SC2023-0682

In the Supreme Court of Florida

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

On a Petition for an Advisory Opinion to the Attorney General

Brief of The Cato Institute in Support of the Initiative

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IDENTITY AND INTEREST OF SUPPORTER

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

This case interests Cato because it concerns the right of state citizens to make changes to the form and policies of their government and the role of judicial review in that process. Cato writes to point out that aggressive application of the single-subject rule to initiatives upsets the balance of power between citizens and their government and to urge the Court to adopt a pragmatic reading that faithfully implements the state constitutional commitment to self-determination.

STATEMENT OF THE CASE AND FACTS

Cato has no substantive disagreement with the statement of the facts appearing in the brief of the Florida Chamber of Commerce and adopts that statement.

SUMMARY OF THE ARGUMENT

Citizen initiatives to amend the state Constitution are a tool by which citizens control and check their government. They secure individual rights, prevent governmental abuses, and allow statewide majorities to exert their might even when stymied by having only minority representation in the state legislature. They can be a powerful instrument both of individual liberty and of democratic ideals, and courts should not interpret rules in ways that thwart that purpose. But Florida courts sometimes unduly restrict citizen initiatives through misapplication of the single-subject rule.

Supporter urges the Court to adopt a reading of the single-subject rule that better implements the clear—and laudable—state constitutional commitment to self-determination. Not coincidentally this approach better aligns with the history and purposes of the amendment-by-initiative process. While the Court's past practice has been to enforce the rule more stringently against the citizens than

the legislature, Supporter shows that history and purpose are to the contrary.

The relevant history indicates that the citizens took back their right to directly amend their state Constitution in response to minority party control over the legislature. Thus, it is crucial that judicial review not prevent the people from exerting control over their government.

Moreover, the single-subject rule addresses concerns that are less troubling in the context of an initiative than in the legislature: logrolling and riders. These smoke-filled-room practices, whereby legislators can pass minority provisions by tying them to each other or to a more popular provision, allow representatives to vote against the interests of their constituencies. But in the case of an initiative, the citizens are themselves the constituency, making unseemly backroom deals difficult, if not impossible. What's more, riders can even increase utility for the population. In any case, the Chamber's attempt to characterize this initiative as a case of logrolling or as containing a impermissible rider are unpersuasive.

A more moderate application of the single-subject rule is also more neutral. Empirical research shows that the more aggressively

the rule is enforced, the more the outcomes align with the partisan preferences of the judge, an effect that is less pronounced when the rule is interpreted more loosely.

Finally, measures included in an initiative solely to prevent the government from thwarting implementation do not constitute a second subject. They are simply a means of preventing a hostile legislature from thwarting the people's ability to exercise their rights.

LEGAL STANDARD

Unless a proposed amendment is "clearly and conclusively defective," the right of the citizens to amend their constituting document prevails over a single-subject challenge. *Advisory Op. to Att'y Gen. re: Fla's Amend. to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (cleaned up). "[T]he merits" of the proposal is a question left to the voters. *Id.*

ARGUMENT

The Court must tread carefully when it stands between the people, who individually are the sovereigns in our system of government, and their attempts to secure liberty through the Constitution, which they created and "can only change." *Chisholm v. Georgia*, 2 U.S. 419, 448 (1793) (Iredell, J.), *superseded on other*

grounds by constitutional amendment as stated in Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019). The people are the authors and maintainers of the Constitution; it is "the people[] with whom the sovereign power is found[.]" *Afroyim v. Rusk*, 387 U.S. 253, 260 (1967). Courts must be particularly careful not to interfere with the amendment process because "under state constitutions, the most important aspect of amendment design is providing the people with an effective instrument for controlling the government."[1]

In this case, the Florida Chamber of Commerce argues that the proposed constitutional amendment violates the single-subject rule because it both decriminalizes and commercializes marijuana. *See* Art. XI, § 3, FLA. CONST. (1968). While this amendment concerns a single subject under any reading, an aggressive application of the single-subject rule upsets the balance of power between the citizens and their government. The Court should repudiate the strict interpretation adopted in its past advisory opinions and instead adopt a flexible reading that allows the people wide-latitude to protect

[1] Jonathan L. Marshfield, *The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States*, 101 NEB. L. REV. 71, 77 (2022).

their liberty through the initiative process. Such a stance is found in California's "reasonably germane" test.[2] *See Briggs v. Brown*, 3 Cal. 5th 808, 828 (2017) (emphasizing that the requirement "should not be interpreted in an unduly narrow or restrictive fashion that would preclude the use of the initiative process to accomplish comprehensive, broad-based reform"). Under that test, the provisions need not "effectively interlock in a functional relationship." *Id.* They just need to be germane to each other and to the amendment's purpose. *Id.*[3]

I. Amendment By Initiative Provides an Important Check on the Government

The history and purpose of amendment by citizen initiative counsels in favor of giving the people wide latitude to amend. History illuminates the purpose: allowing the rights of the people to prevail

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[2] *See* John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399 (2010).

[3] This argument should not be taken to imply that a flexible standard is necessary for *this* initiative to pass muster. Indeed, it is single-subject under any interpretation of the rule. But it is independently true that a rigorous approach upsets the purposes of the initiative and the balance of power between the people and the government, and so must be eschewed.

over the government's power when in conflict. Prior to the 1968 revision of the Florida Constitution, the people of Florida had delegated away the ability to initiate an amendment. *See* Art. XVII, FLA. CONST. (1885). The Constitution could only be amended by convention or by voter ratification of a legislative proposal. *Id.* When the legislature proposed one, the people retained the power of approval. But that state of affairs was deemed insufficiently protective of the people against the power of their government and so the citizen initiative was added as a means of constitutional amendment in the 1968 revision. That revision represented a major shift for Florida, throwing off the vestiges of Confederate influence in its 1885 constitution and modernizing more generally.[4]

One of the vestiges driving the revision was the lack of "true representational fairness" in the legislature.[5] The 1885 constitutional scheme, under which the House of Representatives contained between one and three representatives per county, *see* Art. VII, § 3,

[4] Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What it Has Become*, 18 FLA. COASTAL L. REV. 5, 7–9 (2016).

[5] *Id.* at 10.

FLA. CONST. (1885), meant that the populous, urban counties were severely underrepresented. In such circumstances, the people could not effectively check their government. Thus, the people had experience with a legislative majority representing a minority of the population, with the people at the mercy of a government accountable to only a thin sliver of society. While changing legislative apportionment[6] solved the immediate problem, further steps to protect the ability of the people to check their government, such as amendment by initiative, were needed.[7]

More broadly, the amendment by initiative process provides a means for citizens to directly amend their relationship with the government they founded without the need for permission from any government middleman. Where the people desire to protect their liberty, such as by decriminalizing recreational marijuana, while the government is opposed or reluctant, this process allows the will of the citizenry to prevail. It is "a core collective right of the people that

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[6] *Adkins, supra note 4*, at 19. *Compare* Art. III, § 16, FLA. CONST. (1968) *with* Art. VII, § 3, FLA. CONST. (1885).

[7] *See* Marshfield, *supra* note 1, at 88 (explaining that citizen initiatives allow an underrepresented majority to exert its will).

reflects great trust in voters and great distrust of government officials."[8]

The single-subject rule for amendment by initiative, by contrast, acts to impede the will of the people and enhance governmental power, so applications of the rule must be mindful of the threat it poses. While the rule is properly used to prevent contradictions in the Constitution, *see Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984), and to ensure that voters are presented with clear choices, *id.* at 988, aggressive enforcement risks subjugating the will of the people to that of the government. In so doing, it risks defeating the very purpose of citizen initiatives: to enable the people to exercise their will despite the opposition of the government.[9]

II. The Single-Subject Rule Initially Restricted, and Today Overwhelmingly Restricts, Legislatures

The single-subject rule first emerged in New Jersey in 1844 as a constitutional means of limiting the *legislature*. It now appears in the constitutions of 43 states, where it limits their legislatures to

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[8] *Id.* at 121.

[9] *See* Marshfield, *supra* note 1, at 88.

considering bills of a single purpose.[10] So conceived, it protects the people from governmental overreach. The overriding purpose is to protect constituents from perverse incentives for elected officials to engage in logrolling and riders.[11] *Heggs v. State*, 759 So. 2d 620, 627 (Fla. 2000); *Fine*, 448 So. 2d at 988. Legislative logrolls and riders allow a bad or unpopular measure to measure because another also passes. Applied to the people, by contrast, it threatens to protect the government from the people, anathema to this nation's founding principles. This difference demands a less aggressive approach when applied to citizen initiatives.[12] Perverse incentives are less likely and

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[10] Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1629 (2019).

[11] *Id.* at 1632–33.

[12] Although this is an inversion of the Court's practice of applying greater rigor when this rule is assessed in the initiative context, *see, e.g.*, *Fine*, 448 So. 2d at 989, the rule to be proposed is not inconsistent with the Court's past formulation, calling for a "[u]nity of object and plan," *Advisory Op. to the Att'y Gen. re: Marriage Protection*, 926 So. 2d 1218, 1234 (Fla. 2006) (quotation omitted), and "logical and natural oneness of purpose." *Advisory Op. to the Att'y Gen. re: Voter Control of Gambling in Fla.*, 215 So. 3d 1209, 1214 (Fla. 2017) (cleaned up). To the extent it does require deviation, advisory opinions are not binding precedent. *Ray v. Mortham*, 742 So. 2d 1276, 1284–85 (Fla. 1999). Indeed, the Attorney General urges this Court to turn from its precedents on the question of the ballot statement. AG Br. at 23. Where a different standard better suits both the text of the requirement and its purpose, the Court having

less harmful and are far outweighed by the need for the citizenry to make use of the initiative as a check on the government.

A. Logrolling and Riders Are Not Serious Concerns for Initiatives

Logrolling and riders[13] in the legislature may present problems for a representative democracy; less so with initiatives. A legislature consists of a relatively small number of repeat players who may engage in backroom deals, defeating their individual responsibilities to their constituents.[14] But none of that applies to initiatives, where the citizenry as a whole decides. The citizenry answers to no one; it contains the constituencies to which politicians owe loyalty. Logrolling and riders are therefore far less likely or problematic.

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previously reasoned from purpose for this requirement, *see, e.g.*, *Fine*, 448 So. 2d at 993, there is reason to deviate from persuasive authority. *See id.* at 988–89 ("[R]eced[ing] from [the Court's] prior language in *Floridians*").

[13] Consistent with this Court's usage, the Chamber uses the term "logrolling" for both logrolling and riders. But in the relevant literature, a rider refers to an unpopular piece of legislation attached to a popular one, as the Chamber argues exists here, while logrolling is a way to advance two or more unpopular pieces of legislation by attaching them to each other. Briffault, *supra* note 10, at 1634. Supporter uses that terminology here so as to facilitate separate treatment.

[14] *See id.* at 1635; Thomas Stratmann, *The Effects of Logrolling on Congressional Voting*, 82 AM. ECON. REV. 1162, 1162 (1992).

Consider riders. Imagine two proposals—A, which is popular, and B, which is not—folded into one initiative. If the initiative passes, it is because a majority, containing at least some who dislike B, decided that A and B together was preferable to nothing at all. That stark choice is the same one faced here. Should the Court find a violation of the single-subject rule, it will strike the initiative from the ballot, frustrating the will of the people. *See Fine*, 448 So. 2d at 993.

Logrolling is also much less of a concern in initiatives. While riders are less harmful in initiatives than in the legislature, logrolling is less likely. Logrolling, the passing of two unpopular proposals by melding together their minority supporters, requires backroom deals followed by partisan voting.[15] Backroom deals are far harder in initiatives, where the entire voting public must be brought along, as opposed to bringing along party members who depend on leadership for funding.

Consequently, an aggressive application of the single-subject rule in the context of initiatives does not advance any of its goals. To

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[15] *See* Nicholas Miller, *Logrolling* (May 20, 1999), https://bit.ly/3Q29vzx, *from* ENCYCLOPEDIA OF DEMOCRATIC THOUGHT (Paul Barry Clark & Joe Foweraker, eds. 1999).

apply the rule in a way that does not defeat the purpose of amendment by initiative, the Court must limit its review to preventing voter confusion and ensuring that the result matches citizen preferences. That can be accomplished through a restrained application.

B. The Chamber Has Not Shown Logrolling or Riders Here

The Chamber has not shown logrolling or attachment of riders in this case. It claims the initiative contains a rider, citing polls it characterizes as showing majority support for decriminalization but majority opposition to commercialization. Chamber Br. at 20–21. But there are at least three problems. First, as described above, the Chamber's proposed solution is to prevent decriminalization, a rights-enhancing provision that the Chamber admits is overwhelmingly popular. Second, the Chamber points to national polls to support this claim. *Id.* But this is hardly a national matter. Our federalist form of government celebrates differences between states. And those differences are often large, both in preferences and in policy. The ability to respond to different preferences with different policies is part and parcel to the federal system. *Printz v. United States*, 521 U.S. 898, 919–20 (1997). An attempt to short-circuit the

right of Florida citizens to protect their rights by amending their own constitution by reference to national preferences is an assault on federalist principles.

Third, even assuming that the preferences in Florida match those nationally, the question the Chamber uses as a proxy for commercialization is not helpful. It asked only if respondents want a dispensary in their own neighborhoods. Chamber Br. at 20–21. A person may well consider his own neighborhood a poor place for a dispensary without opposing the construction and licensure of dispensaries elsewhere. A negative vote on the question presented in the poll, then, is not a negative vote on commercialization. The poll reflects only NIMBY[16] tendencies. And NIMBYism is characterized by worries about the locations, not the existence, of things (here, dispensaries).

III. Aggressive Enforcement of the Rule Leads to Politicization

There is yet a further problem with aggressive enforcement of the single-subject rule: research shows it results in politically-driven judicial decisions. As the legal scholar Daniel Hayes Lowenstein

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[16] *See generally NIMBY*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/3pW0Nbq (last visited July 11, 2023).

wrote decades ago, and as remains a truism today, "subject" depends on the level of abstraction.[17] Any two laws can be read as being on the same subject if the question is viewed on a high enough level. On the other hand, if fine enough distinctions are admitted, any two laws are on different subjects. This makes the rule dangerously pliable. Courts apply various legal tests to try to give those inherently vague terms meaning, such as this Court's unity of object and plan test. *See Fine*, 448 So. 2d at 990.

The more flexible the test, the more likely judges are to engage in traditional legal interpretation and application. But when the test becomes more strict, judges tend to rule in ways that confirm their political biases.

Empirical research bears this out. Economist John G. Matsusaka and political scientist and legal scholar Richard L. Hasen studied judicial review of initiatives in five states with the single-subject rule during 1997–2006.[18] What they found was striking.

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[17] Briffault, *supra* note 10, at 1636 & n.64 (quoting Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 938 (1983)).

[18] Matsusaka & Hasen, *supra* note 2, at 1–2.

When a state's courts applied a flexible standard to the rule, there was little to no relationship between the deemed partisan affiliation of the judges,[19] the ideological leaning of the amendment, and the tendency to accept or reject the initiative.[20] But with more aggressive enforcement, judges were more likely to approve initiatives matching their partisan priors.[21]

IV. Implementing Rules are Necessary to Prevent Governmental Sabotage

The proposed amendment's "commercialization" is not a second subject; it's merely a method of preventing governmental sabotage. Government, after all, is often hostile both to the rights of the citizens and to citizen control over its policies and forms. While the initiative process gets around legislative refusal to propose an amendment, the government still retains a number of ways to thwart the popular will. By its nature, a constitutional amendment is typically not self-executing, and requires either legislative or executive action.[22] This

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[19] As determined by the appointing governor's party, except that in open elections in Washington, the judge's former career is used to determine a partisan affiliation. *See id.* at 16.

[20] *Id.* at 28.

[21] *Id.*

[22] Marshfield, *supra* note 1, at 95.

opens the door to sabotage. The legislature might fail to fund a program established by initiative.[23] It, or the executive, might fail to adopt necessary implementing statutes or regulations.[24] Either might adopt implementing rules and regulations that undermine the amendment.[25] Or government actors can fail to take necessary actions for the amendment to come to fruition.[26]

These are not just theoretical concerns in Florida. After the 2016 medical marijuana amendment passed by initiative, the legislature passed supposed enabling legislation prohibiting the smoking of medical marijuana.[27] It further imposed burdens on physicians attempting to prescribe marijuana with the apparent goal of discouraging them from ever becoming fully qualified to prescribe the medication.[28] The state had similar experiences with government interference with its high-speed rail referendum, where the Governor's opposition to funding led to broken contracts and

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[23] *Id.*

[24] *Id.* at 96.

[25] *Id.* at 96–97.

[26] *Id.* at 98.

[27] *Id.* at 96.

[28] *Id.* at 97.

eventual repeal, as well as with the felon enfranchisement initiative.[29] *See also Advisory Op. to Att'y Gen. re: Repeal of High-Speed Rail Amend.*, 880 So. 2d 628, 629 (Fla. 2004) (rejecting financial impact statement as including possible but not probable costs and directed at households rather than governments).

This possibility might reasonably lead initiative sponsors to take steps to prevent such governmental foot-dragging, like implementing rules. If these specifics, necessary as countermeasures in case of government opposition, themselves invalidate an initiative, then governmental foot-dragging works. It's for exactly this reason that this Court has held that implementing regulations are not a different subject for purposes of the single-subject rule. *See Advisory Op. to Att'y Gen. re: All Voters Vote in Primary Elections for State Leg., Gov., and Cabinet*, 291 So. 3d 901, 905 (Fla. 2020) (rejecting similar claim and the dissent's argument that "tak[ing] away the Legislature's discretion to provide for state-run elections to choose political party nominees" together with allowing for top-two primary violated the rule (quoting *id.* at 911 (Muñiz, J., dissenting))). In *All Voters Vote*,

[29] *Id.* at 99, 101–02.

while implementing a top-two scheme required three steps, all were part of the same logical design, and thus were a single subject. So too here.

Countermeasures, of course, expand the text of initiatives. They increase the complexity of the amendment, sometimes making it appear more like a statute or regulation than a constitutional amendment.[30] But they do not change the subject. Instead, they "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *See Advisory Op. to the Att'y Gen. re: Marriage Protection*, 926 So. 2d 1229, 1234 (Fla. 2006) (quoting *Advisory Op. to Att'y Gen. re: Additional Homestead Tax Exemption*, 880 So. 2d 646, 649 (Fla. 2004)). Indeed, the purpose of the implementing rules and countermeasures is to ensure that the aim of the initiative is carried out even over governmental hostility, a clear unity of object and plan. Their natural relation is one of goal and strategy, suitably situating both as parts of a dominant scheme—to achieve the goals of the underlying change.

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[30] *See* Marshfield, *supra* note 1, at 111 (describing an apt example).

It's rational that voters sought to include provisions that would overcome governmental interference here. As the Attorney General notes, 20 bills to achieve the same aim have died in the legislature in the last 10 years. AG Br. at 1 & n.1. The sponsors therefore chose a means of implementation rather than leaving gaps for the legislature to fill.

The sponsors chose what the Chamber calls "commercialization." Perhaps mindful of the experience of New Jersey, where the government did not license any facilities for years after adoption of a recreational marijuana initiative,[31] the sponsors also chose to allow, at least as an initial step, existing dispensaries (MMTCs), to sell the newly legal recreational marijuana. That ensures that there will be facilities authorized to sell the decriminalized marijuana once the amendment takes effect. Again, the plan remains unified, as does the purpose.

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[31] *Cannabis Laws in New Jersey—Frequently Asked Questions*, BRACH EICHLER LLC 2, https://bit.ly/3OmrTC0 (describing situation in June 2021 as "New Jerseyans are allowed to possess up to 6 oz of marijuana or up to 17 grams of hashish; yet, they have nowhere to legally buy it.").

CONCLUSION

The Court should uphold the initiative under any set of standards. It should use the opportunity, though, to announce a less aggressive approach to policing initiatives under the single-subject rule. Additionally, consistent with the Court's precedent and practice, provisions in an amendment that implement the amendment, and that seek to prevent potential government hostility, do not create a second subject, and do not violate the single-subject rule.

Respectfully submitted,

(July 19, 2023)

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) 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 3,929 words, exclusive of those sections which may be omitted pursuant to Rule 9.045(e).

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