SC2023-0682

IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF OF FLORIDA CHAMBER OF COMMERCE IN OPPOSITION TO THE INITIATIVE

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IDENTITY AND INTEREST OF OPPONENT

The Florida Chamber of Commerce is Florida's largest federation of employers, chambers of commerce, and associations. It seeks to protect the Florida Constitution as a foundational document that provides for basic rights and organization of government.

STATEMENT OF THE CASE AND FACTS

On May 15, 2023, the Attorney General petitioned this Court for an advisory opinion as to the validity of an initiative petition titled "Adult Personal Use of Marijuana" (the "Proposed Amendment"). This Court has jurisdiction. *See* art. IV, § 10, art. V, § 3(b)(10), Fla. Const.

The ballot summary for the Proposed Amendment states:

> Allows adults 21 years or older to possess, purchase, or use marijuana products and marijuana accessories for non-medical personal consumption by smoking, ingestion, or otherwise; allows Medical Marijuana Treatment Centers, and other state licensed entities, to acquire, cultivate, process, manufacture, sell, and distribute such products and accessories. Applies to Florida law; does not change, or immunize violations of, federal law. Establishes possession limits for personal use. Allows consistent legislation. Defines terms. Provides effective date.

As for its text, the Proposed Amendment is not written on a blank slate. Instead, it would alter article X, section 29 of the Florida Constitution, titled "Medical marijuana production, possession and use." Presently, article X, section 29 consists of more than 1200 words that span three "public policy" statements, ten "definitions," eight "limitations," four main "duties" of the

Department of Health, a "legislation" provision, and a "severability" provision.

If adopted by Florida voters, the Proposed Amendment would alter article X, section 29 in six respects: (1) by changing its title; (2) by adding two new "public policy" statements; (3) by adding three new "definitions"; (4) by entirely rewording the second of eight "limitations" and adding new language to the fifth limitation; (5) by changing the "legislation" provision to authorize "the licensure of entities that are not Medical Marijuana Treatment Centers"; and (6) by providing an effective date. Grafting the Proposed Amendment onto the existing medical marijuana provision would cause article X, section 29 to read as follows—with strikethroughs indicating deletions and underlining indicating additions:

ARTICLE X
MISCELLANEOUS

SECTION 29. ~~Medical m~~Marijuana production, possession and use.—

(a) PUBLIC POLICY.

(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.

(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.

(4) The non-medical personal use of marijuana products and marijuana accessories by an adult, as defined below, in compliance with this section is not subject to any criminal or civil liability or sanctions under Florida Law.

(5) Medical Marijuana Treatment Centers, and other entities licensed as provided below, are allowed to acquire, cultivate, process, manufacture, sell, and distribute marijuana products and marijuana accessories to adults for personal use upon the Effective Date provided below. A Medical Marijuana Treatment Center, or other state licensed entity, including its agents and employees, acting in accordance with this section as it relates to acquiring, cultivating, processing, manufacturing, selling, and distributing marijuana products and marijuana accessories to adults for personal use shall not be subject to criminal or civil lability or sanctions under Florida law.

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

(1) “Debilitating Medical Condition” means cancer, epilepsy, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS),

Crohn's disease, Parkinson's disease, multiple sclerosis, or other debilitating medical conditions of the same kind or class as or comparable to those enumerated, and 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 qualifying patient or a caregiver.

(4) "Marijuana" has the meaning given cannabis in Section 893.02(3), Florida Statutes (2014), and, in addition, "Low-THC cannabis" as defined in Section 381.986(1)(b), Florida Statutes (2014), shall also be included in the meaning of the term "marijuana."

(5) "Medical Marijuana Treatment Center" (MMTC) 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 caregivers and is registered by the Department.

(6) "Medical use" means the acquisition, possession, use, delivery, transfer, or administration of an amount of marijuana not in conflict with Department rules, or of related supplies by a qualifying patient or caregiver for use by the caregiver's designated qualifying patient for the treatment of a debilitating medical condition.

(7) "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 qualified for and obtained a caregiver identification card issued by the

Department. The Department may limit the number of qualifying patients a caregiver may assist at one time and the number of caregivers that a qualifying patient may have at one time. Caregivers are prohibited from consuming marijuana obtained for medical use by the qualifying patient.

(8) "Physician" means a person who is licensed to practice medicine 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 medical use of marijuana would likely outweigh the potential 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 and a full assessment of the medical history of the patient. In order for a physician certification to be issued to a minor, a parent or legal guardian of the minor must consent in writing.

(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.

(11) "Marijuana accessories" means any equipment, product, or material of any kind that are used for inhaling, ingesting, topically applying, or otherwise introducing marijuana products into the human body for personal use.

(12) “Marijuana products” means marijuana or goods containing marijuana.

(13) “Personal use” means the possession, purchase, or use of marijuana products or marijuana accessories by an adult 21 years of age or older for non-medical personal consumption by smoking, ingestion, or otherwise. An adult need not be a qualifying patient in order to purchase marijuana products or marijuana accessories for personal use from a Medical Marijuana Treatment Center. An individual’s possession of marijuana for personal use shall not exceed 3.0 ounces of marijuana except that not more than five grams of marijuana may be in the form of concentrate.

(c) LIMITATIONS.

(1) Nothing in this section allows for a violation of any law other than for conduct in compliance with the provisions of this section.

~~(2) Nothing in this section shall affect or repeal laws relating to non-medical use, possession, production, or sale of marijuana.~~

(2) Nothing in this amendment prohibits the Legislature from enacting laws that are consistent with this amendment.

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

(4) Nothing in this section shall permit the operation of any vehicle, aircraft, train or boat while under the influence of marijuana.

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

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

(7) 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.

(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.

(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 and annual renewal of qualifying patient identification cards to people with physician certifications and standards for renewal of such identification cards. Before issuing an identification card to a minor, the Department must receive written consent from the minor's parent or legal guardian, in addition to the physician certification.

b. Procedures establishing qualifications and standards for caregivers, including conducting appropriate

background checks, and procedures for the issuance and annual renewal of caregiver identification cards.

c. Procedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper 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) Identification cards and registrations. The Department shall begin issuing qualifying patient and caregiver identification cards, and registering MMTCs no later than nine (9) months 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 MMTCs 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 section. <u>The legislature may provide for the licensure of entities that are not Medical Marijuana Treatment Centers to acquire, cultivate, possess, process, transfer,</u>

transport, sell, and distribute marijuana products and marijuana accessories for personal use by adults.

(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 a court of competent jurisdiction other provisions shall continue to be in effect to the fullest extent possible.

(g) EFFECTIVE DATE. This amendment shall become effective six (6) months after approval by the voters.

In compliance with this Court's briefing schedule, the Florida Chamber of Commerce submits its initial brief as an interested party opposed to the Proposed Amendment.

SUMMARY OF ARGUMENT

The power to amend Florida's Constitution by initiative petition is not unfettered. Rather, a proposed amendment must comply with the "one subject" limitation imposed by article XI, section 3 of the Florida Constitution. And the proposed amendment's ballot title and summary must also satisfy the clarity requirements of section 101.161(1), Florida Statutes. The failure to satisfy either the constitutional or statutory requirement is fatal, and the Proposed Amendment in this case fails to satisfy both.

Contrary to article XI, section 3, the Proposed Amendment impermissibly embraces the dual subjects of decriminalization *and* commercialization of recreational marijuana. The prohibited duality is apparent on the face of the Proposed Amendment's text, hallmarked by its use of impermissible logrolling, and inherent in its substantial alteration and performance of both legislative and executive functions.

Also, contrary to section 101.161(1), the ballot title and summary fail to disclose that the commercialization of recreational marijuana is a chief purpose of the Proposed Amendment—so much so that it would preclude adults 21 years of age or older from growing marijuana for their own personal use. Moreover, to the extent that the ballot title and summary hint that the Proposed Amendment has a commercial purpose, they affirmatively mislead voters to believe that a vote for the Proposed Amendment is a vote for business as usual in Florida—obscuring that the Proposed Amendment authorizes an entirely new licensing scheme that will allow for the proliferation of recreational marijuana dispensaries.

Because the Proposed Amendment is clearly and conclusively defective when measured against the governing constitutional and

statutory requirements, this Court should preclude its placement on the ballot.

STANDARD OF REVIEW

In reviewing the validity of an initiative petition, this Court has traditionally measured whether the proposed amendment is "clearly and conclusively defective" under either of two requirements: (1) the single-subject requirement of article XI, section 3 of the Florida Constitution, which applies to the text of the proposed amendment itself; or (2) the clarity requirements of section 101.161, Florida Statutes, which govern the proposed amendment's ballot title and summary. *Adv. Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1179 (Fla. 2021) (quoting *Adv. Op. to Att'y Gen. re Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 891 (Fla. 2000)).[1]

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1. In 2020, the Florida Legislature amended Florida law to require the Attorney General to expand the scope of the advisory opinion requested from this Court to include whether the proposed amendment is facially invalid under the United States Constitution. *See* ch. 2020-15, § 2, Laws of Fla. (codified at § 16.061(1), Fla. Stat.). This Court has not yet decided what the remedy should be if an initiative petition is facially invalid under the United States Constitution. But addressing that question is unnecessary here because the Proposed Amendment is clearly and conclusively defective under the Court's traditional inquiry and thus cannot be

The Court's "clearly and conclusively defective" standard of review reflects how it balances the tension between the right of Florida's citizens to formulate their own organic law and the importance of the Florida Constitution as the State's foundational governing document. *See Adv. Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses*, 818 So. 2d 491, 494 (Fla. 2002) (explaining that because "the Florida Constitution embodies the right of self-determination for *all* Florida's citizens," the "Court traditionally has been reluctant to interfere with this right by barring citizens from formulating their own organic law," *except* " 'where there is an entire failure to comply with a plain and essential requirement of [the law]' ") (quoting *Pope v. Gray*, 104 So. 2d 841, 842 (Fla. 1958)); *see also Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984) ("requir[ing] strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions").

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placed on the ballot. *See In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006) (explaining that the Court will exercise judicial restraint to "avoid considering a constitutional question when the case can be decided on nonconstitutional grounds").

ARGUMENT

I. BECAUSE THE PROPOSED AMENDMENT FORCES VOTERS TO DECIDE, BY A SINGLE VOTE, WHETHER FLORIDA SHOULD DECRIMINALIZE *AND* COMMERCIALIZE RECREATIONAL MARIJUANA, IT VIOLATES THE "ONE SUBJECT" REQUIREMENT OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION.

Article XI, section 3 of the Florida Constitution imposes a textual limitation on any citizen's initiative petition—namely that the proposed constitutional amendment "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const.[2]

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2. Article XI, section 3 of the Florida Constitution states in full:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

In recent years, this Court has solidified its stance as a textualist court. *See, e.g.*, *Adv. Op. to Gov. re Implementation of Amend. 4, the Voting Restoration Amend.*, 288 So. 3d 1070, 1078 (Fla. 2020) ("We . . . adhere to the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.' " (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012))).

Even so, where the "one subject" requirement of article XI, section 3 is concerned, the Court has not focused on "determining the objective meaning of the text." *Id.* Instead, the Court has focused on the "intent and purpose" of the single-subject requirement, *Fine*, 448 So. 2d at 993, which this Court has said is for a proposed amendment to have "a logical and natural oneness of purpose," *id.* at 990. *See*, *e.g.*, *Adv. Op. to Att'y Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet*, 291 So. 3d 901, 905 (Fla. 2020) (quotation omitted).

It would be truer to textualism for this Court to rule that—in the context of article XI, section 3—the word "one" means "single" and the word "subject" means "topic." *See The American Heritage*

Dictionary of the English Language (5th ed. 2022)[3] (defining "single" as "[c]onsisting of one in number" and identifying "topic" as a synonym of "subject" that means "[t]he subject of a speech, essay, thesis, or discourse"); *see also Black's Law Dictionary* (11th ed. 2019) (defining the "one-subject rule" as "[t]he principle that a statute should embrace only one topic, which should be stated in its title").

Indeed, applying the supremacy-of-text principle to the "one subject" requirement of article XI, section 3 would avoid perpetuating a "vague and malleable" "conception of 'oneness' [of purpose]" that "change[s] every time new members . . . come onto th[e] Court." *Adv. Op. to Att'y Gen.—Ltd. Pol. Terms in Certain Elective Offs.*, 592 So. 2d 225, 231 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part); *see also* Scalia & Garner, *Reading Law* at 18 ("Any provision of law or of private ordering can be said to have a number of purposes, which can be placed on a ladder of abstraction.").

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3. This dictionary is available at: https://www.ahdictionary.com (last visited June 26, 2023).

Nevertheless, in this case, regardless of whether the Court enforces the textual "one subject" requirement of article XI, section 3 or applies decades of precedent rooted in the requirement's "intent and purpose," *Fine*, 448 So. 2d at 993, the result is the same. Because the Proposed Amendment embraces two subjects—the decriminalization *and* commercialization of recreational marijuana—it violates the single-subject requirement of article XI, section 3 and cannot be placed on the ballot. Three points underscore why.

A. On its face, the Proposed Amendment embraces dual subjects.

Textually, the Proposed Amendment embraces dual subjects by decriminalizing *and* commercializing recreational marijuana. The "personal use" promised by the Proposed Amendment connotes a *personal* right. *See Black's Law Dictionary* (11th ed. 2019) (defining "personal right" as "[a] right that forms part of a person's legal status or personal condition"). Something that is personal is commonly understood to be private. *See The American Heritage Dictionary of the English Language* (5th ed. 2022) (defining "private" to mean "[o]f or confined to the individual; personal"). Yet, the

Proposed Amendment does not stop at decriminalizing and immunizing the adult personal use of marijuana under Florida law; nor does it limit itself to addressing "matter directly related therewith." Art. XI, § 3, Fla. Const.

Instead, the Proposed Amendment moves on to an entirely different subject—the commercialization of recreational marijuana. *See The American Heritage Dictionary of the English Language* (5th ed. 2022) (defining "commercialization" as "[t]o apply methods of business to for profit"). The Proposed Amendment does so by authorizing Medical Marijuana Treatment Centers ("MMTCs")—which are currently only authorized to deal in medical marijuana—to "acquire, cultivate, process, manufacture, sell, and distribute marijuana products and marijuana accessories to adults for personal use." Proposed Amendment at (a)(5). And the Proposed Amendment goes even further by providing for the licensure of "other entities" to do the same. *Id.*; *see also id.* at (e) (adding the words "possess," "transfer," and "transport" to the list of authorized activities). This commercialization component of the Proposed Amendment is plainly not "personal" and thus cannot "be logically viewed as having a natural relation and connection" to the subject

of "personal use" that the Proposed Amendment identifies—through its ballot title—as its "single dominant plan or scheme." *Fine*, 448 So. 2d at 990 ("Unity of object and plan is the universal test.") (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)).

Accordingly, because the Proposed Amendment on its face impermissibly embraces two subjects—the decriminalization *and* commercialization of recreational marijuana—this Court should hold that it clearly and conclusively violates the "one subject" requirement of article XI, section 3 of the Florida Constitution. *See Fine*, 448 So. 2d at 988 ("The single-subject requirement in article XI, section 3, mandates that the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution.").

B. Tethering the decriminalization of recreational marijuana to its commercialization is impermissible logrolling.

Further underscoring the single-subject violation is that the Proposed Amendment presents a textbook example of logrolling. Logrolling is "a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval

of an otherwise unpopular issue." *Adv. Op. to Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994). Logrolling is the hallmark of a single-subject violation because it forces voters "to vote in the 'all or nothing' fashion that the single subject requirement safeguards against." *Adv. Op. to Att'y Gen. re Independent Nonpartisan Comm'n to Apportion Legis. & Cong. Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1226 (Fla. 2006).

Decriminalizing the adult personal use of marijuana and creating a commercial recreational marijuana industry are discrete subjects with differing degrees of voter support. Polls tend to show above-average support for states decriminalizing the recreational use of marijuana. *See, e.g.*, CBS News Poll of Adults in the U.S. – April 14-18, 2023 (64% favoring legalization).[4] But the numbers change when people are asked whether they favor or oppose "having a licensed business in [their] neighborhood that sells recreational marijuana." *Id.* (37% oppose; 31% favor; 32% indifferent). And

4. The poll is available at: https://docs.cdn.yougov.com/v2zrmdg8d2/cbsnews_20230418_marijuana.pdf (last visited June 26, 2023).

among those who oppose the licensed sale of recreational marijuana in their neighborhood, 80% or more cite increased crime, increased use by minors, decreased desirability of the neighborhood, and the harm to people's health as reasons for their opposition. *Id.*

Polls like this show that voters view the decriminalization and commercialization of recreational marijuana as discrete subjects. Yet, if the Court approves the Proposed Amendment, Florida's voters will face the all-or-nothing choice to decriminalize recreational marijuana *and* simultaneously commercialize it.[5]

In the past, this Court has invalidated proposed amendments that presented similar all-or-nothing propositions. One example is a proposed amendment that would have created a new redistricting commission *and* changed the standards applicable to the districts that the new commission would have created. *See Nonpartisan Comm'n*, 926 So. 2d at 1225. In denying this proposed

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5. That the Proposed Amendment attempts to force such a choice is unsurprising. The Florida Department of State's records show that a single MMTC contributed virtually all the tens of millions of dollars received by the sponsor, Smart & Safe Florida. The sponsor's campaign finance activity is available at: *https://dos.elections.myflorida.com/committees/ComDetail.asp?account=83475* (last visited June 26, 2023).

amendment's placement on the ballot, the Court explained that combining these two subjects was logrolling since "[a] voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place." *Id.* at 1226.

Similarly, this Court invalidated a proposed amendment that would have established a trust to restore the Everglades *and* required the sugar industry to fund it. *See Save Our Everglades*, 636 So. 2d at 1341. In doing so, this Court explained that this "duality of purposes" is "precisely the sort of logrolling that the single-subject requirement was designed to foreclose" because "[o]ne objective—to restore the Everglades—is politically fashionable, while the other—to compel the sugar industry to fund the restoration—is more problematic," yet "voters would be forced to choose all or nothing." *Id.*

Like the defective amendments in *Nonpartisan Commission* and *Save Our Everglades*, the Proposed Amendment logrolls the

disparate subjects of decriminalizing and commercializing recreational marijuana. By doing so, it impermissibly forces Florida's voters into an all-or-nothing choice. Because the single-subject requirement prohibits this duality, the Court should preclude the Proposed Amendment's placement on the ballot.

C. The Proposed Amendment substantially alters or performs the functions of multiple branches of state government.

The Proposed Amendment also evinces another telltale sign of a single-subject violation: it "substantially alters or performs the functions of multiple branches" of state government—namely, the legislative and executive branches. *Adv. Op. to Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1354 (Fla. 1998).

The Proposed Amendment "implements a public policy decision of statewide significance and thus performs an essentially legislative function." *Save Our Everglades*, 636 So. 2d at 1340. Specifically, the Proposed Amendment would add to article X, section 29 two provisions that are expressly titled "public policy." Collectively, these policies would decriminalize and immunize under Florida law the adult personal use of marijuana; authorize MMTCs and other licensed entities to deal in personal use marijuana; and

immunize MMTCs, other licensed entities, and their agents and employees from criminal or civil liability under Florida law. Proposed Amendment at (a)(4)-(5). The Proposed Amendment also strikes laws from the statute books and limits the Legislature's authority in future lawmaking. *See id.* at (c)(2) (adding new language that constrains the Legislature to enact only laws that are consistent with the Proposed Amendment and striking current limiting language, the practical effect of which is to affect and repeal laws related to the adult personal use of marijuana, as well as its possession, production, and sale). Additionally, the Proposed Amendment provides for the state licensure of other "entities" besides MMTCs. *See id.* at (a)(5) & (e). These "other entities" would not only be permitted to "sell" but also to "cultivate" recreational marijuana—potentially leaving no room for the Legislature to ever authorize non-licensed home growth for personal use and very probably limiting legislation directed at licensed entities to the activities specified in the Proposed Amendment. *See id.*

In addition, the Proposed Amendment substantially alters and performs functions of the executive branch. The Proposed Amendment is not written on a blank slate. Instead, it grafts itself

onto article X, section 29, which is the existing constitutional provision governing medical marijuana. Article X, section 29 details the duties of an executive agency (the Department of Health) related to medical marijuana—including the agency's responsibilities for regulating Medical Marijuana Treatment Centers. *See* art. X, § 29(d)(1)-(4).

Although article X, section 29 caused separation of powers problems by delegating legislative powers to an executive agency, *see* art. II, § 3, Fla. Const., the Proposed Amendment makes it so much worse. *See Askew v. Cross Key Waterways*, 372 So. 2d 913, 920-21 (Fla. 1978) (explaining that a delegation of legislative powers violates separation of powers unless "the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards"). The Proposed Amendment usurps total control of the licensure and regulation of MMTCs by expressly authorizing them to begin dealing in recreational marijuana. *See* Proposed Amendment at (a)(5) ("Medical Marijuana Treatment Centers . . . are allowed to acquire, cultivate, process, manufacture, sell, and distribute marijuana products and marijuana accessories to adults for personal use *upon*

the Effective Date provided below.") (Emphasis added). Under the plain text of the Proposed Amendment, MMTCs will be above the law—and any regulatory authority of the Department of Health—in their dealing of recreational marijuana.

Accordingly, the Proposed Amendment substantially alters and performs the functions of both Florida's legislative and executive branches. And this is the third, and final, reason why this Court should hold the Proposed Amendment violates the single-subject requirement of article XI, section 3. *See Fine*, 448 So. 2d at 988 (explaining that the single-subject requirement is a "rule of restraint" that "allow[s] the citizens, by initiative petition, to propose and vote on *singular changes* in the functions of our governmental structure").

II. THE BALLOT TITLE AND SUMMARY VIOLATE THE CLARITY REQUIREMENTS OF SECTION 101.161(1), FLORIDA STATUTES.

Independent of article XI, section 3's "one subject" requirement, section 101.161(1) imposes "certain clarity requirements for ballot titles and summaries." *Adv. Op. to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, & Other Restrictions*, 320 So. 3d 657, 667

(Fla. 2021). This Court recently summarized those requirements as follows:

> The ballot summary for an initiative petition is limited to seventy-five words, must "be printed in clear and unambiguous language on the ballot," and "shall be an explanatory statement . . . of the chief purpose of the measure." § 101.161(1), Fla. Stat. The ballot title is limited to fifteen words and "shall consist of a caption . . . by which the measure is commonly referred to or spoken of." *Id.*

Id.[6]

In reviewing whether the ballot title and summary comply with these statutory clarity requirements, this Court "consider[s] two

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6. In pertinent part, section 101.161(1) provides:

> (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

questions: (1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voters of the chief purpose of the amendment; and (2) whether the language of the ballot title and summary, as written, will be affirmatively misleading to voters." *Id.* (quoting *Adv. Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 794 (Fla. 2014)). In this case, the ballot title and summary fail both inquiries.

A. The ballot title and summary fail to disclose that commercialization is a chief purpose of the Proposed Amendment.

In explaining the clarity requirements of section 101.161(1), this Court has said that "a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an amendment." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008) (quoting *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000)). The ballot title and summary for the Proposed Amendment do just that.

The ballot title and summary grant a new individual right to Florida adults 21 years of age or older—i.e., the right to the "personal use" of marijuana. But they fail to disclose a material way in which the Proposed Amendment contracts this right: the

same adults cannot *grow* marijuana for their own use. *Cf.* Proposed Amendment at (a)(5) & (e) (providing for the licensure of "other entities" besides MMTCs that would be authorized not only to "sell" but also to "cultivate" recreational marijuana).

Instead, the Proposed Amendment shackles the adult personal use of marijuana to a commercial recreational marijuana industry. As explained above, this is an impermissible single-subject violation. But it is also a problem under section 101.161(1) because the ballot title and summary never disclose that the commercialization of recreational marijuana is a chief purpose of the Proposed Amendment. *See Dep't of State v. Fla. Greyhound Ass'n*, 253 So. 3d 513, 520 (Fla. 2018) (a ballot summary that fails to inform the voter of a proposed amendment's "material effects" is defective); *see also Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998) ("When 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.").

B. To the extent the ballot title and summary hint that the Proposed Amendment has any commercial purpose, they affirmatively mislead voters that approving the Proposed Amendment will mean business as usual in Florida.

Even if voters could intuit from the ballot summary that the Proposed Amendment moves beyond its titled subject of "adult personal use of marijuana" into the separate subject of commercializing recreational marijuana, the ballot title and summary affirmatively misled voters that approving the Proposed Amendment would mean business as usual in Florida. The ballot summary tells voters that adults 21 years of age or older would be able to purchase marijuana products and marijuana accessories from "other state ***licensed*** entities" besides Medical Marijuana Treatment Centers—falsely suggesting (by using the past tense) that such entities already exist. Nowhere in the ballot summary are voters plainly told that, if passed, the Proposed Amendment authorizes an entirely *new* commercial licensing scheme. *See* Proposed Amendment at (a)(5) & (e).

As explained above, polling shows that it makes a real difference to voters whether the decriminalization of recreational marijuana is linked to its commercialization. Yet, there is no

textual clue in the ballot title and summary that voters who say "yes" to decriminalizing the adult personal use of marijuana are also saying "yes" to the proliferation of recreational marijuana dispensaries. Instead, the ballot summary affirmatively misleads voters to believe that "licensed entities" other than MMTCs already exist. *Cf. Adv. Op. to Att'y Gen. re Casino Authorization, Taxation & Reg.*, 656 So. 2d 466, 468 (Fla. 1995) (finding ballot summary misleading because it inaccurately described the proposed amendment as having a narrower scope than the text of the proposed amendment allowed).

* * *

The ballot title and summary do not fairly apprise voters that a chief purpose of the Proposed Amendment is to enshrine in Florida's Constitution the link between the decriminalization *and* commercialization of recreational marijuana. They further affirmatively mislead voters as to the scope of the proposed amendment. Because the ballot title and summary do not allow voters to "cast an intelligent and informed ballot," the Court should hold that they violate the clarity requirements of section 101.161(1). *Adv. Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d at 1180

("The purpose of these statutory requirements is to ensure that the ballot summary and title provide fair notice of the content of the proposed amendment to voters so that they will not be misled as to the proposed amendment's purpose and can cast an intelligent and informed ballot.") (cleaned up). The Court should therefore hold that the Proposed Amendment cannot be placed on the ballot.

CONCLUSION

Because the Proposed Amendment clearly and conclusively violates the "one subject" requirement of article XI, section 3 and the statutory clarity requirements of section 101.161(1), this Court should preclude its placement on the ballot.

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I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.210(a)(2) because it was prepared using Bookman Old Style 14-point font and because the word count from the word-processing system used to prepare this document is 6,242 words.

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