SC19-2116

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF DRUG FREE AMERICA FOUNDATION, FLORIDA COALITION ALLIANCE, NATIONAL FAMILIES IN ACTION, AND SMART APPROACHES TO MARIJUANA, IN OPPOSITION TO THE INITIATIVE

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ARGUMENT[1]

The initiative petition entitled "Adult Use of Marijuana" (the "Proposed Amendment") should not be permitted to appear on the ballot (at some unknown point in the future as the proponents have failed to secure sufficient signatures for it to appear on the November 2020 ballot).

II(A). The Proposed Amendment's Ballot Summary is Fatally Defective

In order to successfully defend its Proposed Amendment, Make It Legal contorts its opponents' arguments into positions much more capable of being defeated. It does this in two ways. First, it argues the opponents' are ***really*** asking this Court to determine the Proposed Amendment fails on the merits since it is in conflict with federal law. (Ans. Br. at 12). Second, it falsely equates providing accurate information in a ballot summary with being "required to educate voters on the current state of federal law." (Ans. Br. at 12). In reality, the Drug Free Opponents did not ask this Court to rule on the merits of this proposal nor did they ask for a primer on federal law be provided in the ballot summary. Rather, the Drug Free Opponents argued the Proposed Amendment's ballot summary does not truthfully

[1] Since this Court will receive able briefing from a number of interested parties presenting arguments in opposition to the Proposed Amendment, the Drug Free Opponents will limit this Reply to those specific portions of Make It Legal's Answer Brief that address arguments raised by the Drug Free Opponents.

explain to voters its ability to "permit" the use of marijuana given the current state of federal law.

First, Make It Legal attempts to convert its opponents' arguments regarding the fatally defective ballot summary into a challenge over the conflict between the Proposed Amendment and federal law. Since such is not true, the authority relied upon by Make It Legal is inapposite and lends no support. ***If*** the Drug Free Opponents had argued to this Court the Proposed Amendment could not be placed on the ballot because it conflicted with federal law, this Court's opinion in *In re Advisory Opinion to Attorney Gen. re Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229 (Fla. 1991) would be instructive.

In *Ltd. Political Terms in Certain Elective Offices*, this Court declined to entertain the arguments raised by opponents to the initiative regarding the proposed amendment's conflict with the United States Constitution. *Id.* at 227. It is abundantly clear from the briefing in that case, the question raised to the Court was not whether the ballot summary was inadequate or defective due to its failure to address the relationship between the proposed amendment and the U.S. Constitution. (Br. Resp. Let The People Decide, et al, at pp. 21—28).[2] Rather, the parties briefed and argued before the Court the proposed amendment should be stricken because of a defect in

[2] The parties' briefs and a video of the oral argument may be reviewed at The Florida Supreme Court Records & Briefs Project available online at https://fall.fsulawrc.com/flsupct/index.html (last accessed February 10, 2020).

the ***merits*** of the proposed amendment – namely, that it conflicted with the U.S. Constitution. *Id.* at 22 ("[T]he proposed amendment is pre-empted by facial conflict with the federal constitution."). This Court's analysis ultimately turned on that fact. The Court determined those challenges were "not justiciable in the instant proceeding." *Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d at 227.

Quite the contrary, the Drug Free Opponents argued the Proposed Amendment is invalid because its ballot summary does not truthfully explain the conflict between the Proposed Amendment and federal law. On that analysis, this Court's jurisprudence is clear: a summary's misrepresentations and omissions are two equally powerful reasons to strike an initiative from the ballot. *Advisory Opinion to Atty. Gen. re Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998). When a ballot summary "does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken." *Id.* Make it Legal's reliance on *Ltd. Political Terms in Certain Elective Offices* is wholly misplaced. The Proposed Amendment affirmatively represents it will "permit" an activity undisputedly illegal under federal law.

Second, Make It Legal relies heavily on this Court's prior discussions of ballot initiatives,[3] to prove that somehow it is not required to be forthright with Florida's

[3] *In re Advisory Op. to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 791 (Fla. 2014) ("*Marijuana I*") and *In re Advisory Op. to Atty. Gen.*

voters. On closer examination, neither of this Court's opinions in *Marijuana I* or *Marijuana II* lend support for the Proposed Amendment. The following table shows the ballot summary of each:

Marijuana I	*Marijuana II*	*Proposed Amendment*
Allows the medical use of marijuana for individuals with debilitating diseases as determined by a licensed Florida physician. Allows caregivers to assist patients' medical use of marijuana. The Department of Health shall register and regulate centers that produce and distribute marijuana for medical purposes and shall issue identification cards to patients and caregivers. ***Applies only to Florida law. Does not authorize violations of federal law*** or any non-medical use, possession or production of marijuana.	Allows medical use of marijuana for individuals with debilitating medical conditions as determined by a licensed Florida physician. Allows caregivers to assist patients' medical use of marijuana. The Department of Health shall register and regulate centers that produce and distribute marijuana for medical purposes and shall issue identification cards to patients and caregivers. ***Applies only to Florida law. Does not immunize violations of federal law*** or any non-medical use, possession or production of marijuana.	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

See Marijuana I, *Marijuana II*, and Proposed Amendment. (emphasis added).

In *Marijuana I*, the dissents of then-Chief Justice Polston and now-Chief Justice Canady correctly noted the ballot summary was misleading since it purported

re Use of Marijuana for Debilitating Med. Conditions, 181 So. 3d 471, 473 (Fla. 2015) ("*Marijuana II*").

not to "authorize violations of federal law"; yet did exactly that by purporting to "[a]llow" the use of marijuana. *Marijuana I*, 132 So. 3d at 818—21 (Polston, J., dissenting and Canady, J. dissenting). When the Court reviewed the summary in *Marijuana II*, the proponents had corrected the flaw. As shown above, the summary truthfully informed voters it would not immunize individuals using marijuana in compliance with the proposed amendment from prosecution or penalties under federal law. *Marijuana II*, 181 So. 3d at 476.

In this instance, the Proposed Amendment tells voters "adults" will be "[p]ermit[ed]" to use marijuana falsely implying such use will comport with federal law. Noticeably absent from the Proposed Amendment is any clarification or analysis as to the conflict with federal law. At least in *Marijuana I*, its proponents attempted to describe the relationship between state and federal law (however clumsily). And in *Marijuana II* the sponsor's truthfully told voters the use of marijuana, despite permission from Florida law, would remain subject to federal prohibitions and penalties.

The Proposed Amendment's summary is completely silent on the issue and provides no notice to voters, much less "fair notice," of the Proposed Amendment's relationship with federal law (one of direct conflict). Make It Legal could have followed the language already approved by this Court in *Marijuana II* and truthfully informed voters of its inability to immunize violations of federal law. Given its

proclaimed knowledge of the current state of marijuana laws around the country, its failure to do so is inexcusable. Make It Legal attempts to rewrite the Proposed Amendment in its Answer Brief by narrowing the definition of the word "permit" to only include permission under Florida law. (Ans. Brief, p. 11—12). If that was indeed the ***only*** purpose, the ballot summary should have stated just that. Rather, Make It Legal chose much broader language, presumably for its better curb appeal, and must now live with that choice.

By its affirmative representation and its silence, the Proposed Amendment misleads voters about the legality of marijuana use in compliance with the Proposed Amendment. As a result, the Proposed Amendment's ballot summary is fatally defective and renders the Proposed Amendment unfit for the ballot.

III(C). Proposed Amendment's Ballot Summary Fails to Give Proper Notice of Broad Grant of Immunity

Make It Legal similarly tries to rewrite its Proposed Amendment in its Answer Brief to limit the broad grant of immunity it will provide to individuals using marijuana. The Proposed Amendment provides:

> **(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***.

See Proposed Amendment.

It should be clear, at least on some level, the Proposed Amendment grants "immunity" to individuals. The question, then, is to what extent is the immunity conferred. Truthfully, the Court need not answer that question to determine the ballot summary is fatally defective since a review of the summary will show there is no reference or "fair notice" of ***any*** type of immunity. But, even if the Court undertakes the analysis, the immunity granted is far broader then argued by Make It Legal.

Again, as with the discussion above, it is important to first review what this Court considered in *Marijuana I* and *Marijuana II*, compared to the Proposed Amendment. The following table shows the "immunity" language provided in each:

Marijuana I	*Marijuana II*	*Proposed Amendment*
(1) The medical use of marijuana by a qualifying patient or personal caregiver is not subject to criminal or civil liability or sanctions under Florida law except as provided in this section. (2) A physician licensed in Florida shall not be subject to criminal or civil liability or sanctions under Florida law for issuing a physician certification to a person diagnosed with a debilitating medical condition in a manner consistent with this section.	(1) The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law. (2) A physician shall not be subject to criminal or civil liability or sanctions under Florida law solely for issuing a physician certification with reasonable care to a person diagnosed with a debilitating medical condition in compliance with this section.	(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

(3) Actions and conduct by a medical marijuana treatment center registered with the Department, or its employees, as permitted by this section and in compliance with Department regulations, shall not be subject to criminal or civil liability or sanctions under Florida law except as provided in this section..	(3) Actions and conduct by a Medical Marijuana Treatment Center registered with the Department, or its agents or employees, and in compliance with this section and Department regulations, shall not be subject to criminal or civil liability or sanctions under Florida law. * * * (c)(8) ***Nothing in this section shall affect or repeal laws relating to negligence or professional malpractice*** on the part of a qualified patient, caregiver, physician, MMTC, or its agents or employees.	with this section and Department regulations and is not subject to criminal or civil liability or sanctions under Florida law.

See Marijuana I, Marijuana II, and Proposed Amendment. (emphasis added).

Important to this analysis are the corrections made by the proponents in *Marijuana II* fixing the issues identified in *Marijuana I*. In *Marijuana II*, the backers specifically included in the proposed amendment the immunity provided in the public policy section "shall [not] affect or repeal laws relating to negligence or professional malpractice." Art. X, § 29(c)(8), Fla. Const. This "savings clause" corrected a defect identified by then-Chief Justice Polston and now-Chief Justice Canady. *Marijuana I,* 132 So. 3d at 818—21 (Polston, J., dissenting and Canady, J. dissenting).

The Proposed Amendment seeks to rely on that "savings clause" in order to salvage its own immunity provision, but to no avail. To be sure, it is at best a confusing rabbit hole to require voters to understand the Proposed Amendment for recreational marijuana use relies on the "savings clause" of medical marijuana use. Regardless, the "savings clause" in Article X, § 29(c)(8), only claws back the grant of immunity to MMTCs and, applying the text faithfully, would not apply to individuals. Thus, even though the proponents in *Marijuana II* corrected the error and clawed back the immunity given to "a qualified patient, caregiver, physician, MMTC, or its agents or employees" to the extent it gave cover for claims of negligence, the Proposed Amendment's reference to that section does not undo the grant of immunity to individuals using marijuana in compliance with the Proposed Amendment.

Yet, Make It Legal somehow argues the Proposed Amendment does not "grant blanket immunity from independent torts"; rather it provides immunity "only as far as Florida law grants immunity for the lawful use of any other lawful product." (Ans. Br. at p. 28). There is no example provided, though, of another Florida statute or constitutional provision that provides such immunity.

Make It Legal could have followed the language already approved by this Court in *Marijuana II*, but it chose not to. Again, the self-proclaimed experts on marijuana laws failed to follow what this Court permitted in *Marijuana II* and asks

this Court to approve an initiative with even more errors and loopholes than the one this Court considered in *Marijuana I*. Its failure to do so is inexcusable.

As with the argument above, this is not an analysis of the ***merits*** of the Proposed Amendment and whether it should or should not provide immunity to individuals (although it should not).[4] The question is whether the ballot summary provides fair notice of the immunity provided. The Proposed Amendment simply fails to provide "fair notice" to voters of this broad immunity provision and the implications of this amendment. The Proposed Amendment should not be permitted to be placed on the ballot.

CONCLUSION

Because the Proposed Amendment fails to comply with Florida law, contains an outright misleading ballot summary, and is otherwise invalid, the Drug Free Opponents respectfully request this Court determine it to be invalid and prohibit it from being placed on the ballot.

Respectfully submitted,

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[4] The attempt to provide civil immunity by ballot initiative could run afoul of this Court's jurisprudence on log-rolling by attempting to simultaneously amend Article X, § 29 and Article X, § 21 of the Florida Constitution.

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