SC23-682

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

ATTORNEY GENERAL'S REPLY BRIEF

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The Adult Personal Use of Marijuana initiative is invalid.

When the Court reviews a ballot summary for accuracy, it ensures that the citizen-initiative process does not "become[] . . . the den of special interest groups seeking to impose their own narrow agendas." *In re Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 654 (Fla. 2004). This case puts the truth to that statement. This carefully curated ballot summary misleads in ways that, though sometimes subtle, are likely to influence voters—and to do so in a way that entrenches the Sponsor's monopolistic stranglehold on the marijuana market to the detriment of Floridians. The initiative should be stricken.

A. The ballot summary misleadingly suggests that the amendment would "allow[]" recreational marijuana, when in fact the drug would remain criminal under federal law.

1. The proposed amendment has a very particular legal effect: if ratified, it would guarantee that the recreational use of marijuana by adults 21 years or older "is not subject to any criminal or civil liability or sanctions under Florida law." Pet. 13 (creating Art. X, § 29(a)(4), Fla. Const.). Put differently, the amendment would eliminate state-law penalties for the recreational possession and use of marijuana.

Yet the ballot summary does not track this language. *See In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 821 (Fla. 2014) (*Medical Marijuana I*) (Polston, C.J., dissenting) (observing that the sponsor could have made the summary track the ballot language but instead "chose—for some inexplicable reason—the deceptive statement"). It instead says that the proposed amendment would "[*a*]*llow*[]" persons 21 or older in Florida to "possess, purchase, or use marijuana . . . for non-medical personal consumption." Pet. 13 (emphasis added). That is misleading because the amendment would not actually allow anything; all possession of marijuana would remain unlawful under federal law. Att'y Gen. Init. Br. 18–20.

It is not hard to surmise why the Sponsor chose to shroud the chief purpose of the amendment in this way: "political rhetoric." *Additional Homestead Tax Exemption*, 880 So. 2d at 653–54 (holding that a summary should avoid "political rhetoric" and instead be an "accurate and informative synopsis"). A proposed constitutional amendment that actually "allows" an activity is far more attractive to voters than an initiative that does not (because that activity is independently forbidden by federal law).

The ballot summary's use of "allows," absent sufficient clarifying language, is thus misleading. *See Advisory Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1180–81 (Fla. 2021) (holding that a recreational marijuana initiative summary was misleading because it purported to "permit[]" marijuana use). The Sponsor nevertheless retorts that "in ordinary usage the word 'allow' seldom means that the permitted conduct is free from constraints imposed by actors other than the parties mentioned." Sponsor Br. 24. Thus, it says, a school "allows" students to bring cellphones to campus even though individual parents might bar their children from doing so. *Id.*

That is unpersuasive. In the Sponsor's analogy, "allows" is accurate only because at least some, maybe even most, students will be permitted to bring cellphones to school. But imagine if the analogy were a closer fit to the facts of this case: though the school announces that it will "allow" cellphones, the *county school board* independently prohibits cellphones on campus, with penalties to include detention or suspension. In that circumstance, no reasonable English speaker would say that cellphones are "allowed"; instead, a higher regulatory authority banned the conduct entirely, making all such conduct *disallowed*.

The question, then, is simply whether the line, "Applies to Florida law; does not change, or immunize violations of, federal law," eliminates the confusion caused by "allows." *See Adult Use of Marijuana*, 315 So. 3d at 1182 (acknowledging that "qualif[ying]" language is necessary to offset the confusion caused by "permits"). It does not. The average Florida voter will attempt to make sense of the summary's first and second sentences. The most natural way to harmonize the two is that some subset of recreational marijuana possession will be legal in Florida, but that federal law will continue to regulate that use in some unspecified way—perhaps, for example, by criminalizing prohibition of marijuana that exceeds the "possession limits" previewed by the ballot language. Really, not a single instance of recreational marijuana use will be lawful.

In its pursuit of a larger customer base and greater profits, Trulieve has invited millions of Floridians to join it in reckless violation of federal criminal law. In response, the Sponsor declares that it "strains credulity well past the breaking point to think that the average voter is unaware that marijuana is illegal at the federal level." Sponsor Br. 25. But most Americans cannot name a single Supreme Court justice. Tim Marcin, *Half of Americans Can't Name A Supreme*

Court Justice, Poll Finds, Newsweek (Aug. 28, 2018), https://tinyurl.com/5xbn8cun. And the Sponsor fails to acknowledge its own, and the press's, responsibility for sowing public misperception about that very fact. Att'y Gen. Init. Br. 27–28. If anything, most reasonable voters would not assume that a national corporation like Trulieve would openly and notoriously violate federal criminal law. That evidently is not true, but "[t]he burden of informing the public should not fall only on the press and opponents of the measure—the ballot title and summary must do this." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

Trulieve may be reckless enough to stake an entire business model on the whims of federal prosecutors. *See* Sponsor Br. 33 n.3. But it cannot invite Florida voters to permanently amend their governing charter by promising that the amendment will do something ("allow" recreational marijuana) that it will not do.

2. The Sponsor also argues that the Court must greenlight its summary because the summary follows the "roadmap" from *Medical Marijuana I* and *II*. Sponsor Br. 25–34. As an initial matter, that premise is incorrect. The ballot summary's discussion of federal law is not identical ("Applies ~~only~~ to Florida law;~~.~~ D~~d~~oes not change, or

immunize violations of, federal law.") to the one approved in *Medical Marijuana II*, as one might expect if the Sponsor were studiously following this Court's guidance. *Compare* Pet. 13, *with Advisory Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 476 (Fla. 2015) (*Medical Marijuana II*). While the language is similar, this Sponsor watered down the already questionable federal-law caveat approved in those cases by removing the word "only" and adding that the proposed amendment does not "change" federal law. That latter alteration is especially significant, lending the impression that a state constitutional amendment *could* change federal law. From that, a voter aware that federal penalties exist for marijuana possession might conclude that the proposed amendment, though not changing federal law itself, exempts Florida residents from federal law's purview.

In any event, *stare decisis* does not apply—not really—in the advisory opinion context. Att'y Gen. Init. Br. 24–25. Trulieve therefore has no legitimate "reliance interests" at stake here, Sponsor Br. 30, much less ones that would outweigh ensuring that Florida voter are not misled in deciding whether to permanently amend their governing charter. The initiative process "relies on an accurate, objective

ballot summary for its legitimacy." *In re Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004). Anything less than searching review of a ballot summary risks the Florida Constitution becoming "the den of special interest groups." *Id.* at 654. So while the Sponsor has spent a small fortune (some $40 million) peddling its initiative to Floridians, there are far more important interests at play. And that is truer still given the Sponsor's own role in spreading misinformation about the initiative, Att'y Gen. Init. Br. 28, a point it outright ignores in its brief.

B. The ballot summary misleadingly suggests that it would authorize "other state licensed entities" beyond MMTCs to cultivate and distribute marijuana.

Though the ballot summary claims that the proposed amendment would "allow[] . . . other state licensed entities" to engage in the recreational marijuana trade, Pet. 13, the proposed amendment does not have that effect. All it does vis-à-vis "other state licensed entities" is preserve the Legislature's pre-existing prerogative to authorize the licensure of non-MMTCs. In reality, the *only* "licensed" entities that the amendment would itself "allow" to sell recreational marijuana are MMTCs. Att'y Gen. Init. Br. 29–32.

Unable to answer that argument, the Sponsor instead torches

three separate strawmen. The Sponsor first refutes any suggestion "that some voters would believe that there are already 'existing' entities licensed to sell *recreational marijuana*" in Florida. Sponsor Br. 35 (emphasis added). Our point was not that absurdity; clearly recreational marijuana is currently unlawful under state law. Nor is the Sponsor correct that the Attorney General suggested "that the amendment *itself*" licenses any entities, or that the summary implies that the amendment itself would require the Legislature to provide for licensing. Sponsor Br. 34, 35, 36. Instead, the Attorney General focused on the phrase "other state licensed entities" in the summary. That phrase could refer to existing state-licensed entities other than MMTCs that are either authorized to engage in the medical marijuana trade or licensed to carry on some other activity under state law. It could also refer to new, non-MMTC licensed entities that might wish to engage in the marijuana trade. Either of those would compete with MMTCs, helping to lower consumer prices. Yet the ballot summary falsely declares that the amendment itself would "allow" non-MMTC "other state licensed" entities to deal in recreational marijuana, when in fact it would not. Att'y Gen. Init. Br. 29–32.

The Sponsor's very defense of its summary underscores the

problem. It tells us that the "most natural understanding of the summary is that entities other than MMTCs may sell marijuana *if* they obtain a license from the State." Sponsor Br. 34. But the Sponsor does not dispute that, under the amendment, only MMTCs—such as Trulieve—would be entitled to "obtain a license from the State," unless the Legislature enacts a law expanding the licensing scheme. It is plainly misleading for the summary to represent that non-MMTCs "may" deal in marijuana "if" they obtain a license that would not exist, and thus could not actually be obtained, under the law as it would stand upon ratification of the amendment. *See Advisory Op. to Att'y Gen. re: Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions,* 320 So. 3d 657, 668 (Fla. 2021). In other words, it is false to say—as the Sponsor does point blank in its brief—that the amendment "authorizes state-licensed entities that are not MMTCs, if any, to engage in the same activity as MMTCs." Sponsor Br. 39.

The Sponsor next suggests (at 38–40) that the summary, in saying the amendment would "allow" additional licensure beyond MMTCs, simply clarifies that the Legislature is not constitutionally precluded from providing for such licensure. In its view, "it is not at

all clear that the Legislature would possess the authority to license non-MMTCs if the relevant authorization were not included in the [p]roposed [a]mendment." Sponsor Br. 38.

What the Sponsor fails to appreciate is that "[t]he Legislature may exercise any lawmaking power that is not forbidden by" the Constitution. *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1111 (Fla. 2021). Existing Article X, Section 29(e) in fact expressly preserves the Legislature's authority to expand on the licensing scheme in that fashion. *See* Art. X, § 29(e), Fla. Const. ("Nothing in this section shall limit the legislature from enacting laws consistent with this section[.]"). The Sponsor is thus wrong to speculate (at 38-39) that Article X, Section 29 could be read to impliedly preclude the Legislature from authorizing non-MMTCs. That amendment does not forbid the Legislature from *increasing access* to medical marijuana by authorizing non-MMTCs to enter the market.

The summary, in short, falsely states that the proposed amendment, of its own force, expands beyond MMTCs the businesses that can be licensed to engage in the marijuana trade in Florida. This misdirection was no doubt engineered by the Sponsor to appeal to voters

who wish to end MMTCs' stranglehold on the State's marijuana market. That bait-and-switch is misleading.

C. The ballot summary misleadingly suggests that the amendment "limits" the scope of the immunity for possession, when it actually outright bans possession of more than 3 ounces.

Next, the ballot summary misrepresents the effect of the proposed amendment's ban on possessing more than 3 ounces of marijuana. The text of the amendment states that "[a]n individual's possession of marijuana for personal use shall not exceed 3.0 ounces of marijuana." Pet. 15. Best read, that language establishes a constitutional ban on possessing more than 3 ounces of marijuana—a cap that the Legislature cannot lift. The summary does not make this clear and, if anything, suggests a very different effect. Atty Gen. Init. Br. 32–36.

1. The Sponsor responds, first, that the proposed amendment would not impose this ban. Sponsor Br. 40–45. That is so, it says, because the language imposing the ban appears in a "definitional" section of Article X, Section 29 that does not "operate as an independent constraint on legislative action." *Id.* at 40–41 (pointing to the

inclusion of the ban in a paragraph in Article X, Section 29(b), a subsection ostensibly setting forth "DEFINITIONS"). Instead, the Sponsor argues, the language of that "definition" merely "delimits [] what qualifies as 'personal use' under the amendment." *Id.* at 41 (emphasis omitted).

An examination of the text dispels that theory. It might well ordinarily be the case that statutory definitions lack independent operative effect. But simply labeling something a "definitions section" does not mean that the provisions in that section relate exclusively to the definition of operative terms. Here, for instance, the proposed amendment was not drafted by professional legislative staff, and thus there is no reason to believe it adheres to the usual drafting conventions. On top of that, the proposed amendment appears to follow in the mold of existing Article X, Section 29, which comingles numerous operative provisions into its definitions section.

A few examples prove the point. Existing Article X, Section 29(b)(9) defines "physician certification" to mean "a written document signed by a physician, stating that in the physician's professional opinion, the patient suffers from a debilitating medical condition, that the medical use of marijuana would likely outweigh the potential

health risks for the patient, and for how long the physician recommends the medical use of marijuana for the patient." Art. X, § 29(b)(9), Fla. Const. That is no doubt a definition. The remainder of the paragraph, however, is not. The second sentence limits the circumstances in which a physician certification may issue ("may only be provided after the physician has conducted a physical examination and a full assessment of the medical history of the patient"), and the third sentence further restricts the issuance of physician certifications to minors ("a parent or legal guardian of the minor must consent in writing"). *Id.*

In similar fashion, the first sentence of existing Section 29(b)(7) defines "caregiver" as "a person who is at least twenty-one (21) years old who has agreed to assist with a qualifying patient's medical use of marijuana and has qualified for and obtained a caregiver identification card issued by the Department." *Id.* Art. X, § 29(b)(7). But the second sentence is a grant of regulatory authority to the Department of Health, providing that "[t]he Department may limit the number of qualifying patients a caregiver may assist at one time and the number of caregivers that a qualifying patient may have at one time," *id.*—undoubtedly an operative provision. And the third sentence adds a

prohibition of the sort that the Sponsor claims will not be found in a definitions section: "Caregivers *are prohibited* from consuming marijuana obtained for medical use by the qualifying patient." *Id.* (emphasis added).[1]

Turning to the proposed amendment, proposed Article X, Section 29(b)(13) follows that template by exceeding the traditional bounds of a "definition." In full, that paragraph states:

> "Personal use" means the possession, purchase, or use of marijuana products or marijuana accessories by an adult 21 years of age or older for non-medical personal consumption by smoking, ingestion, or otherwise. An adult need not be a qualifying patient in order to purchase marijuana products or marijuana accessories for personal use from a Medical Marijuana Treatment Center. An individual's possession of marijuana for personal use shall not exceed 3.0 ounces of marijuana except that not more than five grams of marijuana may be in the form of concentrate.

Pet. 15.

Certain elements of the first sentence indeed appear to be a definition that can be "inserted, for interpretive purposes," into an operative provision of the amendment, Section 29(a)(4). Sponsor Br. 43.

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[1] Tellingly, when professional legislative staff drafted a statute to implement Article X, Section 29, they relocated each of the provisions highlighted above from the definitions section to operative sections. *Compare* § 381.986(1)(a), (k), Fla. Stat. (2017) (definitions), *with id.* § 381.986(4)(a)8., (6)(b)4. (operative text).

But other elements of that sentence are not definitional at all. For example, the provision restricts the types of individuals who may possess the right to personal use: "adult[s] 21 years of age or older." Pet. 15.

And the second and third sentences (the third contains the ban on possessing more than 3 ounces) are even more clearly operative. Consider the second sentence. It does not define "personal use." Just the opposite, it *employs* the term personal use, reflecting that "personal use" has by that point in the text already been defined. Rather than define anything, the second sentence expands the scope of the right set out in Section 29(a)(4) by specifying that "[a]n adult need not be a qualifying patient in order to purchase marijuana products or marijuana accessories for personal use from a Medical Marijuana Treatment Center." Pet. 15.

The third sentence is no less operative. Again, rather than define "personal use," it constrains the amount of marijuana that a person can possess: "An individual's possession of marijuana for personal use shall not exceed 3.0 ounces of marijuana except that not more than five grams of marijuana may be in the form of concentrate." *Id.* Were that sentence a definition, it would more naturally

read, "'Personal use' means possession of between 0 and 3 ounces of marijuana, or between 0 and 5 grams of concentrate." The Sponsor instead invoked the language of a prohibition: "*shall not*."

In sum, the proposed amendment would ban the possession of more than 3 ounces of marijuana. Having misread the legal effect of its own initiative, *see* Sponsor Br. 40–45, it comes as no surprise that the Sponsor drafted an inaccurate ballot summary.

2. The Sponsor next argues that, even if it misread its own amendment, the ballot summary ("[e]stablishes possession limits for personal use") is sufficiently vague that a voter would not conclude from it that the amendment did *not* constitutionalize a ban on possessing more than 3 ounces. Sponsor Br. 45 ("Whether the Legislature could *raise* those amounts by statute is an issue that is not addressed one way or the other in the summary."). But vagueness is no virtue in a ballot summary. And a constitutional limitation on an individual's possession of marijuana is a "material effect[]" of a citizen initiative that must be revealed to voters. *Dep't of State v. Fla. Greyhound Ass'n*, 253 So. 3d 513, 520 (Fla. 2018) (per curiam) (explaining that a ballot summary is misleading "in a negative sense" if it "fail[s] to inform the voters of [] material effects"). That alone is enough to

justify striking the initiative.

Either way, the summary is not merely agnostic (Sponsor Br. 45–46) about the possession limit. Most naturally read, the summary implies that the "possession limits" it refers to are merely limits on the scope of the right created by proposed Article X, Section 29(a)(4). Att'y Gen. Init. Br. 32–36. That is quite different from a constitutional ban on possessing more than 3 ounces that the Legislature cannot lift

The summary's treatment of the possession limit fits within a broader pattern: the Sponsor chose to highlight the effects of the proposed amendment that it thought voters would like, while obscuring the effects it thought voters would not like. That is not a recipe for "an accurate, objective, and neutral summary." *Additional Homestead Tax Exemption*, 880 So. 2d at 653. It instead smacks of a corporate interest prioritizing its own future profits over the right of voters to cast an informed vote.

D. The ballot summary fails to advise voters that the amendment would leave MMTCs unregulated with respect to recreational marijuana.

Last, the summary misleadingly suggests that MMTCs and other entities manufacturing and selling marijuana for recreational

use would be regulated by the Department of Health. Att'y Gen. Init. Br. 36–39. In response, and without analyzing the text of the proposed amendment, the Sponsor disputes that the Department will lack regulatory authority. Sponsor Br. 49–51.

By far the better reading of the text, however, is that the Department's regulatory authority would be cabined by the proposed amendment's express statement of purpose: "The purpose of the regulations is to ensure the availability and safe use of *medical marijuana by qualifying patients*." Pet. 15 (existing Art. X, § 29(d), Fla. Const.) (emphasis added). And the existing amendment lists various regulations that the Department must adopt, all of which relate to medical marijuana. Pet. 15–16 (existing Art. X, § 29(d)(1)a.–d., Fla. Const.). So while the Department of Health is obligated to issue regulations, those regulations address the "medical [use of] marijuana" and do not relate to recreational marijuana. *Id.*

The Sponsor appears to assume that, in regulating marijuana for medical purposes, the Department would necessarily regulate marijuana for recreational use. Sponsor Br. 50–51 ("[M]arijuana is the same substance regardless of whether it is colloquially called 'medical marijuana' or 'recreational marijuana.'"). But regulations

frequently treat the same substances differently when used for different purposes, which is why using Adderall with a prescription is legal, but using it for recreational purposes is a crime. For instance, large-scale marijuana producers like Trulieve might opt to grow marijuana destined for sale by medical retailers in one facility and marijuana for sale by non-medical retailers in another, potentially exempting the latter from Department oversight. *See, e.g.*, Fla. Admin. Code R. 64-4.013 (regulating the use of pesticides used to grow "medical marijuana or low-THC cannabis"). The Department might likewise lack the purview to regulate the packaging, advertising, storage, and shipment of marijuana products that MMTCs choose to market as non-medicinal. And in the worst-case scenario, MMTCs and other state-licensed entities might cease their medical-marijuana production and focus on the recreational market, removing themselves entirely from the Department's scope.

* * *

In the end, if the Sponsor wanted to abolish state-law barriers to recreational marijuana, the straightforward way would have been to erase the old medical regime and replace it with a recreational one.

It instead built recreational marijuana into the old regime. Why? Because the Sponsor is backed by an MMTC that already has a license and on day one will be able to sell recreational marijuana with no further steps required. And it advances that self-interest by concealing from voters that the amendment would expose them to federal criminal liability, would not enhance competition, and would leave recreational marijuana unregulated (and thus unsafe). This misleading ballot summary should not go before voters.

CONCLUSION

The Adult Personal Use of Marijuana initiative should be struck.

August 2, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Times New Roman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2), and contains 3,959 words.

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