In the Supreme Court of Florida

CASE NOS.: SC19-1266; SC19-1601 (Consolidated)

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: PROHIBITS POSSESSION OF DEFINED ASSAULT WEAPONS

INITIAL BRIEF OF PROPONENTS BRADY AND TEAM ENOUGH

IN SUPPORT OF THE INITIATIVE

Matthew Triggs
Florida Bar No. 0865745
PROSKAUER ROSE LLP
2255 Glades Road, Suite 421-A
Boca Raton, Florida 33431
Telephone: (561) 241-7400
Facsimile: (561) 241-7145
mtriggs@proskauer.com

Lindsey Olson Collins
(admitted *pro hac vice*)
Nathaniel J. Miller
(admitted *pro hac vice*)
PROSKAUER ROSE LLP
11 Times Square
New York, New York 10036
Telephone: (212)969-3000
Facsimile: (212)969-2900
lcollins@proskauer.com
nmiller@proskauer.com

Kyle A. Casazza
(admitted *pro hac vice*)
Christina H. Kroll
(admitted *pro hac vice*)
PROSKAUER ROSE LLP
2029 Century Park E.
Los Angeles, CA 90067
Telephone: (310)557-2900
Facsimile: (319)557-2193
kcasazza@proskauer.com
ckroll@proskauer.com

Jonathan Lowy
(admitted *pro hac vice*)
BRADY
940 First Street, NE Suite 400
Washington, DC 20002
Telephone: (202)370-8100
jlowy@bradyunited.org

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INTRODUCTION

The proposed amendment to Article I, Section 8 is simple. If approved by the voters, any long gun that is both semiautomatic and capable of holding more than ten rounds would be prohibited. This straightforward two-part test contains ambiguity only where gun violence prevention opponents disingenuously insert it. The amendment would still permit a diverse range of semiautomatic firearms suitable for self-defense, hunting, and other lawful uses. Opponents' premature claim that the amendment would violate the Second Amendment has been rejected by every federal court to have addressed a similar assault weapons ban. Criticisms of the substance of the proposed amendment cannot avoid what its opponents know to be true: that the proposed amendment easily passes the deferential standards to appear on the ballot.

IDENTITY AND INTEREST OF THE PROPONENTS

Brady

Brady (formerly the Brady Center to Prevent Gun Violence) is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Brady has a substantial interest in ensuring that the Constitution and state laws are properly interpreted to allow strong government action to prevent gun violence. Through its Legal Action Project, Brady has filed numerous briefs in support of government regulation of firearms.

Team ENOUGH

Team ENOUGH is a youth-led, Brady-sponsored initiative that educates and mobilizes young people in the fight to end gun violence. Team ENOUGH is committed to bringing a fresh perspective and a common-sense approach to America's gun policy, and has an interest in promoting laws that seek to help bring an end to gun violence. Team ENOUGH has a particular interest in laws affecting Florida: it represents the interests of 20 Florida students, who are members of three chapters at Florida schools, including two executive council members who lost friends and family in the Marjory Stoneman Douglas shooting.

STATEMENT OF THE CASE

On February 14, 2018, a gunman armed with a semi-automatic rifle and more than 300 rounds of ammunition murdered 17 people at Marjory Stoneman Douglas High School in Parkland, Florida, including 14-year old Alex Schacter.

In an effort to help prevent more mass killings in Florida, Schacter's aunt, Gail Swartz, drafted and submitted a ballot initiative to amend the Florida Constitution. This amendment would prohibit certain "defined assault weapons," specifically "semiautomatic rifles and shotguns capable of holding more than 10 rounds of ammunition at once."

On July 26, 2019, the Attorney General requested this Court's advisory opinion as to whether Swartz's proposed amendment complies with the Florida

Constitution's single-subject requirement, *see* Article XI, Section 3, and whether the proposed ballot title and summary comply with the technical requirements of section 101.161(1) of the Florida statutes. This Court has jurisdiction to render an advisory opinion under Article V, Section 3(b)(10) of the Florida Constitution.

The Ballot Title and Summary

> **Prohibits Possession of Defined Assault Weapons**
>
> Prohibits possession of assault weapons, defined as semiautomatic rifles and shotguns capable of holding more than 10 rounds of ammunition at once, either in fixed or detachable magazine, or any other ammunition feeding device. Possession of handguns is not prohibited. Exempts military and law enforcement personnel in their official duties. Exempts and requires registration of assault weapons lawfully possessed prior to this provision's effective date. Creates criminal penalties for violations of this amendment.

The Amendment

The proposed initiative amends Article I, Section 8, by adding a new subsection. The new subsection would provide:

(e) The possession of an assault weapon, as that term is defined in this subsection, is prohibited in Florida except as provided in this subsection. This subsection shall be construed in conformity with the Second Amendment to the United States Constitution as interpreted by the United States Supreme Court.

1) Definitions –

> a) Assault Weapons – For purposes of this subsection, any semiautomatic rifle or shotgun capable of holding more than ten (10) rounds of ammunition at once, either in a fixed or detachable magazine, or any other ammunition-feeding device. This subsection does not apply to handguns.

b) Semiautomatic – For purposes of this subsection, any weapon which fires a single projectile or a number of ball shots through a rifled or smooth bore for each single function of the trigger without further manual action required.

c) Ammunition-feeding device – For purposes of this subsection, any magazine, belt, drum, feed strip, or similar device for a firearm.

2) Limitations –

a) This subsection shall not apply to military or law enforcement use, or use by federal personnel, in conduct of their duties, or to an assault weapon being imported for sale and delivery to a federal, state or local governmental agency for use by employees of such agencies to perform official duties.

b) This subsection does not apply to any firearm that is not semiautomatic, as defined in this subsection.

c) This subsection does not apply to handguns, as defined in Article I, Section 8(b), Florida Constitution.

d) If a person had lawful possession of an assault weapon prior to the effective date of this subsection, the person's possession of that assault weapon is not unlawful (1) during the first year after the effective date of this subsection, or (2) after the person has registered with the Florida Department of Law Enforcement or a successor agency, within one year of the effective date of this subsection, by providing a sworn or attested statement, that the weapon was lawfully in his or her possession prior to the effective date of this subsection and by identifying the weapon by make, model, and serial number. The agency must provide and the person must retain proof of registration in order for possession to remain lawful under this subsection. Registration records shall be available on a permanent basis to local, state and federal law enforcement agencies for valid law enforcement purposes but shall otherwise be confidential.

3) Criminal Penalties – Violation of this subsection is a third-degree felony. The legislature may designate greater, but not lesser, penalties for violations.

4) Self-executing – This provision shall be self-executing except where legislative action is authorized in subsection (3) to designate a more severe penalty for violation of this subsection. No legislative or administrative action may conflict with, diminish or delay the requirements of this subsection.

5) Severability – The provisions of this subsection are severable. If any clause, sentence, paragraph, section or subsection of this measure, or an application thereof, is adjudged invalid by any court of competent jurisdiction, other provisions shall continue to be in effect to the fullest extent possible.

6) Effective date – The effective date of this amendment shall be thirty days after its passage by the voters.

SUMMARY OF THE ARGUMENT

The proposed amendment should be allowed on the ballot because the title and summary clearly state that its purpose is to ban possession of certain defined assault weapons.

First, the proposed amendment is clear in its purpose and scope. As identified by the ballot title and summary, the purpose is to ban a defined subset of guns: semiautomatic rifles and shotguns capable of holding more than ten rounds. By virtue of its appearing alongside the sole constitutional section it amends, that the amendment would be modifying a part of the Florida Constitution is readily apparent to any voter. The use of the term "defined assault weapons" creates no confusion. The term "assault weapon" is generally understood to refer to a particular category of weapon even if the precise definition varies by jurisdiction.

And, the title's additional use of "defined" directs the voter to the precise definition.

Second, the Attorney General's claim that mini-shells would render all semiautomatic shotguns banned under the proposed amendment is not correct. Mini-shells are too small to properly cycle in virtually all semiautomatic shotguns and cannot be used in nearly any shotgun unless the weapon is modified.

Finally, a Second Amendment challenge is beyond the scope of this review, but would nevertheless fail. Only whether the initiative covers a single subject and whether the title and summary are clear are at issue. In any event, challenges to similar bans have failed in every federal appellate court that has addressed the issue.

ARGUMENT

I. The Ballot Title and Summary Are Not Misleading.

A. The Ballot Title and Summary Clearly and Unambiguously State That the Amendment's Chief Purpose Is to Prohibit the Possession of Defined Semi-Automatic Assault Weapons.

The ballot title and summary must explain the "chief purpose of the measure" in "clear and unambiguous language," section 101.161(1) of the Florida Statute, but it "need not explain every detail or ramification of the proposed amendment." *Advisory Op. to Att'y Gen. re Rights of Elec. Consumers Regarding Solar Energy Choice*, 188 So.3d 822, 831 (Fla. 2016). "[T]he ballot title and

summary must give fair notice of the content of the proposed amendment to enable the casting of an intelligent and informed vote." *Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So.2d 415, 418 (Fla. 2002) (internal citation omitted). Courts are "obligated to uphold the proposal unless it is clearly and conclusively defective." *Advisory Op. to Att'y Gen. re Voting Restoration Amendment*, 215 So.3d 1202, 1205 (Fla. 2017) (internal citation omitted).

The chief purpose of this proposed amendment, captured by the title alone, is to prohibit the possession of defined assault weapons. The summary, in less than 75 words, effectively communicates this purpose in the very first sentence: "Prohibits possession of assault weapons, defined as semiautomatic rifles and shotguns capable of holding more than 10 rounds of ammunition at once, either in fixed or detachable magazine, or any other ammunition feeding device." Any voter reading this summary would discern that the amendment's chief purpose is to ban a defined category of assault weapons—semiautomatic rifles and shotguns capable of holding more than 10 rounds of ammunition at once. "[T]he summary need not go any further in order to satisfy Florida law." *See, e.g.*, *Advisory Op. to Att'y Gen. re Protect People from Health Hazards of Second-Hand Smoke*, 814 So.2d 415, 419 (Fla. 2002) (summary stated the amendment's chief purpose of

prohibiting smoking in the workplace and did not need to specify that workplaces include restaurants).

The proposed amendment is explicit: it prohibits all semiautomatic rifles and shotguns capable of holding more than 10 rounds. The opponents' arguments that the title and summary somehow mislead the voter by hiding the amendment's "true" purpose of prohibiting "virtually all semi-automatic long guns" are hyperbole. *See, e.g.*, Attorney General Initial Brief ("Att'y Gen. Initial Br.") at 7-12; National Shooting Sports Foundation Initial Brief ("NSSF Initial Br.") at 4-9. Not only do the title and summary, using the same language as in the proposed amendment, clearly notify the voter of the proposed amendment's chief purpose and scope, numerous readily-available semi-automatic long guns would still be permitted.

Nearly all semiautomatic shotguns have fixed magazines with capacities of ten rounds or less. Affidavit of Stephen J. Lindley ("Lindley Aff.") ¶ 11 (Exhibit 1). The opposition briefing concedes as much: "[w]ith respect to semi-automatic shotguns, the vast majority come with fixed magazines, and *many come with a standard capacity of ten or less*." Att'y Gen. Initial Br. at 9 (emphasis added). While the Attorney General's opening brief repeatedly references a semiautomatic shotgun with a fixed 6-round magazine, that weapon would not be subject to the

ban. Having a fixed 6-round magazine, such a gun is inherently not "capable of" holding more than 10 rounds without modification.

For semiautomatic rifles, major manufacturers make many models that would remain legal under the ban. Lindley Aff. ¶ 15. Such models would undoubtedly be more popular and widely available if the ban were enacted by Florida voters. *See* Lindley Aff. ¶ 16. In addition to the many permissible guns that are already widely available, manufacturers would likely develop new models that comply with this amendment, as has repeatedly occurred in response to weapons bans in other states.[1] Lindley Aff. ¶¶ 16-18. The amendment does not, as the Attorney General contends, constitute a "virtual ban" on semiautomatic long guns. *See* Att'y Gen. Initial Br. at 12-14.

[1] It is no surprise that the proposed amendment would prohibit a gun manufacturer's possession of a defined semi-automatic assault weapon. Just like voters can be presumed to understand that restaurants are workplaces, voters should be presumed to understand that the amendment includes manufacturers. *See*, *e.g.*, *Protect People from the Health Hazards of Second-Hand Smoke*, 814 So.2d at 419 ("In our view, the argument that Florida citizens cannot understand that a restaurant may be a workplace is contrary to rational analysis."). To the extent the proposed amendment does include gun manufacturers in Florida, an issue unrelated to the proposed amendment's chief purpose and is thus not before this Court, manufacturers in Florida would likely be largely unaffected because their Florida facilities could be used to manufacture Florida-compliant long guns. *See* Lindley Aff. ¶¶ 16-18.

B. The Term "Capable Of" Means Presently "Capable Of" Holding More than 10 Rounds, Without Alteration.

The opposition manufactures confusion by employing an unnatural reading of the term "capable of." Read naturally, a gun is "capable of" holding more than 10 rounds if, without further modifications, it is actually capable of holding more than 10 rounds. The Attorney General invites this Court to construe "capable of," as meaning "theoretically capable of being altered to become capable of holding 10 or more rounds." The amendment's plain text contradicts that creativity.

Contrary to the Attorney General's arguments, this Court's precedent in *Pittman v. State*—a 130-year-old case addressing language in a jury charge—supports the natural reading of the term "capable of." *See Pittman v. State*, 25 Fla. 648, 651 (Fla. 1889). There, the Court found that the charge's use of the phrase "capable of producing death" was overly broad for determining whether a weapon is deadly as a matter of law because so many things, without alteration, are capable of producing death but are "not likely to do so." *See id.* ("Any weapon or instrument, such as a needle or pin, is capable of producing death."). The Court did not address the meaning of "capable of," let alone suggest, as the opponents do here, that the term naturally includes all that a weapon can theoretically accomplish once altered. And while "not likely to do so," neither needles nor pins would require further modification to be "capable of" producing death.

C. The Proposed Amendment Appropriately Discloses Its Modification of Article I, Section 8 of the Florida Constitution.

Opponents argue that the proposed ballot title and summary are defective for not disclosing the effect they claim the proposed amendment has on Floridians' rights under Article I, Section 8 of the Florida Constitution. *See* National Rifle Association Initial Brief ("NRA Initial Br.") at 12-14. It is unfathomable that a voter presented with an initiative explicitly purporting to amend Article I, Section 8 to prohibit the possession of certain assault weapons would not appreciate that the amendment would impact any rights to possess such weapons under that section. Pursuant to Florida law, both the Section being amended and substance of that amendment would be listed right on the ballot. *See* Fla. Admin. Code r. 1S-2.032.

As outlined by the cases provided by opponents, there is no additional requirement that the *ballot title* and *summary* state the constitutional amendment that may be affected; all that is required is that "an *initiative* identify the provisions of the constitution substantially affected by the proposed amendment." *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 565 (Fla. 1998) (emphasis added). So long as the impacted portions of the Constitution are identified in the initiative itself, voters are presumed to know its constitutional effect and are therefore not at risk of unwittingly re-writing portions of the Florida constitution. *Cf. Advisory Op. to Att'y Gen. re Tax Limitation*, 644

So.2d 486, 493-94 (Fla. 1994) (finding ballot initiative improper for failing to disclose its effect on unnamed provisions in the Florida Constitution).

The proposed amendment undoubtedly affects Article I, Section 8—indeed the only point of the proposed amendment is to change this subsection. Unlike cases in which the initiative did not disclose how particular constitutional provisions would be affected, the current initiative petition explicitly states both the constitutional provision at issue and how exactly it would be amended. *Compare Advisory Op. to Att'y Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So.2d 888, 890-91 (Fla. 2000) (title was defective for its negative implication, which was not corrected in the summary, that there did not already exist a constitutional protection against race discrimination) *with Advisory Op. to Att'y Gen. re Ltd. Political Terms in Certain Elective Offices*, 592 So.2d 225, 228 (Fla. 1991) (petition was proper because it was "not a situation in which the ballot summary conceals a conflict with an existing provision."). And again, as it would appear on the face of the ballot, voters would not even have to resort to the initiative itself to discern the effect of the amendment.

Opponents argue that *Rinzler v. Carson*, 262 So.2d 661 (Fla. 1972) confers an unqualified right under Article I, Section 8 to possess semi-automatic long guns. NRA Initial Br. at 14. *Rinzler* does no such thing. The Court noted that a machine

gun ban "could be construed to prohibit any person owning or possessing any semi-automatic hand gun," and that "such a construction *might* run counter to the historic constitutional right of the people to keep and bear arms." 262 So.2d at 666 (emphasis added). The Court construed the statute to "not prohibit the ownership, custody and possession of weapons not concealed upon the person, which, although designed to shoot more than one shot semi-automatically, are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *Id.* The Court did not suggest an unqualified right to own such weapons, and explicitly recognized that while "the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen," and cited instances where it upheld restrictions on particular weapons. *See id.* at 665-66 (noting a prior decision upholding a statute "which made it a criminal offense for any person to carry around with him or to have in his manual possession a pistol, Winchester rifle or other repeating rifle in a county without a license from the county commissioners"). While it is doubtful that *Rinzler* did confer such a right under Article I, Section 8, by purporting to amend that section to prohibit possession of certain assault weapons, the proposed amendment nevertheless gives sufficient notice to voters of its effect on that section. *See Advisory Op. to Att'y Gen. re*

Physician Shall Charge the Same Fee for the Health Care Serv. to Every Patient, 880 So.2d 659, 664 (Fla. 2004) (where "the proposed constitutional amendment does not impact any other provision of the Florida Constitution…it is not necessary that the summary inform voters of any conflict or impact with an existing provision").

D. The Amendment's Exemptions do not Mislead Voters as to the Chief Purpose of the Amendment.

The opponents confuse the amendment's exemptions—a grandfathering clause and creation of a registry for owners of grandfathered weapons—with the amendment's chief purpose of prohibiting defined assault weapons. Att'y Gen. Initial Br. at 16-17; NRA Initial Br. at 15-19; NSSF Initial Br. at 10-12. The issue before this Court is whether the ballot title and summary explain the chief purpose of the amendment, which they plainly do. Challenges to details of the amendment's administration—here, its exemptions—are "better left to subsequent litigation, should the amendment pass." *In re Advisory Op. to Att'y Gen. re Med. Liab. Claimant's Comp. Amendment*, 880 So.2d 675, 679 (Fla. 2004) ("Although the opponents argue that the efficacy of the amendment is at issue because of the vague 'medical liability' term, the issue as to the precise meaning of this term is better left to subsequent litigation, should the amendment pass.").

And yet, the opponents argue that the initiative must fail because they read confusion into the exemption language. Att'y Gen. Initial Br. at 16-17; NRA

Initial Br. at 15-19; NSSF Initial Br. at 10-12. The summary explains that the amendment "[e]xempts and requires registration of assault weapons lawfully possessed prior to this provision's effective date." The word "exempt," refers to an exemption from the amendment's chief purpose—to prohibit possession of defined semi-automatic assault weapons. "Requires registration of assault weapons" refers to the requirement that gun owners register their weapons to avail themselves of the exemption.

Opponents argue that a reader would not know how to read the sentence and would understand "exempts" to refer to the gun itself, rather than an exemption for its owner. This illogical construction would mean that any gun that is possessed before the amendment takes effect could be exempt from the law in perpetuity, and could be sold (or given) to anyone at any time. The "exempts" clause naturally relates to the amendment's chief purpose—regulating possession—and thus clearly applies to a person's possession rather than to the object of the possession. Indeed, the previous sentence "exempts military and law enforcement personnel in their official duties," clearly demonstrating that the exemption belongs to the possessor of the guns and not the guns themselves.[2] "[T]he argument that Florida

[2] Also, if, as opponents erroneously suggest, the exemption applied to guns rather than an individual's possession of them, the exemption for military and law enforcement personnel would largely be surplusage because any registered guns used in officers' official duties would already be exempt. *See TRW Inc. v.*

Citizens cannot understand [this] is contrary to rational analysis." *Protect People from the Health Hazards of Second-Hand Smoke*, 814 So.2d at 419.

Even if voters did need the amendment's full text to understand the exact contours of the exemptions, a summary that alerts the voter that more detailed text is available in the amendment still clearly states the amendment's chief purpose. *See, e.g.*, *id.* (finding that a "summary [that] indicate[d] that definitions are provided in the amendment text, thereby alerting voters to review the contents of the amendment text" clearly stated the proposed amendment's chief purpose and gave voters fair notice). By virtue of noting in the summary that an exemption is available, the summary alerts the voter that more detailed text is available in the amendment. The title and summary need not "explain every ramification of the proposed amendment." *Id.* Indeed, "[i]t is obvious that the seventy-five word limit placed on the ballot summary as required by statute does not lend itself to an explanation of all of a proposed amendment's details." *Id.* at 419 (internal citation omitted).

Andrews, 534 U.S. 19, 32 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting.") (internal citation omitted).

E. The Term "Assault Weapons" is a Neutral Descriptor and Not Political Rhetoric.

Opponents argue that the term "assault weapons" was "[c]oined by anti-gun activists as a derogatory and pejorative term" designed to inflame passions rather than convey neutral meaning. NRA Initial Br. at 6-7.

Not only is the history of the term "assault weapons" much more complicated than is presented by opponents,[3] that history is a red herring intended to distract from what is actually at issue—that the term "assault weapons" is *currently* widely used and understood by both voters and legislators to describe a particular category of semi-automatic long gun. How the term may have been used thirty years ago is beside the point. NRA Initial Br. at 8. What is important is how voters today will understand the term "assault weapon."

A leading dictionary defines "assault weapon" as "any of various automatic or semiautomatic firearms." "Assault Weapon," *Merriam-Webster*;[4] *see Advisory*

[3] Opponents' characterization of the term "assault weapon" as a sinister gun-control machination is unsupported by its history, which shows that it has been widely used across the political spectrum. *See*, *e.g.*, Erica Goode, *Even Defining 'Assault Rifles' Is Complicated*, N.Y. TIMES, Jan. 16, 2013, available at https://www.nytimes.com/2013/01/17/us/even-defining-assault-weapons-is-complicated.html., (noting that while the history of the term "assault weapon" does not point to a clear origin the most basic definition is a semi-automatic weapon capable of holding a high-capacity magazine); Phillip Peterson, *Gun Digest Buyer's Guide to Assault Weapons*, GUN DIGEST BOOKS, Oct. 28, 2008 (stating that the term "assault weapon" was coined by the gun industry in order to give the class of weapons a catchy and attractive name).

[4] *Available at* https://www.merriam-webster.com/dictionary/assault%20weapon.

Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions, 132 So.3d 786, 800-01 (Fla. 2014) (approvingly citing Meriam Webster's as "a dictionary may provide the popular and common-sense meaning of terms presented to the voters") (internal citation omitted). Consistent with this definition, many states and localities currently have legislation that ban weapons using some variation of the term "assault weapon." *See, e.g.* Cal. Penal Code § 30515 (banning defined "assault weapons"); Conn. Gen. Stat § 53-202a (banning defined "assault weapons"); Cook County, Ill. Code §§ 54-211, 54-212(a) (banning defined "assault weapons"); D.C. Code Ann. § 7-2502.02(a)(6) (banning defined "assault weapons"); Haw. Rev. Stat. § 134-1 (banning defined "assault pistols"); Md. Code Ann., Crim. Law § 4-303 (banning defined "assault long guns"); Mass. Gen. Laws ch. 140 § 131M (banning defined "assault weapons"); N.J. Stat. Ann. § 2C:39-1w (banning defined "assault firearms"); N.Y. Penal Law §§ 265.02(7), 265.10 (banning defined "assault weapons"); Va. Code Ann. § 18.2-308.2:2(G) (defining "assault firearm"). Requiring use of a term other than "assault weapon" would both buck convention and sow confusion in this context.

Further, available evidence on the term "assault weapons" indicates that it is simply how most people refer to certain semi-automatic long guns. *See* Frank

Newport, *Analyzing Survey on Banning Assault Weapons*, GALLUP, Nov. 14, 2019[5] (finding only minor differences in responses between groups asked about bans on "assault rifles" or "high-capacity semi-automatic rifles such as the AR-15, AK-47 or M16" and noting that under either wording a clear majority supported making sale or possession of such guns illegal). Opponent's citation to a Quinnipiac University study finding voters reacted more strongly to the term "assault weapons" than "semi-automatic rifles" reinforces this point—the term "assault weapon" is a salient term used and understood by voters to describe certain semi-automatic long guns. Voters having stronger reactions to certain words does not inherently make them misleading political rhetoric. Instead, providing them with an accurate description allows them to accurately assess the weapons at issue.

Because "assault weapon" is a neutral, descriptive term, the ballot language lacks any superfluous value judgments and therefore does not attempt to improperly sway public opinion. *Cf. Fla. Dep't of State v. Mangat*, 43 So.3d 642, 648 (Fla. 2010) (holding phrase "mandates that don't work" to be political rhetoric); *Evans v. Firestone*, 457 So.2d 1351, 1355 (Fla. 1984) (holding "unnecessary costs" to be improper "editorial comment").

[5] *Available at* https://news.gallup.com/opinion/polling-matters/268340/analyzing-surveys-banning-assault-weapons.aspx.

And the summary does nothing to hide its substance. In *Save our Everglades*, this Court struck down a title and summary that used emotional language to hide the true nature of the amendment's effect. *Advisory Op. to Att'y Gen. re Save Our Everglades*, 636 So.2d 1336 (Fla. 1994); *see Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So.2d 1229, 1238-39 (Fla. 2006) (noting that the decision in *Everglades* rested on the fact that the language would mislead voters). The text of the amendment did not explain why the Everglades were in peril or how it would be saved, and it also misled voters. The summary stated that taxes on the sugarcane industry would "*help* pay" for the cleanup, which incorrectly implied that entities other than the sugarcane industry would share the cost of the cleanup when in fact the tax would have been levied solely on the sugarcane industry. *Save Our Everglades*, 636 So.2d at 1338 (emphasis added). By contrast, the amendment here specifically states that assault weapons would be banned, as well as what the exemptions are.

In *Additional Homestead Tax Exemption*, the summary promised tax "relief" despite the fact that receipt of relief was not guaranteed and dependent on a variety of factors. *Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So.2d 646, 653–54 (Fla. 2004). As in *Save our Everglades*, it was the artful deception that made the amendment improper political rhetoric.

The proposed Florida Amendment suffers from none of these defects. It clearly states that its intent is to ban a readily-understood, defined subset of weapons. It then proceeds to ban that subset of weapons in no uncertain terms, and uses the standardized term "assault weapon" throughout. Opponents cannot remove the word "assault" from the context in which it is used ("defined assault weapons") to try and reshape the otherwise neutral phrase into something emotional and rhetorical. *See Rights of Elec. Consumers Regarding Solar Energy Choice*, 188 So.3d at 833 ("when read within the full context of the ballot title and summary, none of the terms … constitute political or emotional rhetoric"); *Fla. Marriage Prot. Amendment*, 926 So.2d at 1239-40 (finding "protect" was not political rhetoric based on its dictionary definition and its use within the context of the amendment).

Further, the initiative's title and summary do not rely solely on the term "assault weapon" to inform voters. The title refers specifically to "*defined* assault weapons," and the summary goes on to concisely define them. That voters are told that the term is defined, and provided with a concise definition, eliminates any danger of misinformation. *See Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient*, 880 So.2d at 666 ("[T]he sponsors have satisfied the statute by informing the voters of the chief purpose of the amendment, and the summary cannot be expected to include and fully explain all possible

effects and ramifications."); *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. For Non-Violent Drug Offenses*, 818 So.2d 491, 498 (Fla. 2002) ("[T]he voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth."). Voters who read only the title and summary would therefore be informed about the scope of the amendment. Voters who read the amendment would know even more. *See Advisory Op. to Att'y. Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So.3d 235, 245–46 (Fla. 2015) (undefined term was not ambiguous or misleading and could be given a fair meaning after the court's holistic review of "the text of the ballot title and summary, and the text of the amendment").

II. Mini-shells Are Not Functional in Semi-Automatic Shotguns.

On a flawed factual premise, the Attorney General contends that even without alteration, the amendment prohibits virtually every semiautomatic shotgun because of "a special type of shotgun rounds—called 'mini-shells' or 'mini-rounds,'" that are shorter in length than standard rounds. Att'y Gen. Initial Br. at 9. The AG contends that owners of otherwise permissible semiautomatic shotguns can use these mini-shells to "increase capacity by fitting more rounds in the same magazine." Att'y Gen. Initial Br. at 10. This is false.

While someone may be able to *load* more than 10 mini-shells into a semiautomatic shotgun magazine, few (if any) would actually fire. Lindley Aff. ¶ 22. By virtue of its smaller size, the mini-shell lacks the explosive force necessary to properly cycle ammunition in a semiautomatic shotgun. *Id.* These shorter shells also have a tendency to misfeed in any kind of shotgun. *Id.*.

A review of the very Aguila Ammunition mini-shell described by the Attorney General's "expert" puts it bluntly: "Just for curiosity's sake, I tried the Minishells in a semi-automatic shotgun. I didn't think it would work. It didn't." Lindsey Bertomen, *Review: Aguila Ammunition's Minishells*, OFFICER.COM, June 13, 2018.[6] Aguila's own website notes that its product "*may* work in *some* semi-automatic shotguns *with modified feed systems.*" Aguila Ammunition, *Frequently Asked Questions*[7] (emphasis added). A typical unmodified semiautomatic shotgun is not "capable of" firing more than 10 mini-shells. *See* Lindley Aff. ¶¶ 21-25.

Notwithstanding the Attorney General's "expert" declaration, this should come as no surprise to the amendment's opponents. Just last month, the opponent National Rifle Association published in its official journal, Shooting Illustrated, a review of the same popular mini-shell. At the beginning of the review, the author

[6] *Available at* https://www.officer.com/tactical/firearms/article/21002984/a-review-of-aguila-ammunitions-minishells.
[7] *Available at* https://www.aguilaammo.com/frequently-asked-questions/.

warns readers that "certain shotguns just won't feed these [minishells]. Of course, they'll be fine in a single-barrel and double-barrel guns, but *I haven't found a single semiautomatic* which will cycle properly with the Minishells, other than a purpose-build model." Philip Massaro, *Review: Aguila Minishells*, SHOOTING ILLUSTRATED, Oct. 23, 2019 [8] (emphasis added). The article notes that modification is needed for use with the Mossberg 500 and 590, both which are pump-action shotguns. *Id*. *See also* MOSSBERG, Pump-Action Shotguns.[9] As a result, the opponents' claim that virtually all semi-automatic shotguns would be banned is untrue.

III. A Second Amendment Challenge Is Both Not Ripe And Futile.

A. Opponent's Constitutional Challenge is Not Ripe.

When deciding the validity of ballot initiatives, the Court considers only two legal issues: (1) "whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution," and (2) "whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999)." *Amendment to Bar Gov't from Treating People*

[8] *Available at* https://www.shootingillustrated.com/articles/2019/10/23/review-aguila-minishells/.
[9] *Available at* https://www.mossberg.com/firearms/shotguns/pump-action-shotguns/ (last visited Dec. 4, 2019).

Differently Based on Race in Pub. Educ., 778 So.2d at 890-91; *see also Med. Liab. Claimant's Comp. Amendment.*, 880 So.2d at 676-77; *Advisory Op. to Att'y Gen. re Voting Restoration Amendment*, 215 So.3d 1202, 1205 (Fla. 2017). Judicial review of a ballot initiative does not address the wisdom or the merits of the proposed amendment, including whether the proposed amendment is consistent with the U.S. Constitution. *See Fla. Marriage Prot. Amendment*, 926 So. 2d at 1233; *Advisory Op. to Att'y Gen. re Ltd. Casinos*, 644 So.2d 71, 74 (Fla. 1994). Challenges under the United States Constitution are non-justiciable. *See In re Advisory Op. to Att'y Gen. re Fla.'s Amendment to Reduce Class Size*, 816 So.2d 580, 582 (Fla. 2002) ("other constitutional challenges are not justiciable in this type of proceeding."); *Ltd. Political Terms in Certain Elective Offices*, 592 So.2d at 227 (finding First Amendment challenge non-justiciable at the advisory opinion stage).

The initiative's opponents' premature arguments that the initiative violates the Second Amendment to the U.S. Constitution are outside the proper scope of this dispute. *See, e.g.*, NRA Initial Br. at 14; NSSF Initial Br. at 12-14. They are also contrary to every federal appellate court to have addressed the issue.

B. Even if a Challenge Were Ripe, the Amendment Satisfies the Second Amendment.

"[E]very court of appeals to have considered the issue has reached the same conclusion … bans on assault weapons and large-capacity magazines do not

contravene the Second Amendment." *Wilson v. Cook Cty.*, 937 F.3d 1028, 1035 (7th Cir. 2019) (petition for cert. docketed); *see also Worman v. Healey*, 922 F.3d 26, 40 (1st Cir. 2019) (upholding Massachusetts ban on "semiautomatic assault weapons" and "large-capacity magazines") (petition for cert. docketed); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y General N.J.*, 910 F.3d 106, 118 (3d Cir. 2018) (high-capacity magazine ban did "not severely burden, and in fact respects, the core of the Second Amendment right.") (no cert. petition filed); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), *cert denied*, 138 S. Ct. 469, 199 L. Ed. 2d 374 (2017) (upholding assault weapon ban); *N.Y. Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d. Cir. 2015) (ban on possessing certain semiautomatic assault rifles did not violate the Second Amendment), *cert denied*, 136 S.Ct. 2486, 195 L.Ed.2d 822 (2016); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (denying challenge to high-capacity magazine ban) (no cert. petition filed); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (ban on semiautomatic rifles and magazines capable of holding more than ten rounds did not violate Second Amendment) (no cert. petition filed).

Claiming that the amendment "amounts to a near categorical ban on the possession of semi-automatic rifles and shotguns in Florida," opponents argue that it is as unconstitutional as a ban on handguns. *See* NSSF Initial Br. at 13 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)). The first problem with

opponent's reasoning is that the amendment is not a categorical ban on semi-automatic long guns. *See, e.g.*, *Kolbe*, 849 F.3d at 138 (finding that assault weapon ban did not concern a "'class' like that encompassing all handguns, in that the banned assault weapons are just some of the semiautomatic rifles and shotguns in existence."); *see also* Part I.A. *supra*. Owners of guns subject to the ban can retain possession by complying with the amendment's registration provision. *See* Proposed Amendment Art. I, § 8(e)(2)(d). And many semi-automatic rifles and the overwhelming majority of semi-automatic shotguns are not subject to the ban. Lindley Aff. ¶¶ 13, 15.

The deeper problem with opponents' argument is that it misses the critical distinction that the defined assault weapons are materially different from handguns and subject to more stringent regulation under the Second Amendment. In *Heller II*, cited by the NRA, the Court upheld the District's ban on semiautomatic assault rifles because "[u]nlike the law held unconstitutional in *Heller*, the laws at issue here do not prohibit the possession of the quintessential self-defense weapon, to wit, the hand gun." *Heller II*, 670 F.3d at 331-32 (internal citations omitted). The proposed amendment's definition of assault weapons specifically exempts handguns. *See* Proposed Amendment Art. I, § 8(e)(1). Accordingly, the proposed amendment fits comfortably in the constitutional framework created by *Heller* and its progeny.

CONCLUSION

For the foregoing reasons the initiative should be allowed on the ballot.

Respectfully submitted,

/s/ Kyle A. Casazza
Kyle A. Casazza
Christina H. Kroll
2029 Century Part East, Suite 2400
Los Angeles, CA 90067
Ph.: (310) 557-2900
kcasazza@proskauer.com
ckroll@proskauer.com

Lindsey Olson Collins
Nathaniel J. Miller
Eleven Times Square
New York, NY 10036
Ph.: (212) 969-3000
lcollins@proskauer.com
nmiller@proskauer.com

Matthew Triggs
2255 Glades Rd, Suite 421 Atrium
Boca Raton, FL 33431
Ph.: (561) 241-7400
mtriggs@proskauer.com

PROSKAUER ROSE LLP

Jonathan Lowy
840 First St. NE, Suite 400
Washington, DC 20002
Ph.: (202) 370-8100
jlowy@bradyunited.org

BRADY

Counsel for Brady and Team ENOUGH

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished this 5th day of December, 2019, through the Florida Courts E-Filing Portal to:

Amit Agarwal, Solicitor General
James H. Percival, Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1060
(850) 414-3300
amit.agarwal@myfloridalegal.com
james.percival@myfloridalegal.com
Counsel for Attorney General Ashley Moody

Joe Jacquot, General Counsel
EXECUTIVE OFFICE OF THE GOVERNOR
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001
joe.jacquot@eog.myflorida.com
General Counsel to Governor Ron DeSantis

Brad McVay, General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
brad.mcvay@dos.myflorida.com
General Counsel to Secretary of State Laurel Lee

J. Michael Maida, Deputy General Counsel
FLORIDA HOUSE OF REPRESENTATIVES
418 The Capitol
402 South Monroe Street

Tallahassee, Florida 32399-1300
michael.maida@myfloridahouse.gov
Deputy General Counsel to House Speaker Jose Oliva

Jeremiah Hawkes, General Counsel
THE FLORIDA SENATE
409 The Capitol
404 S. Monroe Street
Tallahassee, Florida 32399-1100
hawkes.jeremiah@flsenate.gov
General Counsel to Senate President Bill Galvano

Corey P. Gray
Stuart H. Singer
Jon L. Mills
BOIES SCHILLER FLEXNER LLP
401 E Las Olas Blvd., Suite 1200
Fort Lauderdale, FL 33301
100 S.E. 2nd Street, Suite 2800
Miami, Florida 33131
cgray@bsfllp.com
ftleserve@bsfllp.com
ssinger@bsfllp.com
jmills@bsfllp.com

Andrew M. Starling
1655 Lake Shore Drive
Orlando, Florida 32803
amstarling@bethesdaterracemgmt.com
Counsel to Ban Assault Weapons Now

Jason Unger
George T. Levesque
Ashley H. Lukis
Andy Bardos
GRAYROBINSON, P.A.
Post Office Box 11189

Tallahassee, Florida 32302
jason.unger@gray-robinson.com
george.levesque@gray-robinson.com
ashley.lukis@gray-robinson.com
andy.bardos@gray-robinson.com
teresa.barreiro@gray-robinson.com
Counsel to the National Rifle Association

Edward G. Guedes
Jamie A. Cole
Adam M. Hapner
WEISS SEROTA HELFMAN COLE & BIERMAN, P.L.
2525 Ponce de Leon Blvd., Ste. 700
Coral Gables, Florida 33134
eguedes@wsh-law.com
jcole@wsh-law.com
ahapner@wsh-law.com
szavala@wsh-law.com
msarraff@wsh-law.com
Counsel to the City of Weston, et al.

Jason Gonzalez
Benjamin Gibson
Daniel Nordby
Amber Nunnally
SHUTTS & BOWEN LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
850-241-1717
bgibson@shutts.com
jasongonzalez@shutts.com
dnordby@shutts.com
anunnally@shutts.com
mpoppell@shutts.com
Counsel to the National Shooting Sports Association

Amy J. Baker, Coordinator
FINANCIAL IMPACT ESTIMATING CONF.
OFFICE OF ECONOMIC AND
DEMOGRAPHIC RESEARCH
111 West Madison Street, Suite 57
Tallahassee, Florida 32399-6588
baker.amy@leg.state.fl.us

Maria Matthews
DIRECTOR, DIVISION OF ELECTIONS
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250
DivElections@dos.myflorida.com

/s/Kyle A. Casazza
Kyle A. Casazza
Christina H. Kroll
2029 Century Part East
Suite 2400
Los Angeles, CA 90067
Ph.: (310) 557-2900
kcasazza@proskauer.com
ckroll@proskauer.com

PROSKAUER ROSE LLP

Counsel for Brady and Team ENOUGH

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure.

/s/ Kyle A. Casazza
Kyle A. Casazza
Christina H. Kroll
2029 Century Part East
Suite 2400
Los Angeles, CA 90067
Ph.: (310) 557-2900
kcasazza@proskauer.com
ckroll@proskauer.com

PROSKAUER ROSE LLP

Counsel for Brady and Team ENOUGH