SC2023-0682

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: ADULT PERSONAL USE OF MARIJUANA

REPLY BRIEF OF FLORIDA CHAMBER OF COMMERCE IN OPPOSITION TO THE INITIATIVE

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REPLY ARGUMENT

This Court should rule that the Florida Constitution means what it says when it provides that a constitutional amendment proposed by citizen's initiative "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. This court routinely applies the supremacy-of-text principle when interpreting constitutional provisions, *see, e.g.*, *Adv. Op. to Gov. re Implementation of Amend. 4, the Voting Restoration Amend.*, 288 So. 3d 1070, 1078 (Fla. 2020), and the proponents fail to examine the text of the constitution in context as the foundation for their analysis.

In opposing the initiative, the Chamber primarily focused its initial brief on the constitutional single-subject requirement for two reasons. First, as demonstrated by the Proposed Amendment—which impermissibly embraces the dual subjects of decriminalization and commercialization of recreational marijuana—the citizen's initiative process is increasingly being misused to propose legislative-like changes to the Florida Constitution that violate the strict single-subject requirement and that usurp the Legislature's express constitutional role. Second, as

shown by recent cases, the Court often declines to address such single-subject violations, opting instead to sideline citizen's initiatives for statutory clarity violations. *See, e.g.*, *Adv. Op. to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, & Other Restrictions*, 320 So. 3d 657, 668 (Fla. 2021); *Adv. Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1179 (Fla. 2021).

Of course, whether or how this Court limits its decision in any given case is its prerogative. And if the Court wishes to strike the Proposed Amendment for statutory clarity violations, the opponents (including the Chamber) have presented it with plenty to pick from. But by not addressing textualism in the context of the single-subject requirement, the Court risks perpetuating a non-textual single-subject standard that has devolved into a "vague and malleable" "conception of 'oneness' [of purpose]" that "change[s] every time new members . . . come onto th[e] Court." *Adv. Op. to Att'y Gen.—Ltd. Pol. Terms in Certain Elective Offs.*, 592 So. 2d 225, 231 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part).

The three answer briefs that respond to the Chamber's single-subject argument underscore why the Court should take this

opportunity to hold that the Florida Constitution means what it says and rule that its textual application to the Proposed Amendment requires striking it from the ballot for impermissibly embracing dual subjects. The Chamber's reply addresses each of these three answer briefs in turn and concludes by explaining why the Sponsor is wrong to give short shrift to the Chamber's statutory clarity arguments, which independently preclude placing the Proposed Amendment on the ballot.

I. BECAUSE THE PROPOSED AMENDMENT EMBRACES THE DUAL SUBJECTS OF DECRIMINALIZATION *AND* COMMERCIALIZATION OF RECREATIONAL MARIJUANA, IT VIOLATES THE FLORIDA CONSTITUTION'S SINGLE-SUBJECT REQUIREMENT.

A. The Sponsor Seeks Cover for Its Single-Subject Violation By Improperly Conflating Recreational Marijuana With Medical Marijuana.

The theme of the Sponsor's brief lies on page 50: "[M]arijuana is the same substance regardless of whether it is colloquially called 'medical marijuana' or 'recreational marijuana.' " From this theme flows the Sponsor's argument that decriminalizing and providing for the commercialization of recreational marijuana in a single initiative is no different from authorizing and providing a regulatory

framework for medical marijuana in a single initiative. The Court should reject this argument for four reasons.

First, Sponsor's argument does not start with the text. The constitutional limitation on citizen's initiative petitions is that they "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. In construing constitutional language, this Court "often looks to dictionary definitions of the terms because [they generally] provide the popular and common-sense meaning of terms presented to the voters." *Adv. Op. to Gov. re Implementation of Amend. 4*, 288 So. 3d at 1078-79 (internal citations and quotations omitted). The words of this provision are straightforward. The most appropriate contextual definition of "embrace" is to "include or contain." *See The American Heritage Dictionary of the English Language* (5th ed. 2022).[1] "Single" means "[n]ot accompanied by another or others; solitary" or "[c]onsisting of one part, aspect, or section." *Id.* This language is extraordinarily exacting, such that there can be no question that the Proposed Amendment involves more than one "solitary" subject.

1. This dictionary is available at: https://www.ahdictionary.com (last visited July 31, 2023).

The text also allows by citizen initiative "matter directly connected [with the single subject allowed]." Art. XI, § 3, Fla. Const. "Matter" refers to the "substance of thought or expression." *The American Heritage Dictionary of the English Language* (5th ed. 2022). And "directly" means "[i]n a direct line or manner; straight" or "[w]ithout anyone or anything intervening," and conveys a sense of immediacy, as in "[a]t once, instantly." *Id.* Finally, use of the word "matter" in the singular, rather than "matters" in the plural conveys an exacting, tight standard. If two subjects are regularly and naturally discussed and debated as separate issues in practice, each with their own distinct and separate policy considerations, they cannot fairly be viewed as being "directly connected" because of the "intervening" "substance of thought"—policy considerations, ideas, and concepts—that separate them in practice. For this reason, the fact that citizens have divergent views on different parts of a single initiative should provide a clarion signal that the initiative involves more than one "subject and matter directly connected therewith."[2]

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2. Giving the text its plain meaning in this manner aligns with the primary purpose of the single-subject restriction: to prevent

With this background, it is easy to see that that by improperly conflating medical marijuana with recreational marijuana, the Sponsor misses the mark with its single-subject analysis. Where *medical* marijuana is concerned, establishing a *medical* reason for the dispensation and use of marijuana is arguably "a matter directly connected therewith" because of the highly regulated context of the medical profession. Citizens voting in favor of authorizing *medical* marijuana favor authorizing a framework for determining when marijuana is *medically* necessary and a method for dispensing it to individuals for whom it has been deemed *medically* necessary.[3]

In contrast to the arguable direct connection between the legalization of medical marijuana and the diagnosis, treatment, and

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"logrolling" by which sponsors could force citizens to consider enshrining in their constitution a policy that they disfavor (view as bad policy) to attain a policy that they favor (view as good policy), *see Adv. Op. to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 795 (Fla. 2014), without the safeguards inherent in the other amendment processes. *See Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984).

3. In addition to this distinction, it should not be assumed that the medical marijuana initiatives would have passed constitutional muster had the prior Court used a textual analysis to interpret and apply article XI, section 3.

care directly required with respect to the primary subject addressed by the proposed medical marijuana amendments, the same direct connection is lacking where the decriminalization and commercialization of recreational marijuana are concerned. Citizens who vote in favor of decriminalizing recreational marijuana are not necessarily voting in favor of the state-sponsored commercialization of recreational marijuana—or to give MMTCs a recreational marijuana monopoly if the Legislature does not provide for the licensure of other entities. Rather, reasons for voting in favor of decriminalizing recreational marijuana could run the gamut from individual rights; to disagreeing with recreational marijuana personally but believing the government should not control what adults do in the privacy of their own homes so long as no harm comes to others; to believing that state resources should not be used to prosecute the adult possession and use of recreational marijuana. Thus, far from being "two sides of the same coin," *Adv. Op. to Att'y Gen. re Rights of Electricity Consumers Regarding Solar Energy Choice*, 188 So. 3d 822, 827 (Fla. 2016), the decriminalization and commercialization of recreational marijuana are disparate subjects.

Because the necessary direct connection is lacking between decriminalization and commercialization of recreational marijuana, so too is the constitutional authorization for including both subjects in a single citizen's initiative. *See* art. XI, § 3, Fla. Const.; *see also Adv. Op. to Att'y Gen. re Independent Nonpartisan Comm'n to Apportion Legis. & Cong. Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1226 (Fla. 2006) (explaining that logrolling is the hallmark of a single-subject violation because it forces voters "to vote in the 'all or nothing' fashion that the single subject requirement safeguards against").

Second, the Court's past *Medical Marijuana* decisions[4] do not license the duality of subjects embraced by the Proposed Amendment. To the contrary, the analyses in those decisions rest upon a direct connection between authorizing medical marijuana and providing regulatory oversight for the entities involved in the medical decisions necessary to its dispensation and use. *See Medical Marijuana II*, 181 So. 3d at 477-78; *Medical Marijuana I*,

4. *Adv. Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014) (*Medical Marijuana I*); *Adv. Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471 (Fla. 2015) (*Medical Marijuana II*).

132 So. 3d at 795-96. To claim, as the Sponsor does, that the *Medical Marijuana* decisions are dispositive on the validity of an entirely different initiative that seeks to decriminalize and commercialize *recreational* marijuana misreads them. Moreover, relying upon the *Medical Marijuana* decisions to approve the Proposed Amendment because it gloms onto the existing constitutional framework for medical marijuana would impermissibly expand the constitutional phrase "and matter directly connected therewith" instead of properly limiting the phrase to the "one subject" requirement to which it is directed.

Third, the Sponsor's argument demonstrates the problem with continuing to apply the non-textual standard of asking whether a proposed amendment has "a logical and natural oneness of purpose." *Adv. Op. to Att'y Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet*, 291 So. 3d 901, 905 (Fla. 2020) (quotation omitted). After all, "[a]ny provision of law . . . can be said to have a number of purposes, which can be placed on a ladder of abstraction." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 18 (2012). In contrast, the "one-subject rule" connotes that a law "should

embrace only one topic, which should be stated in its title." *Black's Law Dictionary* (11th ed. 2019). Under a textualist approach, the tools of examining whether a proposed amendment engages in impermissible logrolling or substantially alters or performs the functions of multiple branches of state government would remain helpful for analyzing whether a proposed amendment comports with the textual single-subject requirement. These tools do not purport to replace the constitutional text; rather, they are concerned with examining what functional effect a proposed amendment would have to help judge whether it is truly confined to a single subject and "matter directly connected therewith."

Fourth, in responding to the Chamber's argument that the Proposed Amendment evinces a telltale sign of a single-subject violation because it substantially alters or performs the functions of the legislative and executive branches, the Sponsor's answer brief wrongly assumes (at page 62) that because the Proposed Amendment "merely builds upon a regulatory scheme that was already approved in the *Medical Marijuana* cases," there can be no single-subject violation. This is wrong.

The Florida Constitution vests the legislative power of the state solely with the Florida Legislature. *See* art. II, § 3, Fla. Const. Yet, the Proposed Amendment curtails the Legislature's authority to establish policies concerning recreational marijuana, particularly as related to MMTCs. Under article X, section 29 of the Florida Constitution, MMTCs are regulated by the Department of Health, which is an executive agency. The Proposed Amendment authorizes MMTCs to deal in recreational marijuana. *See* Proposed Amendment at (a)(5). So, if the Proposed Amendment passes, the Legislature cannot "make[] the fundamental policy decision [about recreational marijuana] and delegate[] to some other [agency] the task of implementing that policy under adequate safeguards"—at least not with respect to MMTCs. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 920-21 (Fla. 1978). Rather, the regulation of MMTCs, including their dealing of recreational marijuana, is constitutionally enshrined with the Department of Health. *See* art. X, § 29(d), Fla. Const.

Moreover, the Proposed Amendment substantially alters or performs functions of the executive branch, too. Despite nominally retaining the Department of Health's regulatory authority over

MMTCs, the Proposed Amendment puts MMTCs above the law in their dealing of recreational marijuana—at least for a time. This is because the Proposed Amendment authorizes MMTCs to begin dealing in recreational marijuana "upon the Effective Date" of the Proposed Amendment if it is passed, notwithstanding the absence of any laws or regulations governing MMTCs in their dealing of recreational marijuana. Proposed Amendment at (a)(5).

The Court should not allow the Sponsor to escape a single-subject violation by improperly conflating recreational marijuana with medical marijuana. Rather, the decriminalization and commercialization of recreational marijuana are dual subjects that the Florida Constitution expressly prohibits combining into a single citizen's initiative.

B. The Cato Institute Invites the Court to Jettison the Constitution's Text and Replace It With California Law.

The Cato Institute's core argument posits that since power emanates from the people, the single-subject limitation found in the citizen's initiative provision should be read broadly—with California law serving as a model—such that if the Legislature fails to adopt policies supported by a majority, the people should possess an

expansively read right to directly intervene and enact the legislation themselves. This underlying rationale forms the basis of the Cato Institute's constitutional analysis, which they urge this Court to adopt—a perspective that, ironically, contradicts the principles enshrined in the people's constitution.

Yes, all power derives from the people—and they have expressed their will in the Florida Constitution, outlining how their power is to be constrained and exercised for the benefit of all. That is why courts look to our Constitution—its words, its structure, and the original public understanding of its meaning and purpose—when deciding how to apply the social contract through which Florida's citizens are governed.

As a general matter, by adopting a Republican form of government the populace relinquished the power of direct self-governance, opting instead to live under policies enacted by their elected representatives with the protections of a bicameral legislature—and an added safeguard of gubernatorial veto. This structure is designed to promote the free and full exchange of ideas, a deliberative approach with studied analysis of issues of concern, caution, and an atmosphere of collaboration.

The ideal is this: The citizenry elects those who have the capacity and commitment to objectively appreciate the challenges we face as a State and Nation, combined with the wisdom and skill necessary to work with others to enact the policies and deploy the resources that will best address those issues for the good of all. In this ideal, a majority of those elected would be capable of: (1) objectively pondering societal issues from all sides; (2) attaining clarity as to the extent of the issue and whether governmental action is required; (3) collaborating with others to find the best policies if governmental action is determined to be the best approach; (4) and communicating with the populace in a manner that builds confidence in our institutions of government and the policies enacted. It should be easy to see that this ideal should produce much more desirable results than placing the legislative power directly in the hands of the people. This is because the populace would not be expected to have the time or inclination to objectively study and collaborate with others in the manner of the ideal and would be expected, instead, to simply vote based upon their own self-interest and, for many, a pre-conceived, limited, and unchallenged perspective.

Given this foundational theory inherent in our constitutional republic, the Court should readily reject the Cato Institute's core premise that because we have a system in which power is derived from the citizenry, the Court should read the single-subject requirement that limits the citizen initiative process as broadly as possible—in favor of direct legislation by popular vote. Instead, the general theory underpinning the form of government chosen by the people should caution against reading into the Florida Constitution a direct legislation provision any broader than can be reasonably supported by the Constitution itself.[5] Certainly, the Court should not jettison the Florida Constitution's text in favor of California law.

5. There is at least one other significant reason why legislation by constitutional amendment would be unwise. For example, given the time, energy, and effort it would take to use the constitutional amendment process to undo a failed policy initiative, react to new information, or adapt to changing circumstances, it would be highly risky to rely on that process for legislation. No matter how foolish a bold policy initiative proved to be, there would be no "fix" or "glitch bill" possible until a new constitutional amendment could make its way onto a general election ballot.

C. The ACLU of Florida's Brief Misses Why It Matters If a Proposed Amendment Substantially Alters or Performs the Functions of Multiple Branches of State Government.

In urging the Court to recede from using the substantially-alters-or-performs-the-functions-of-multiple-branches-of-state-government test, the ACLU of Florida misses the point of the test. The test is a tool that "look[s] to the functional effect of [the proposed amendment] to determine whether it satisfies the single subject requirement." *Evans v. Firestone*, 457 So. 1351, 1354 (Fla. 1984). It is not a substitute for the constitutional text, nor is it a license for this Court to substitute its will for that of the people by passing on the wisdom or merit of a proposed citizen's initiative—which in any event this Court has repeatedly held it does not do. *See, e.g.*, *Fine*, 448 So. 2d at 992.

Rather, the test helps ensure that the citizen's initiative process stays in its proper lane in the context of the entire Florida Constitution. Structurally, the Florida Constitution divides "[t]he powers of the state government . . . into legislative, executive and judicial branches" and imposes a strict separation of powers: "No person belonging to one branch shall exercise any powers

appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const.

Contextually, the citizen's initiative process is a way to amend or revise *the constitution*. *See* art. XI, § 3, Fla. Const. It does not permit citizens to reallocate through proposed amendments the authority exclusively vested in Florida's three branches of government—without an express proposed amendment or revision to the constitution's structure and allocation of power itself. In other words, rather than reserving to the citizens any of the governmental powers vested exclusively in the legislative, executive, or judicial branches, the citizen's initiative process reserves to the citizens the power to propose reallocations or restructuring of those governmental powers and to propose the creation or elimination of individual rights.

Consequently, examining as part of the single-subject analysis whether a proposed amendment substantially alters or performs the functions of multiple branches of state government helps to preserve the Florida Constitution's integrity. It prevents using the citizen's initiative process to end-run the express allocation and separation of governmental powers without directly amending those

constitutional provisions. *See Evans*, 457 So. 2d at 1354 (striking a proposed amendment that would have "affect[ed] the function of the legislative and the judicial branches of the government"); *see also Fine*, 448 So. 2d at 985 (invalidating an initiative that "include[d] three subjects, each of which affect[ed] a separate existing function of government"). And, as already explained, the functional effect of the Proposed Amendment is to substantially alter and perform the functions of both the legislative and executive branches.

The Court should use this case as an opportunity to solidify that the single-subject requirement means what it says. And the Court should apply it here to strike from the ballot the Proposed Amendment because it impermissibly embraces the dual subjects of decriminalization and commercialization of recreational marijuana.

II. THE BALLOT TITLE AND SUMMARY VIOLATE THE STATUTORY CLARITY REQUIREMENTS.

Although the single-subject violation is enough to keep the Proposed Amendment off the ballot, the Sponsor is wrong to give short shrift to the Chamber's statutory clarity arguments. The Sponsor's answer to the Chamber's arguments that the ballot title and summary are misleading for failing to disclose

commercialization as a chief purpose of the Proposed Amendment boil down to this: "What commercialization?" This is the response from a sponsor that raised nearly *all* the funds for the Proposed Amendment—tens of millions of dollars—from a single MMTC donor. The text of the Proposed Amendment belies it. *See Dep't of State v. Fla. Greyhound Ass'n*, 253 So. 3d 513, 520 (Fla. 2018) (a ballot summary that fails to inform the voter of a proposed amendment's "material effects" is defective).

Moreover, the ballot title and summary also fail the statutory clarity requirements in another way related to commercialization: they purport to give adults over the age of 21 the right to use recreational marijuana without explaining a critical way in which the Proposed Amendment contracts that right: only *commercial* entities (like the MMTC that funded the initiative) can grow recreational marijuana. Although the Sponsor contends that a ballot summary is not required to affirmatively state what a proposed amendment does not do, that argument misses the point. The ballot title and summary describe the Proposed Amendment as *granting* an individual right to recreational marijuana. To simultaneously contract the scope of that right without explicitly

saying so is misleading, regardless of what terms are used to explain what the Proposed Amendment allows commercial entities to do. *Cf. Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998) ("When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken.").

Finally, the ballot title and summary are affirmatively misleading because, to the extent they can be read to hint that the Proposed Amendment has a commercial purpose, they mislead voters to think that adopting the Proposed Amendment will mean business as usual in Florida. The ballot summary states that "Medical Marijuana Treatment Centers, and other state licensed entities" will be allowed to deal in recreational marijuana. The use of "other stated licensed entities" is misleading in this context because there are no *other state licensed* entities besides MMTCs. Of course, the word "licensed" can be used like the Sponsor says, as a past-participle adjective, but it can also be used in the past tense. Context is key. *See Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946-47 (Fla. 2020). Using the phrase "other state licensed entities" immediately after "Medical Marijuana Treatment Centers"

(which is a defined term that refers to entities that have a license to sell medical marijuana) misleads the voter into believing that other state licensed entities (besides MMTCs) already exist.

These statutory clarity violations, *see* § 101.161(1), Fla. Stat., also preclude placing the Proposed Amendment on the ballot.

CONCLUSION

Because the Proposed Amendment violates the "one subject" requirement of article XI, section 3 of the Florida Constitution and the statutory clarity requirements of section 101.161(1), Florida Statutes, this Court should preclude its placement on the ballot.

Respectfully submitted,

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I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.210(a)(2) because it was prepared using Bookman Old Style 14-point font and because the word count from the word-processing system used to prepare this document is 3,905 words.

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