

Medical Marijuana

Number: PETITION

Date: October 25, 2013

The Honorable Ricky Polston
Chief Justice, and Justices of
The Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

Dear Chief Justice Polston and Justices:

A political committee called People United for Medical Marijuana (the "Sponsor") has sponsored an initiative petition to amend the Florida Constitution. On September 26, 2013, this office received the initiative petition from the Secretary of State, along with a certification that the Sponsor obtained sufficient signatures to initiate this Court's review. See Fla. Const. art. IV, § 10; § 16.061, Fla. Stat. Accordingly, I now petition this Honorable Court for an opinion regarding the initiative petition's validity.

Introduction

When asked to amend our Constitution, Florida voters deserve full disclosure. They deserve proposals presented accurately and fairly—proposals that allow "an intelligent and informed vote." *Advisory Opinion to Atty. Gen. re Ltd. Casinos*, 644 So. 2d 71, 74 (Fla. 1994). Some proposals, though, use "wording techniques in an attempt to persuade voters." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008). These techniques can hide an amendment's true meaning, and when they "render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot—regardless of the substantive merit of the proposed changes." *Id.*

In this case, the Sponsor has presented its proposal in a way that does not convey its "true meaning and ramifications." *Advisory Opinion to the Attorney Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994). Indeed, the Sponsor has obscured the most fundamental issue underlying its proposal: the nature and scope of marijuana use the amendment would allow. The ballot title and summary suggest that the amendment would allow medical marijuana in narrow, defined circumstances, and only for patients with "debilitating diseases." But if the amendment passed, Florida law would allow marijuana in limitless situations. Any physician could approve marijuana for seemingly any reason to seemingly any person (of any age)—including those without any "debilitating disease." So long as a physician held the opinion that the drug use "would likely outweigh" the risks, Florida would be powerless to stop it.

In addition, rather than informing voters that federal criminal law restricts medical marijuana, the ballot summary misleadingly suggests the opposite. The summary says the amendment "[a]llows the medical use of marijuana," even though federal law prohibits it. And by saying that the amendment "[d]oes not authorize violations of federal law," the summary implies that the

amendment squares with existing federal law, rather than flatly contradicting it.

Because of how the amendment is presented, its true scope and effect remain hidden. And because Florida voters deserve the truth, this Court has long rejected proposals that "'hide the ball' as to the amendment's true effect." *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000).

The Amendment's Text, Ballot Title, and Ballot Summary

The full text of the proposed amendment, which would add a new section 29 to Article X of the Florida Constitution, is:

"ARTICLE X, SECTION 29. Medical marijuana production, possession and use.—

(a) PUBLIC POLICY.

(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.

(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.

(b) DEFINITIONS. For purposes of this section, the following words and terms shall have the following meanings:

(1) 'Debilitating Medical Condition' means cancer, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis or other conditions for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient.

(2) 'Department' means the Department of Health or its successor agency.

(3) 'Identification card' means a document issued by the Department that identifies a person who has a physician certification or a personal caregiver who is at least twenty-one (21) years old and has agreed to assist with a qualifying patient's medical use of marijuana.

(4) 'Marijuana' has the meaning given cannabis in Section 893.02(3), Florida Statutes (2013).

(5) 'Medical Marijuana Treatment Center' means an entity that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their personal caregivers and is registered by the Department.

(6) 'Medical use' means the acquisition, possession, use, delivery, transfer, or administration of marijuana or related supplies by a qualifying patient or personal caregiver for use by a qualifying patient for the treatment of a debilitating medical condition.

(7) 'Personal caregiver' means a person who is at least twenty-one (21) years old who has agreed to assist with a qualifying patient's medical use of marijuana and has a caregiver identification card issued by the Department. A personal caregiver may assist no more than five (5) qualifying patients at one time. An employee of a hospice provider, nursing, or medical facility may serve as a personal caregiver to more than five (5) qualifying patients as permitted by the

Department. Personal caregivers are prohibited from consuming marijuana obtained for the personal, medical use by the qualifying patient.

(8) 'Physician' means a physician who is licensed in Florida.

(9) 'Physician certification' means a written document signed by a physician, stating that in the physician's professional opinion, the patient suffers from a debilitating medical condition, that the potential benefits of the medical use of marijuana would likely outweigh the health risks for the patient, and for how long the physician recommends the medical use of marijuana for the patient. A physician certification may only be provided after the physician has conducted a physical examination of the patient and a full assessment of the patient's medical history.

(10) 'Qualifying patient' means a person who has been diagnosed to have a debilitating medical condition, who has a physician certification and a valid qualifying patient identification card. If the Department does not begin issuing identification cards within nine (9) months after the effective date of this section, then a valid physician certification will serve as a patient identification card in order to allow a person to become a 'qualifying patient' until the Department begins issuing identification cards.

(c) LIMITATIONS.

(1) Nothing in this section shall affect laws relating to non-medical use, possession, production or sale of marijuana.

(2) Nothing in this section authorizes the use of medical marijuana by anyone other than a qualifying patient.

(3) Nothing in this section allows the operation of a motor vehicle, boat, or aircraft while under the influence of marijuana.

(4) Nothing in this law section requires the violation of federal law or purports to give immunity under federal law.

(5) Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any place of education or employment, or of smoking medical marijuana in any public place.

(6) Nothing in this section shall require any health insurance provider or any government agency or authority to reimburse any person for expenses related to the medical use of marijuana.

(d) DUTIES OF THE DEPARTMENT. The Department shall issue reasonable regulations necessary for the implementation and enforcement of this section. The purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients. It is the duty of the Department to promulgate regulations in a timely fashion.

(1) Implementing Regulations. In order to allow the Department sufficient time after passage of this section, the following regulations shall be promulgated no later than six (6) months after the effective date of this section:

a. Procedures for the issuance of qualifying patient identification cards to people with physician certifications, and standards for the renewal of such identification cards.

b. Procedures for the issuance of personal caregiver identification cards to persons qualified to assist with a qualifying patient's medical use of marijuana, and standards for the renewal of such identification cards.

c. Procedures for the registration of Medical Marijuana Treatment Centers that include procedures for the issuance, renewal, suspension, and revocation of registration, and standards to ensure security, record keeping, testing, labeling, inspection, and safety.

d. A regulation that defines the amount of marijuana that could reasonably be presumed to be an adequate supply for qualifying patients' medical use, based on the best available evidence. This presumption as to quantity may be overcome with evidence of a particular qualifying patient's

appropriate medical use.

(2) Issuance of identification cards and registrations. The Department shall begin issuing qualifying patient and personal caregiver identification cards, as well as begin registering Medical Marijuana Treatment Centers no later than nine months (9) after the effective date of this section.

(3) If the Department does not issue regulations, or if the Department does not begin issuing identification cards and registering Medical Marijuana Treatment Centers within the time limits set in this section, any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department's constitutional duties.

(4) The Department shall protect the confidentiality of all qualifying patients. All records containing the identity of qualifying patients shall be confidential and kept from public disclosure other than for valid medical or law enforcement purposes.

(e) LEGISLATION. Nothing in this section shall limit the legislature from enacting laws consistent with this provision.

(f) SEVERABILITY. The provisions of this section are severable and if any clause, sentence, paragraph or section of this measure, or an application thereof, is adjudged invalid by any court of competent jurisdiction other provisions shall continue to be in effect to the fullest extent possible.

The proposed amendment's ballot title is "Use of Marijuana for Certain Medical Conditions," and the proposed amendment's ballot summary is:

"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."

Pursuant to Rule 9.510(b), Florida Rules of Appellate Procedure, I also provide the following information:

1. The name of the sponsor and address: The sponsor of the initiative is People United for Medical Marijuana, 20 North Orange Avenue, Suite 1600, Orlando, Florida 32801.

2. The name and address of the sponsor's attorney, if the sponsor is represented: Mr. Jon L. Mills, Boies, Schiller & Flexner, LLP, 100 Southeast 2nd Street, Suite 2800, Miami, Florida 33131.

3. A statement as to whether the sponsor has obtained the requisite number of signatures to have the initiative placed on the ballot: As of September 26, 2013, the sponsor had not obtained the necessary number of signatures to place the initiative on the ballot.

4. The current status of the signature collection process: The Secretary of State's September 26, 2013, letter states that the Supervisors of Elections have certified to the Division of Elections a total of 94,541 valid petition signatures. This number represents more than 10% of the total number of valid signatures needed from electors statewide and in a least one-fourth of the

congressional districts in order to place the initiative on the general election ballot.

5. The date of the election during which the sponsor is planning to submit the proposed amendment: The initiative itself does not specify the date of the election. The Department of State advises that the earliest date that this proposed amendment could be placed on the ballot is November 4, 2014, provided the sponsor successfully obtains the requisite number of valid signatures by February 1, 2014.

6. The last possible date that the ballot for the target election can be printed in order to be ready for the election: The Department of State advises that this date is September 4, 2014, if the amendment is to be placed on the November 2014 ballot.

7. A statement identifying the date by which the Financial Impact Statement will be filed, if the Financial Impact Statement is not filed concurrently with the request: This office has been advised that the Financial Impact Estimating Conference intends to file the financial impact statement no later than November 8, 2013.

8. The names and complete mailing addresses of all of the parties who are to be served:

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People United for Medical Marijuana
Post Office Box 560296
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The Honorable Rick Scott
Governor, State of Florida
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Mr. Ken Detzner, Secretary
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The Honorable Don Gaetz
President, Florida Senate
Senate Office Building, Room 212
420 The Capitol
404 South Monroe Street

Tallahassee, Florida 32399-1100

The Honorable Will Weatherford
Speaker, Florida House of Representatives
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Financial Impact Estimating Conference Director's Office
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Mr. Allen Winsor
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The Ballot Title and Summary Do Not Convey the Amendment's True Meaning

As this Court has explained, "[t]he citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy." *In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004). Indeed, because the actual text of a proposed amendment does not appear on the ballot, "an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution." *Id.* at 653-54. The proposal at issue falls short because it misleads regarding both the amendment's scope and its conflict with existing federal law.

This Petition identifies these two prominent defects, which I respectfully suggest require this Court's attention. See § 16.061(1), Fla. Stat. (petition may identify issues for resolution). Within the Court's deadline for doing so, this office will also submit a brief with legal argument regarding the proposal's validity, addressing the issues raised here and identifying other, independent defects. See Fla. Const. art. IV, § 10 (providing for "interested persons to be heard on the questions presented").

The Ballot Title and Summary Mislead Voters Regarding the Amendment's True Scope.

Among other requirements, a ballot title and summary must "accurately describe the scope of the text of the amendment." *Roberts v. Doyle*, 43 So. 3d 654, 659 (Fla. 2010). When the title or summary suggest a more limited scope than the amendment provides, they mislead the public and invalidate the proposal. See, e.g., *Advisory Opinion to the Atty. Gen.*, 656 So. 2d 466, 469

(Fla. 1995). Here, the narrow scope presented in the title and summary cannot square with the amendment's true scope, which is anything but narrow.

According to the ballot summary, medical marijuana would be only for those "with debilitating diseases." But the amendment itself does not limit use to individuals with "debilitating diseases," instead allowing marijuana for those with imprecise "other conditions." Nowhere does the amendment even require that the individual's "condition" be a "disease" or "debilitating." Rather, the amendment creates a defined term—"debilitating medical condition"—that includes not only cancer, ALS, HIV, AIDS, and Parkinson's disease, but also "other conditions for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient." Amendment § 29(b)(1). This open-ended catchall includes no qualification: so long as a "physician"[1] conducts "a physical examination of the patient and a full assessment of the patient's medical history," that physician may certify "that in the physician's professional opinion," the patient has a "debilitating medical condition." Particularly for a physician who considers marijuana's health risks low, there is no "condition" beyond the amendment's reach. The ballot summary does not convey this breathtaking scope, instead telling voters that marijuana would be limited to "individuals with debilitating diseases."

This Court has invalidated summaries that use narrower terms than the amendment's text. *In Advisory Opinion to the Atty. Gen.*, 656 So. 2d 466, 469 (Fla. 1995), for example, the summary described allowing casinos in "hotels." The amendment itself, though, used the phrase "transient lodging establishments"—not "hotels". As this Court explained, "the public perceives the term 'hotel' to have a much narrower meaning than the term 'transient lodging establishment.'" *Id.* "Thus, while the summary leads the voters to believe that casinos will be operated only in 'hotels,' the proposed amendment actually permits voters to authorize casinos in any number of facilities, including a bed and breakfast inn." *Id.* Similarly, while this summary leads voters to believe that medical marijuana is for "debilitating diseases" only, the proposed amendment actually permits marijuana for any number of conditions, including those that are neither "debilitating" nor "diseases." *Cf. Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 897 (Fla. 2000) (invalidating amendment because summary used "divergent terminology" from amendment's text).

The ballot title is likewise defective because it, too, suggests a more restrictive scope than the amendment delivers. The title—"use of marijuana for certain medical conditions"—wrongly indicates the specific conditions are determined. The term "certain" is understood to mean fixed, definite, or settled. *See, e.g.,* Am. Heritage Dictionary, 254 (2d ed. 1990) ("definite" or "fixed"); Merriam-Webster Dictionary ("fixed" or "settled") (available at www.m-w.com).[2] For example, the ballot title "limited political terms in certain elected offices," used the term "certain" to refer to a fixed and settled set of offices—not an open-ended group to be determined later. *See Advisory Opinion to Attorney Gen.—Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991). Here, by contrast, there is nothing "certain" about the medical conditions to which the amendment would apply.

Next, the proposal is not saved by the summary's suggestion that the amendment allows marijuana only "for individuals with debilitating diseases as determined by a licensed Florida physician." (emphasis added). This only adds to the problem by misleadingly signaling that the

physician is, in fact, diagnosing the presence of a "debilitating disease." The summary offers no hint that the amendment requires no such finding. Indeed, under the amendment, a "debilitating medical condition" means anything a physician wants it to mean.

The limitless definition of "debilitating medical condition" has even greater significance because of another undisclosed feature of the amendment: a physician's certification is effectively unreviewable. Specifically, the amendment provides that "[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." Amendment § 29(a)(2). While existing law allows for discipline when physicians fall short of the appropriate standard of care, *see, e.g.*, §§ 458.331(1)(t); 456.50(1)(g), Fla. Stat., the amendment purports to immunize physicians from consequences of negligently authorizing marijuana. Neither the title nor the summary notifies voters that the amendment frees physicians from existing requirements regarding standard of care—or that the current cause of action for medical negligence will be unavailable for the negligent prescription of marijuana.

If Florida voters are asked to approve an amendment to grant physicians unbridled discretion to allow marijuana for limitless "conditions," they should have adequate notice to allow intelligent and informed ballots. *See Advisory Opinion to the Attorney Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994) ("[T]he ballot title and summary must advise the electorate of the true meaning and ramifications of the amendment and, in particular, must be accurate and informative."). Here, though, the title and summary hide the amendment's true scope and purpose. *Cf. Doyle*, 43 So. 3d at 659 ("A proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose.").

The Ballot Summary Leads Voters To Believe there Is No Conflict With Federal Law.

The summary is defective for an additional, independent, reason. Its first words are: "Allows the medical use of marijuana for individuals with debilitating diseases." But what the ballot summary says the amendment "allows" is forbidden under federal law. *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."). The amendment's legal effect, then, is not to "allow" marijuana, notwithstanding the summary's suggestion. *See In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) ("This misleading language does not reflect the true legal effect of the proposed amendment.").

Nonetheless, rather than remain silent about federal law, the summary raises the topic by cryptically stating that the amendment "[d]oes not authorize violations of federal law." This tells the voter nothing. Certainly, the amendment does not authorize violations of federal law, which no state law could. Yet the Sponsor chose this "wording technique" rather than explaining that marijuana use is criminal under federal law. Because voters know that state law cannot authorize violations of federal law—and because voters would find it counterintuitive that Florida law would authorize conduct federal law prohibits—the summary will mislead some voters into

believing that federal law already permits medical marijuana (as opposed to recreational marijuana) or that the amendment utilizes some federal-law exception. This, of course, is not correct. Congress has "designate[d] marijuana as contraband for any purpose" and "expressly found that the drug has no acceptable medical uses." *Gonzales*, 545 U.S. at 27. Voters deserve to know that. As this Court has said, "[t]he voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008).

* * *

Pursuant to Section 16.061, Florida Statutes, I respectfully request this Honorable Court's opinion as to whether the proposed amendment complies with Article XI, section 3, Florida Constitution, and whether the amendment's ballot title and summary comply with section 101.161, Florida Statutes.

Respectfully submitted,

Pamela Jo Bondi
Attorney General

[1] The amendment's text defines "physician" only as "a physician who is licensed in Florida," without specifying whether the term is limited to medical doctors or includes chiropractors, podiatrists, and others who are considered "physicians" under some provisions of Florida law. *Compare, e.g.*, § 456.056(a), Fla. Stat. ("Physician' means a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, a chiropractic physician licensed under chapter 460, a podiatric physician licensed under chapter 461, or an optometrist licensed under chapter 463.") *with id.* § 409.9131(2)(e) ("*Physician'* means a person licensed to practice medicine under chapter 458 or a person licensed to practice osteopathic medicine under chapter 459.").

[2] Black's Law Dictionary defines "certain" this way: "Ascertained; precise; identified; settled; exact; definitive; clearly known; unambiguous; or, in law, capable of being identified or made known, without liability to mistake or ambiguity, from data already given. Free from doubt." *Black's Law Dictionary*, 225 (6th ed. 1990).