a law have standing to challenge it. *Alterra Healthcare Corp. v. Estate*

of Shelley, 827 So. 2d 936, 940–41 (Fla. 2002). To overcome that bar, a litigant must show (1) it has "suffered an 'injury in fact'"; (2) it has a "close relation to the third party"; and (3) "some hindrance to the third party's ability to protect his or her own interests." *Id.* at 941–42 (quoting *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)). Petitioners here assert their patients' privacy rights but fail to assert their own injury or show that their patients cannot vindicate their own rights.

Petitioners first have said that "they will comply with HB5 if it is in effect." ROA 54. They thus do not allege any plan "to engage in a course of conduct" that will violate HB5. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979). Though Petitioners need not expose themselves "to actual arrest or prosecution" to "challenge a statute," *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), they must still allege that complying with HB5 will deprive them of their own rights and cause them injury in fact, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (Stevens, J., concurring) (controlling opinion). Petitioners have not asserted that they will earn less money when they stop performing abortions after 15 weeks. They claim only that doing so will interfere with their patients' rights, and they disclaim any "economic" interest in removing that interference. *See* Init. Br.

22. That is not enough to show injury. *See June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2148 (2020) (Thomas, J. dissenting).

As to hindrance, Petitioners argue that their patients risk their claims becoming moot, as well as "practical barriers" like finances and maintaining privacy. Init. Br. 33. But courts treat claims involving pregnancy as "capable of repetition yet evading review." *Burton v. State*, 49 So. 3d 263, 265 (Fla. 1st DCA 2010) (claim not moot where woman gave birth before appeal was heard). This Court also allows pseudonymous suits to protect privacy (e.g., *T.W.*). And courts do not typically find litigation expense or lack of an attorney a "hindrance" that supports third-party standing. *E.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 131–32 (2004). The many suits brought by women asserting their privacy rights "disprove[s]" Petitioners' hindrance argument. *Id.* at 132; *e.g.*, *T.W.*, 551 So. 2d 1186; *Renee B.*, 790 So. 2d 1036.

Petitioners thus lack standing.

CONCLUSION

The Court should approve the decisions below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman Old Style font and contains 12,954 words.

/s/ Henry C. Whitaker
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