SC2023-0682

IN THE SUPREME COURT OF FLORIDA

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

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

WEBER, CRABB & WEIN, P.A.

Jeremy D. Bailie (FBN 118558)
5453 Central Avenue
St. Petersburg, Florida 33710
(727) 828-9919
Jeremy.Bailie@webercrabb.com
Secondary:
carol.sweeney@webercrabb.com
honey.rechtin@webercrabb.com

Counsel for Opponent,
The Drug Free America Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CASES **PAGE(S)**

FEDERAL STATUTES

FLORIDA STATUTES

OTHER AUTHORITIES

ARGUMENT

Drug Free America has suggested two independent reasons this Court should prevent the Proposed Amendment from being placed on the ballot: (1) the Proposed Amendment is facially unconstitutional under the Supremacy Clause of the United States Constitution; and (2) the Proposed Amendment's ballot summary is affirmatively misleading for failing to provide notice of its grant of immunity.

Since the Sponsor only provided a cursory response to Drug Free America's second argument, Drug Free America will not belabor the point with further briefing on that argument. On the first issue, the Sponsor correctly notes this Court is required to determine "whether the proposed amendment is facially invalid under the United States Constitution" by section 16.061(1), Florida Statutes. The Sponsor fails to explain how this Court could reach a conclusion that the Proposed Amended is not facially invalid. For that reason alone, this Court should strike the Proposed Amendment from the ballot.

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

The parties agree that 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). And the parties agree this Court has never had occasion to apply section 16.061 to a proposed amendment. This case provides that opportunity and is precisely the situation the Legislature intended for that provision to be applied.

The Sponsor suggests the Proposed Amendment is not facially invalid under the Supreme Clause since the Controlled Substances Act only "preempts state law only where there is a 'positive conflict'" between the state law and the CSA. SSF Ans. Br, p. 66 (citing 21 U.S.C. § 903). Its only argument that the Proposed Amendment does not result in a "positive conflict" is a cherry-picked sentence (likely dicta) from *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). Of course, *Gamble* involved a Double Jeopardy challenge to prosecutions by state and federal sovereigns for the same conduct.

Gamble did not affirmatively hold that states are permitted to legalize the sale of marijuana.

This Court's analysis is controlled by the text of the CSA. It is clear the CSA prohibits the use, possession, sale, importation, manufacturing, and distribution of marijuana. 21 U.S.C. § 801, et seq. The Sponsor also failed to address how the Proposed Amendment would conflict with the United States' treaty obligations that also prohibit the use, sale, or possession of marijuana. *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 clear text of the CSA creates a positive conflict between what the Proposed Amendment purports to allow—legalization of marijuana—and federal law—that prohibits marijuana possession. And the Supreme Court has repeatedly instructed that states cannot create exceptions to the plain language of the CSA.

For instance, in *United States v. Oakland Cannabis Buyers' Co-op.*, the Supreme Court rejected a common law defense since the Nation's drug laws are set by Congress at the federal level and cannot be modified by individual states. 532 U.S. 483, 489–90 (2001). The

Supreme Court rejected the idea that state law could interject exceptions "notwithstanding the apparently absolute language" of the CSA. *Id.* at 490. The plain language of the text is clear—marijuana possession, cultivation, and distribution are (and remain to this day) illegal. States are not free to modify the reach of a federal statute.

Likewise, in *Gonzales v. Raich*, the Supreme Court reviewed the district court's decision that cultivation and possession of marijuana pursuant to California state law was exempted from the CSA's prohibition on cultivation and possession of marijuana. 545 U.S. 1, 8 (2005). The Supreme Court explained that Congress validly exercised federal power (through the Commerce Clause) when it enacted the CSA. *Id.* at 9. California could not by its own laws legalize something federal law expressly made illegal. *Id.* The Sponsor's attempts to distinguish *Gonzalez* is unavailing.

As this Court has previously made clear, "the activities contemplated by the proposed amendment are criminal offenses under federal law." *Advisory Opinion to Attorney Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1180 (Fla. 2021). See also, *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013) ("Marijuana remains illegal under federal law, even in those states in which medical

marijuana has been legalized."); *United States v. Inzer*, 8:14-CR-437-T-30EAJ, 2015 WL 3404672, at *4 (M.D. Fla. May 26, 2015) (holding that the "CSA . . . preempts conflicting state laws, and, therefore, marijuana remains a Schedule I drug across the nation."). The Proposed Amendment seeks to make an end run around the CSA's prohibitions on the possession of marijuana. This Court should reject that effort.

The Proposed Amendment is facially unconstitutional since it is in "positive conflict" with federal law and thus violates the Supremacy Clause of the United States Constitution.

CONCLUSION

This Court should find the Proposed Amendment facially unconstitutional pursuant to the Supremacy Clause of the U.S. Constitution. This Proposed Amendment should be stricken from the ballot.

DATED: August 2, 2023

Respectfully submitted,

/s/ Jeremy D. Bailie

Jeremy D. Bailie (FBN 118558)
WEBER, CRABB & WEIN, P.A.
5453 Central Avenue
St. Petersburg, FL 33710
(727) 828-9919

Jeremy.Bailie@webercrabb.com
Secondary:
carol.sweeney@webercrabb.com
honey.rechtin@webercrabb.com
Counsel for Opponent,
The Drug Free America Foundation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2023, I filed the foregoing using the Florida Courts E-Filing Portal, which will electronically serve the following:

Alan Lawson, Esq.
Jason Gonzalez, Esq.
Jessica Slatten, Esq.
Lawson Huck Gonzalez, PLLC
215 South Monroe Street, Suite 320
Tallahassee, FL 32301
alan@lawsonhuckgonzalez.com
jason@lawsonhuckgonzalez.com
jessica@lawsonhuckgonzalez.com
Counsel for Opponent Florida Chamber of Commerce

Henry C. Whitaker, Esq.
Solicitor General
Jeffrey Paul DeSousa, Esq.
Daniel W. Bell, Esq.
Chief Deputy Solicitors General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com
jeffrey.desousa@myfloridalegal.com
daniel.bell@myfloridalegal.com

Christopher J. Baum
Senior Deputy Solicitor General
Office of the Attorney General
1 SE 3rd Avenue
Miami, FL 33131
(978) 460-1314
christopher.baum@myfloridalegal.com
Counsel for Attorney General Ashley Moody

Ryan Newman
Executive Office of the Governor
State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399
(850) 717-9310
ryan.newman@eog.myflorida.com
General Counsel to Governor Ron DeSantis

Joseph S. Van de Bogart
Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, FL 32399
(850) 245-6536
joseph.vandebogart@dos.myflorida.com
General Counsel to Secretary of State Cord Byrd

Carlos A. Rey
The Florida Senate
The Capitol
404 S. Monroe Street
Tallahassee, FL 32399
(850) 487-5237
carlos.rey@flsenate.gov
Counsel to Senate President Kathleen Passidomo

David Axelman
Florida House of Representatives
The Capitol
402 S. Monroe Street
Tallahassee, FL 32399
(850) 717-5500
david.axelman@myfloridahouse.gov
Counsel to Florida House of Representatives

Glenn Burhans, Jr.
Stearns Weaver Miller
106 E. College Ave., Suite 700
Tallahassee, FL 32301
(850) 329-4850
gburhans@stearnsweaver.com

Barry Richard
Barry Richard Law Firm
101 E. College Ave, Suite 400
Tallahassee, FL 32301
(850) 251-9678
barryrichard@barryrichard.com

Dan Humphrey
Quinn Emanuel Urquhart & Sullivan, LLP
2601 South Bayshore Dr., Suite 1550
Miami, FL 33133
(513) 373-7837
danielhumphrey@quinnemanuel.com

John Bash
Quinn Emanuel Urquhart & Sullivan, LLP
600 W. 6th St., Suite 2010
Austin, TX 78701
(737) 667-6100
johnbash@quinnemanuel.com

Ellyde R. Thompson
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Ave., 22nd Floor
New York, NY 10010
(212) 849-7344
ellydethompson@quinnemanuel.com

Rachel G. Frank
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I St. NW, #900
Washington, DC 20005
(202) 538-8380
rachelfrank@quinnemanuel.com
Counsel for Sponsor Smart & Safe Florida

Jonathan S. Robbins, Esq.
Zachary R. Kobrin, Esq.
Scott Miller, Esq.
Akerman LLP
201 East Las Olas Blvd., Suite 1800
Fort Lauderdale, FL 33301
(954) 552-9915
jonathan.robbins@akerman.com
zachary.kobrin@akerman.com
scott.miller@akerman.com
Counsel for Proponent The Medical Marijuana Business Association of Florida, Inc., a Florida Corporation

Spencer George
Law Office of Spencer George
567 Nutmeg Ct.
Chuluota, Fl 32766
(407) 473-5302
lawofficeofspencergeorge@gmail.com

Joshua Katz
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001

(202) 842-0200
jkatz@cato.org
Attorneys for Proponent Cato Institute

Hélène Barthélemy
ACLU Found. of Fla.
4343 W. Flagler St., Suite 400
Miami, FL 33134
786.363.3348
HBarthelemy@aclufl.org

Daniel B. Tilley
ACLU Found. of Fla.
4343 W. Flagler St., Suite 400
Miami, FL 33134
786.363.2714
dtilley@aclufl.org
Counsel for Proponent ACLU of Florida, Inc.

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).

/s/ Jeremy D. Bailie
Attorney