

SC19-2116

IN THE SUPREME COURT OF FLORIDA

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

**INITIAL BRIEF OF FLORIDA CHAMBER OF COMMERCE,
FLORIDIANS AGAINST RECREATIONAL MARIJUANA,
SAVE OUR SOCIETY FROM DRUGS AND
NATIONAL DRUG-FREE WORKPLACE ALLIANCE
IN OPPOSITION TO THE INITIATIVE**

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IDENTITY AND INTEREST OF OPPONENTS

The following interested parties appear in opposition to the proposed amendment entitled “Adult Use of Marijuana” (the “Proposed Amendment”).

The Florida Chamber of Commerce is Florida’s largest federation of employers, chambers of commerce, and associations across the state. It seeks to protect the Florida Constitution as a foundational document that provides for basic rights and organization of government.

Floridians Against Recreational Marijuana is a statewide political committee formed to oppose this initiative. It is comprised of a coalition of citizens, businesses, anti-drug advocates, and patients that have come together to defeat the amendment because of the increased burden it would place on Florida taxpayers and individuals seeking medical care in the state.

Save Our Society From Drugs, a national nonprofit organization based in St. Petersburg, Florida, is committed to establishing sound drug laws and policies that will reduce illegal drug use, drug addiction, and drug-related illness and death.

The National Drug-Free Workplace Alliance is an organization whose mission is to be a national leader in the drug-free workplace industry. It directly assists employers and stakeholders, provides drug-free workplace program resources and assistance, and supports a national coalition of drug-free workplace service providers.

STATEMENT OF THE CASE AND FACTS

On December 19, 2019, the Attorney General petitioned this Court for an advisory opinion as to the validity of an initiative petition entitled “Adult Use of Marijuana.” This Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const. The Proposed Amendment would create a new section within Article X of the Florida Constitution. The full text of the Proposed Amendment is set forth below.

The Proposed Amendment’s ballot title and summary are as follows:

BALLOT TITLE: Adult Use of Marijuana.

BALLOT SUMMARY: Permits adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason. Permits Medical Marijuana Treatment Centers to sell, distribute, or dispense marijuana and marijuana accessories if clearly labeled and in childproof packaging to adults. Prohibits advertising or marketing targeted to persons under 21. Prohibits marijuana use in defined public places. Maintains limitations on marijuana use in defined circumstances.

The full text of the Proposed Amendment provides:

Section 1. A new section in Article X is created to read:

Section 33. Adult Use of Marijuana.

(a) Definitions. As pertaining to this section

- (1) “Adult” means a person 21 years of age or older.
- (2) “Department” means the Florida Department of Health or its successor agency.
- (3) “Marijuana” shall have the same meaning as defined in Article X, Section 29.
- (4) “Marijuana accessories” means any equipment, products, or

materials of any kind which are for ingesting, inhaling, topically applying, or otherwise introducing marijuana into the human body.

(5) “Medical Marijuana Treatment Center” shall have the same meaning as defined in Article X, Section 29, except a licensed Medical Marijuana Treatment Center is permitted to sell, distribute, or dispense marijuana to a person 21 years of age or older for personal use for any reason in compliance with this section.

(6) “Public place” means any public street, sidewalk, park, beach, or other public commons.

(b) Public policy.

(1) An adult is permitted to possess use, display, purchase, or transport marijuana or marijuana accessories for personal use for any reason in compliance with this section and Department regulations and is not subject to criminal or civil liability or sanctions under Florida law.

(2) A Medical Marijuana Treatment Center is permitted to sell, distribute, or dispense marijuana or marijuana accessories to an adult for personal use for any reason in compliance with this section and Department regulations and is not subject to criminal or civil liability or sanctions under Florida law.

(c) Restrictions.

(1) An adult may possess, display, purchase, or transport up to two and a half ounces of marijuana for personal use for any reason.

(2) A Medical Marijuana Treatment Center that sells, distributes, or dispenses marijuana or marijuana accessories to an adult shall ensure any marijuana or marijuana accessories are clearly labeled and in childproof packaging.

(3) Marijuana or marijuana accessories shall not be advertised or marketed to target persons under the age of 21.

(4) Marijuana authorized by this section may not be used in any public place.

(5) The limitations set forth in Article X, Section 29(c)(4), (5), (6), and (8) shall apply to personal use of marijuana authorized by this section.

(d) Authority.

(1) The Department shall issue reasonable regulations necessary for

the implementation and enforcement of this section.

(2) Nothing in this section shall limit the legislature from enacting laws consistent with this section.

(e) 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.

On December 20, 2019, this Court issued an order establishing a briefing schedule. The Florida Chamber of Commerce, Floridians Against Recreational Marijuana, Save Our Society from Drugs, and National Drug-Free Workplace Alliance submit this brief as interested parties opposed to the Proposed Amendment.

SUMMARY OF THE ARGUMENT

The point of the ballot summary is to provide voters the clarity needed to make an informed decision when considering whether to amend the Florida Constitution. The summary to the Proposed Amendment fails to serve that basic function – to provide fair notice based on clear, non-misleading information – by omitting material facts and including language that creates ambiguity and obscures the chief purpose and scope of the Proposed Amendment.

Specifically, the summary falsely implies that the recreational possession and use of marijuana will be *permitted* without qualification when, in fact, that activity will remain illegal and subject to prosecution under federal law. It also creates an ambiguity as to the Proposed Amendment's chief purpose and ramifications in that it is not clear if the Proposed Amendment raises the age limit for use of *medical* marijuana and relaxes the qualifying requirements under the existing regulatory scheme for medical use, or *instead* expands the use of marijuana to *non-medical* uses. Lastly, the ballot summary falsely implies that the restriction on where marijuana can be used is narrower than what the text of the Proposed Amendment actually imposes.

For any or all of those reasons, which render the Proposed Amendment clearly and conclusively defective, the Court should prohibit the amendment's placement on the ballot.

ARGUMENT

I. Standard of Review.

A court may declare a proposed constitutional amendment invalid if the record shows that the proposal is “clearly and conclusively defective.” *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000), *cert. den.*, 532 U.S. 958 (2001). That presents a question of law, which is reviewed *de novo*. *Id.*

II. The Ballot Summary is Misleading and Does Not Clearly and Unambiguously Provide Fair Notice to Voters of the Proposed Amendment’s Chief Purpose and Scope.

The Florida statute governing ballots, Section 101.161(1), Florida Statutes, provides in relevant part:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word “yes” and also by the word “no,” and shall be styled in such a manner that a “yes” vote will indicate approval of the proposal and a “no” vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with s. 100.371(5) [renumbered as § 100.371(13) by Laws 2019, c. 2019-64, § 3]. The ballot title shall consist of a caption,

not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. This subsection does not apply to constitutional amendments or revisions proposed by joint resolution.

The ballot summary is an explanatory statement in “clear and unambiguous language” of the “chief purpose of the measure.” *Id.* When reviewing the validity of a ballot title and summary under Section 101.161, the Court asks two questions: 1) whether the ballot title and summary fairly and accurately inform the voter of the chief purpose of the amendment; and 2) whether the language of the title and summary, as written, misleads the public. *See, e.g., Adv. Op. to Att’y Gen. re Water & Land Conservation*, 123 So. 3d 47, 51 (Fla. 2013); *Fla. Dep’t of State v. Slough*, 992 So. 2d 142, 147, 149 (Fla. 2008).

The ultimate purpose of the ballot title and summary requirements 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.” *Adv. Op. to Att’y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citations omitted). “Reduced to colloquial terms, a ballot title and summary cannot ‘fly under false colors’ or ‘hide the ball’ with regard to the true effect of an amendment.” *Slough*, 992 So. 2d at 147 (citation omitted).

A. The ballot summary is misleading because it falsely implies that the use and possession of marijuana as contemplated in the Proposed Amendment is permitted under federal law.

On this point, the problem “lies not with what the summary says, but, rather, with what it does not say.” *Term Limits Pledge*, 718 So. 2d at 804 (citing *Adv. Op. to Att’y Gen. re Fish & Wildlife Conservation Comm’n*, 705 So. 2d 1351, 1355 (Fla. 1998) and *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Specifically, the ballot summary is misleading because it leaves voters with the false impression that the recreational use of marijuana will be *permitted* without qualification when, in fact, that activity will continue to be illegal under federal law.

Congress has designated marijuana as a Schedule I controlled substance, which means that it is illegal to possess, use, manufacture and distribute marijuana, except for purposes of government-approved research projects. *See* 21 U.S.C. §§ 801(2), 812(b)(1) & (c) Schedule I (c)(10), 841(a)(1), 844(a), 860; *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress’s authority to regulate marijuana, including prohibiting and criminalizing its possession, manufacture, and distribution); *United States v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483, 491 (2001) (“the Controlled Substances Act ... reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project)”). In short, the possession of marijuana,

even for personal use, violates federal law.

The text of the Proposed Amendment does not suggest differently, but the ballot summary does. The text of the Proposed Amendment provides in pertinent part:

(b) Public policy.

(1) An adult is permitted to possess use, display, purchase, or transport marijuana or marijuana accessories for personal use for any reason in compliance with this section and Department regulations and is not subject to criminal or civil liability or sanctions *under Florida law*.

(2) A Medical Marijuana Treatment Center is permitted to sell, distribute, or dispense marijuana or marijuana accessories to an adult for personal use for any reason in compliance with this section and Department regulations and is not subject to criminal or civil liability or sanctions *under Florida law*.

See Proposed Amendment, Art. X, § 33(b)(1) & (2) (emphasis added).

The ballot summary, on the other hand, omits the material fact that using or facilitating the use of marijuana in accordance with the Proposed Amendment is only permitted under Florida law:

Permits adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason. Permits Medical Marijuana Treatment Centers to sell, distribute, or dispense marijuana and marijuana accessories if clearly labeled and in childproof packaging to adults. Prohibits advertising or marketing targeted to persons under 21. Prohibits marijuana use in defined public places. Maintains limitations on marijuana use in defined circumstances.

By omitting that, the ballot summary falsely implies that the activities

contemplated by the Proposed Amendment are lawfully permitted without qualification, which is not true. Using or facilitating the use of marijuana in accordance with the Proposed Amendment *would* remain a crime under federal law. *See* 21 U.S.C. §§ 801(2), 812(b)(1) & (c) Schedule I (c)(10), 841(a)(1), 844(a), 860; *Raich*, 545 U.S. at 13-15; *Oakland Cannabis Buyers' Co-op*, 532 U.S. at 491. Implying differently is reckless and it is a problem that requires striking the Proposed Amendment from the ballot. *See, e.g., Adv. Op. to Att'y Gen. re Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 819 (Fla. 2014) (Polston, J., dissenting) (“[W]hile ballot summaries are not required to mention the current state of federal law or a proposed state constitutional amendment’s effect on federal law, they are required to not affirmatively mislead Florida voters by falsely implying the opposite of what that current state of federal law is.”); *Term Limits Pledge*, 718 So. 2d at 804 (“When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken.”).

Florida law requires clarity in ballot titles and summaries, which are all that appear on an actual ballot when a person votes. § 101.161(1), Fla. Stat.; *see Armstrong*, 773 So. 2d at 12-13 (“Because voters will not have the actual text of the amendment before them in the voting booth when they enter their votes, the accuracy requirement is of paramount importance for the ballot title and

summary”). “The 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*, 421 So. 2d at 156.

Voters are entitled to a clear, non-misleading explanation of the Proposed Amendment so that they can make an informed decision based on accurate information when they vote. The ballot summary does not provide voters with fair notice of what is at stake because it fails to accurately describe the scope of the Proposed Amendment and, by omission, affirmatively misleads voters with respect to federal law. The Proposed Amendment should not be placed on the ballot.

B. The ballot summary’s reference to the existing regulatory scheme for medical use of marijuana renders the Proposed Amendment ambiguous and misleading.

The ballot summary is also misleading because it creates an ambiguity as to the Proposed Amendment’s chief purpose and ramifications. The Proposed Amendment purports to legalize the recreational use of marijuana. Although it bootstraps that initiative to the existing regulatory framework governing medical use of marijuana under Article X, Section 29 of the Florida Constitution, the Proposed Amendment separately addresses the permitted use and dispensation of marijuana to adults, within and outside the confines of a Medical Marijuana Treatment Center. *See* Proposed Amendment, Art. X, § 33(a)(5), (b)(1), (2) & (c)(5).

The ballot summary does not. Instead, the first sentence of the summary states that “adults 21 years or older [are permitted] to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason.” Immediately after that, the summary states that “Medical Marijuana Treatment Centers [are permitted] to sell, distribute, or dispense marijuana and marijuana accessories if clearly labeled and in childproof packaging to adults.”

Thus, the sentence addressing Medical Marijuana Treatment Centers does not expressly disclose that those centers would be allowed to dispense “up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason,” as the text of the Proposed Amendment does. Rather, the summary’s sentence on Medical Marijuana Treatment Centers refers back to the first sentence of the summary by addressing marijuana packaging for “adults.” The point is the two sentences are presented as interrelated and, taken together, it is not clear if the Proposed Amendment raises the age limit for use of *medical* marijuana and relaxes the qualifying requirements under the existing regulatory scheme for medical use, or *instead* expands the use of marijuana to *non-medical* uses.

This Court’s responsibility is “to determine whether the language [of the ballot title and summary] as written misleads the public.” *Adv. Op. to Att’y Gen. re Casino Authorization, Taxation & Reg.*, 656 So. 2d 466, 468 (Fla. 1995)

(amendment not placed on ballot because summary inaccurately described amendment as narrower in scope than actual text of amendment; amendment applied to transient lodging establishments, not just hotels). The ballot summary does not clearly and unambiguously inform voters that the Proposed Amendment seeks to expand the lawful use of marijuana to non-medical uses under Florida law, independent of the medical use of marijuana. Instead, it conflates the issues and makes it unclear whether the amendment is concerned with a narrower issue affecting the *medical* use of marijuana. The summary's incomplete description of the purpose and substance of the Proposed Amendment renders the summary defective and the amendment ineligible for submission to the ballot.

C. The ballot summary's explanation of the restriction on marijuana use in "defined public places" is misleading because it does not clearly and accurately disclose the scope of the Proposed Amendment, which broadly prohibits marijuana use in "any public place."

The same deficiency applies with respect to the ballot summary's use of the term "defined public place." Specifically, the summary states that the Proposed Amendment "[p]rohibits marijuana use in defined public places." By adding the qualifier *defined* to describe public places, the summary falsely suggests that marijuana use is not prohibited in simply any public place – rather, only in certain, defined public places. That is the kind of tempered use restriction that voters would reasonably expect based on other constitutional restrictions of this kind.

See, for example, Article X, Section 20's ban on tobacco smoking/vaping in indoor workplaces. Art. X, § 20(a), Fla. Const. ("As a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke and vapor, tobacco smoking and the use of vapor-generating electronic devices are prohibited in enclosed indoor workplaces.").

But that is not what the text of the Proposed Amendment says. The amendment's public place restriction is all-encompassing: "Marijuana authorized by this section may not be used in *any* public place"; and public place is defined broadly with a catchall at the end to include "any public street, sidewalk, park, beach, *or other public commons.*" See Proposed Amendment, Art. X, § 33(a)(6) & (c)(4) (emphasis added). It would have been simple enough to say that in the ballot summary – *any* public place – without sacrificing the word count. Instead, the summary uses coy wording that misleads by suggesting the use restriction is not as broad as it actually is in the text of the Proposed Amendment. For this reason too, the Proposed Amendment should not be placed on the ballot.

CONCLUSION

The Proposed Amendment's ballot summary is inaccurate and misleading and, as such, fails to provide fair notice to voters of the initiative's chief purpose and effect. The Court should issue an advisory opinion prohibiting the Proposed Amendment from being placed on the ballot.

Respectfully submitted,

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