SC2023-0682

IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF OF DRUG FREE AMERICA FOUNDATION IN OPPOSITION TO THE INITIATIVE

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IDENTITY OF OPPONENT

The Drug Free America Foundation, Inc. ("Drug Free America") is a drug prevention and policy organization committed to developing strategies that prevent drug use and promote sustained recovery. Drug Free America is a Non-Governmental Organization (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations.[1] Drug Free America submits this brief in opposition to the initiative petition.

STATEMENT OF THE CASE AND FACTS

Pursuant to Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General has petitioned this Court for an advisory opinion as to the validity of an initiative petition entitled "Adult Personal Use of Marijuana" (the "Proposed Amendment"). This Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const.

[1] See The Drug Free America Foundation, Inc., *About Us*, https://www.dfaf.org/about-us/ (last visited June 21, 2023).

The relevant text of the Proposed Amendment, which would amend section 29 of Article X of the Florida Constitution,[2] is as follows:

ARTICLE X

MISCELLANEOUS

Section 29. ~~Medical m~~Marijuana production, possession and use.

(a) PUBLIC POLICY.

* * *

(4) The non-medical personal use of marijuana products and marijuana accessories by an adult, as defined below, in compliance with this section is not subject to any criminal or civil liability or sanctions under Florida Law.

(5) Medical Marijuana Treatment Centers, and other entities licensed as provided below, are allowed to acquire, cultivate, process, manufacture, sell, and distribute marijuana products and marijuana accessories to adults for personal use upon the Effective Date provided below. A Medical Marijuana Treatment Center, or other state licensed entity, including its agents and employees, acting in accordance with this section as it relates to acquiring, cultivating, processing, manufacturing, selling, and distributing marijuana products and marijuana accessories to adults for personal use shall not be subject to criminal or civil liability or sanctions under Florida law.

(b) DEFINITIONS. For purposes of this section, the following words and terms shall have the following meanings:

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[2] Article X, section 29, Florida Constitution presently provides the regulatory scheme for "medical" use of marijuana. The additions and deletions to convert this scheme to provide for "personal" use of marijuana are shown by underline and strikethrough.

* * *

(11) “Marijuana accessories” means any equipment, product, or material of any kind that are used for inhaling, ingesting, topically applying, or otherwise introducing marijuana products into the human body for personal use.

(12) “Marijuana products” means marijuana or goods containing marijuana.

(13) “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.

(c) LIMITATIONS.

(1) Nothing in this section allows for a violation of any law other than for conduct in compliance with the provisions of this section.

~~(2) Nothing in this section shall affect or repeal laws relating to non medica use, possession, production or sale of marijuana.~~

(2) Nothing in this amendment prohibits the Legislature from enacting laws that are consistent with this amendment.

(3) Nothing in this section authorizes the use of medical marijuana by anyone other than a qualifying patient.

(4) Nothing in this section shall permit the operation of any vehicle, aircraft, train or boat while under the influence of marijuana.

(5) Nothing in this section changes federal law or requires the violation of federal law or purports to give immunity under federal law.

* * *

(e) LEGISLATION. Nothing in this section shall limit the legislature from enacting laws consistent with this section. The legislature may provide for the licensure of entities that are not Medical Marijuana Treatment Centers to acquire, cultivate, possess, process, transfer, transport, sell, and distribute marijuana products and marijuana accessories for personal use by adults.

(f) SEVERABILITY. The provisions of this section are severable and if any clause, sentence, paragraph or section of this measure, or an application thereof, is adjudged invalid by a court of competent jurisdiction other provisions shall continue to be in effect to the fullest extent possible.

(g) EFFECTIVE DATE. This amendment shall become effective six (6) months after approval by the voters.

The ballot title for the Proposed Amendment is "Adult Personal Use of Marijuana" and includes the following ballot summary:

BALLOT SUMMARY:

Allows adults 21 years or older to possess, purchase, or use marijuana products and marijuana accessories for non-medical personal consumption by smoking, ingestion, or otherwise; allows Medical Marijuana Treatment Centers, and other state licensed entities, to acquire, cultivate, process, manufacture, sell, and distribute such products and accessories. Applies to Florida law; does not change, or immunize violations of, federal law. Establishes possession limits for personal use. Allows consistent legislation. Defines terms. Provides effective date.

This Court issued its order establishing a briefing schedule. Drug Free America submits this brief as an interested party in opposition to the Proposed Amendment.

SUMMARY OF ARGUMENT

For nearly two decades, proponents for recreational marijuana use in Florida have attempted to dodge the legislative process by way of constitutional amendment. This is the fourth attempt to have a marijuana provision put on the ballot. This iteration of the marijuana ballot initiative is fatally flawed and must be stricken from the ballot.

The Proposed Amendment is facially invalid under the Supremacy Clause of the United States Constitution because it conflicts with federal law. Federal law, through the Controlled Substances Act and the Convention on Psychotropic Substances, unequivocally prohibits anyone from possessing or using marijuana for nearly every purpose. Therefore, if Florida were to pass the Proposed Amendment, it would create a positive conflict because the use and possession of marijuana remains federally illegal. And under the well-established hierarchy of law, no state constitutional amendment can surpass the dictates of federal law and cure federally illegal activity within the state.

In addition to squarely conflicting with federal law, the Proposed Amendment's ballot summary gives no notice to the voters of the broad grant of civil immunity to marijuana users. Ballot summaries must be clear and unambiguous as to not mislead the voter and give notice of the proposition for which the amendment stands. The Proposed Amendment fails to do this because the summary is silent on the broad grant of civil authority, which would close the courts' doors to anyone with a valid claim under federal law. As it currently reads, the ballot summary does not provide even a scintilla of notice to voters about the grant of civil immunity and could lure them into voting for the Proposed Amendment by omitting material facts voters are entitled to know.

This court should strike the Proposed Amendment.

ARGUMENT

Article IV, Section 10, Florida Constitution requires the Attorney General to "request the opinion of the justices of the Supreme Court as to the validity of any initiative petition" and permit "interested persons to be heard" on the petition. Art. IV, § 10, Fla. Const. Section 16.061 explains the Attorney General's petition must request this Court's opinion on three topics:

> [1] regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution, [2] whether the proposed amendment is facially invalid under the United States Constitution, and [3] the compliance of the proposed ballot title and substance with s. 101.161.

§ 16.061(1), Fla. Stat. (2022).

For nearly two decades, proponents of recreational use of marijuana have sought to bypass the legislative process and change Florida's laws prohibiting the use, possession, cultivation, and distribution of marijuana through the ballot initiative process.[3] First, a 2014 initiative aimed at changing Florida law to allow the use of marijuana for "medical purposes" came before this Court. *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 791 (Fla. 2014) ("*Marijuana I*"). Although this Court permitted the initiative to appear on the November 2014 ballot, Florida voters rejected the *Marijuana I* amendment.

The following general election marijuana proponents again attempted to amend the Florida Constitution. *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181

[3] *See* Fla. Dep't of State, Div. of Elec., Initiatives / Amendments / Revisions Database, https://dos.elections.myflorida.com/initiatives/ (last accessed June 21, 2023).

So. 3d 471, 473 (Fla. 2015) ("*Marijuana II*"). This Court permitted *Marijuana II* to appear on the ballot, and Florida voters approved the amendment entitled "Use of Marijuana for Debilitating Medical Conditions," which is now found at Article X, section 29, Florida Constitution. Following that win, marijuana proponents sought to overturn the remaining prohibitions in Florida law regarding the use and possession of marijuana. *Advisory Opinion to Attorney Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1177 (Fla. 2021) ("*Marijuana III*"). This Court rejected that attempt determining the ballot summary was "affirmatively misleading." *Id.* The Proposed Amendment presents the same issue for this Court's review.

The Proposed Amendment is fatally flawed since it is facially invalid under the United States Constitution and because the ballot summary is (again) affirmatively misleading. This Court should strike this Proposed Amended from being placed on the ballot.

I. THE PROPOSED AMENDMENT IS FACIALLY INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

In order to succeed on a facial challenge, the challenger must show "no set of circumstances exists in which the [challenged provision] can be constitutionally valid." *Fraternal Order of Police,*

Miami Lodge 20 v. City of Miami, 243 So. 3d 894, 897 (Fla. 2018). The Court looks only at the text of the challenged provision and does not apply the provision to any particular facts. *Id.* In this case, the text of the Proposed Amendment must be evaluated in light of the strict command of the U.S. Constitution that all state laws are subservient to conflicting federal law. Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art. VI.

This section—known as the Supremacy Clause—explicitly proclaims the definitive hierarchy of law within the United States, with state law submitting to its federal counterpart. In other words, "the Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

This Court is obligated, pursuant to section 16.061(1), to issue an advisory opinion determining "whether the proposed amendment is facially invalid under the United States Constitution." This Court

should hold the Proposed Amendment is facially unconstitutional because it is in direct conflict with federal law, and thus the Supremacy Clause, which offends the very notion of this nation's constitutional structure.

A. The Supremacy Clause Operates to Invalidate Any State Law that is Preempted by Federal Law

It is axiomatic that if there is conflict between federal law and state law, federal law prevails. And this preemption can be express or implied. *Georgia Latino All. for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1262 (11th Cir. 2012). "States unquestionably do retain a significant measure of sovereign authority . . . however, only to the extent that the Constitution has not divested them of their original powers . . ." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)). This type of analysis is a facial analysis of a state enactment's compliance with the U.S. Constitution. If state law is preempted, then the state law is void because the Supremacy Clause is the "inevitable underpinning for the striking down of a state enactment which is inconsistent with

federal law." *Swift & Co. v. Wickham*, 382 U.S. 111, 122 (1965) n. 18 (1965).

B. Federal Law Unambiguously Prohibits the Conduct the Proposed Amendment Purports to "Permit"

The federal government has enacted a myriad of laws to dominate the legal and regulatory environment regarding controlled substances. For example, the Comprehensive Drug Abuse Prevention and Control Act of 1970, which includes the Controlled Substance Act ("CSA"), prohibits the use, possession, sale, importation, manufacturing, and distribution of marijuana. 21 U.S.C. § 801, et seq. In addition, the use, sale, or possession of marijuana is also prohibited pursuant to the United States' treaty obligations under Article 2 of the Convention on Psychotropic Substances. *Convention on Psychotropic Substances Done at Vienna February 21, 1971, As Rectified by the Proces-Verbal of August 15, 1973;*, T.I.A.S. No. 9725 (July 15, 1980). The CSA provides for only one limited exception—government research projects. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 489–90 (2001) (citing 21 U.S.C. § 841(a)(1), § 823(f)). Accordingly, in *Gonzales v. Raich*, the Supreme Court struck down a California law allowing for personal

possession and cultivation of marijuana because it contradicted the CSA. 545 U.S. 1 (2005). The Supreme Court rejected the intrastate commerce arguments in *Gonzales*, and unequivocally held that state laws have no power to legalize something federal law prohibits. *Id.* at 29.

Though other states have continued to decriminalize or affirmatively legalize medical and recreational marijuana—as the Proposed Amendment attempts to do now through constitutional amendment—the CSA still remains the law of the land. Thus, under the proposed amendment, every Florida resident who engages in marijuana usage is in violation of federal law, and no law or state constitutional amendment will cure this illegality.

C. The Proposed Amendment is in Conflict with the Terms of the Controlled Substances Act

Although preemption can occur in three ways (express, field, and conflict), Congress has expressly invoked conflict preemption as the test for the Court to apply in the drug context. 21 U.S.C. § 903. Congress provided that state law is preempted whenever "there is a positive conflict between [a] provision of th[e Controlled Substances Act] and [a] State law so that the two cannot consistently stand

together." *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1236 (9th Cir. 2017) (quoting 21 U.S.C. § 903).

In this case, it is undoubtably true that there is a "positive conflict" between the terms of the Controlled Substances Act and the Proposed Amendment. This Court explained in *Marijauna III* that "[t]here is no dispute here that the activities contemplated by the proposed amendment are criminal offenses under federal law." *Marijuana III*, 315 So. 3d at 1180. There remains no dispute that the activities purported to be legalized by the Proposed Amendment remain illegal under federal law. There is a positive conflict between the CAS's absolute prohibition on the possession, use, and cultivation of marijuana and the Proposed Amendment's purported efforts to legalize the same. Both things cannot be true at once.

Congress' decision to preempt these state laws to the contrary, pursuant to the Supremacy Clause, is the supreme law of the land. U.S. Const. art. VI. It logically follows that if the U.S. Constitution mandates state law subservience, then a state enactment that contradicts federal law facially violates the Supremacy Clause of the United States Constitution.

II. THE BALLOT SUMMARY HIDES FROM VOTERS THE BROAD GRANT OF CIVIL IMMUNITY TO THOSE USING MARIJUANA IN ACCORDANCE WITH THE PROPOSED AMENDMENT

This Court has noted its review of a petition initiative does not "address the merits or wisdom of the proposed amendment," but, rather, is a determination of whether the initiative complies with Florida law. *Advisory Op. to Att'y Gen. re Raising Florida's Minimum Wage*, 285 So. 3d 1273, 1275 (Fla. December 19, 2019) (quoting *Advisory Opinion to Attorney Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo*, 959 So. 2d 210, 212 (Fla. 2007)). This Court is tasked with determining whether the proposed amendment: (1) "embrace[s] but one subject and matter directly connected therewith"; and (2) includes a ballot title and summary in compliance with the requirements of section 101.161(1), Florida Statutes. *Id.* (internal citations omitted). The "clear and unambiguous" summary of the amendment's "chief purpose" requires "'that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.'" *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) (quoting *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)). A ballot summary must give "fair notice" of the

proposed change and such summary may not be vague, misleading, or contradict the text of the proposed amendment. *Raising Florida's Minimum Wage*, 285 So. 3d at 1275 (internal citations omitted).

The summary may not omit material facts regarding the purpose or effects of the proposed amendment. *Advisory Opinion to Atty. Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citing *Advisory Opinion to the Atty. Gen. re Fish & Wildlife Conservation Com'n*, 705 So. 2d 1351, 1355 (Fla. 1998) and *Advisory Opinion to the Attorney Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994)). Nor may the summary mislead voters. *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (noting this Court would invalidate a ballot initiative if "the language of the title and summary, as written, misleads the public."); *Advisory Opinion to Attorney Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 975–76 (Fla. 2009) (rejecting from placement on the ballot a proposed amendment that had a defective ballot summary which was misleading and omitted material facts).

A proposed amendment's summary may not "fly under false colors" or "hide the ball" as to the amendment's true effect. *Armstrong*

v. Harris, 773 So. 2d 7, 16 (Fla. 2000) (quoting *Askew*, 421 So. 2d at 156). "A proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose." *Roberts v. Doyle*, 43 So. 3d 654, 659 (Fla. 2010) (internal citations omitted). The summary "must also be accurate and informative." *Id.* (citing *Advisory Opinion to Atty. Gen. re Term Limits Pledge*, 718 So. 2d at 803); see also *Advisory Opinion to the Atty. Gen.* re *Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (holding that a summary may be "misleading not because of what it says, but what it fails to say.").

In this instance, the ballot summary of the Proposed Amendment is outright misleading and fails to give voters "fair notice" of the true effect of the Proposed Amendment since it hides from voters the Proposed Amendment's broad grant of civil immunity.

This Court has previously rejected proposed amendments that mislead voters about the current state of the law in an attempt to lure voters into voting favorably for that proposal. For instance, this Court rejected a proposed amendment that attempted to modify then-current legislative proscriptions on lobbying by former officeholders.

Askew, 421 So. 2d at 156. The summary told voters it would "[p]rohibit[] former legislators and statewide elected officers from representing other persons or entities for compensation before any state government body for a period of 2 years following vacation of office, unless they file full and public disclosure of their financial interests." *Id.* at 153. Hidden from the voters, however, was the fact that such lobbying was already prohibited under Florida law. *Id.* at 155. In fact, by voting in favor of the proposed amendment, voters would be gutting the prohibition on lobbying by former officeholders by introducing a very easy task (submission of a financial disclosure) in order to evade entirely the two-year ban. *Id.* at 153; 155—56. This Court rejected such sleight-of-hand and determined the summary was "so misleading to the public" that the proposed amendment must be removed from the ballot. *Id.* at 156.

Similarly, in *Casino Authorization, Taxation and Regulation*, the summary told voters the proposed amendment "prohibits casinos unless approved by the voters . . . who may authorize casinos on riverboats, commercial vessels, within existing pari-mutuel facilities and at hotels." 656 So. 2d at 467. The text of the amendment, though, provided something quite different; it permitted voters to authorize

casinos "within pari-mutuel facilities"; "on board stationary and non-stationary riverboats and U.S. registered commercial vessels"; and at "transient lodging establishments licensed by the state." *Id.* at 468.

This Court noted the glaring discrepancies between what the summary promised voters and what the proposed amendment actually delivered. The summary promised voters it would only allow gambling at "hotels"; yet, the amendment provided for gambling to be permitted by voters at "transient lodging establishments licensed by the state," which has a far broader definition. *Id.* at 467–69. The amendment also misled voters regarding the use of "riverboats" and "commercial vessels" by expanding the definition in the text of the amendment to also include such vessels while "stationary." *Id.* at 469. This Court held the summary was misleading since it "suggests that the amendment is necessary to prohibit casinos in this state." *Id.* Such was simply not true. This summary, by *omission*, failed to inform voters of the current state of the law. *Id.* By not giving voters this critical information, voters may have been felt compelled to vote *for* the amendment thinking they were prohibiting casinos; but by voting yes were providing a means to do the opposite.

Not only does the Proposed Amendment promise to immunize conduct that remains illegal under federal law, the Proposed Amendment also states an individual or entity using or selling marijuana in compliance with the Proposed Amendment is "not subject to . . . civil liability . . . under Florida law." (Proposed Amendment, at (a)(4) and (a)(5)). The Proposed Amendment's summary fails to inform voters of its grant of broad civil immunity and is thus fatally defective.

Although this Court permitted the *Marijuana I* amendment to appear on the 2014 ballot, it did so over the dissents of Justices Polston, Canady, and Labarga. *Marijuana I*, 132 So. 3d 786, at 818—26 (Polston, J., dissenting; Canady, J. dissenting; and Labarga, J., dissenting). In his dissent, Justice Polston explained that the ballot initiative provided immunity to three (3) groups of individuals and entities: (1) qualifying patients and personal caregivers; (2) physicians; and (3) medical marijuana treatment centers. *Marijuana I*, 132 So. 3d at 817—18 (Polston, J., dissenting). The amendment immunized those three groups of individuals and entities from "criminal or civil liability or sanctions under Florida law." *Id.* But nowhere in the ballot's title or summary did the proponents disclose

to voters the broad immunity being enacted. *Id.* Justice Polston correctly noted the summary was defective since it "fail[ed] to disclose the amendment's significant effect on Floridians' constitutional right of access to courts." *Id.* Justice Canady agreed the ballot summary's omission of "any mention of this immunity" was yet another reason the ballot summary was fatally inaccurate. *Id.* at 822 (Canady, C.J., dissenting).

Should the Proposed Amendment be enacted, voters will be opening the floodgates to the "personal use of marijuana" by any adult (which it defines as "a person 21 years of age or older") and permitting MMTCs to "acquire, cultivate, possess, process (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfer, transport, sell, distribute, dispense, or administer marijuana, products containing marijuana, related supplies, or educational materials." Art. X, § 29. Floridians deserve to be told that they will be simultaneously closing the courthouse doors for any claims they may have against those same individuals or entities who "acquire, cultivate, possess, process, . . . transfer, transport, sell, distribute, dispense, or administer marijuana [or]

products containing marijuana." There is not a scintilla of notice to the voters regarding this immunity in the ballot summary.

The Proposed Amendment simply fails to provide "fair notice" to voters of this broad immunity provision and the implications of this amendment. The Proposed Amendment should not be permitted to be placed on the ballot.

CONCLUSION

This Court should find the proposed amendment facially unconstitutional pursuant to the Supremacy Clause of the U.S. Constitution. This Court should also determine the Proposed Amendment fails to accurately provide notice to the voters of its content. This Proposed Amendment should be stricken from the ballot.

DATED: June 26, 2023

Respectfully submitted,

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I HEREBY CERTIFY that on this 26th day of June, 2023, I filed the foregoing using the Florida Courts E-Filing Portal, which will electronically serve the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and word count requirements of Fla. R. App. P. 9.045(b) and 9.210(a).

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