IN THE SUPREME COURT OF FLORIDA
CASE NO: SC2023-0682

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

ANSWER BRIEF OF MEDICAL MARIJUANA BUSINESS ASSOCIATION OF FLORIDA IN SUPPORT OF THE INITIATIVE

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IDENTITY AND INTEREST OF THE MEDICAL MARIJUANA BUSINESS ASSOCIATION OF FL

The Medical Marijuana Business Association of FL, Inc., a Florida Corporation ("MMBAFL"), as an interested persons, supports the citizen initiative "Adult Personal Use of Marijuana" (No. 22-05) and submits this Answer Brief in response to the Initial Brief filed by the Attorney General of Florida. *See* Fla. R. App. P. 9.510(c)(1). The MMBAFL is the voice of business for Florida's medical marijuana industry, founded to protect and promote a rational and compassionate approach to Florida's emerging marijuana regulatory framework. Specifically, MMBAFL writes to explain the history and state of regulation of the marijuana industry in Florida, and how – contrary to the Attorney General's argument – the ballot title and summary of the Adult Personal Use of Marijuana amendment (the "Proposed Amendment") are not misleading.

SUMMARY OF ARGUMENT

Florida, which has regulated the marijuana[1] industry for nine years, has one of the most robust regulatory frameworks in the

[1] A note on terminology: marijuana and cannabis are interchangeable terms used for the same substance. Furthermore, "medical

country. *See e.g.* LEAF 411, *Why Cannabis is Different Between Legal States,* https://leaf411.org/why-cannabis-is-different-between-legal-states/ (demonstrating Florida's strict labeling requirements for marijuana products as compared with other states). Florida's near decade long history of marijuana regulation is one of consistent assurance of public safety.

If approved by the voters, the Proposed Amendment would leave in place the existing regulatory scheme and reserve for the Legislature broad authority to implement additional consistent regulations. Absent legislative action, on day one of the Proposed Amendment becoming effective, the only change to Florida's marijuana industry would be who may purchase marijuana from fully regulated medical marijuana treatment centers ("MMTCs"). Regardless, the Legislature has demonstrated the willingness and capability to build upon the State's existing framework for regulating marijuana, as the industry changes and grows.

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marijuana" and "recreational marijuana" are different terms for a single substance. The use of these terms creates a false dichotomy, when in reality they describe the same substance being used for different purposes.

The Attorney General argues without any support that the summary of the Proposed Amendment is misleading because it fails to disclose that there *may* be a significant period when "recreational marijuana" is unregulated. Att'y Gen. Br. 39. The Attorney General bases this argument on two unfounded claims: (1) the Proposed Amendment would not extend the Department of Health's (the "Department") regulatory authority over marijuana used for non-medical purposes, and (2) it would take years for the Legislature and Department to implement a new comprehensive regulatory regime. *See id.* at 36-39. For the following reasons, both claims are refuted by the text of the Proposed Amendment and Florida's long history of regulating marijuana.

ARGUMENT

I. Legal Standard.

"This Court has traditionally applied a deferential standard of review to the validity of a citizen initiative petition and has been reluctant to interfere with the right of self-determination for all Florida's citizens to formulate their own organic law." *In re Advisory Op. to Att'y Gen. re Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Advisory Op. to the Attorney Gen. Re: Right*

To Competitive Energy Market For Customers Of Investor-Owned Utilities, 287 So. 3d 1256, 1260 (Fla. 2020) ("*Allowing Energy Choice*") (quoting *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 794 (Fla. 2014)) (internal citations omitted). As such, the Court will not interfere unless the proposal can be shown to be "clearly and conclusively defective." *Allowing Energy Choice,* 287 So. 3d 1260. While the Court has a variety of responsibilities in reviewing a proposed amendment, this brief is limited to addressing whether the language of the ballot title and summary of the Proposed Amendment is misleading, pursuant to section 101.161, Florida Statutes.[2]

Section 101.161(1) states that "a ballot summary of [a proposed] amendment … shall be printed in clear and unambiguous language." § 101.161(1). The purpose of § 101.161(1) is "to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *In re Advisory Op. to Att'y Gen re Rights of Electricity Consumers Regarding Solar Energy Choice*, 188 So. 3d 822, 830-31

[2] All statutory references and citations are to the Florida Statues (2023) unless otherwise stated.

(Fla. 2016) (quotation omitted); *see also In re Advisory Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1180 (Fla. 2021) (stating same) (citations omitted). Accordingly, this Court asks: (i) whether the ballot title and summary fairly inform the voter of the chief purpose of the amendment; and (ii) whether the language of the ballot title and summary misleads the public. *Adult Use of Marijuana*, 315 So. 3d at 1180 (citations omitted). "Ballot language may be clearly and conclusively defective either in an affirmative sense, because it misleads the voters as to the material effects of the amendment, or in a negative sense by failing to inform the voters of those material effects." *Dep't of State v. Florida Greyhound Ass'n, Inc.*, 253 So. 3d 513, 520 (Fla. 2018). The ballot title and summary here accurately inform voters of the Proposed Amendment's chief purpose, do not fail to advise voters of any material effects, and are in no way "clearly and conclusively defective." The measure should be placed on the ballot for the voters to decide.

II. The Ballot Summary is Not Misleading for Failing to Disclose Non-Existent and Speculative Effects.

The Attorney General contends that the ballot summary is misleading because it fails to disclose that there *may* be a significant

period when "recreational marijuana" is unregulated. Att'y Gen. Br. 39. As an initial matter, the Attorney General is wrong because MMTCs and marijuana remain subject to regulation by the Department of Health. The only immediate effect of the Proposed Amendment is that adults 21 years or older may purchase marijuana in MMTCs for personal use without holding a state-issued qualified patient ID card. The argument is also speculative and fails to prevent ballot placement. *See e.g. In re Advisory Op. to Att'y Gen. re English-The Official Language of Florida*, 520 So. 2d 11, 13 (Fla. 1988); *In re Advisory Op. to Att'y Gen re Public Protection from Repeated Medical Malpractice*, 880 So. 2d 667, 670 (Fla. 2004)*; Rights of Electricity Consumers*, 188 So. 3d at 830-31 (the Court refusing to speculate as to the unknown effects of the proposed amendment). Last, the argument is contrary to the State's history of regulating marijuana.

a. The History of Florida's Robust Marijuana Regulatory Scheme

Florida has a robust framework for regulating marijuana, which has been in development and use for almost a decade. The State has had some form of marijuana regulation since 2014, when the Legislature passed, and Governor Scott signed into law, the

Compassionate Medical Cannabis Act, creating Section 381.986, Florida Statutes. Since then, the Legislature has amended that statute to account for both changing uses and increasing demands for marijuana, including changes to facilitate the 2016 constitutional amendment in favor of medical marijuana.

b. Compassionate Medical Cannabis Act of 2014

Florida's regulation of marijuana began with the Compassionate Medical Cannabis Act of 2014 ("CMCA"). CMCA allowed doctors to prescribe, and patients to use, low-THC cannabis. § 381.986(2), F.S. (2014). The statute also set the framework to create, license, and regulate "dispensing organizations," which were authorized to manufacture and distribute low-THC cannabis. § 381.986(6), F.S. (2014). Section 381.986, Florida Statutes, directed the Department to maintain a registry of physicians ordering low-THC cannabis and patients authorized to use low-THC cannabis. *Id.* The statute also directed the Department to authorize the establishment of five dispensing organizations across the state based on the organizations' ability to cultivate low-THC cannabis, secure their premises, maintain accountability of raw materials, dispense cannabis, maintain operations, and other qualifying criteria.

§ 381.986(2), F.S. (2014). Importantly, the statute also authorized the Department to adopt rules necessary to implement the section. *See* § 381.986(5)(h), (6)(h), (7)(c), (8)(b), (8)(k), (10)(h), 381.986(13)(b) F.S. (2014).

From there, the Department promulgated a variety of rules to regulate the application for registration of dispensing organizations, Fla. Admin. Code R. 64-4.002, the revocation of dispensing organization approval, Fla. Admin. Code R. 64-4.004, inspection and authorization procedures, Fla. Admin. Code R. 64-4.005, the creation of a Compassionate Use Registry, Fla. Admin. Code R. 64-4.009, and violations and penalties for applicants and licensees, Fla. Admin. Code R. 64B15-19.002. To cap off this regulatory scheme, the legislature passed SB 1700, a bill exempting from public records personal identifying information of patients and physicians held by the Department.

c. House Bill 307 of 2016

Following the success of CMCA, the Legislature passed House Bill 307 in 2016. This bill allowed patients with terminal conditions to use medical cannabis, without THC limits or cannabinoid composition requirements. Fla. H.B. 2016-307 Final Bill Analysis,

https://www.flsenate.gov/Session/Bill/2016/307/Analyses/h0307z2.HHSC.PDF. Building upon the regulatory scheme which was already in place under CMCA, House Bill 307 amended section 381.986 to allow dispensing organizations—which were already authorized to dispense low-THC cannabis—to cultivate and dispense medical cannabis for terminal patients. § 381.986, F.S. (2016). To address the fact that more people would be using medical marijuana and in a different form than low-THC cannabis, the bill created stricter criteria for ordering physicians, created new education requirements, set an order limit, and set penalties for receiving compensation from a dispensing organization related to the ordering of cannabis. § 381.986(3)-(4), F.S. (2016). The bill also allowed the Department to approve three additional dispensing organizations, and created new standards for dispensing organizations for growing, processing, testing, packaging, labeling, dispensing, distributing, and transporting of cannabis. § 381.986(6), F.S. (2016).

Because the State already had significant infrastructure in place to regulate low-THC cannabis, the regulation of medical cannabis for terminal patients did not start from scratch. Rather, the Legislature analyzed the existing regulatory scheme, saw where

changes needed to be made—for example, increasing the number of dispensing organizations to accommodate increase in demand—and authorized the Department to do the same.

d. Medical Use of Marijuana Act of 2017

In 2016 Floridians overwhelmingly voted to amend the Florida Constitution to allow for medical marijuana. Although the new amendment did not require enacting legislation to become effective, the Legislature passed Senate Bill 8-A to facilitate the change in our organic law. Yet again, the Legislature built upon the regulatory scheme already in place and amended section 381.986, Florida Statutes. Among other changes, the amended statute (1) established detailed requirements for MMTCs, (2) grandfathered in existing dispensing organizations as MMTCs, (3) directed the Department to license ten new MMTCs, (4) authorized the creation of more MMTCs as the number of registered patients grew, (5) changed the name of the Compassionate Use Registry to the Medical Marijuana Use Registry, (6) required laboratory testing of MMTC products, and (7) provided rulemaking and other provisions to aid the Department in adopting rules. Fla. S.B. 2017-8A, Final Bill Analysis.

https://flsenate.gov/Session/Bill/2017A/8A/Analyses/2017s00008A.ap.PDF.

Following the 2016 constitutional amendment and Senate Bill 8-A, the Department adopted a variety of rules regulating the medical marijuana industry in Florida. As directed by Article X, Section 29(d), these rules regulate the "security, record keeping, testing, labeling, inspection, and safety," of MMTCs. *See, e.g.,* Fla. Admin. Code R. 64-4.207 MMTC Marijuana Waste Management and Disposal (addressing the disposal of plant material waste and processing waste); Fla. Admin. Code R. 64-4.212 MMTC Regulatory Compliance Testing (requiring MMTCs to arrange for Certified Marijuana Testing Laboratories to test a random and representative sample of Final Product from every Retail Batch for regulatory compliance); Fla. Admin. Code R. 64-4.213 MMTC Remediation (providing for the process to remediate Retail Batches which fail laboratory testing); Fla. Admin. Code R. 64-4.210 MMTC Fines, Suspension, and Revocation (setting penalties for MMTCs who fail to fully account for all marijuana and safeguard marijuana in its possession or control). There is nothing in the Proposed Amendment removing MMTCs from

this regulatory scheme should they to start selling to adults for non-medical personal use.

e. The Proposed Amendment's Impact on Marijuana Regulations

While the Proposed Amendment reserves for the Legislature the authority to enact additional regulation of marijuana, it does not require the Legislature to do so. This creates two possibilities following voter approval: the Legislature will take no action on marijuana, and existing regulation of the marijuana industry remains in place, or the Legislature—as it has done in the past—will adopt additional consistent changes. Whichever path the Legislature takes, adoption of the Proposed Amendment will allow for the non-medical personal use of marijuana in a fully regulated industry. The Attorney General's argument that the summary is misleading because it does not disclose the fact that "recreational marijuana" may be unregulated for a substantial time is unfounded.

f. If the Legislature takes no action, MMTCs and Marijuana will remain fully regulated

First, should the Legislature choose not to act following approval of the Proposed Amendment, the only change to the marijuana industry would be the purchaser. MMTCs would remain

the only entity authorized to cultivate and distribute marijuana, and the statute and rules which regulate MMTCs would remain intact. Accordingly, the Proposed Amendment would extend the Department's regulatory authority over marijuana used for non-medical purposes. Therefore, the summary is not misleading.

The Proposed Amendment would change Article X Section 29 to allow MMTCs to cultivate and distribute marijuana products and marijuana accessories to adults for non-medical personal use. It would also protect MMTCs from criminal or civil liability so long as they acquire, cultivate, process, manufacture, sell, and distribute marijuana products and marijuana accessories to adults for personal use *in accordance with Article X Section 29*. Proposed Amd. Art. X, Sec. 29(a)(5). However, the Proposed Amendment does not change how MMTCs are regulated. It still requires MMTCs to be registered by the Department, Proposed Amd. Art. X, Sec. 29 (b)(5), and it still requires the Department to incorporate into the MMTC registration procedures for "issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." Proposed Amd. Art. X, 29(d)(1)(c). Furthermore, the Proposed Amendment continues to

reserve for the Legislature authority to enact laws consistent with the section. Proposed Amd. Art. X, § 29(e). Consequently, in order for MMTCs to cultivate, process and sell marijuana for personal use in accordance with Article X, Section 29, they would remain subject to the Department's rules. If MMTCs cultivated or distributed marijuana for non-medical personal use without complying with these rules, their Department registration could be suspended or revoked, and they would not be entitled to the civil and criminal protection the Proposed Amendment affords. *See* Fla. Admin. Code R. 64-4.210 MMTC Fines, Suspension, and Revocation; Proposed Amd. Art. X, Sec. 29 (b)(5); Proposed Amd. Art. X, 29(d)(1)(c); Proposed Amd. Art. X, § 29(e).

Moreover, existing regulations apply to marijuana and an MMTC's cultivation, processing, transporting and dispensing of marijuana, regardless of whether it is intended for medical or non-medical personal use. This is because there is no distinction between "medical marijuana" and "recreational marijuana" – that is a false construct created by opponents of the Proposed Amendment. Marijuana is the same substance regardless of what it is called. That is clear from Article X, Section 29 which defines "marijuana" by

incorporating the definition under Section 893.02(3), Fla. Stat. and including the definition of low-THC cannabis from section 381.986(1)(b), Fla. Stat., Fla. Const. Art. X, § 29(b)(4). The only distinction that results from the adoption of the Proposed Amendment is between the *use* of marijuana and, necessarily who can use it for those different purposes. *Compare* Art. X, § 29(b)(4) (defining "medical use") *with* Proposed Amd. Art. X, 29(b)(13) (defining "personal use").

Accordingly, even if the Legislature were to take no action following the approval of the Proposed Amendment, MMTCs would remain subject to Department rules in order to maintain the legal protections afforded by the Proposed Amendment. Further, those rules apply to marijuana equally, no matter who purchases the final product and for what purpose, *i.e.*, the qualifying patient for medical use or the adult 21 or older for personal use. As such, the marijuana industry would remain strictly regulated following the approval of the Proposed Amendment even without facilitating legislation or additional rulemaking.

g. The Legislature has a history of taking fast action to regulate marijuana

Over the past nine years, Florida has developed a robust infrastructure for regulating the marijuana industry. Section 381.986, Florida Statutes has gone through fifteen iterations, *see* § 381.986 F.S. (2022), and the Department continuously updates its rules, because as the use of marijuana changes, so must the law. The most significant changes to the laws regulating marijuana followed voter approval of medical marijuana by citizen initiative. The Legislature amended section 381.986 to facilitate the amendment adopted by voters in 2016. S.B. 8-A (2017). The bill was signed into law less than one year after the amendment was approved, even though the amendment did not require enacting legislation. This history demonstrates the Legislature's willingness and ability to address the needs of its citizens. Should the voters choose marijuana again, and approve the Proposed Amendment, the state of Florida is well equipped to facilitate that choice. Evidence of the Legislature's and Department's ability to tackle regulation of marijuana directly refutes the Attorney General's speculative and counter-factual claim

that it would take years to implement a comprehensive regulatory regime. Frankly, a comprehensive regulatory regime already exists.

Although the Proposed Amendment does not require enacting legislation to become effective, the Legislature retains the authority to facilitate voters' approval of marijuana for non-medical personal use by adults. Proposed Amend. Art. X, § 29(c)(2) ("Nothing in this amendment prohibits the Legislature from enacting laws that are consistent with this amendment."). Encompassed in the Legislature's inherent authority, and protected by the Proposed Amendment, is the authority to establish entities other than MMTCs, licensed by the state to cultivate and distribute marijuana, and to delegate rulemaking authority to state agencies to regulate those entities. *See Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1111 (Fla. 2021) ("[t]he Legislature may exercise any lawmaking power that is not forbidden by" the Constitution).

Considering the Legislature's history in regulating the marijuana industry, it is more likely than not that following approval of the Proposed Amendment, the Legislature will take steps to facilitate the non-medical personal use of marijuana. Following voters' approval of medical marijuana in 2016, the Legislature

amended section 381.986, Florida Statutes, took the existing regulatory framework for low-THC cannabis and expanded it to facilitate a much larger medical marijuana industry. One prime example of how the Legislature incorporated the existing industry into the new framework was to direct the Department to license all existing dispensing organizations as MMTCs. § 381.986(8), F.S (2017). Clearly, the Legislature understands how to quickly and effectively regulate marijuana. Fortunately, here, it need not create a new regime out of whole cloth.

There were many more changes to section 381.986, Florida Statutes, and the Department promulgated even more rules. But over the course of five years, regulating an industry which now serves over 830,000 Floridians, Florida has established a broad and detailed regulatory scheme. *Florida Dep't of Health, Office of Medical Marijuana Use*, WEEKLY UPDATE, July 7, 2023.[3] To reiterate, if the Legislature does nothing, MMTCs will remain the only entities legally entitled to cultivate and distribute marijuana, and the Department's regulatory regime governing security, record keeping, testing,

[3] Available at: https://knowthefactsmmj.com/about/weekly-updates/ (last accessed 7/14/23).

labeling, inspection, and safety remains applicable. However, if the Legislature chooses to, it may authorize additional entities that can be licensed by the state to cultivate and distribute marijuana, and establish rules for those entities based on any timeline the Legislature sees fit. The Legislature may also choose to delegate its authority to regulate those entities to the Department, or it may choose to delegate authority to another agency, like the Department of Agriculture. The fear of an unregulated marijuana industry is simply unwarranted.

Ultimately, the Legislature has regulated marijuana for years. It began regulating the industry in 2014, and it has amended existing statutes and enabled agency rulemaking to adapt to Floridians' changing uses of marijuana. The Legislature enacted its most robust regulations shortly after the voter approval of medical marijuana in 2016, with Governor Scott signing the bill into law only seven months after the amendment was approved by voters. *See* Chapter 2017-232 S.B. No. 8-A. This is especially indicative of the Legislature's willingness to act in the arena of marijuana regulation given the 2016 amendment did not require enacting legislation. The Legislature has demonstrated its facility to regulate the marijuana industry as it

evolves, so the argument that it would take years to implement a comprehensive regulatory regime is not only conjecture but contrary to Florida's history of robustly regulating marijuana.

Because the Proposed Amendment would not become effective until six (6) months after adoption by the voter (i.e., May 5, 2025), the Legislature would have ample time during the 2025 legislative session to enact any legislation it deemed appropriate.[4]

CONCLUSION

The Attorney General's argument that the Proposed Amendment's summary is misleading because it fails to disclose that there may be a significant period in which the marijuana industry will be unregulated in the production of marijuana for non-medical personal use by adults ignores the current regulatory scheme that

[4] If deemed appropriate by the Governor or Legislature, a special session could be called prior to the regular 2025 session should the voters approve the initiative. Fla. Const. Art. I, § 3(c). Indeed, numerous special sessions have been called on a variety of issues in recent years. Fla. Gov., Proclamation (Apr. 26, 2022) (calling the Legislature for a special session to consider legislation relating to property insurance); Fla. Gov., Proclamation (Apr. 19, 2022) (calling the Legislature for a special session to consider legislation relating to independent special districts); Fla. Gov., Proclamation (Oct. 29, 2021) (calling the Legislature for a special session to address federal COVID-19 vaccine requirements).

would remain in place, is speculative, and is belied by Florida's history of robustly regulating marijuana. Accordingly, the Attorney General's claim fails. The ballot title and summary of the Proposed Amendment are not misleading and, as such, the initiative should be approved for the ballot.

Respectfully submitted this 19th day of July, 2023.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this 19th day of July 2023, to the following:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font, spacing, and word count requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(A), (E). This brief was prepared in Bookman Old Style, 14-point font, double spaced, and contains **3,708** words as counted by Word, excluding the parts of the brief exempted by Florida Rule of Appellate Procedure 9.210(a)(2)(E).

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