

SC19-1536

In the Supreme Court of Florida

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: REGULATE
MARIJUANA IN A MANNER SIMILAR TO ALCOHOL TO ESTABLISH
AGE, LICENSING, AND OTHER RESTRICTIONS

ATTORNEY GENERAL'S INITIAL BRIEF

Ashley Moody
Attorney General

Amit Agarwal (FBN 125637)
Solicitor General

Jeffrey Paul DeSousa (FBN 110951)
Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
amit.agarwal@myfloridalegal.com
jeffrey.desousa@myfloridalegal.com

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Counsel for Attorney General

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STATEMENT OF THE CASE AND FACTS

In recent years, proponents of marijuana legalization have repeatedly sought to enact legislation authorizing, as a matter of state law, the recreational use of marijuana. So far, all of those efforts have failed, including six bills introduced in the Florida Legislature in the last five years alone.¹

In the wake of those legislative defeats, supporters of marijuana legalization turned to the citizen-initiative process for amending the Florida Constitution. One such initiative, at issue here, proposes the creation of a constitutional amendment entitled the “Florida Cannabis Act.” Pet. 21.² If approved, that initiative would amend Article X, Section 29 of the Florida Constitution to provide that certain acts related to the growth, possession, use, sale, and transfer of marijuana “are not unlawful and shall not be an offense under Florida law.” Pet. 23 (proposed Art. X, § 29(c), addressing “[p]ersonal use of cannabis”); Pet. 24 (proposed Art. X, § 29(d),

¹ *See, e.g.*, SB 1780 (2019) (died in Health Policy Comm.); HB 1117 (2019) (died in Criminal Justice Subcomm.); SB 1176 (2015) (died in Regulated Industries Comm.); HB 1297 (2015) (died in Criminal Justice Subcomm.); SB 1562 (2014) (died in Regulated Industries Comm.); HB 1039 (2014) (died in Criminal Justice Subcomm.).

² The Petition for an Advisory Opinion, filed in this Court on September 11, 2019, contains an official copy of the initiative on file with the Secretary of State, *see* Pet. 21-30, which is also available online. *See* “Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions, 16-02,” Florida Sec’y of State (last visited Nov. 1, 2019), *available at* <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64837&seqnum=2>.

providing for “[l]awful operation of [a] cannabis establishment”). In addition, the initiative would incorporate a comprehensive regulatory regime directly into the constitutional text. *See* Pet. 24-29 (proposed Art. X, § 29(e), addressing “regulation of cannabis”).

The proposed amendment is 10 pages, consisting of 4,189 words spread across 89 subsections and subparagraphs. Pet. 21-30 (reproducing full text). By contrast, Florida’s current Declaration of Rights, found in Article I of the state constitution, is 3,504 words. Each section of the Declaration of Rights averages 116 words, making each roughly 1/36th of the length of the section that the amendment would add to Article I. And the proposed amendment would exceed, by many pages, any individual section of Article X, where the new amendment would reside.

The ballot title for the proposed amendment is: “Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions” (hereinafter “Regulate Marijuana amendment”). Pet. 21. The full text of the accompanying ballot summary states:

Regulates marijuana (hereinafter “cannabis”) for limited use and growing by persons twenty-one years of age or older. State shall adopt regulations to issue, renew, suspend, and revoke licenses for cannabis cultivation, product manufacturing, testing and retail facilities. Local governments may regulate facilities’ time, place and manner and, if state fails to timely act, may license facilities. Does not affect compassionate use of low-THC cannabis, nor immunize federal law violations.

Id.

The Regulate Marijuana initiative was initially filed with the Secretary of State in early 2016. By its terms, the text of the proposed amendment would be set forth in “Article X, Section 29” of the Florida Constitution. Pet. 21 (listing “Article X, Section 29” as the “Article and Section Being Created or Amended”). Subsequently, on November 8, 2016, voters approved a separate constitutional amendment authorizing, as a matter of state law, certain medical uses of marijuana. That provision is embodied in the current version of Article X, Section 29.

Despite this development, the text of the Regulate Marijuana initiative has not been updated to reflect the medical marijuana amendment. It instead continues to identify “Article X, Section 29” as the “Article and Section Being Created or Amended,” Pet. 21, and the full text of the proposed amendment has not been altered to incorporate the text currently set out in that provision. Pet. 21-30.

On August 12, 2019, the Secretary of State advised the Attorney General that the Regulate Marijuana initiative had met certain signature criteria set forth in Section 15.21, Florida Statutes. In accordance with Article IV, Section 10 of the Florida Constitution, the Attorney General filed a petition with this Court seeking an advisory opinion on whether the ballot language for the Regulate Marijuana initiative complies with the requirements of Article XI, Section 3, Florida Constitution, and Section 101.161(1), Florida Statutes. This Court has jurisdiction. *See* Art. V, § 3(b)(10), Fla. Const.

SUMMARY OF ARGUMENT

I. The Regulate Marijuana initiative has two broad purposes. Neither is adequately disclosed by the ballot title and summary.

As the text of the proposed amendment makes clear, one of the main aims of the initiative is to legalize, as a matter of state law, the recreational use of marijuana. The very first provision of the “Purpose and findings” section declares that “the use of cannabis should be legal for persons twenty-one years of age or older.” Consistent with that express statement of purpose, the first operative provisions of the proposed amendment provide that the growth, possession, use, sale, and transfer of marijuana “are not unlawful and shall not be an offense under Florida law.” Yet the ballot language does not tell voters that the amendment seeks to legalize under state law activities that are currently unlawful, and therefore does not reveal a chief purpose of the proposed amendment.

The ballot language also fails to adequately disclose a second chief purpose of the proposed amendment—*i.e.*, the enactment and constitutionalization of a broad range of rules and policies germane to the growth, use, and sale of recreational marijuana. That is largely due to the sheer length and breadth of the amendment, which more closely resembles a comprehensive statutory code than a constitutional provision. By way of illustration, the 4,189 words of new constitutional text proposed by the amendment would be longer than the entirety of both the U.S. Bill

of Rights and Florida’s current Declaration of Rights, and is nearly as lengthy as the whole of the unamended federal constitution. It is therefore unsurprising that the ballot summary neglects to disclose any number of significant policy innovations that would no longer be subject to legislative modification. To take just a few examples, the proposed amendment would delegate regulatory authority to an executive agency rather than to the Legislature, create anti-competitive restraints on cannabis business licensing, and strip from local governments the power to ban marijuana use in restaurants and other business establishments open to the public. Because it does not apprise voters of those and other significant effects, the ballot language fails to provide fair notice of the content of the amendment.

II. The ballot title and summary are also affirmatively misleading in at least four ways.

First, a reasonable voter reviewing the ballot language would believe that the amendment increases, rather than decreases, the quantum of regulation in the field of marijuana. Both the title and summary speak only in terms of regulating, restricting, and limiting—not legalizing, decriminalizing, or expanding access to—marijuana. For example, the ballot title states that the amendment would “*Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions.*” Similarly, the ballot summary asserts that the amendment would “[*r*]egulate[] marijuana . . . for *limited* use and growing” and that the “State shall

adopt *regulations*.” In common parlance, words like “regulate,” “restrict[]” and “limit[]” denote restraints on, not enlargements of, individual rights. Yet, because recreational marijuana is wholly illegal under current Florida (and federal) law, the principal purpose and effect of the amendment is to vastly *reduce*—not to *expand*—the scope of state-law regulations, restrictions, and limitations related to recreational marijuana usage.

Second, rather than disclose that the amendment would permit marijuana use in any amount, in public or private, under any circumstance, the summary assures voters that a “yes” vote will result only in “limited use.” That deceptive wording would unfairly garner support for the amendment among voters who favor a cautious and incremental approach to marijuana legalization but who would otherwise balk at a measure, like this one, legalizing unlimited recreational use as a matter of state law.

Third, the ballot language misleads voters into thinking that, if the proposed amendment is approved, Floridians could engage in various lawful activities involving the growth, use, and sale of marijuana. That is incorrect. Federal law makes it a crime to possess, use, or sell marijuana; and it does not carve out an exception for jurisdictions that have legalized marijuana as a matter of state or local law. Nevertheless, the ballot language refers to “use and growing,” and tells voters that the State would be required to “adopt regulations to issue, renew, suspend, and

revoke licenses for cannabis cultivation, product manufacturing, testing and retail facilities.” Those references are most reasonably construed to mean that at least some lawful “use,” “growing,” “cultivation,” “manufacturing,” or “retail” sales of marijuana would be allowed if the amendment is passed. Because the ballot language does not dispel that reasonable inference by informing voters that *all* the activities it purports to “regulate” would remain illegal under federal law, the ballot is misleading.

Finally, the ballot title obscures more than it reveals insofar as it informs voters that the proposed amendment would “Regulate Marijuana in a Manner *Similar* to Alcohol to Establish Age, Licensing, and Other Restrictions.” The State’s alcohol policies are not prescribed by the Constitution, so the Legislature retains its authority to make or modify age, licensing, and other restrictions relating to the use and sale of alcohol. In contrast, the amendment would make the recreational use of marijuana a constitutional right, adopt a broad range of regulations that would no longer be subject to legislative modification, and assign certain residual regulatory authorities to an executive agency rather than the Legislature. Because the Legislature would be unable to regulate recreational marijuana as it has traditionally regulated the alcohol industry, the proposed amendment would not regulate marijuana in a manner similar to alcohol.

ARGUMENT

I. THE BALLOT SUMMARY FAILS TO APPRISE VOTERS OF THE CHIEF PURPOSES OF THE PROPOSED AMENDMENT.

A. Legal standard.

“The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy.” *In re Advisory Op. to Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004). Because voters “never see the actual text of the proposed amendment” and “vote based *only* on the ballot title and the summary,” the accuracy of the title and summary are paramount. *Id.* In fact, “an accurate, objective, and neutral summary” of the proposed amendment is the “sine qua non” of the citizen-initiative process for amending the state constitution. *Id.* Absent this informational safeguard, the constitution becomes “not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.” *Id.* at 654.

Section 101.161(1) codifies the standard for reviewing ballot titles and summaries of citizen initiative petitions. Any measure submitted to the vote of the people must include a ballot title “not exceeding 15 words in length, by which the measure is commonly referred to or spoken of,” and a ballot summary, “not exceeding 75 words in length,” explaining “the chief purpose of the measure.” § 101.161(1), Fla. Stat. (2019). “Implicit in this provision is the requirement that the

proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity.” *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000).

The purpose of the ballot title and summary is “to provide fair notice of the content of the proposed amendment.” *Advisory Op. to the Att’y Gen.-Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996). Thus, to satisfy Section 101.161, the title and summary must “state in clear and unambiguous language the chief purpose of the measure,” *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), so that the proposed amendment does not “fly under false colors” or “hide the ball” as to its legal effect. *Armstrong*, 773 So. 2d at 16 (internal quotation marks omitted).

In assessing a proposed amendment’s ballot title and summary, this Court asks two questions: “First, whether the ballot title and summary ‘fairly inform the voter of the chief purpose of the amendment,’ and second, ‘whether the language of the title and summary, as written, misleads the public.’” *Fla. Educ. Ass’n v. Fla. Dep’t of State*, 48 So. 3d 694, 701 (Fla. 2010).

B. Analysis.

The proposed amendment has two overarching purposes. The first is the legalization of recreational marijuana, as a matter of state law, for persons twenty-one or older; the second is the enactment and constitutionalization of a sweeping regulatory regime. As explained below, the ballot language fails to adequately inform voters of either chief purpose.

1. The ballot title and summary do not tell voters that the amendment aims to legalize the use of marijuana as a matter of state law.

The primary purpose of the amendment is to legalize, as a matter of state law, the recreational use of marijuana. The first provision of the “[p]urpose and findings” section of the amendment states that “the people of the State of Florida find and declare that the use of cannabis should be legal for persons twenty-one years of age or older.” Pet. 21 (proposed Art. X, § 29(a)(2)). Consistent with that purpose, the first operative provision of the proposed amendment states that “[n]otwithstanding any other provision of law,” specified “acts *are not unlawful and shall not be an offense under Florida law . . .* for persons twenty-one years of age or older.” Pet. 23 (proposed Art. X, § 29(c)) (emphasis added). Those acts include “[p]ossessing, using, displaying, purchasing, or transporting cannabis, and cannabis products in quantities reasonably indicative of personal use or for use by household members,” as well as certain kinds of “[g]rowing” and “[t]ransfer[s],” Pet. 23 (proposed Art. X, §§ 29(c)(1), (2), (3)), and the “operation of cannabis establishment[s].” Pet. 24 (proposed Art. X, § 29(d)).

The ballot title and summary do not apprise voters that a chief purpose of the proposed amendment is to legalize under state law certain activities that are currently prohibited. The title instead advises voters that the Amendment “*Regulates Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other*

Restrictions.” Pet. 21 (emphases added). Likewise, the summary states that the amendment “[r]egulates marijuana . . . for *limited* use and growing by persons twenty-one years of age or older,” employing the term “regulate” or “regulation” no fewer than three times. *Id.* (emphases added).

In contrast to the Regulate Marijuana initiative, other citizen initiative petitions addressing marijuana legalization have employed straightforward ballot language. A 2017 proposal, for example, told voters that the proposed amendment would “make cannabis legal for adults 21 years of age or older.” “Legalize and Regulate Cannabis Initiative,” Initiative No. 17-01. An earlier petition was similarly entitled “The Legalization of Cannabis Sativa L. for ALL PURPOSES,” Initiative No. 00-05, and purported to “[e]stablish[] the Right of individuals” to use marijuana. *Id.* Likewise, the medical marijuana initiative approved for ballot placement and passed by voters in 2016 informed the electorate that it would “[a]llow[] the medical use of marijuana” as a matter of state law. *In re Advisory Op. to Att’y Gen. re Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 794 (Fla. 2014) (emphasis added).³ As that standard practice underscores, the whole point of such

³ See also “Marijuana use for recreational purposes in the State of Florida,” Initiative No. 15-16 (“*Allows* the recreational use of marijuana for all individuals 18 and older.”) (emphasis added); “Adult Use of Marijuana,” Initiative No. 19-10 (“*Permits* adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana”) (emphasis added).

measures is to “legalize,” “permit,” or “allow” certain uses of marijuana that would otherwise be prohibited—and voters must be told of that manifest purpose.

The Sponsor may speculate that many voters already know that recreational marijuana is currently banned under Florida law, and that such voters would likely infer that an initiative purporting to *regulate* marijuana must also have the effect of *legalizing* the growth, possession, use, sale, or transfer of marijuana for recreational purposes. But this Court has held that “[f]air notice in terms of a ballot summary must be *actual notice* consisting of a *clear and unambiguous explanation* of the measure’s chief purpose.” *Askew*, 421 So. 2d at 156 (emphasis added). Notice by implication is not the same as “actual notice,” and requiring voters to deduce the chief purpose of a proposed amendment is antithetical to the concept of “a clear and unambiguous explanation.”

This problem is exacerbated by the amendment’s failure to distinguish between the recreational use of marijuana (a use currently prohibited by state law) and the medical use of marijuana (a use authorized, as a matter of state law, by a recent constitutional amendment). Because the ballot language does not purport to legalize, authorize, or otherwise expand access to marijuana, voters might reasonably assume that an amendment purporting only to “regulate” marijuana would not *allow* a new use currently prohibited by law (recreational marijuana use),

but would instead *further regulate* an existing use of marijuana (medical use) that is already legal as a matter of state law.

These problems are compounded by a number of factors, explained in greater depth below, *infra* at 20-22, that may confuse voters as to the current state of recreational marijuana legalization in Florida, including a rash of decriminalization policies at the county and municipal level that create confusion about whether recreational marijuana is “illegal” in those areas, and the rapid evolution of recreational marijuana policy nationwide. As a consequence, the ballot language is deficient because it does not inform voters of the chief purpose of recreational marijuana legalization.

2. Due to the proposed amendment’s extraordinary length, it would be impossible to adequately summarize the amendment’s other chief purpose of comprehensively regulating recreational marijuana.

As the text of the initiative makes clear, a second chief purpose of the proposed amendment is the enactment of a comprehensive marijuana regulatory regime embedded, not in any statute, but within the state constitution. The “Purpose and findings” section of the amendment declares that “cannabis should be regulated,” Pet. 21 (proposed Art. X, § 29(a)(3)), and subsection (e) is devoted to the “[r]egulation of cannabis.” Pet. 24-29. Accordingly, the ballot language tells voters that the proposed amendment would “regulate marijuana” in certain broad ways. But, in light of the number and breadth of the regulations that the amendment

would incorporate into Florida’s Constitution, that general disclosure falls short of the “explanatory purpose” required by Florida law. § 101.161(1), Fla. Stat.

This Court has explained that “[w]hen 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.” *E.g., Advisory Op. to Att’y Gen. re Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998) (emphasis added). A ballot summary fails to disclose the chief purpose unless it allows voters to “comprehend the sweep of each proposal” as “neither less nor more extensive than it appears to be.” *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So.2d 825, 829 (Fla. 1976)). Thus, a ballot summary describing the legal effect of the proposed amendment in only broad and vague terms may well be deficient. In *Term Limits Pledge*, for instance, the Court struck from the ballot an initiative whose summary simply told voters that the proposed amendment would “affect[] the powers of the Secretary of State,” yet offered no specifics as to the newfound discretionary duties the Secretary would possess, including the Secretary’s authority to promulgate rules and to effectively determine which candidates had violated the proposed term limits pledge. 718 So. 2d at 803-04. Because the summary did not “sufficiently inform” voters of “important aspects of the proposed amendment,” it was invalid. *Id.* at 803.

So too here. Spanning ten pages, the amendment was entitled the “Florida Cannabis Act” by its own drafters. Pet. 21 (emphasis added). And for good reason.

The measure comprises 4,189 words allocated among 89 subsections and subparagraphs. By word count, the amendment dwarfs both the Bill of Rights and Florida’s own Declaration of Rights, and is nearly as long as the whole of the unamended federal constitution. It would be remarkable if the full range of key legal rights and duties established by such a detailed and comprehensive regulatory scheme could be fairly conveyed to voters in a mere 75 words.

Not surprisingly, the ballot summary for the “Florida Cannabis Act” fails to disclose to voters numerous critical legal effects of the amendment. Those undisclosed effects include, among other things, the following:

- *Delegation of Regulatory Authority to an Agency.* First, the summary fails to disclose that the amendment would strip elected state legislators of their ordinary power to regulate Florida commercial activities, instead delegating to an executive agency—the Department of Business and Professional Regulation—the power to regulate marijuana. *See* Pet. 24 (proposed Art. X, § 29(e)(1), providing that “the department shall adopt regulations necessary for implementation of this section”). That upsets conventional lawmaking norms, whereby the Legislature enjoys the power to regulate, in the first instance, all conduct within the State’s police power. *See Dickinson v. State*, 227 So. 2d 36, 37 (Fla. 1969). Yet the summary tells voters only that “[the] State shall adopt regulations,” with no indication that this regulation will be conducted only by agency officials who are not chosen by, or

directly accountable to, the electorate. That alone is sufficient to strike the amendment. *See Advisory Op. to the Att’y Gen. re Fish and Wildlife Conservation Com’n*, 705 So. 2d 1351, 1355 (Fla. 1998) (invalidating proposed amendment which would “strip[] the legislature of its exclusive power to regulate marine life and grant[] it to a constitutional entity,” where “[t]he summary does not sufficiently inform the public of this transfer of power”).

· *Right of Businesses to Allow Use.* Next, the ballot summary does not disclose language in the amendment guaranteeing that it “shall not be an offense under Florida law” to “[a]llow[] or restrict[] consumption of cannabis within a private business establishment or on its premises.” Pet. 23 (proposed Art. X, § 29(c)(4)). That is no small thing. Indeed, it would guarantee the right of individual businesses to decide for themselves whether to permit marijuana use on their premises, thereby depriving both the Legislature and local and municipal governments of the power to outlaw the smoking of marijuana in restaurants, hotels, and other establishments frequented by the public. That is, Florida legislative bodies would be curtailed in their ability to regulate marijuana in the same way they have traditionally been empowered to regulate tobacco, an area in which the Legislature has forbidden smoking in any “indoor workplace,” a broad term that disallows smoking in most restaurants, bars, retail stores, and hotels. *See* § 386.204, Fla. Stat. (2019); § 386.202(5), Fla. Stat. (2019). Voters will naturally, but incorrectly, assume

that this sort of consumer health protection will remain available to lawmakers. *See In re Advisory Op. to the Att’y Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994) (denying ballot placement because summary failed to explain amendment “would curtail the authority of government entities”).

· *Anti-Competitive Restraints on Business Licensing*. Also unmentioned in the ballot summary are the amendment’s numerous limitations on the types of business entities that may be licensed to operate a cannabis establishment in Florida. Most significantly, the amendment would forbid licensure of any business of which “at least 25% of the directors, members, partners, or joint venturers have [not] been domiciled in the State of Florida for at least 6 months.” Pet. 25 (proposed Art. X, § 29(e)(1)e.). The practical effect of that provision is to exclude from Florida’s marijuana industry all corporations, large or small, whose directors do not have a residential nexus to Florida, thereby reducing competition and likely increasing the prices Florida consumers will pay.

Those and other legal effects represent the sort of “material information” that is “necessarily included in a valid summary.” *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992). To be sure, this Court has explained that, due to the 75-word limit on ballot summaries, a summary “need not explain every detail or ramification of the proposed amendment.” *Advisory Op. to Att’y Gen. ex rel. Amendment to Bar Gov’t from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d

888, 899 (Fla. 2000) (internal quotation marks and citation omitted). At the same time, however, “the word limit does not give drafters of proposed amendments leave to ignore the importance of the ballot summary and to provide an abbreviated, ambiguous statement in the hope that this Court’s reluctance to remove issues from the ballot will prevent us from insisting on clarity and meaningful information.” *Id.* (quoting *Smith*, 606 So. 2d at 621). “Thus, drafters of proposed amendments cannot circumvent the requirements of section 101.161, Florida Statutes, by cursorily contending that the summary need not be exhaustive.” *Id.*

In short, the ballot language does not, and could not, “adequately describe the general operation of the proposed amendment.” *Id.* at 899-900. It should not be placed on the ballot.

II. THE BALLOT TITLE AND SUMMARY ARE MISLEADING.

A. The summary misleadingly suggests that the amendment increases, rather than decreases, the quantum of regulation.

The ballot language also violates Section 101.161(1) because it affirmatively misleads voters in several ways. First, the ballot title and summary deceptively suggest that the amendment will *increase*, rather than decrease, the extent of marijuana regulation throughout the state. As discussed above, the ballot language speaks only of “regulat[ion],” not “legalization.” The verb “regulate” means “to control (an activity or process) esp. through implementation of rules,” *Regulate*, Black’s Law Dictionary (11th ed. 2019), or “to bring under the control of law or

constituted authority.” *Regulate*, Merriam-Webster Dictionary, *available at* <https://www.merriam-webster.com/dictionary/regulate>. This Court has explained that “[e]very regulation is of necessity a restriction,” and that the term means “to direct by rule of restriction,” as in “prohibiting the sale of intox[i]cating liquors to minors and to persons in the habit of getting drunk.” *Ex parte Lewinsky*, 63 So. 577, 578 (Fla. 1913) (internal quotation marks and citations omitted).

Based on the ordinary meaning of words like “regulate,” “restrict[],” and “limit[],” Florida voters would not understand that the proposed amendment seeks to substantially *expand* the right to use marijuana. Yet the Sponsor settled on the “word ‘[regulate]’ in the ballot summary when the word ‘[legalize]’ is what actually is to be given effect in the amendment’s text”—an “affirmatively misleading choice.” *See Use of Marijuana for Certain Medical Conditions*, 132 So. 3d at 811 (Polston, C.J., dissenting). As a result, persons opposed to the use of marijuana might unwittingly support the measure believing it to restrict marijuana usage. *See id.* at 814-15 (explaining that the Court should reject drafting choices made “in an attempt to gain electoral advantage with voters who might object to a broader use of [] marijuana”).

It is no answer to say that the reasonable voter will understand that recreational marijuana is currently banned under Florida law, and therefore that voters will view the amendment as an expansion of rights. A ballot summary is

deficient if it “fl[ies] under false colors” or “hide[s] the ball” as to its legal or practical effect, *Armstrong*, 773 So. 2d at 16, as this summary does. And, more specific to this case, the subject matter of the Regulate Marijuana initiative is likely to cause confusion for at least four reasons.

First, in the wake of the recent constitutional amendment legalizing *medical* marijuana, *see* Art. X, § 29, Fla. Const. (added via general election on Nov. 8, 2016), voters may well assume that this amendment regulates the medicinal use of marijuana, not recreational use. Neither its ballot title nor summary references the term “recreational.” That lack of specificity makes the ballot summary at best ambiguous, and may lead voters to interpret the ballot’s use of the phrase “limited use” as a reference to “[medicinal] use.” Indeed, a careful voter will observe that the ballot title and summary do not mention the “legalization” of marijuana—as one would ordinarily expect of a proposed amendment effecting that substantial change—and therefore might reasonably assume that the regulatory regime created by the amendment addresses only the form of marijuana that is currently lawful at the state level: medical marijuana.

This confusion is especially likely because the proposed amendment purports to “[c]reate[] or [a]mend[]” Article X, Section 29, Pet. 21, the constitutional provision which presently addresses “Medical marijuana production, possession and

use.”⁴ Art. X, § 29, Fla. Const. (Title). In addition, other marijuana-related citizen initiative petitions currently in circulation provide for some of the same new rights as the amendment—like the personal right to grow a limited number of cannabis plants—but do so only for persons authorized under state law to use *medical* marijuana. *See* “Marijuana Plants for Medical Marijuana Patients,” Initiative No. 18-05 (broadening existing Article X, Section 29 to include the right to “grow[] up to nine mature flowering marijuana plants and possessing the harvest therefrom”). Thus, voters aware of these pending medical marijuana initiatives may mistake the proposed amendment for one addressing medical marijuana.

Second, numerous Florida counties and municipalities—including some of the largest, like Miami, Tampa, Orlando, and Palm Beach County—have adopted decriminalization policies,⁵ and the electorate may assume that the amendment was

⁴ Because the ballot language is defective for the reasons set out in the main text, this Court need not decide whether the proposed amendment should also be denied ballot placement on the ground that it purports to create or amend Article X, Section 29, which currently houses the medical marijuana amendment, or because it impermissibly fails to explain how the new amendment would relate to the medical marijuana amendment set forth in that provision. *See* Pet. 21.

⁵ *See, e.g.*, “Florida Local Decriminalization,” NORML (last accessed Oct. 14, 2019), *available at* <https://norml.org/legal/item/florida-local-decriminalization> (listing 14 cities and counties that have decriminalized marijuana via ordinance); Douglas Hanks, “Miami-Dade adopts \$100 fine for pot possession,” *Miami Herald* (June 30, 2015), *available at* <https://www.miamiherald.com/news/local/community/miami-dade/article25858318.html>.

designed to combat those developments by constraining the breadth of decriminalization that is permissible at the county or municipal level.

Third, marijuana policy is in flux nationwide. Over the last decade, 11 states have legalized recreational use, another 15 have permitted medical use, and 12 apply some reduced degree of criminality.⁶ This rapidly evolving regulatory patchwork makes it less safe to assume that voters will be familiar with the current state of Florida law.

Fourth, both Congress and the Florida Legislature recently authorized the growing of hemp, which like marijuana comes from the plant *Cannabis sativa* L., but contains a lesser percentage of the drug THC. *See* Agriculture Improvement Act of 2018, Pub. L. 115-334, tit. X, § 10113, 132 Stat. 4908-19 (2018) (codified at 7 U.S.C. § 1621, *et seq.*); *id.*, tit. XII, § 12619, 132 Stat. 5018 (codified at 21 U.S.C. § 802(16)); Ch. 2019-132, Laws of Fla. Based on similarities between marijuana and hemp, there has already been confusion as to whether recent laws relating to hemp also impacted the legality of marijuana.⁷

A voter who generally supports increasing the quantum of regulation in the

⁶ “Map of Marijuana Legality by State,” DISA Global Solutions (last visited Nov. 1, 2019), *available at* <https://disa.com/map-of-marijuana-legality-by-state>.

⁷ *See, e.g.*, Shawn Mulcahy, “Did Florida Accidentally Legalize Pot? Officials Clamber for a Solution After Hazy Hemp Law,” WJCT (July 25, 2019), *available at* <https://news.wjct.org/post/did-florida-accidentally-legalize-pot-officials-clamber-solution-after-hazy-hemp-law>.

field of marijuana, or who seeks to outlaw or cut back on local decriminalization policies, may believe that the amendment accomplishes those aims when it actually does the opposite. Because “voters are entitled to know if they are being asked to open Florida to the expansive use of [] marijuana,” the amendment has no place on the ballot. *Use of Marijuana for Certain Medical Conditions*, 132 So. 3d at 810 (Polston, C.J., dissenting).

B. The summary misleadingly informs voters that marijuana will be regulated only for “limited use.”

Next, the ballot summary advises voters that the amendment “[r]egulates marijuana . . . for limited use.” That is incorrect. Nowhere in the text of the amendment would the new law place limitations on “use,” as distinct from “growing” or “possession.” The amendment would not, for instance, prohibit persons from smoking or ingesting marijuana in excessive amounts; forbid the use of marijuana in certain locations; or ban certain methods of using marijuana. Nor would the amendment bar the use of marijuana by certain categories of people, such as pregnant mothers, or forbid marijuana use in public places.

To the extent any limitation at all can be inferred from the text of the amendment, it stems only indirectly from the amendment’s limitation on the amount of marijuana a single person is allowed to “possess[]” at one time: “quantities reasonably indicative of personal use.” Pet. 23 (proposed Art. X, § 29(c)(1)). That, however, is hardly a limitation on “use.” Instead, the quantity of marijuana a person

will be allowed to possess in the wake of the amendment would appear to facilitate more use in a short period of time than would generally be humanly possible, and, in the event that a person nevertheless desires to obtain and use *more* marijuana, nothing in the text of the amendment precludes a person from procuring more after exhausting his or her current stock. And while the Sponsor might argue that the phrase “limited use” refers to the amendment’s decision to preserve existing statutory proscriptions on operating a motor vehicle while under the influence of marijuana, Pet. 29 (proposed Art. X, § 29(f)(2)), that is a limitation on driving, not on using marijuana.

In short, to the extent the ballot language warns voters at all that the amendment has the effect of legalizing recreational marijuana at the state level, it does so in misleading fashion by assuring the electorate that marijuana “use” will be “limited,” thereby suggesting a cautious and incremental approach to marijuana legalization that does not reflect reality. This Court has previously stricken proposed amendments where “the summary could lead a voter to believe that the initiative is limited” in some fashion, when in fact “the text of the initiative is not so limited.” *Advisory Op. to the Att’y Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994).

A similar analysis applies here.

C. The summary fails to warn voters of the amendment’s very serious implications under federal criminal law.

On top of that, the ballot summary nowhere cautions voters that, if adopted,

the amendment would purport to authorize, as a matter of state law, activities that would constitute violations of federal criminal law.

For decades, the possession, use, and sale of marijuana have been prohibited nationwide by the federal Controlled Substances Act (CSA). *See* 21 U.S.C. § 801, *et seq.*; *see also Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.”). Among other things, the CSA creates criminal penalties for the possession of any drug listed in a series of federal drug “schedules”; marijuana is included in Schedule I, a list of drugs with no currently accepted medical use and for which federal penalties are most severe. *See* 21 U.S.C. § 812; 21 C.F.R. § 1308.11(d)(23); 21 U.S.C. §§ 841(b), 844(a). Trafficking in marijuana is an offense punishable by up to life imprisonment, depending upon the amount. *See* 21 U.S.C. §§ 841(b)(1)(A)(vii), (b)(1)(B)(vii), (b)(1)(D). Any conspiracy to commit an offense under the CSA—which might well embrace an agreement made by any “cannabis establishment,” its owners, and employees to grow, transport, advertise, or sell recreational marijuana within Florida—is punishable to the same extent as the offense itself. 21 U.S.C. § 846.

Criminal liability under the CSA also extends to anyone who uses or maintains a property for the purpose of manufacturing, distributing, or using a controlled substance, as well as those who knowingly rent or lease for those purposes. 21 U.S.C. § 856(a)(1). The penalty for such a violation is incarceration for up to 20 years and fines of up to \$500,000 for an individual, or \$2,000,000 for a business entity. *Id.* § 856(b).

Notably, the United States Attorney General has recently rescinded an earlier policy exercising prosecutorial discretion *not* to prosecute persons guilty of federal marijuana offenses where that person’s conduct would have been permissible under state law.⁸ And, specific to Florida, federal prosecutors within the state have announced that they will prosecute even under circumstances where the local State Attorney’s Office declines to bring charges.⁹

The ballot summary says almost nothing about federal marijuana law and policy, and the little it does say is inadequate. In particular, the ballot summary indicates that the amendment “[d]oes not . . . immunize federal law violations.” But, at best, this language suggests that a *subset* of the conduct regulated by the

⁸ “Justice Department Issues Memo on Marijuana Enforcement,” U.S. Dep’t of Justice (Jan. 4, 2018), *available at* <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

⁹ “U.S. federal court in Florida to continue prosecuting marijuana cases,” ABC WTXL Tallahassee (Aug. 15, 2019), *available at* <https://www.wtxl.com/news/local-news/u-s-federal-court-in-florida-to-continue-prosecuting-marijuana-cases>.

amendment may implicate federal law. Otherwise, it would be fair for voters to wonder why the amendment would purport to regulate or legalize, at the state level, conduct that would remain *entirely* unlawful under federal law. In other words, the reasonable voter would interpret this language to suggest that *some* activities that would be legal at the state level would constitute violations of federal law. But this language does nothing to warn voters that *all* of the conduct regulated by the amendment would constitute a violation of federal criminal law.

Put differently, the ballot’s references to “limited use and growing” and to State-adopted “regulations to issue, renew, suspend, and revoke licenses for cannabis cultivation, product manufacturing, testing and retail facilities” are most reasonably construed to mean that at least some growing, sale, possession, and use of marijuana would be lawful if the amendment passes, when in fact *all* the activities the amendment purports to regulate would remain illegal under federal law.

Moreover, the summary’s immunity language does not warn that any potential violation of federal law will constitute a *criminal* violation, a distinction which—were voters apprised of it—might diminish support for the measure.

D. The title misleads voters because the amendment’s regulation of marijuana is not “similar to” existing regulations of alcohol.

Finally, the ballot title tells voters that the proposed amendment would “Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions.” But, in critical respects, the manner in which the

amendment would regulate recreational marijuana is *not* akin to existing regulations governing alcohol manufacture, sale, and consumption. Most markedly, alcohol is not governed by the constitution and is subject to regulation by the Legislature within the scope of its general police power; marijuana, on the other hand, would hereinafter be a constitutional right, the limited regulation of which would be the domain of the Department of Business and Professional Regulation, not the Legislature. The Legislature would therefore be unable to regulate recreational marijuana as it has traditionally regulated the alcohol industry.

That is significant, among other reasons, because the constitutionalization of the right to possess a controlled substance prevents the Legislature from responding to new social, political, or legal developments. *Cf. District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73 (2009) (explaining that to “constitutionalize [an] area” of law may “short-circuit ... a prompt and considered legislative response”). By contrast, nothing precludes the Legislature from responding with necessary and timely regulations in the field of alcohol.

CONCLUSION

For these reasons, the proposed amendment should be kept off the ballot.

Respectfully submitted.

Ashley Moody
ATTORNEY GENERAL

/s/ Jeffrey Paul DeSousa
Amit Agarwal (FBN 125637)
SOLICITOR GENERAL
Jeffrey Paul DeSousa (FBN 110951)
DEPUTY SOLICITOR GENERAL
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300
amit.agarwal@myfloridalegal.com
jeffrey.desousa@myfloridalegal.com

Counsel for Attorney General

CERTIFICATE OF FONT

I certify that this brief was prepared in 14-point Times New Roman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jeffrey Paul DeSousa

Jeffrey Paul DeSousa

DEPUTY SOLICITOR GENERAL

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this **first** day of November 2019, to the following:

William R. Wohlsifer
12612 4th Isle
Hudson, FL 34667-1928
william@infringement-attorney.com
william@wohlsifer.com
(727) 378-3657
Counsel for Sensible Florida, Inc

Joe Jacquot
Executive Office of the Governor
State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001
(850) 717-9310
joe.jacquot@eog.myflorida.com
*General Counsel to Governor
Ron DeSantis*

Jeremiah Hawkes
The Florida Senate
The Capitol
404 S. Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237
hawkes.jeremiah@flsenate.gov
*General Counsel to Senate President
Bill Galvano*

Mohammad O. Jazil
Michael R. Beato
mjazil@hgslaw.com
michaelb@hgslaw.com
Hopping Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
(850) 222-7500
*Counsel for Florida House of
Representatives*

Jason Gonzalez
Daniel Nordby
Benjamin Gibson
Amber Stone Nunnally
Rachel Procaccini
Shutts and Bowen LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
JasonGonzalez@shutts.com
DNordby@shutts.com
BGibson@shutts.com
ANunnally@shutts.com
RProcaccini@shutts.com
(850) 241-1717
*Counsel for Opponents Florida
Chamber of Commerce, Drug Free
America Foundation, National Drug-
Free Workplace Alliance, and Save
Our Society From Drugs*

Brad McVay
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
(850) 245-6536
brad.mcvay@dos.myflorida.com
*General Counsel to Secretary of
State
Laurel Lee*

/s/ Jeffrey Paul DeSousa
Jeffrey Paul DeSousa
DEPUTY SOLICITOR GENERAL