IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-1050

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, on behalf of itself, its staff, and its patients, *ET AL.*,

Petitioners,

v.

STATE OF FLORIDA, *ET AL.*,

Respondents.

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

Consolidated with Case No. SC2022-1127
Lower Tribunal Nos. 1D22-2034; 2022-CA-912

BRIEF OF AMICUS CURIAE LIBERTY COUNSEL ACTION IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Founded in 1986, *Amicus* Liberty Counsel Action (LCA) is a law and policy education, training, and advocacy organization. From offices in Washington, D.C. and Orlando, Florida, LCA advances religious freedom, the sanctity of human life, the family, responsible government, and national security. In the nation's capital, Liberty Counsel Action works with all three branches of government. Liberty Counsel Action is also active in all fifty states and territories working with state and local legislative bodies.

Counsel of record, Kenneth, L. Connor, was president of Florida Right to Life in 1989, when the Court decided *In re T.W.*, 543 So. 2d 837 (Fla. 1989). Mathew D. Staver, who serves as Chairman of LCA, was general counsel for Florida Right to Life in 1989. Attorneys Conner and Staver wrote an amicus brief to the Court then, urging a correct interpretation of the Privacy Amendment, article I, section 23 of the Florida Constitution. Contrary to the text and historical purpose, the Court invented a right to privacy that extends to abortion. The Court now has the opportunity to rectify this wrong and remain faithful to the Florida Constitution. LCA submits this brief to highlight the original meaning and purpose of the text of the

Privacy Amendment and to reveal that it in no way supports a right to abortion. Given LCA's background and experience in pro-life advocacy and education, LCA's perspective is unlikely to be represented by the parties or other *amici*.

SUMMARY OF THE ARGUMENT

Florida's challenged pro-life statute, House Bill 5 (HB 5), prohibits abortions after fifteen weeks and properly protects the rights of the unborn. Fla. Stat. §§ 390.011, 390.0111. LCA argues that such a law does not violate any express or implied right contained in article I, section 23 of the Florida Constitution because the Privacy Amendment contains no right to abortion. Instead, the text, history, and early interpretations of the Amendment show that it was intended by the People of Florida only to protect personal informational privacy. The Court's extension of the Amendment to cover abortion and other claimed substantive rights is contrary to the original meaning of the text. The Court should uphold Florida's rightful restrictions on abortion, conform its article I, section 23 jurisprudence to the Amendment's original limited scope, and overrule *In re T.W.*'s wrongful declaration of a right to abortion under the Amendment.

ARGUMENT

The Court should uphold HB 5 because, properly understood, article I, section 23 applies only to informational privacy and was intended to protect citizens from government intrusion into their private data and information. The Privacy Amendment was not intended to provide a right to abortion, and *In re T.W.*'s holding to the contrary should be overruled.

I. Article I, Section 23's Text and History Show It Was Intended Only to Protect Informational Privacy.

In 1980 Florida voters approved a constitutional amendment providing for an explicit right of informational privacy. The amendment became article I, section 23:

> 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 last sentence of the amendment clearly indicates the intent: "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." While the amendment protects the individual against private or government

sector intrusion into the person's informational privacy, it does not restrict the same person's right of access to public records as provided by law.

Those participating in the 1977–78 Constitution Revision Commission (CRC) explained that the proposed amendment was meant to protect Florida citizens' private information from increasingly intrusive private and government sectors. In the late 1970s, the country was still reeling from Watergate, and informational privacy concerned many Americans. A 1979 Harris survey revealed that 67 percent of the public believed new laws and organizational policies "could go a long way to help preserve our privacy."[1] During the Carter Administration, several bills were passed relating to the protection of personal informational privacy rights. These federal initiatives and the public attitudes and debate about informational privacy were dominant factors in the development and

[1] *The Dimensions of Privacy: A National Opinion Research Survey of Attitudes toward Privacy* 9 (Alan Westin, Louis Harris and Associates, compilers, Garland Pub. 1981).

adoption of what became article I, section 23.[2] A solid 60-percent majority of Florida voters approved the amendment.[3]

The focus on informational privacy is also apparent in the remarks by then Chief Justice Ben F. Overton, who served on the CRC, during the opening session:

> 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 operated information systems? **There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business**. The subject of individual privacy and privacy law is in a developing stage. **It is a new problem that should probably be addressed**.[4]

The legislative sponsor of the amendment, Rep. Jon Mills (D-Gainesville), further clarified:

> **The goal is to provide individual and informational privacy.** The bigger government gets, the more it tends to collect information on people. . . . "Anybody [governmental bureaucracies] who wants information just throws it into forms," Mills said, adding businesses and homeowners are inundated with all sorts of official forms containing

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[2] *See, e.g.*, Gerald B. Cope, Jr., *A Quick Look at Florida's New Right of Privacy*, 55 FLA. BAR J. 12 (1981).

[3] *Id.*

[4] Address by Chief Justice Ben F. Overton to the Constitution Revision Commission (July 6, 1977) (cleaned up) (bold emphasis added) (quoted in *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536 (Fla. 1987)).

> questions that are not the government's business. . . . **Mills said he would expect courts to express a conservative view on the amendment's applicability**.[5]

During the debates in the legislative session, many concerns arose about the possibility of overbroad judicial interpretations of the amendment. Examination of tape recordings from the 1980 legislative committee meetings revealed no mention in discussion or debate about abortion rights being a potential concern of either opponents or proponents of the privacy initiative. State Attorneys feared that the amendment would limit their ability to use surveillance tools and other means to investigate crimes. State Senator Don Childers (D-West Palm Beach) was one of the most ardent opponents of the amendment. His concerns included the legitimization of homosexual relationships, the use of marijuana in homes, police search and seizure, and preservation of the Sunshine Amendment. However, even the most vocal opponents of the amendment expressed no concern for the possibility it would or could apply to abortion.

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[5] *Right to Privacy Amendment Debated*, Florida Times-Union, Oct. 26, 1980 (emphasis added).

II. The Florida Supreme Court's Understanding of the Amendment Prior to 1989 Support's This Limited Interpretation.

When embarking on the task of interpretation, the Court has instructed that constitutional amendments are to be interpreted to best fulfill the intent of the framers and voters. *Williams v. Smith*, 360 So. 2d 417, 419 (Fla. 1978) (citing *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla.1960)). In the first case to interpret article I, section 23, the Court acknowledged the intent of the Amendment was protection of informational privacy:

> **We believe that the amendment should be interpreted in accordance with the intent of its drafters. Thus, we find that the law in the state of Florida recognizes an individual's legitimate expectation of privacy in financial institution records.** However, we further find that the state's interest in conducting effective investigations in the pari-mutuel industry is a compelling state interest and that the least intrusive means was employed to achieve that interest. We also note that predisclosure notification by a bank to its customers should not be and is not mandated by article I, section 23. Thus, we hold that article I, section 23, of the Florida Constitution does not prevent the Division of Pari-Mutuel wagering from subpoenaing a Florida citizen's bank records without notice.

Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985) (emphasis added).[6]

Prior to 1989, the Court consistently adhered to the original informational privacy intent of the amendment:

> Although the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, **there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others**. The proceedings of the Constitution Revision Commission reveal that the right to informational privacy was a major concern of the amendment's drafters. Thus, **a principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life**.

Rasmussen, 500 So. 2d at 536–37 (1987) (emphasis added); *see also Atwell v. Sacred Heart Hosp. of Pensacola,* 520 So. 2d 30, 31 (Fla. 1988) (holding article I, section 23 protects privacy of medical records); *Shaktman v. State*, 553 So. 2d 148, 151 (Fla. 1989) (holding article I, section 23 protects privacy of telephone records).

[6] *See also* John Stemberger & Jacob Phillips, *Watergate, Wiretapping, and Wire Transfers: The True Origin of Florida's Privacy Right*, 53 Cumb. L. Rev. 1 (2023).

III. The *In re T.W.* Court's Radical Redefinition of Article I, Section 23 to Include Abortion.

Even after 1989, the Florida Supreme Court recognized that article I, section 23 was primarily aimed at protecting personal property rights against government intrusion:

> Article I, section 23 provides that every natural person has the right to be let alone and free from governmental intrusion into his private life. As we have previously noted, **these property rights are woven into the fabric of Florida history. The main thrust of these protections is that, so long as the public welfare is protected, every person in Florida enjoys the right to possess property free from unreasonable government interference**.

In re Forfeiture of 1969 Piper Navajo, 592 So. 2d 233, 236 (Fla. 1992) (cleaned up) (emphasis added). This acknowledgement of the amendment's original intent, therefore, makes all the more remarkable the Court's radical shift in 1989, when it found that the amendment also supplied a woman's right to terminate the life of her unborn child and, more particularly, a minor's right to terminate the life of her unborn child without parental consent. *See In re T.W.*, 551 So. 2d 1186, 1192–93 (Fla. 1989).

The *T.W.* Court did not discuss or allude to the longstanding principle that constitutional amendments should be interpreted to fulfill the intent of the voters, but instead adopted expansive

language from United States Supreme Court abortion cases finding a right of privacy in the "penumbra" of the United States Constitution that included the right to obtain an abortion. *Id.* Thus, without the support of the text or express intent of article I, section 23, the Court opined, "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment." *Id.* at 1192.

The Court's analogy of the decision to intentionally terminate a pregnancy to the decision of a terminally ill person to refuse medical treatment, as justification for extending article I, section 23 to encompass an abortion right defies reason. The Court had previously held in 1980, prior to the passage of article I, section 23, that a competent adult has the privacy right to refuse lifesaving medical treatment for himself. *See Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980). In a later decision upholding this right, nearly a decade after passage of the privacy amendment, the Court did not cite the amendment as a basis for its decision. *See Pub. Health Trust of Dade*

Cnty. v. Wons, 541 So. 2d 96, 97 (Fla. 1989). And, the Court would later hold article I, section 23 does not encompass a right for a competent, terminally ill adult to intentionally terminate his own life with medical assistance. *See Krischer v. McIver*, 697 So. 2d 97, 100 (Fla. 1997). Thus, the Court's own rulings show article I, section 23 did not supply the right for a competent adult to refuse his or her own lifesaving medical treatment (because the right already existed), and the amendment did not supply the right for a competent adult to terminate his or her own life with medical assistance. Nonetheless, by analogy to these life-ending rights **not found in article I, section 23**, the Court found in the amendment the right of a minor to terminate the life of her unborn child with medical assistance, and without the consent of a competent adult parent.

Perhaps more remarkable than the *T.W.* Court's stretch to find abortion in article I, section 23, the Court also undertook to legislate medical facts. With no medical evidence or evidentiary hearing, Justice Shaw wrote that, prior to "meaningful life outside the womb," which he deemed to occur at the end of the second trimester, "the fetus is a highly specialized set of cells that is entirely dependent upon the mother for sustenance." *Id.* at 1193. The Court's strained

reasoning and usurpation of legislative power to create new abortion rights evidences a decision based on ideology rather than law.

The Court has continued to expansively transform article I, section 23 to include "a woman's right to choose an abortion." *See Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003) (invalidating law requiring parental notification by minors seeking abortion as violative of article I, section 23).

Voters responded to the Court's unwarranted redefining of article I, section 23 in November 2004 by enacting article X, section 22, stating that the right to privacy in article I, section 23 does not prohibit mandating parental notification prior to a minor's obtaining an abortion:

> 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.

No less than adults, Florida minors enjoy a right to *informational* privacy under article I, section 23. The new article X, section 22, however, authorized the Legislature to require the sharing of a minor's *information*—the intention to terminate her pregnancy—with the minor's parent or guardian, "notwithstanding a minor's right of privacy provided in Section 23 of Article I." By expressly referencing a departure from article I, section 23 in a new amendment authorizing the sharing of a minor's personal *information* with her parent or guardian, the People of Florida affirmed that informational privacy is the subject of article I, section 23. There is no acknowledgement in article X, section 22 of any right to abortion in article I, section 23.

Nevertheless, the Court has continued to expansively interpret article I, section 23 to incorporate a virtually unfettered right to obtain an abortion. *See Gainesville Woman Care, LLC v. State of Florida*, 210 So. 3d 1243 (Fla. 2017) (striking down statute requiring 24-hour waiting period prior to abortion). Notably, the Court said in *Gainesville Woman Care* that "Article I, section 23, of the Florida Constitution, added by Florida voters in 1980, has remained

unchanged since it was adopted." *Id.* at 1252. But the Court did not explain how an amendment expressly intended to protect informational privacy, if "unchanged," can be construed to supply a right to abortion.

IV. The Need to Return to Article I, Section 23's Original Meaning.

The Court's radical redefinition of the right of privacy under article I, section 23 violates the fundamental principle that "All political power is inherent in the people." Art. I, § 1, Fla. Const.

> The object of constitutional construction is to ascertain and effectuate the intention and purpose of the people in adopting it. That intention and purpose is the 'spirit' of the Constitution—as obligatory as its written word. That spirit, however, cannot consist of mere sophistry nor of fanciful or conjectural theory. It must be found in those implications and intendments which clearly flow from the express mandates of the Constitution when considered in the light of circumstances and historical events leading up to its adoption, from all of which the purpose of the people in adopting it is to be gleaned.

Sullivan v. City of Tampa, 134 So. 211, 216 (Fla. 1931) (cleaned up). "The spirit as well as the letter of this section should be preserved and given full force and effect. Its purpose should not be defeated or frittered away by any narrow or technical construction." *Id.* (cleaned up).

In other words, the Supreme Court has "no power to tamper with the [Florida Constitution]. If a change is made the people will have to make it." *Gibson v. Fla. Legislative Investigation Comm.*, 108 So. 2d 729, 740 (Fla. 1958). Here, not only have the people not made the change suggested by the Supreme Court in 1989, but they have expressed the opposite by enacting article X, section 22 to state that the right of privacy in article I, section 23 does not prohibit laws requiring that minors notify parents or seek a court bypass before obtaining an abortion. If anything, article X, section 22 should be seen by the Court as a resounding rejection of *in re T.W.'s* holding by the People of Florida. The Court should restore article 1, section 23 to its intended meaning by overturning *In re T.W.* and holding that the Privacy Amendment contains no hidden right to an abortion.

CONCLUSION

For the foregoing reasons, LCA respectfully requests that the Court overturn *In re T.W.'s* erroneous interpretation of Art. I, section 23; conform the Court's article I, section 23 jurisprudence to the original, textual meaning that does not recognize a right to abortion; and uphold HB 5's fifteen-week ban as a rightful exercise of the

State's police power to protect every citizen's right to life under the Florida Constitution.

Dated this April 10, 2023.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in 14-point Bookman Old Style font in compliance with Rule 9.045, Fla. R. App. P. I further certify that this brief contains 3,146 words, which complies with the word limit for computer generated briefs in Rule 9.210(a)(2), Fla. R. App. P.

/s/ Kenneth L. Connor
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal to all counsel of record, pursuant to Fla. R. Jud. Admin 2.516(b)(1), on this April 10, 2023.

/s/ Kenneth L. Connor
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