

SC19-2116

IN THE SUPREME COURT OF FLORIDA

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

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

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ARGUMENT

I. Standard of Review.

Make It Legal (the “Sponsor”) does not dispute the standard of review explained in the Initial Brief filed by the Florida Chamber of Commerce, Floridians Against Recreational Marijuana, Save Our Society from Drugs, and National Drug-Free Workplace Alliance (collectively, the “Opponents”). That is, the Court reviews de novo whether the proposed constitutional amendment is “clearly and conclusively” defective. (Opponents’ Initial Brief:6, 11); Sponsor’s Brief in Support of the Proposed Petition Initiative (“Sponsor’s Answer Brief”) at 8; *see, e.g., Advisory Opinion to Att’y Gen. re Right to Competitive Energy Market For Customers of Investor-Owned Utilities*, 2020 WL 103665, *2 (Fla. Jan. 9, 2020).

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

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

The Sponsor argues that the ballot summary does not mislead the public because the summary is not required to “educate” or “remind” voters of federal law, which prohibits the use and possession of marijuana and cannot be changed by a state constitutional amendment. (Sponsor’s Answer Brief at 11-22). But this

is not about educating voters on federal law or constitutional amendments. The issue raised by the Opponents, which the Sponsor does not directly address, is that the ballot summary is affirmatively misleading because, unlike the text of the Proposed Amendment, the summary does not disclose that the scope of the amendment is limited to Florida law; instead, it makes a blanket statement that the Proposed Amendment *permits* the recreational use and possession of marijuana. (Opponents' Initial Brief at 8-11); *see Advisory Opinion to Att'y Gen. re Right to Competitive Energy*, 2020 WL 103665 at *3 ("Ballot language may be clearly and conclusively defective either in an affirmative sense, because it misleads the voters as to the material effects of the amendment, or in a negative sense by failing to inform the voters of those material effects.") (citing *Dep't of State v. Florida Greyhound Ass'n, Inc.*, 253 So. 3d 513, 520 (Fla. 2018)).

The sweeping, unqualified representation in the summary is misleading because, as the Sponsor acknowledges, the recreational use and possession of marijuana would remain illegal under federal law. (Sponsor's Answer Brief at 17). It is not enough for the Sponsor to say that Florida voters should know that – when the summary says the amendment *permits, without qualification*, the use and possession of marijuana – the summary really means decriminalization only applies *under Florida law*. Section 101.161 exists, despite the presumption of knowledge that the Sponsor insists should fill in gaps in its favor. That is to say,

the presumption is not enough. The Sponsor has an obligation to comply with the mandatory clarity requirements of Section 101.161(1), which are designed “to assure that the electorate is advised of the true meaning, and ramifications, of an amendment.” *Wadhams v. Board of County Com’rs of Sarasota County*, 567 So. 2d 414, 416 (Fla. 1990) (citing *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)); accord *Advisory Opinion to Att’y Gen. re Right to Competitive Energy*, 2020 WL 103665 at *3.

Past marijuana initiatives and the current state of federal law do not give the Sponsor a pass to create the misleading impression that by virtue of the Proposed Amendment a more expansive legalization of marijuana is intended this time around. See *Advisory Opinion to Att’y Gen. re Right to Competitive Energy*, 2020 WL 103665 at *3 (ballot summary held invalid; “[t]he question is not whether a person has the right to sell electricity if the Initiative is adopted, but whether, as the ballot summary claims, the Initiative grants that right. It does not, and the ballot summary is therefore affirmatively misleading.”). That might very well affect how electors cast their vote on an issue as significant as decriminalizing the use and possession of marijuana.

This is not a matter of “disclos[ing] something that does not appear in the text of the Amendment.” (Sponsor Answer Brief at 15). To the contrary, the Sponsor expressly addressed in the text of the Proposed Amendment the limited

scope of the proposed change by including the phrase *under Florida law*. Proposed Amendment, Art. X, § 33(b)(1) & (2) (“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*.”; “[a] Medical Marijuana Treatment Center is permitted to sell, distribute, or dispense marijuana or marijuana accessories to an adult for personal use for any reason in compliance with this section and Department regulations and is not subject to criminal or civil liability or sanctions *under Florida law*.”) (emphasis added).

In the summary, the Sponsor chose to omit that limitation. By doing so, the summary does not adequately reflect the chief purpose of the Proposed Amendment, which would only permit the use and possession of marijuana under Florida law.

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

Here too the Sponsor relies on presumptions to try to clarify the ballot summary’s use of the existing regulatory framework that governs the medical use of marijuana. The Sponsor argues that the summary is not ambiguous or misleading because: (i) “[c]ommon sense dictates” that Medical Marijuana

Treatment Centers would be limited to dispensing up to 2.5 ounces of marijuana, even though the summary does not say that; and (ii) the reference to those medical centers “simply builds upon existing law, with which Florida voters are presumed to be familiar.” (Sponsor’s Answer Brief at 22, 24). That position shows there are deficiencies in the summary, as written, which prevent it from conveying the chief purpose of the Proposed Amendment (that is, to expand the lawful use of marijuana to non-medical uses under Florida law, independent of Florida’s regulation of the medical use of marijuana).

To follow the Sponsor’s logic, voters are presumed to know that Medical Marijuana Treatment Centers are in place to dispense marijuana only to qualifying patients (or their caregivers) for certain medical conditions. Art. X, § 29(a)(3), (b)(5), Fla. Const. The summary does not say differently. The medical centers are addressed in the second sentence of the summary, which provides: “Permits Medical Marijuana Treatment Centers to sell, distribute, or dispense marijuana and marijuana accessories if clearly labeled and in childproof packaging to adults.” Notably, the summary is silent on the amount of marijuana the medical centers can sell and the reasons for which they can sell marijuana. Even in the context of the entire summary, that incomplete construct lends itself to ambiguity. It is difficult to determine what the scope and effect of the Proposed Amendment is relative to medical centers, which the public associates with dispensing marijuana only for

medical use.

The point of Section 101.161(1) is that, when a sponsor proposes an amendment to the Florida Constitution, voters must be put on notice of what is at stake in clear, unambiguous language. *See Advisory Opinion to Att’y Gen. re Right to Competitive Energy*, 2020 WL 103665 at *3 (the purpose of Section 101.161(1) is “to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.”) (citing *Advisory Op. to the Att’y Gen. re Voting Restoration Amendment*, 215 So. 3d 1202, 1207 (Fla. 2017); *Advisory Op. to Att’y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998)). The clarity requirements of Section 101.161 are not met by presuming that voters should figure out what they are voting on.

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

The Sponsor argues that the ballot summary accurately states that marijuana use is prohibited in “defined public places” because there is in fact a definition of “public place” in the text. (Sponsor’s Answer Brief at 25). That is not dispositive of the issue. A ballot summary can be rendered “deceptive, because although it contains an absolutely true statement, it omits to state a material fact necessary in

order to make the statement made not misleading.” *Wadhams*, 567 So. 2d at 416 (quoting *Askew*, 421 So. 2d at 158 (Ehrlich, J., concurring)).

That brings us back to the broad definition of public place contained in the text. (Opponents’ Initial Brief at 13-14). The Sponsor tries to downplay it and treats the Opponents’ argument as a policy disagreement with the definition. (Sponsor’s Answer Brief at 28). But the deficiency, again, is the misleading wording of the summary, which makes the public place limitation appear more reasonable and less restrictive than it actually is.

The text of the Proposed Amendment contemplates an expansive view of public place – *i.e.*, “any public street, sidewalk, park, beach, *or other public commons.*” See Proposed Amendment, Art. X, § 33(a)(6) & (c)(4) (emphasis added). To the Sponsor’s point, public commons encompasses land (Sponsor’s Answer Brief at 26-27); it also includes shared public resources – *e.g.*, air, water. Lexico/Oxford Dictionary, <https://www.lexico.com/en/definition/commons> (“Land or *resources* belonging to or affecting the whole of a community”) (emphasis added). The point is, the broad restriction on use in public places in the text is more expansive than the summary explains—rendering the summary misleading.

Overall, these deficiencies render the Proposed Amendment ineligible for placement on the ballot.

Respectfully submitted,

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