IN THE SUPREME COURT OF FLORIDA

Case No. SC19-2116

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

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

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I. The Court should reject the Sponsor's invitation to have Floridians vote on a nullity without notice

The Sponsor acknowledges there is a "conflict" between federal law and what is permitted in their amendment. "The Amendment breaks no new ground in diverging from federal law on this issue." Sponsor Br. at 17. The Sponsors say there is no problem with submitting such an initiative to the voters for two reasons: "first, a conflict between current federal law and a proposed amendment is not justiciable in initiative petition proceeding; and second, a ballot summary is not required to educate voters on the current state of federal law, or a proposed amendment's effect on federal law." *Id.* at 12.

The Sponsors argue the first point by relying on the slender reed of *Advisory Opinion to Attorney General—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991) (*Limited Political Terms*). In *Limited Political Terms*, the initiative sought to add term limits for a number of state and federal offices. Opponents argued that the state could not put new qualifications on federal officers and the term limits violated the U.S. Constitution. The majority opinion declined to address the issue holding "we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989)." *Limited Political Terms* at 227 (citing *Grose v. Firestone,* 422 So. 2d 303, 306 (Fla.

1982) (finding question of whether proposed amendment violated due process not justiciable in challenge to ballot summary)) (footnote omitted).

The Constitution provides "the Attorney General shall, as directed by general law, request the opinion of the justices of the Supreme Court as to the *validity* of any initiative petition circulated pursuant to Section 3 of Article XI." Art. IV, § 10 Fla. Const. General law requires the Court's advisory opinion to address "the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution." *See* § 16.061, Fla. Stat.

Article IV, section 10 of the Florida Constitution and section 16.061, Florida Statutes, do not limit the Court's consideration to the single-subject restriction. The Constitution calls on the Court to consider an initiative's "validity" and the statute calls on the Court to look at its "compliance." If an initiative does not comply with the Federal Constitution, then it is not valid and does not comply with Article XI, section 3 of the Florida Constitution.

This Court's long-standing precedent requires any proposed amendment to comply with the U.S. Constitution. *See Gray v. Winthrop,* 156 So. 270 (1934) (stating unconstitutional proposed amendments are "futile and nugatory"); *see also Gray v. Moss* 156 So. 262, 266 (Fla. 1934) (stating proposed amendments are "subject to applicable prohibitions and limitations of the Federal Constitution"). The Court has applied this principle to citizen initiatives. *See Weber v. Smathers,* 338 So.

2d 819, 821 (Fla. 1976) (stating citizens "have a right to change, abrogate or modify [the Florida Constitution] in any manner they see fit so long as they keep within the confines of the Federal Constitution"). It is clear a citizen initiative proposed under Art. XI, section 3 of the Florida Constitution must comply with the U.S. Constitution to be valid.

The U.S. Supreme Court, in overruling an Arkansas amendment to its constitution that imposed term limits on congressmen, observed "we have frequently noted, 'the States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'" *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801, 115 S.Ct. 1842, 1854, 131 L.Ed.2d 881, 899 (1995) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549, 105 S.Ct. 1005, 1017, 83 L.Ed.2d 1016, 1033 (1985)).

Grose was decided before there was an automatic review of citizen initiatives. The majority in *Limited Political Terms* reliance on *Grose* is misplaced. *Grose* cites *Winthrop* and *Moss* and does not hold that the Court can never consider the constitutionality of an initiative prior to the vote, just that the issue had not been appropriately raised in that case. The clear precedent before *Grose* is that the Court can consider whether initiatives comply with the U.S. Constitution. The majority in

Limited Political Terms held out on the possibility that the constitutionality could be brought up in a future proceeding. Subsequently, when the Court was presented again with the question of the constitutionality of the federal term limits they found "there is no question" they were unenforceable. *See Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999). Instead of striking the amendment however, they ruled it was severable. *See Id.*

It is a disservice to the citizens of the state for the Court to wait on otherwise clear and justiciable claims. *Limited Political Terms* creates an unnatural barrier for the Court's review that is not in the Constitution or Statute. As the Court recently observed "When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield." *State v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020). In this instance the holding in *Limited Political Terms* should yield to the plain restriction found in the Constitution and applied by this Court prior to such holding.

In the present case the Sponsor admits there is a clear conflict with federal law, thus creating a problem under the supremacy clause. "[L]imiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over

commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be." *Gonzales v. Raich*, 545 U.S. 1, at 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (cleaned up).

The Sponsor's second point is equally unconvincing. A ballot summary cannot mislead by omission any more than it can by positive misstatements. *See Askew v. Firestone* 421 So. 2d 151, at 156 (Fla. 1982) (stating "[t]he problem, therefore, lies not with what the summary says, but, rather, with what it does not say"). The summary in the present case states the Initiative "Permits adults… to possess, use, purchase" etc., when it would not permit such activities. It is not a stretch to imagine voters would think that what they are being asked to put into their constitution would actually do the things it claims to do.

The ballot summary also fails to note the powers gained by the Department of Health. In *Advisory Opinion to the Attorney General re Term Limits Pledge,* 718 So. 2d 798, 803-804 (Fla. 1998) the Court struck an initiative for failing to mention that it gave the Secretary of State new discretionary powers to determine which candidates did and did not keep the pledge. Of course, the Sponsors' inability to explain these mandatory topics goes to the point that the Initiative attempts to cram multiple policy points into one initiative.

The ballot summary also utilizes vague terms, such as authorizing the use of marijuana "for any reason," except for within "public places." Such use of

ambiguous terms in a ballot summary violates the "clear and ambiguous requirement". *See Advisory Opinion to Atty. Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 898-99 (Fla. 2000) (finding the use of the term "bona fide qualification based on sex" is vague and ambiguous, thereby violating section 101.161, Florida Statutes). The fact that the Initiative defines the term "public places" does not provide any clarity to the voter. The term is broadly defined to include "the public commons." Commons is an archaic term not used in Florida law. *Black's Law Dictionary* defines a common as "a tract of land set aside for the general public's use." *See Black's Law Dictionary 8th Ed.*, "Common" definition 2, (Thomson West 2004). What the qualifier "public" means is ambiguous because the word already means open to the public.

Furthermore, the Initiative authorizes the use of marijuana accessories, which means "any equipment" used to consume marijuana. So various supplies such as vaping equipment, pipes, and bongs, which are restricted under current law for various reasons, now become legal because they can be used to ingest marijuana. *See e.g.* § 569.0073 Fla. Stat., and § 893.145 Fla. Stat. Unlike the medical marijuana amendment, the Initiative does not leave room to address whether certain uses or delivery devices are inappropriate or unsafe or for the ability to regulate potency or mixers, such as flavors. The interaction of these statutes and the ability for the state to restrict the right to the broad, vague use of marijuana and marijuana accessories

that the Initiative grants is not addressed. The Court will not be aided by a record of legislative history or debate to address textual ambiguities, because the proposed text will result from an initiative proposal. The Court in *Fine* warned against the Court being placed in the position of redrafting substantial portions of the constitution in determining the meaning of such vague and ambiguous terms if the Initiative is adopted. *See Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984).

II. The Sponsor misstates the Senate's position regarding the Single-Subject Requirement

The Sponsor makes the claim that "lawful possession and lawful sale of marijuana" are "two sides of the same coin." This is simply not true. As demonstrated in the Senate's Initial brief, there is a difference between the idea that the State does not need to punish people who have marijuana for personal consumption and the notion that the State should allow wide-spread commercial sales. One way to look at the distinction, is the State can decriminalize marijuana without challenging the Supremacy Clause by attempting to nullify federal law as it attempts to create a marijuana market. This is preempted by the Federal Controlled Substances Act. *See Gonzales v. Raich* 545 U.S. 1 (U.S. 2005). Forcing voters to choose between simply modifying Florida law and an all-out challenge to the Federal Government creates a log-rolling issue.

The Sponsor mistakenly concludes the Senate seeks to strike the Initiative due to the mere fact of pending litigation regarding the interpretation of another

constitutional provision. Rather, the Court should look to interpretations of similar examples of constitutional text in assessing the degree to which the Initiative will affect the legislative and executive branch. It is because the contested constitutional provision includes a similar direct delegation of legislative authority to the executive branch and the exact same language regarding the "preservation" of the Legislature's legislative authority, the Senate suggests the Court look to the *Florigrown* litigation.

As the Sponsor correctly points out, the Court in *Medical Marijuana II* unanimously approved the Florida medical marijuana amendment "without a hint of concern over a single-subject violation." Sponsor Br. at 30. The Court in its analysis of whether the initiative violated the single subject requirement stated "the Department of Health would perform regulatory oversight, which would not substantially alter its function or have a substantial impact on legislative functions or powers." *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Debilitating Medical Conditions*, 181 So. 3d 471, 477 (Fla. 2015) (*Medical Marijuana II*). The Court went on to state "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 non-delegation of legislative power." *Id*. at 478.

However, the First District Court of Appeal in granting an injunction interpreted the amendment's effect on the Legislature and the Department of Health

more broadly. *See Fla. Dep't. of Health vs. Florigrown, LLC,* 44 Fla. L. Weekly D1744 (Fla. 1st DCA July 9, 2019). Instead of applying the deferential standard utilized to assess the constitutionality of statutes, the court narrowed the field in which the Legislature has authority to implement policy regarding medical marijuana. *See id.; see also Graham v. Haridopolos*, 108 So. 3d 597, 603 (Fla. 2013) (finding statutes come clothed with a presumption of constitutionality) (internal citations omitted). The Court found the entire statutory scheme regulating medical marijuana treatment centers (MMTCs) to be unconstitutional because it conflicted with a definition in the Constitution. Furthermore, in denying the motion for a rehearing en banc, the court stated the medical marijuana amendment "expressly granted the executive branch (i.e. the Department of Health) a defined portion of what would otherwise have been the Legislature's plenary power to establish statewide medical marijuana policy, leaving room for *limited* legislation that is consistent with the amendment itself." *Fla. Dep't. of Health v. Florigrown, LLC*, 44 Fla. L. Weekly D2182 (Fla. 1st DCA Aug. 27, 2019) (emphasis added).

It is in light of the district court's interpretation of the exact same language in the Constitution that the Senate draws the Court's attention to the pending litigation before it. The 1st DCA's opinions in *Florigrown* illustrate the substantial effect on the legislative and executive branches of government the Initiative will have.

The Initiative performs a legislative function by implementing statewide public policy and, therefore, substantially affects the Legislature. If, for example, the Initiative had authorized adults 21 years or older to purchase and use a limited amount of marijuana for any reason either in a self-executing fashion by laying out a "sufficient rule by means of which the right or purpose that it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of a legislative enactment," *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960), or left it up to the Legislature to enact implementing legislation, a single subject violation may not exist. This Court has made clear language requiring the Legislature to implement a provision only "affects" the Legislature and is not substantial enough to rise to the level of a single subject violation. *See e.g., Advisory Opinion to Attorney General ex rel. Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 367 (Fla. 2000).

However, a single subject violation is created when a proposed initiative goes further than just affecting the Legislature by requiring the Legislature implement a specific policy. Multiple branches of government are substantially affected when an initiative seeks to divert broad legislative authority from the legislative branch to the executive branch. Thereby, substantially altering both the legislative and executive branches. When the functions of multiple branches of government are substantially altered, the Court should strike the initiative from the ballot. *See Advisory Opinion*

to the Attorney General re Raising Florida's Minimum Wage, No. SC19-548, 2019 WL 6906963 (Fla. Dec. 19, 2019) (stating "to comply with the single-subject rule, the proposed amendment must…not substantially alter[] or perform[] the functions of multiple branches of government") (internal citations omitted).

The breadth of litigation regarding the interpretation of the Legislature's limited role and the broad discretionary scope of the Department of Health's legislative authority illustrates the substantial effect the Initiative will have on both branches of government. The Senate requests the Court reconsider its analysis of whether the direct delegation of broad legislative authority to an executive branch agency usurps the role of the legislative branch and substantially affects the executive branch.

III. The Court should address conflicts with other constitutional provisions

If the text is ambiguous, this Court has held constitutional provisions should be construed so as to harmonize with each other. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992); *see also Graham v. Haridopolos*, 108 So. 3d 591, 603 (Fla. 2013) (stating "when reviewing constitutional provisions, this Court follows principles parallel to those of statutory interpretation). If a constitutional amendment does not contain an express repeal or modification of an existing provision, the provisions should stand and operate

together, unless they conflict, in which case the amendment prevails. *See Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 343 (Fla. 1978).

In recognition of the "dangerous precedent" of this "last passed" principle of constitutional construction, the Court in *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984) receded from *Floridians Against Casino Takeover* and reiterated the importance of requiring initiative proposals to identify the articles or sections of the constitution substantially affected. *See Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984) (stating "the problem of conflicting provisions resulting from the adoption of an initiative proposal cannot be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict"). The Court made clear how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal. *See id*. at 989.

If this constitutional amendment were to pass, it would conflict with article X, section 20 of the Florida Constitution, which prohibits tobacco smoking and the use of vapor-generating devices in enclosed indoor workplaces. Unlike the term "smoking," which is defined more narrowly to include only lighted tobacco products, the term "vapor-generating device" is defined more broadly. The term means "any product that employs an electronic, a chemical, or a mechanical means

capable of producing vapor or aerosol from a nicotine product *or any other substance*…" Art. X, § 20, Fla. Const. (emphasis added). There is no qualification on the type of substance that is prohibited through the use of a vapor-generating device. Therefore, under Article X, section 20 of the Florida Constitution the use of vapor-generating devices for ingesting marijuana in enclosed indoor workplaces is prohibited. Whereas, the Initiative broadly authorizes an adult to "use" or "display" marijuana accessories for personal use for any reason. Therefore, the Initiative directly conflicts with an existing constitutional provision.

The Sponsor characterizes potential conflicts as "another policy gripe," rather than a concern regarding the substantial effect the provision will have on an existing constitutional provision. Sponsor Br. at 35. As the Sponsor notes the Initiative authorizes not only the general use of marijuana, but also using marijuana in multiple forms for any reason, including ingestion through marijuana accessories. *See* Sponsor Br. at 35-36. The term "marijuana accessories" is broadly defined to include "any equipment, products, or materials of any kind which are for ingesting, inhaling, topically applying, or otherwise introducing marijuana into the human body." Therefore, the Initiative broadly authorizes the adult use of *marijuana accessories* for any reason.

The Sponsor cites to the statutory definition of "marijuana delivery device" to indicate the "same is true for the medical marijuana amendment." Sponsor Br. at 36.

However, unlike the Initiative, the medical marijuana amendment did not speak to the ways in which a person would ingest marijuana, rather it defined and authorized the "medical use" of marijuana. It left room for the department and arguably the Legislature to regulate the "safe use" of medical marijuana. For example, the smoking of marijuana in an enclosed indoor workplace is not an authorized "medical use" of marijuana. *See* § 381.986 (1), Fla. Stat. The only explicit limitation the Initiative provides in terms of restrictions on location of use is a restriction in public places, which the Initiative defines as "any public street, sidewalk, park, beach, or other public commons." Clearly, the definition of public places would not encompass enclosed indoor workplaces. The Initiative does incorporate by reference article X, section 29 (c)(6), which states "nothing in this section requires the accommodation of any on-site medical use…in any place of employment." In the context of the medical use of a substance by individuals with medical debilitating conditions, the clarification on accommodations by employers makes sense. An employee having a right to an accommodation for a medical disability is not the same as an establishment's ability to outright prohibit vaping for employees and patrons alike. Therefore, it is unclear whether the State could restrict an adult's use of marijuana by means of a vapor-generating device in places other than "public places," as that term is defined in the Initiative, which would be in direct conflict with article X, section 20 of the Florida Constitution.

There is also precedent to presuppose that if a proposed initiative conflicts with an existing constitutional provision it must be stated in the ballot summary. *See Department of State v. Florida Greyhound Association, Inc.*, 253 So. 3d 513, 522 (Fla. 2018) (citing *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147-148 (Fla. 2008); *see also Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) (requiring a voter to be able to understand the sweep of a proposal to have fair notification of the decision he must make). The ballot summary for the Initiative does not put the voter on notice that it creates a carve out for the use of vaping devices in enclosed indoor workplaces, which are not considered "public" as defined in the Initiative, and when used as a marijuana accessory. Therefore, the ballot summary fails to adequately inform the voter of the decision he must make and should be stricken. *See Askew v. Firestone*, 421 So. 2d at 156 (striking a ballot summary for failure to give notice of an exception to a present constitutional prohibition).

CONCLUSION

The Sponsor urges this Court to allow affirmatively misleading language on the ballot. The Sponsor also wants to allow a bundle of disparate policy goals in one Initiative in violation of the single subject rule. For these reasons, this Initiative should not be permitted on the ballot.

Respectfully submitted,

/s/ _____

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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 10th day of February 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).

/s/
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