Filing # 101201565 E-Filed 01/06/2020 05:51:54 PM

IN THE SUPREME COURT OF FLORIDA

Case No. SC19-2116

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

Initial Brief of THE FLORIDA SENATE; and BILL GALVANO, in his official capacity as President of the Florida Senate

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RECEIVED, 01/06/2020 05:52:30 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Additional Authorities

Constitutional Provisions

STATEMENT OF THE CASE

This case arises from a request for an advisory opinion by the Attorney General pursuant to Article IV, section 10 of the Florida Constitution. The Initiative at issue is entitled "Adult Use of Marijuana," referred herein as the Adult Use Initiative. The Attorney General has asked the Court for an advisory opinion addressing "the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution," and the ballot title and summary requirements in section 101.161(1), Florida Statutes.

The Florida Senate is one house of the Florida Legislature. The Court has held "under section 1 of Article III of the Constitution the legislature may exercise any lawmaking power that is not forbidden by the organic law of the State. 'The Constitution does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the Legislature.'" *See City of Miami Beach v. Crandon*, 35 So. 2d 285, 287 (Fla. 1948) (quoting *Stone v. State*, 71 Fla. 514, 71 So. 634, 635 (Fla. 1916)).

Most amendments to the state constitution must perforce involve the Legislature. As the Court has explained:

> The constitution is the framework of the government containing the general principles upon which the government must function. *City of Jacksonville v. Continental Can*, 113 Fla. 168, 151 So. 488 (1933). It is not designed to provide detailed instructions for the method of its implementation. This must of necessity be left up to the Legislature.

Johns v. May, 402 So. 2d 1166, 1169 (Fla. 1981).

This Initiative expands the legality of marijuana in Florida and largely shuts the Legislature out of the process. By leaving it up to an executive agency and not the Legislature to provide for the implementation and enforcement of the Initiative, the Adult Use Initiative flies in the face of our constitutional framework of government. This reassignment of powers violates Article II, section 3 of the Florida Constitution and unduly encroaches on the powers of the legislative branch.

Furthermore, this specific Initiative concerns the Senate in light of recent case rulings regarding the interpretation of Article X, section 29 of the Florida Constitution, which was enacted through a previous citizen initiative. Such provision has been interpreted as limiting the Legislature's scope of authority regarding medical marijuana and has generated a myriad of legal questions over the Legislature's role and the Department of Health's authority to make public policy. The First District Court of Appeal currently lists 26 active medical marijuana cases and there are others that have been disposed of. This Court currently has before it *Florida Department of Health vs. Florigrown* (SC19-1464), which was certified by the First District Court of Appeal as a case of great public importance. This Initiative's potential to undermine the Legislature's role in implementing statewide policies regarding the recreational use of marijuana, a Schedule I drug prohibited by federal law, is why it should be rejected by this Court.

SUMMARY OF THE ARGUMENT

This Initiative violates the ballot summary rule by failing to inform voters that what it purports to permit is prohibited by federal law. The Initiative also violates the single subject rule by logrolling the legalization of marijuana with its commercial sale. The vague wording of the Initiative also grants broad rights to use marijuana that would force voters to accept a broader regime than they may desire. The Initiative also performs functions of multiple branches of government by granting the Department of Health broad legislative powers, substantially affecting the executive and legislative branches of government.

ARGUMENT

I. The Adult Use of Marijuana Initiative violates the Ballot Summary Rule

"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." § 101.161(1), Fla. Stat. To ensure compliance with this requirement, the Court assesses whether the ballot summary "fairly informs the voter of the chief purpose of the amendment and whether it misleads the public, keeping in mind that the ballot title and summary need to be accurate and informative but need not discuss every detail or consequence of the amendment." *Advisory Opinion to the Attorney General re Raising Florida's Minimum Wage*, No. SC19-548, 2019 WL 6906963 (Fla. Dec. 19, 2019) (cleaned up).

The 75 word ballot summary of the Adult Use Initiative reads:

> 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 problem with this summary begins with its very first word. By claiming to permit the recreational use of marijuana, the ballot summary disregards the fact such use is illegal under the federal Controlled Substances Act (CSA). *See* 21 U.S.C. § 801 *et seq*. Marijuana is classified as a Schedule I drug. *See* 21 U.S.C. § 812(c). Even if a state chooses to legalize marijuana, the U.S. Government can still enforce the CSA. *See Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

So it is misleading to state the Initiative "permits" the use of marijuana for personal use. As noted in the text of the Initiative, an individual would not be subject to criminal or civil liability or sanctions under Florida law, but federal law would still apply. Therefore, the Initiative does not "permit" the activities that it claims to permit. It merely makes it so there is no state crime for the violation for certain types of marijuana possession and use. Persons acting in accordance with the terms of Initiative could still be charged federally. In fact, since "[s]tate law enforcement officers have the power to arrest citizens for crimes against the United States," individuals in Florida could potentially be investigated or arrested by Florida law

enforcement officers while taking actions compliant with this Initiative. *U.S. v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977).

The Court has previously approved two other initiatives dealing with Medical Marijuana. *See In re Advisory Op. to the Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014) (*Medical Marijuana I*) and *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471 (Fla. 2015) (*Medical Marijuana II*). The ballot summaries for both of these initiatives mention the applicability of federal law.

In *Medical Marijuana I* the ballot summary stated in relevant part: "Applies only to Florida law. Does not authorize violations of federal law or any non-medical use, possession or production of marijuana." The Court in a 4-3 opinion found the summary language to be "substantially similar in meaning to the proposed amendment's text" and "legally accurate." *Medical Marijuana I* at 808. While this Initiative incorporates by reference Art. X, § 29(c)(5), ("nothing in this section requires the violation of federal law or purports to give immunity under federal law"), the ballot summary does not disclose this very important caveat. This clause essentially swallows the rest of the Initiative, because the federal law does not permit any of the activities the summary says the Initiative permits. It is not "legally accurate." The majority in *Medical Marijuana I* also stated: "[t]his Court has also never required that a ballot summary inform voters as to the current state of federal

law and the impact of a proposed state constitutional amendment on federal statutory law as it exists at this moment in time." *Id.* While in many instances an explanation of every intersection of federal and state law may be overly cumbersome for a 75-word ballot summary, in a situation like the present where the main purpose of the Initiative is forbidden by federal law, it is deceptive to voters to have them vote on something while providing no information on this point. As noted by Justice Polston in his dissent:

> Therefore, despite what the summary falsely implies to voters, Floridians can still be prosecuted for the medical use of marijuana even if such use is in accordance with this amendment. *See City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal.4th 729, 156 Cal.Rptr.3d 409, 300 P.3d 494, 497 (2013) (explaining that California's medical marijuana laws "have no effect on the federal enforceability of the CSA in California. The CSA's prohibitions on the possession, distribution, or manufacture of marijuana remain fully enforceable in this jurisdiction."); *United States v. Stacy*, 734 F.Supp.2d 1074, 1084 (S.D.Cal.2010) (explaining that defendant's compliance with California's medical marijuana laws did not grant him immunity under federal law and that, in his federal prosecution, defendant could not present the defense that he was cultivating marijuana in compliance with state law and that he had a good faith belief it was lawful). And while 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.
>
> *Id.* at 819

The issue is not addressed by just entirely eliding any mention of federal law. The way the summary is written leaves the impression voters are being given legal

options that they are not being given. A ballot summary can mislead by omission. *See Askew v. Firestone* 421 So.2d 151, 156 (Fla. 1982) (stating "the problem, therefore, lies not with what the summary says, but, rather, with what it does not say.") The Court has said that "[a] ballot summary may be defective if it omits material facts necessary to make the summary not misleading." *Advisory Op. to the Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 975-976, (Fla. 2009) (internal citations omitted). By failing to mention the Initiative only immunizes an individual from liability under Florida law, it falsely implies it permits activities that are actually illegal.

In *Medical Marijuana II* the ballot summary, which was approved unanimously by the Court, stated in relevant part: "[a]pplies only to Florida law. Does not immunize violations of federal law or any non-medical use, possession or production of marijuana." *Medical Marijuana II* at 476. Unlike in *Medical Marijuana I*, the summary in *Medical Marijuana II* made clear that only Florida law was affected, and that Federal law could still apply. This is an important point in a situation where Floridians are being asked to vote on an initiative that claims to be "permitting" a legal framework, but incorporates by reference a clause that, for the present at least, undoes the whole thing.

II. The Adult Use of Marijuana Initiative violates the Single Subject Rule

Article XI, section 3 of the Florida Constitution requires that citizen initiatives "shall embrace but one subject and matter directly connected therewith." The Court has described this as a "rule of restraint" to "allow citizens, by initiative petition, to propose and vote on *singular changes* in the functions of our governmental structure." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984) (emphasis added). The Court further explained:

> It is apparent that the authors of article XI realized that the initiative method did not provide a filtering legislative process for the drafting of any specific proposed constitutional amendment or revision. The legislative, revision commission, and constitutional convention processes of sections 1, 2 and 4 all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal. That opportunity for input in the drafting of a proposal is not present under the initiative process and this is one of the reasons the initiative process is restricted to single-subject changes in the state constitution. The single-subject requirement in article XI, section 3, mandates that the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution.
>
> *Id.*

To comply with the single-subject requirement, a proposed initiative must manifest a "logical and natural oneness of purpose." *Advisory Op. to Att'y Gen. re Prohib. State Spending for Experimentation that Involves Destruction of a Live Human Embryo*, 959 So. 2d 210, 212 (Fla. 2007). The Court has held the single-subject requirement has two parts: (1) to prevent logrolling and (2) to prohibit substantially

altering or performing the functions of multiple aspects of government. *See Id*. The Initiative fails under both prongs of the single-subject test.

A. The Initiative engages in logrolling by permitting personal use for "any reason" and authorizing commercial sales.

"The single-subject limitation also guards against "logrolling," a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." *In re Advisory Op. to Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994). In *Save Our Everglades* the Court invalidated an amendment that both called for restoring the Everglades and making the sugar industry fund the restoration. This was, according to the Court, a "duality of purposes." *See also Advisory Opinion to Attorney General re Independent Nonpartisan Commission to Apportion Legislative & Congressional Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1225 (Fla. 2006) (declaring an initiative that created new standards for drawing legislative districts and a new entity to draw the lines invalid because it engaged in logrolling).

It is important to note that in this instance, the label "citizen initiative" is a bit of a misnomer. Over 99.99% of the money raised comes from Suterra Holdings, Inc. and MM Enterprises USA, LLC.[1] Both companies are licensed Medical Marijuana Treatment Centers (MMTCs) and sell medical marijuana in Florida. They stand to

[1] https://dos.elections.myflorida.com/committees/ComDetail.asp?account=74455 Last accessed 12/27/19

gain upon the legalization of recreational marijuana, even more so if sales are limited to MMTCs as required by the Initiative. A representative of the Medical Marijuana Business Association said donating to this initiative is "the wisest investment an MMTC can make to date." In first 30 days, adult-use pot proposal rakes in $1 million from FL industry backers, Samantha J. Gross, Miami Herald, 09/12/19.[2]

So it is easy to discern why this Initiative, rather than just decriminalizing the personal use of marijuana, also protects and extends the oligopoly that sells medical marijuana. However, this is not representative of how voters consider the issue. For instance, an Emerson University poll of New Yorkers in 2017 (sponsored by Smart Approaches to Marijuana, a pro-legalization group) found that if voters were asked if they favored legalization for adults 21 and up they supported it 60%-29%. However, when given specific policy options only 40% supported full legalization, while 26% supported medical marijuana plus decriminalization of personal use, 22% wanted only medical marijuana, and 11% supported no legal marijuana.[3] A YouGov national poll taken in 2018 showed that only 48% of polled Americans wanted full legalization, while 19% supported decriminalization and 22% thought it should remain illegal.[4] A Qunnipiac University Poll of Florida Voters from June 2019

[2] https://www.miamiherald.com/news/politics-government/election/article234977527.html
[3] https://www2.emerson.edu/sites/default/files/ECP_SAM_NY%20PDF-2.pdf
[4] https://today.yougov.com/topics/international/articles-reports/2018/11/06/canada-legalized-marijuana-and-over-half-americans

showed 65% of respondents supported legalizing small amounts of marijuana while only 61% supported the legal sale of marijuana.[5] These poll results show it is conceivable that a voter may want to authorize personal use while being opposed to allowing commercial sales of marijuana.

The last gubernatorial election also provided various approaches as the candidates differed on decriminalization, legal sales, and use for only medical purposes. *See* Which Florida Governor Candidates support legalizing marijuana?, Mike Vasilinda, WFLA (6/13/2018).[6] As can be seen from the variance reflected in the aforementioned polls and positions of various office-seekers, there clearly is a population that feels criminalizing the personal use of marijuana is too harsh, but does not agree with creating a new commercial industry limited to already established companies.

This Initiative clearly has a logrolling problem in that it seems quite likely that if it passes it would be with the support of voters who support less criminal penalties, but are not comfortable with allowing commercial sales. The sponsors have chosen to include commercial sales (limited only to themselves) to benefit their industry, not because it is the next natural iteration of or incidental to the recreational use of marijuana in Florida.

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[5] https://poll.qu.edu/florida/release-detail?ReleaseID=2630

[6] https://www.wfla.com/news/florida/which-florida-governor-candidates-support-legalizing-marijuana/

Another example of the way the Initiative brings in multiple policy choices is in regards to the kind of use allowed. The Initiative allows for marijuana accessories which are for, among other things, inhaling marijuana. *See* Initiative at Part (a)(4). This means devices to smoke marijuana are permitted by the Initiative. *See* Initiative at Part (b)(1) allows for the use of marijuana or marijuana accessories "for any reason" and "is not subject to criminal or civil liability or sanctions." Initiative at Part (c)(1).

The only general limitation is in public places, which the Initiative defines as "any public street, sidewalk, park, beach, or other public commons." It is unclear whether "public" in this context refers to "relating or belonging to an entire community, state, or nation" or "open or available for all to use, share, or enjoy." *See* public, *adj*. 1. and 2., Black's Law Dictionary 8th Ed., (2004, West Publishing Group). Whatever it means, it clearly is not as broad as the restriction found in Article X, section 20 of the Florida Constitution, which bans smoking in any enclosed indoor workplace. So Floridians, who have in the past banned tobacco smoke where they work, where they dine, where they worship and just last election added vaping to that ban could now find that their coworker, fellow diner, fellow parishioner, is smoking marijuana and that may be permissible. It is hard to think

that voters who are not okay with persons smoking tobacco around them would be accepting of persons smoking marijuana in such locations.[7]

It is hard to gauge the full extent of what would be presented to voters with this Initiative. While a limitless reading of "for any reason" would be absurd, the Initiative still creates many questions. Can someone on community supervision for a crime be limited from possessing or using marijuana? Can individuals sell or distribute marijuana? Cultivate marijuana? Are there limitations on potency? What can private entities such as employers enforce? Can employees be restricted from personal use? Can home owner associations prevent usage in common areas? More restrained language would have been something like for "personal consumption" instead of "for any reason." The vagueness of the language itself creates multiple questions about what voters will think they are voting for.

B. The Initiative substantially affects the legislative and executive branches of government.

The second prong of the single subject analysis requires a determination into whether the initiative "substantially alters or performs the functions of multiple branches" of government. *See Advisory Op. to Atty'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353 (Fla. 1998). The purpose of this

[7] It is acknowledged that the Initiative incorporates by reference Art. X, §29(6) of the Fla. Const., which makes it so such smoking does not have to be "accommodated," but that is much different than the outright, unequivocal ban Art. X, §20 of the Fla. Const. provides.

restriction is "to protect against multiple precipitous changes in our state constitution." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). The Court should

> Require strict compliance with the single-subject rule in the initiative process for constitution change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature.
>
> *Id*. at 989.

All legislative power of the state is vested in the legislative branch. *See* Art. III, § 1, Fla. Const. Article II, section 3 of the Florida Constitution prohibits one branch of government from exercising any powers appertaining to either of the other branches of government. The Initiative substantially alters multiple branches of government by limiting the legislative branch's authority and providing such authority to an executive branch agency in violation of the separation of powers doctrine. While the Legislature may leave the administration of programs to an executive agency, provided it sets some minimal standards and guidelines, it may not delegate its legislative authority. *See Askew v. Cross Key Waterways*, 372 So. 2d 913, 920-921 (Fla. 1978).

The Initiative gives the Department of Health broad authority to "issue reasonable regulations necessary for the implementation and enforcement of this section." Initiative at Part (d) (1). DOH is a state executive agency established pursuant to statutory law. *See* § 20.43, Fla. Stat. DOH does not have any legislative authority beyond what the Legislature permissibly delegates. In violation of the

separation of powers doctrine, the Initiative without an express declaration directly bestows broad legislative authority to DOH.

Unquestionably, the Initiative substantially affects and performs a legislative function. The Initiative creates a public policy authorizing individuals 21 years of age or older to possess, use, display, purchase, or transport marijuana for personal use for any reason. *See* Initiative at Part (b). Because the Initiative implements a public policy decision of statewide significance, it performs an essentially legislative function. *See Advisory Opinion to the Attorney General-Save Our Everglades*, 636 So. 2d 1336, 1340 (Fla. 1994). Like the Medical Marijuana Initiative, the Adult Use Initiative states it leaves room for the Legislature to enact laws consistent with the proposed constitutional provision. *See* Initiative at Part (d)(2). However, the Initiative also states adults and MMTCs are permitted to use and sell marijuana respectively for personal use for any reason *in compliance with this section and Department regulations*…" Initiative at Part (b) (emphasis added). Arguably, the text of the Initiative does not leave room for the Legislature to provide additional standards for compliance which adults or MMTCs must follow regarding personal marijuana use. Notwithstanding the degree of authority left to the Legislature to regulate recreational marijuana, the Initiative substantially affects and performs a core legislative function.

The Initiative substantially affects the legislative branch by divesting the Legislature of authority regarding recreational marijuana use and failing to identify the contours of the scope of such divestiture. As this exact issue in relation to the interpretation of Article X, section 29 of the Florida Constitution is currently before this Court, it is not speculation to assume the Initiative would imperil the Legislature's ability to regulate the recreational use of marijuana. In approving the Medical Marijuana Initiative the Court stated, "the Department of Health would not be empowered under this proposed amendment to make the types of primary policy decisions that are prohibited under the doctrine of the non-delegation of legislative power." *Medical Marijuana II* at 478.

However, as interpreted by the First District Court of Appeal, the effect of the Medical Marijuana Initiative was much broader. The court stated the provision "elbowed out the legislative branch as the arbiter of medical marijuana policy by giving the Department of Health the compulsory and detailed authority to 'issue reasonable regulations necessary for the implementation and enforcement' of the medical marijuana amendment." *See Florida Department of Health v. Florigrown*, 44 Fla. L. Weekly D2182 (Fla. 1st DCA August 27, 2019).

Furthermore, by providing rulemaking authority to an executive agency which emanates directly from the constitution, the Initiative substantially affects the executive branch. The Medical Marijuana Initiative was the first instance in which

a statutorily created executive agency was given a constitutional grant of explicit rulemaking authority. In its advisory opinion approving the Medical Marijuana Initiative, the Court did not consider the effect on DOH to be substantial because it found DOH would merely "perform regulatory oversight," which would not "have a substantial impact on legislative functions or powers." *Medical Marijuana II*, 181 So. 3d 471, 477.

However, as evidenced by the 26 active medical marijuana cases DOH is currently involved in, it is clear DOH was tasked with more than just performing regulatory oversight. In response to the unprecedented grant of authority, DOH instituted rulemaking procedures outside of the Administrative Procedures Act to issue rules related to marijuana without any legislative guidance. Providing DOH with unbridled rulemaking authority outside of our constitutional framework created a Brave New World of challenges for affected parties and the courts. The Adult Use Initiative will only exacerbate the problem as it provides DOH with even broader authority and zero implementation guidelines. By forcing DOH into the role of sole arbiter of marijuana policy in the state of Florida outside of the longstanding constitutional framework in which the Legislature makes policy and the executive branch implements such policy, the DOH does not have any specific grounds to stand on. With only a broad, vague grant of constitutional authority, which is

questionable on its face, DOH is substantially affected and left exposed to endless litigation.

The Court must consider to what extent the separation of powers doctrine is affected in deciding whether an initiative violates the single subject rule. *See Fine v. Firestone*, 448 So. 2d 984, 989 (1984). Such an analysis necessitates a determination as to the extent of DOH's scope of legislative authority. The Initiative must fail because it substantially affects the executive and legislative branches of government by requiring a statutorily created executive agency to encroach upon the constitutional duties of the legislative branch.

CONCLUSION

This Initiative undermines the concept of the citizen-initiative process by attempting to rewrite state policy to benefit a particular special interest group. In doing so it misleads voters about the scope and effect of the Initiative, as well entrenching the group behind the Initiative as the primary ones who would see a financial gain. This is not how the citizen initiative process is supposed to work and the Court should reject this Initiative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed electronically with the Clerk of the Court via the Florida eFiling Portal which will serve all parties of record this 6th day of January 2020.

s/ Jeremiah Hawkes

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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