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CASE NO.: SC22-1050

IN THE SUPREME COURT OF FLORIDA

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

v.

STATE OF FLORIDA, ET AL.,
Respondents.

Discretionary Proceeding to Review Decision
of the First District Court of Appeal

BRIEF OF SCHOLARS ON ORIGINAL MEANING IN STATE CONSTITUTIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici (all of whom are listed in the Appendix) are scholars interested in the original meaning of state constitutions and its implications for issues related to the protection of unborn human life. Some of them have devoted attention to how language functions in the particular context of state constitutions. *See, e.g.*, Christopher Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006) (cited in James Fox, *An Historical and Originalist Defense of Abortion in Florida*, __ RUTGERS L. REV. __, 7 n.32 (forthcoming 2023); Christopher Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) (relying on aspects of the Florida Constitution to understand the nature of constitutions in general). Amici's expertise in history, law, and the philosophy of language will help the Court clarify exactly what question it should ask with respect to assertions about the Florida Constitution and what evidence is most relevant to the answers.

Amici are particularly concerned about courts being careful about the use of historical material after the adoption of a proposal. That material is interpretatively relevant only if it is textually

focused—telling us what the *language* of earlier provisions expressed in its original context, rather than simply the possible policy preferences of a different, later group of Floridians. Accordingly, amici are particularly concerned with the arguments of plaintiff's amici ("Brief of Amicus Curiae Law Professors in Support of Petitioners," hereafter "LP") that the 2004 addition of article X, section 22, and the unsuccessful proposal in 2012 of "Amendment 6" to ban abortion funding and require that "[t]his constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution" make it more reasonable to think that as used in 1980, "the right to be let alone and free from governmental intrusion into the person's private life" encompassed abortion rights.

SUMMARY OF ARGUMENT

The Court's concern in interpreting the Florida Constitution should be the meaning expressed by the constitutional text in its original context. "Speculation about why a later [group of lawmakers] declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier [group of lawmakers] did adopt. … 'Arguments based on subsequent legislative history … should not be taken seriously.' " *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring)).

Accordingly, the 2012 failure of the electorate to ratify the proposed Amendment 6, which would have banned abortion funding and required that "[t]his constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution," supplies no relevant evidence about what "the right to be let alone and free from governmental intrusion into the person's private life" expressed in 1980. Further, carefully considering the support given by amici for the relevance of the

Amendment 6 rejection actually undermines that amendment's evidentiary value.

The 2004 adoption of article X, section 22, likewise gives no reason to abandon an information-based reading of article I, section 23. The codicil protecting the legislature's power to require "notification to a parent or guardian of a minor before the termination of the minor's pregnancy"—like the original 1980 codicil about "the public's right of access to public records and meetings"—concerns the flow of information, not autonomy in making decisions. Not every reference to sex or abortion in relation to article I, section 23, need be understood as a reference to *decision-making autonomy* with respect to sex or abortion. Construing them as referring instead to informational privacy in these subjects goes a long way toward rendering section 23's history consistent.

ARGUMENT

I. The Touchstone for Interpretation of the Florida Constitution is the Meaning Expressed by Constitutional Text in its Original Context.

The Florida Constitution is composed of text expressing its meaning at a particular point in time. The constitution's textual

nature explains why the text can refer to the entire constitution with the term "herein" and refer to the constitution doing things "expressly," i.e., by means of the constitutional text. *See, e.g.,* Art. X, § 12(a), Fla. Const. (" 'Herein' refers to the entire constitution."); Art. II, § 3, Fla. Const. (noting powers are separated "unless *expressly* provided *herein*"). The "entire constitution" is textual.

The constitution's fixity at a particular point in time explains why the constitutional text uses the word "now" to refer to the time of enactment of particular provisions. *See, e.g.,* Art. V, § 20(c)(4), Fla. Const. (referring to "jurisdiction *now* exercised," i.e., before its adoption in 1972); Art. VIII, § 6(f), Fla. Const. (referring to "all the powers conferred *now* or hereafter by general law upon municipalities," i.e., conferred before its adoption in 2018). *See generally* Christopher Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1650 n.129, 1651 n.138, 1656 n.154, 1659 n.165, 1661 n.173, 1663 n.177 (relying on the Florida Constitution to understand the nature of constitutions in general); *id.* at 1648–56 (using constitutional self-presentation in terms like "herein" and "expressly" as a reason for seeing the constitution as textual); *id.* at

1657–66 (using terms like "now" as a reason to see the constitution as situated at the time of adoption).

Because the Florida Constitution is composed of text, evidence about constitutional assertions needs to be rooted in an explanation of how words express meaning. An interpreter's job is not to weigh all the public commentary in the run-up to the adoption of article I, section 23, with respect to a particular subject matter like abortion or marijuana, but to consider what that material says about the *meaning expressed by the constitution's language*.

As a text situated in time, the Florida Constitution expresses its binding meaning in virtue of the linguistic conventions in place at the time its language is inserted. What were the conventional meanings of "let alone," "intrusion," and "private life" in 1980, when the people of Florida added this language to their constitution? The section reads as follows:

> 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.

As Florida has explained in detail in its brief, all the key parts of this language—"let alone," "intrusion," and "private life"—are well-worn terms derived from the information-based tort of privacy explained by Samuel D. Warren and Louis D. Brandeis in *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and discussed at great length by the Court in *Cason v. Baskin*, 20 So. 2d 243, 247–53 (Fla. 1944). Rather than repeat this powerful evidence of the original meaning expressed by the language of article I, section 23, in 1980, our focus will be two pieces of subsequent evidence on which plaintiffs' amici rely, and why they offer no compelling reason to change our views of the linguistic-historical facts of 1980.

II. The Failure of the 2012 Proposal Sheds No Light on the 1980 Meaning of "Let Alone," "Intrusion," and "Private Life."

The plaintiffs' law-professors amici brief relies on the 2012 failure of a no-abortion-funding-and-no-state-constitutional-abortion-rights amendment as a reflection of the meaning of article I, section 23, in 1980. That proposal, Amendment 6, read as follows:

> (a) Public funds may not be expended for any abortion or for health-benefits coverage that includes coverage of abortion. This subsection does not apply to:

> (1) An expenditure required by federal law;
>
> (2) A case in which a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering, physical condition caused by or arising from the pregnancy itself, which would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or
>
> (3) A pregnancy that results from rape or incest.
>
> (b) This constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution.

Id. There was no reference to article I, section 23, or any of its constituent language in this text, and it failed to pass 32 years after the passage of article I, section 23.

Independent of the lengthy time delay and lack of textual connection to the 1980 provision, there might be, of course, many reasons to vote against a proposal independent of a view about the meaning of article I, section 23. The public-funding ban, for instance, would put restrictions on the legislature, and would therefore not necessarily appeal to critics of the expansive exercise of judicial power in cases like *Roe v. Wade*, 410 U.S. 113 (1973), *Planned*

Parenthood v. Casey, 505 U.S. 833 (1992), and *In re: T.W.*, 543 So. 2d 837 (Fla. 1989).

Further, those who want no constitutional restrictions related to abortion, either in favor or in opposition, could object to Amendment 6 on that basis. The most vehement critics of *Roe* might well object to Amendment 6's reference to rights to abortion "contained in the United States Constitution." Those who think such rights are not actually in our federal Constitution would speak only of rights contained in cases like *Roe*, and *purportedly* contained in the United States Constitution itself. If the actual federal Constitution does *not* contain abortion rights (one might imagine an Amendment 6 critic reasoning) Florida's own constitution should not insinuate otherwise. Finally, Floridians who believe that those conceived as the result of a crime are equally entitled to protection might object to the limit on the abortion-funding ban in cases of rape or incest, and others might object to the wording of the "physical disorder" provision. In sum, we simply cannot read off support of constitutional abortion rights from a vote against Amendment 6. "No on Amendment 6" is not a constitutional text that this Court can properly interpret as it can the meaning expressed by article I, section

23 in 1980. The Florida Constitution is composed of text, not ambiguous signals from the electorate.

Why would the rejection of Amendment 6 be thought to be interpretively relevant? Opposing amici argue that "state courts often acknowledge the relevance of rejected amendments and frequently 'derive[] the meaning of current state constitutional provisions' from 'proposed amendments […] that were defeated by the electorate.' " LP at 18. These are quotations from a treatise by one of the members of the amicus group. *See* ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 341 (2009). But a closer look at the cases that Professor Williams cites for this proposition is quite illuminating.

As is evident from the careful placement of the quotation marks in the amicus brief, Williams uses neither "often" nor "frequently" at this point in his treatise. This is the full sentence in his text: "Courts have also derived the meaning of current state constitutional provisions from proposed amendments to clauses that were defeated by the electorate." *Id.* And here is the footnote that follows:

> Even less by way of inference is required to ferret out public understanding of section 9(e) of article IV, since the voters themselves have addressed the question we now consider…. This amendment was rejected by the voters in the

> 1974 referendum." Cont'l Ill. Nat'l Bank & Trust Co. v. Zagel, 401 N.E.2d 491, 496 (Ill. 1979); Clouse v. State, 16 P.3d 757, 769–70 (Ariz. 2001). *Contra* State ex rel. Lake County v. Zupancic, 581 N.E.2d 1086 (Ohio 1991); Independence National Education Assoc. v. Independence School Dist., 223 S.W.3d 131, 137 n. 4 (Mo. 2007); Leonard v. City of Spokane, 897 P.2d 358, 360 (Wash. 1995).

Id. at fn. 121.

The *Continental Illinois* case that Williams quotes in favor of this proposition is not a persuasive analogue to Florida's defeated 2012 abortion proposal. That case considered a 1974 referendum to revise the 1970 Illinois constitution—a proposal specifically rewording a particular sentence adopted four years before. *See Cont. Ill. Nat'l Bank & Trust Co. v. Zagel*, 401 N.E. 2d 491, 496 (Ill. 1979). The Court's focus was on "public comprehension" in 1970, as reflected in the 1974 vote. *Id.* The close proximity in time was obviously very important to the court's reasoning. Also, the proposal was a specific amendment to the very veto provision that voters had adopted in 1970; it directed voters' attention to the very words used. It would have changed, "The Governor may return a bill together with specific recommendations for change to the house in which it originated," to, "The Governor may return a bill together with specific

recommendations for the correction of technical errors or matters of form to the House in which it originated." *Id.* In the present case, however, the 2012 proposal was made 32 years later, not four, and did not use the text of the 1980 provision at all.

The next case that Williams relies on, *Clouse v. State*, actually cites from the dissent. Justice Feldman noted very briefly, "The legitimacy of the Arizona position has been established by the voters' rejection of several proposed initiative changes that would have abolished or severely modified article XVIII, section 6." But he did not specify anything about the language or timing of these proposals or rely on them for anything more than "legitimacy," as opposed to original meaning. *Clouse v. State*, 16 P. 3d 757, 769–70 (Ariz. 2001) (Feldman, J., dissenting).

Those two cases—an Illinois case dealing with a four-year gap with a specific textual modification and an Arizona dissent referring generally to "legitimacy"—are the sum total of opposing amici's support for the idea that Florida's 2012 rejection of Amendment 6 is interpretively relevant to the 1980 meaning expressed by the text of its intrusion-into-private-life amendment. But of course, Williams's treatise does not stop there; he cites three cases on the other side.

Looking at these three cases, we find much more expansive explanations of why subsequent rejected proposals tell us almost nothing about the meaning expressed by different constitutional text to a different generation.

First, *State ex rel. Lake County v. Zupancic*, 581 N.E. 2d 1086 (Ohio 1991), categorically rejects subsequent failure to adopt legislation as interpretively relevant:

> Appellee auditor argues that the narrow focus of these subsequent amendments indicates that the people of Ohio never intended counties to have the authority to issue bonds to support loans to construct rental housing under Section 13. Had the people wanted the counties to have such authority, the auditor contends, they would have amended the Constitution accordingly.
>
> We find it difficult, however, to draw such conclusions, for "this court places little weight on legislative [or in this case, electoral] inaction as a barometer for determining legislative intent."

Id. at 1090 (quoting *Roosevelt Properties Co. v. Kinney*, 465 N.E. 2d 421, 425 (Ohio 1984)).

Likewise, *Independence National Education Assoc. v. Independence School Dist.*, 223 S.W. 3d 131 (Mo. 2007), categorically rejected the interpretive relevance of this sort of material:

> It might be noted that Missouri's voters in 2002 rejected a proposed constitutional amendment that would have granted firefighters the right to collective bargaining. The Court's task is, of course, to discern what the voters meant when they enacted article I, section 29, which is in the constitution, not what the voters might have intended in rejecting the 2002 amendment. One could say that the voters in 2002 now disapprove of granting public employees the right to bargain collectively, or perhaps just as plausibly, one could say that voters did not wish to grant the right to bargain collectively for one group of public employees and not others, or even that some voters might have thought the 2002 proposal superfluous. Needless to say, the intent of the 1945 voters cannot be ascertained by the actions of the 2002 voters.

Id. at 137 n. 4.

Williams's third case on this side of the ledger, *Leonard v. City of Spokane*, 897 P. 2d 358 (Wash. 1995), is even more emphatic:

> The two proposed constitutional amendments, SJR 143 and HJR 23, expressly authorized the use of a financing scheme of the type embodied in the Act. Therefore, Leonard argues, the voters recognized the unconstitutionality of the Act when they rejected these amendments first in 1982 and then again in 1985. This argument is unfounded. This court, not the electorate, is invested with the power to decide the constitutional fate of a legislative enactment.

Id. at 360.

Since Williams wrote his treatise in 2009, a multitude of other courts have said the same thing. The most prominent is the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020), adopted an interpretation of "because of … sex" that Congress repeatedly considered but failed to adopt. The Court noted, "[S]peculation about why a later [legislature] declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier [legislature] did adopt." *Id.* The Court quoted Justice Scalia's concurrence in *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990): "Arguments based on subsequent legislative history … should not be taken seriously, not even in a footnote."

Further, Justice Scalia once wrote for the Court, "Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition could have had no effect on the congressional vote." *Brusewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (citations and quotations omitted). Similarly, Judge Easterbrook wrote for the Seventh Circuit, "[S]tatements after

enactment do not count; the legislative history of a bill is valuable only to the extent it shows genesis and evolution, making 'subsequent legislative history' an oxymoron." *Cont. Can Co., Inc. v. Chicago Truck Drivers Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990).

Hostility to the interpretive relevance of subsequent legislative history is not, moreover, merely a quirky view of Justice Scalia and his fellow-travelers. Even those who disagreed with him most energetically said the same thing. Justice Stevens wrote for the Court that a "letter … written 13 years after the amendments were enacted … is consequently of scant or no value for our purposes." *Graham Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010). And Judge Posner once explained,

> Postenactment statements are likely to reflect the current preferences of legislators and of the interest groups that determine or at least influence those preferences, but the current preferences bear no necessary relationship to those of the enacting legislators, who may have been reacting to a different group of interest-group pressures. To give effect to the current legislators' preferences is to risk spoiling the deal cut by the earlier legislators—to risk repealing legislation, in whole or in part, without going through the constitutionally prescribed processes for repeal. One cannot

> assume a continuity over successive Congresses.

Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809–10 (1983).

As the cases cited by Professor Williams make clear, states regularly follow the same rule. For Florida, *see, e.g.*, *Ellsworth v. Insurance Co. of North America*, 508 So. 2d 395, 398 (Fla. 1st DCA 1987) ("[T]he trial court did not err in excluding from evidence the 1984 legislative Staff Summary and Analysis. This analysis, which purports to explain the effect of the 1984 amendments, is not determinative of legislative intent with respect to the 1981 version of section 627.727.").

III. The 2004 Adoption of Article X, Section 22, is Perfectly Consistent with an Informationally Focused Article I, Section 23.

In 2004, Floridians added this language to their constitution:

> The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the

> termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

Art. X, § 22, Fla. Const. Opposing amici argue, however, without any supporting elaboration, that "[w]ith the passage of this amendment, Florida voters demonstrated that they … understood the privacy amendment to encompass a right to abortion." LP at 15.

Floridians did no such thing. The first sentence of section 22—"The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court"—says nothing about the meaning of article I, section 23. This is merely an anti-nullificationist expression of submission to the Supreme Court, not any sort of attempt to freeze 2004 federal law on minors' abortion rights in state-constitutional amber. The legislature was not to seek to use abortion restrictions on minors as a vehicle for challenging *Roe*, *Casey*, or *Bellotti v. Baird*, 443 U.S. 622 (1979). That choice of litigation strategy says, of course, nothing about the meaning of article I, section 23.

The explicit reference to article I, section 23, in the second sentence of section 22 is also perfectly consistent with a Warren-and-

Brandeis reading of section 23. Notification to parents is about a minor's literal privacy, i.e., *information* about a minor's private life, not autonomy in decision-making. The 2004 caveat to article I, section 23, is therefore very similar in form to the rule of construction included in the provision when it was originally adopted: "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Access to records and meetings, like notification of a minor's abortion, is a matter of information, not decision-making autonomy. The 2004 amendment is thus perfectly consistent with an information-based reading of article I, section 23.

Abortion sometimes involves informational privacy, not just issues of autonomy in decision-making. The same is true of sexual activities in the home. James Fox has inaccurately characterized James Gordon's reference on May 14, 1980, to support for "the privacy of one's sex life in one's home," as exhibiting "confusion." James Fox, *An Historical and Originalist Defense of Abortion in Florida*, __ RUTGERS L. REV. __, 20 (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224718. Fox surmises that "Gordon clearly did think—as did Dunn—that

Section 23 covered more than informational privacy because Gordon explicitly supported the view that private sexual activities would be protected from government intrusion." *Id. See also* LP at 11 (relying on Fox's characterization of Gordon's comments). But a mere reference to sexual activities in the home does not mean a concern for decision-making autonomy, as opposed to improper intrusions from peeping Toms. *Informational* privacy with respect to "one's sex life in one's home," like informational privacy with respect to a minor's abortion decision, would of course be part of an information-based reading of article I, section 23.

In sum, just because article I, section 23, was thought to have important applications related to abortion or sex does not mean it goes beyond *informational* privacy related to abortion or sex.

CONCLUSION

As enacted in 1980, article I, section 23 is about informational privacy, not decision-making autonomy. Neither the 2004 clarification about limits on minors' informational privacy with respect to abortion nor the 2012 failure of Amendment 6 offers significant reason to think otherwise. This Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the Florida Supreme Court by using the State's e-filing portal, and that the foregoing was electronically served on all parties through the e-filing portal on April 7, 2023.

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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 **3,978** words.

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APPENDIX

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