SC23-682

# In the Supreme Court of Florida

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

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ON A PETITION FOR AN ADVISORY OPINION TO THE
ATTORNEY GENERAL

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## ATTORNEY GENERAL'S INITIAL BRIEF

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## STATEMENT OF THE CASE AND FACTS

### A. Introduction

In recent years, proponents of marijuana legalization have repeatedly sought to enact legislation eliminating state-law penalties for the recreational use of marijuana. So far, all of those efforts have failed, including 20 bills introduced in the Florida Legislature in the last 10 years alone.[1]

In the wake of those legislative defeats, supporters of marijuana legalization trained their efforts on the citizen-initiative process for amending the Florida Constitution. *See* Art. XI, § 3, Fla. Const. One such citizen initiative is entitled "Adult Personal Use of Marijuana,"

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[1] *See, e.g.*, SB 1576 (2023) (died in Agric. Comm.); SB 1884 (2022) (died in Regulated Indus. Comm.); SB 1696 (2022) (died in Health Pol'y Comm.); SB 776 (2022) (died in Health Pol'y Comm.); HB 1597 (2022) (died in Regulatory Reform Subcomm.); HB 1471 (2022) (died in Professions and Pub. Health Subcomm.); HB 549 (2022) (died in Regulatory Reform Subcomm.); HB 467 (2022) (died in Regulatory Reform Subcomm.); SB 1916 (2021) (died in Regulated Indus. Comm.); SB 710 (2021) (died in Health Pol'y Comm.); SB 664 (2021) (died in Regulated Indus. Comm.); HB 1361 (2021) (died in Regulatory Reform Subcomm.); HB 343 (2021) (died in Professions and Pub. Health Subcomm.); SB 1780 (2019) (died in Health Pol'y Comm.); HB 1117 (2019) (died in Crim. Just. Subcomm.); HB 291 (2019) (died in Regulatory Reform Subcomm.); SB 1176 (2015) (died in Regulated Industries Comm.); HB 1297 (2015) (died in Crim. Just. Subcomm.); SB 1562 (2014) (died in Regulated Indus. Comm.); HB 1039 (2014) (died in Crim. Just. Subcomm.).

No. 22-05. The initiative is funded by Trulieve—the "largest medical-marijuana operator" in both Florida and the United States, according to the company's website.[2] Backed by Trulieve's $39-million-and-growing investment,[3] the initiative has now obtained enough signatures for placement on the 2024 ballot.[4]

On May 15, 2023, the Attorney General requested an advisory opinion from this Court as to the validity of the Adult Personal Use of Marijuana initiative. *See* Art. IV, § 10, Fla. Const. The Court has jurisdiction. *See* Art. V, § 3(b)(10), Fla. Const.

As explained in this brief, the Attorney General opposes ballot placement because the initiative's ballot summary is misleading.

### B. Text of the proposed amendment

The full text of the Adult Personal Use of Marijuana amendment

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[2] *Recreational Marijuana Initiative Launched*, Trulieve (Aug. 9, 2022), https://tinyurl.com/bdebvw43; *Trulieve Announces the Largest US Cannabis Transaction*, Trulieve (May 10, 2021), https://tinyurl.com/3u8b36uk.

[3] *Trulieve has spent more than $39 million to legalize recreational marijuana in Florida*, Orlando Weekly (June 13, 2023), https://tinyurl.com/yjdw7wef.

[4] "Adult Personal Use of Marijuana 22-05," Florida Secretary of State—Division of Elections (last visited June 26, 2023), https://tinyurl.com/mvx26ad7.

is as follows, with additions to Article X, Section 29 appearing in underline and deletions in strikethrough:

> [ARTICLE X,] 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 liability 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. The legislature may provide for the licensure of entities that are not Medical Marijuana Treatment Centers to acquire, cultivate, possess, process, transfer, 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.

Pet. 13–16.[5]

### C. Ballot summary

The accompanying ballot summary, which is 74 words, 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.

Pet. 13.

[5] Petition citations use the PDF numbering.

## SUMMARY OF ARGUMENT

The Court should hold that the Adult Personal Use of Marijuana initiative is invalid because its ballot summary misleads voters in several key respects.

A. The ballot summary tells voters that the proposed amendment would "[*a*]*llow*[]" the recreational use of marijuana. That is incorrect and misleading. If the amendment were to pass, marijuana use would remain illegal in Florida because of the federal Controlled Substances Act, which makes marijuana a Schedule I substance generally prohibited nationwide. In previously approving similarly worded ballot summaries, the Court erred. Those non-binding opinions (*Medical Marijuana I* and *II*) overlooked that voters need clear guidance before being asked to lift state-law penalties for the possession of a substance that would subject users to devastating criminal liability under federal law. And the rampant misinformation in the press and being peddled by the sponsor of this initiative about its effects makes clarity all the more pivotal.

B. Next, the ballot summary misleadingly suggests to voters that it "[a]llows . . . other state licensed entities" beyond Medical Marijuana Treatment Centers (MMTCs) to enter the marijuana trade.

Floridians would likely care about this issue because greater competition in the marijuana marketplace would decrease retail prices and increase the quality and professionalism of marijuana producers and retailers. But currently only MMTCs are licensed to engage in the marijuana trade in Florida, and the proposed amendment would not change that. At most, it would preserve the Legislature's power to issue additional business licenses.

C. The ballot summary also misleads because reasonable voters would understand its discussion of "possession limits for personal use" to say that the proposed amendment limits the scope of the immunity created by the amendment. In fact, the amendment does much more: it affirmatively bans the possession of more than 3 ounces of marijuana. If the amendment passed, not even the Legislature would be able to clear the way for possession of greater amounts of marijuana. Were voters warned that the amendment would *restrict* marijuana possession in this way—effectively banning most or all marijuana cultivation—they might reconsider their support for the initiative.

D. Last, the summary misleads as to the regulatory oversight of MMTCs. Though the Department of Health has the power to regulate

the medical marijuana market under Article X, Section 29, it will apparently lack the same authority over the recreational marijuana market. Indeed, the text of Article X, Section 29(d) says that the "purpose" of the Department's existing regulatory authority is to facilitate the "safe use of medical marijuana by qualifying patients," and the proposed amendment would not extend the Department's authority to recreational use. Yet voters will infer from the summary's reference to "licensed state entities" that the Department—or another state agency—*will* have regulatory authority. But even to the extent the Department can regulate this new industry, it cannot realistically do so before the amendment takes effect, meaning there will be a substantial period when MMTCs operate unregulated in the recreational marijuana space.

In short, the Adult Personal Use of Marijuana amendment asks voters to make consequential changes to Florida's Constitution yet is not honest with them about what those changes would be. The initiative should be stricken.

## LEGAL STANDARD

The Florida Constitution "reserve[s] to the people" the enormously consequential power to amend the State's governing charter

through the citizen-initiative process. Art. XI, § 3, Fla. Const. That process "relies on an accurate, objective ballot summary for its legitimacy." *In re Advisory Op. to Att'y 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.* Consequently, "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 that 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 proposed constitutional amendments. 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," § 101.161(1)(d), Fla. Stat., and a ballot summary, "not exceeding 75 words in length," explaining "the chief purpose of the measure" in "clear and unambiguous" terms. *Id.*

§ 101.161(1). "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 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, 154–55 (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.

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).

The Court has said that its advisory-opinion review is "deferential," and that it will invalidate an initiative "only if it is shown to be 'clearly and conclusively defective.'" *Advisory Op. to Att'y Gen. re: Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions*, 320 So. 3d 657, 667 (Fla. 2021).

But the question should simply be whether the summary is misleading, *see* § 101.161(1), Fla. Stat., not whether it is "clearly" so. Far from undermining Floridians' right to "formulate 'their own organic law'" through the initiative process, *Advisory Op. to Att'y Gen. re: All Voters in Primary Elections for State Legislature, Governor, and Cabinet*, 291 So. 3d 901, 905 (Fla. 2020), careful judicial analysis of a summary reinforces democracy by ensuring that the people are fully informed before changing Florida's governing charter. *See In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Medical Conditions (Medical Marijuana I)*, 132 So. 3d 786, 819–20 (Fla. 2014) (Canady, J., dissenting) (noting that the people's "right to vote on constitutional amendments" is "subverted when the voters are presented a misleading ballot summary"). The Court need not revisit its standard of review here, however, because the Adult Personal Use of Marijuana initiative is clearly and conclusively defective and would

fail even under that standard.

## ARGUMENT

### The Adult Personal Use of Marijuana initiative is invalid.

The Adult Personal Use of Marijuana ballot summary misleads voters in several important ways. First, it tells voters that the proposed amendment would "allow[]" recreational marijuana use in Florida, when in fact such use is banned nationwide. Second, it suggests that the amendment itself provides for "other state licensed entities" to compete with MMTCs—thus lowering retail prices—while in truth the amendment simply preserves the Legislature's authority to increase licensure. Third, it implies that the amendment merely limits the scope of the immunity for possession, whereas the amendment would affirmatively outlaw possession of more than 3 ounces of marijuana in a way that the Legislature would be powerless to change. And fourth, the summary neglects to mention that the Department of Health will lack the same constitutional regulatory authority in the recreational marijuana field that it had in the medical marijuana field, and at a minimum fails to disclose that there would be a substantial period when MMTCs engage in the unregulated trade of recreational marijuana.

Any of these misleading aspects of the summary individually would warrant striking the initiative from the ballot, and collectively they do all the more.

### A. The ballot summary misleadingly suggests that the amendment would "allow[]" recreational marijuana, when in fact the drug would remain criminal under federal law.

The Adult Personal Use of Marijuana ballot summary instructs voters that the proposed amendment would "[*a*]*llow*[] adults 21 years or older to possess, purchase, or use marijuana." Pet. 13 (emphasis added). But marijuana is independently prohibited by federal law. Indeed, *every* individual who possesses marijuana under the scheme provided by the proposed amendment would become a federal criminal. The little the summary does say about federal law is inadequate to dispel the misimpression created by the word "allows," and instead suggests that at least some subset of marijuana use in Florida would be lawful under federal law. Because the proposed amendment "will not deliver to the voters of Florida what [the summary] says it will," *Advisory Op. to Att'y Gen. re: Stop Early Release of Prisoners*, 642 So. 2d 724, 727 (Fla. 1994), the Court should strike it from the ballot.

*See also Medical Marijuana I*, 132 So. 3d at 820 (Canady, J., dissenting) (concluding that a ballot summary is fatally defective if voters "are potentially hoodwinked into believing that the amendment is consistent with . . . federal law").

1. Within our federal system, a state has no power to authorize its residents to participate in conduct that would constitute a federal crime. *See* U.S. Const. art. VI, cl. 2; *cf. United States v. Aquart*, 912 F.3d 1, 60–61 (2d Cir. 2018). A state may of course eliminate or reduce *state-law* penalties for conduct that is simultaneously regulated by state and federal law; but because federal-law penalties will remain even then, the conduct is unlawful.

The possession, use, and sale of marijuana have for decades 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.").[6] 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). And any conspiracy to commit an offense under the CSA is punishable to the same extent as the offense itself. 21 U.S.C. § 846.

As a result of the CSA's prohibition on marijuana possession, manufacture, and distribution, the use of marijuana is unlawful nationwide regardless of the idiosyncratic approach of any particular state. The text of the Adult Personal Use of Marijuana amendment

[6] The Agriculture Improvement Act of 2018 removed hemp from the definition of "marijuana." 21 U.S.C. § 802(16)(B). Hemp means "any part" and "all derivatives" of the cannabis plant "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o(1). Hemp is not at issue here.

reflects this reality. Rather than purport to *allow* marijuana use and possession, it simply eliminates state-law penalties for that activity. The relevant provision, which would create a proposed Article X, Section 29(a)(4), states: "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*." Pet. 13 (emphasis added).

The ballot summary easily could have tracked this language. But it did not. Rather, the summary tells voters that the proposed amendment would do something altogether different: that the amendment "[*a*]*llows* adults 21 years or older to possess, purchase, or use marijuana products and marijuana accessories for non-medical personal consumption." *Id.* (emphasis added). As observed above, a state constitution has no power to "allow" activity that is independently proscribed by federal law. Yet reasonable voters will be misled by the ballot summary that marijuana use will be lawful in Florida post-amendment.

That was precisely the conclusion this Court reached two years ago in rejecting ballot placement for the Adult Use of Marijuana initiative. *See Advisory Op. to Att'y Gen. re Adult Use of Marijuana*, 315

So. 3d 1176, 1180–81 (Fla. 2021). The ballot summary there told voters, similarly to this one, that the proposed amendment would "[*p*]*ermit*[] adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason." *Id.* at 1179 (emphasis added). That was misleading, the Court held, because "[t]he summary's unqualified use of the word '[p]ermits' strongly suggests that the conduct to be authorized by the amendment will be free of any criminal or civil penalty in Florida." *Id.* at 1180–81. Even if the amendment passed, however, a marijuana user would "remain exposed to potential prosecution under federal law—no small matter." *Id.* at 1181. The Court therefore declared that "[a] constitutional amendment cannot unequivocally 'permit' or authorize conduct that is criminalized under federal law," and that any ballot summary "suggesting otherwise is affirmatively misleading." *Id.*

To be sure, the Court noted there that the misleading nature of the ballot summary could have been ameliorated with a clear warning to voters about the "interplay between the proposed amendment and federal law." *See id.* at 1180–82 (discussing ballot summaries found to not be misleading in earlier marijuana initiative cases). Here,

though, the little the summary does say about the interplay between state and federal law is inadequate to resolve the confusion.

On that score, the Adult Personal Use of Marijuana summary tells voters that the proposed amendment "[a]pplies to Florida law" and "does not change, or immunize violations of, federal law." Pet. 13. But that language omits the critical fact that the amendment would make federal criminals of those who take advantage of it. That omission creates the misleading implication that adult marijuana use and possession—or at least some subset of it—would be lawful in the State if the amendment passed. "However, this is absolutely false." *Medical Marijuana I*, 132 So. 3d at 819 (Polston, C.J., dissenting). By virtue of federal law, not a single instance of marijuana use would be lawful in Florida even if the amendment passed. *Id.* ("Whether or not this amendment passes, the medical use of marijuana will remain a federal crime.").

An initiative that "will not deliver to the voters of Florida what [the summary] says it will" is invalid. *Stop Early Release of Prisoners*, 642 So. 2d at 727.[7] That includes where factors not explained in the

[7] *See also Advisory Op. to the Att'y Gen. re Tax Limitation*, 644

ballot summary might "render the entire amendment illusory." *Id.* What is more, a ballot summary may not "mislead voters regarding the interplay between the proposed amendment and federal law." *Medical Marijuana I*, 132 So. 3d at 808; *see also id.* at 819 (Polston, C.J., dissenting) ("[W]hile ballot summaries are not required to mention the current state of federal law or a proposed state constitutional amendment's effect on federal law, they are required to not affirmatively mislead Florida voters by falsely implying the opposite of what that current state of federal law is."); *id.* at 820 (Canady, J., dissenting) (explaining that an initiative should be kept off the ballot where "the ballot summary seriously misrepresents the interaction of the proposed amendment with federal law").

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So. 2d 486, 494 (Fla. 1994) (finding summary invalid where it falsely implied that there was "presently no cap or limitation on taxes in the constitution"); *Stop Early Release of Prisoners*, 642 So. 2d at 726 (summary stating that amendment would "ensure" state prisoners serve "at least eighty-five percent of their sentence" was misleading because "this will not be true in cases of pardon and clemency"); *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (summary used word "citizens" rather than phrase "every natural person" appearing in the amendment).

The ballot summary violates those principles because it represents that the amendment would "allow" conduct that is prohibited by federal law.

2. The Attorney General acknowledges that the ballot summary's language discussing federal law resembles language approved by this Court in a prior advisory opinion in 2014. *See Medical Marijuana I*, 132 So. 3d at 818–19.[8] Though advisory opinions are "not strictly binding precedent in the most technical sense," this Court has sometimes said it will revisit an earlier advisory opinion "only under extraordinary circumstances." *Ray v. Northam*, 742 So. 2d 1276, 1285 (Fla. 1999).

The Attorney General respectfully submits that this demanding standard is inapplicable here. The Court's statement in *Northam* addressed a plaintiff's request, in a post-ratification challenge to an amendment, that the Court revisit its approval of the *very same* constitutional provision—in essence, whether the Court should excise an

[8] This Court approved similar language the following year in *Advisory Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 476, 478–79 (Fla. 2015) (*Medical Marijuana II*), though the matter there was not contested through adversarial briefing and oral argument.

existing portion of the Constitution approved by the electors. *See id.*; *see also Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992). The Court should be far less reluctant to revisit an advisory-opinion precedent where, as here, the question is whether materially similar ballot is misleading for a new proposed ballot initiative. Moreover, this Court has clarified that even *binding* "precedent normally must yield" to the correct interpretation of the law as this Court sees it. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). It stands to reason that *nonbinding* advisory-opinion precedents should yield even more readily to this Court's best interpretation of the law.

Here, in addition to the fact that this Court's prior conclusion on a similar ballot summary is "clearly erroneous," *Poole*, 297 So. 3d at 507, two factors support revisiting this Court's precedent. First, the CSA imposes devastating criminal liability on individuals and entities that violate its terms. *See* 21 U.S.C. §§ 841(b)(1)(A)(vii), (b)(1)(B)(vii), (b)(1)(D) (authorizing penalties of up to life imprisonment for marijuana trafficking). CSA marijuana prosecutions in States that

have abolished state-law prohibitions on marijuana have been effectively deferred only based on current federal enforcement policies[9] and a congressional appropriations rider[10]—all of which are subject to change.[11]

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[9] U.S. Attorney General Merrick Garland has intimated that the Justice Department generally will not prosecute marijuana offenses in states that have decriminalized marijuana and have appropriate regulatory regimes in place, though no formal policy has been promulgated. "Justice Department Oversight Hearing," U.S. Sen. Judiciary Comm., at 2:38:56 (Mar. 1, 2023), https://tinyurl.com/5n8s859j.

[10] For example, Congress has included budget riders each year since 2015 that prohibit the Justice Department from using appropriated funds to prevent certain states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Funding Limits on Federal Prosecutions of State-Legal Medical Marijuana*, Congressional Research Service, at 2 (Feb. 4, 2022), https://tinyurl.com/5dmaebu6.

[11] In the last decade, federal marijuana enforcement policies have shifted repeatedly, with the Department of Justice announcing in 2013 that it would generally not enforce marijuana infractions in states that have abolished state-law marijuana penalties, *see* "Memorandum for All United States Attorneys—Guidance Regarding Marijuana Enforcement," U.S. Dep't of Just. (Aug. 29, 2013), https://tinyurl.com/4sssraub, and then rescinding that policy in 2018. "Memorandum for All United States Attorneys—Marijuana Enforcement," U.S. Dep't of Just. (Jan. 4, 2018), https://tinyurl.com/2vnbn9m8. Adding to this uncertainty, one official-looking website, run by a private organization called "Florida Cannabis Information"—whose stated mission is to "make it easier for readers to understand the Florida cannabis industry and its impact on our state," "About Us," Florida Cannabis Information (last visited June 26, 2023), https://tinyurl.com/4hnknk7k—wrongly reports that the federal government

Second, the popular media has sown public confusion about the effects of this new citizen initiative. The press frequently reports that the proposed amendment would "legalize marijuana in Florida,"[12] "legalize the recreational use of marijuana in Florida,"[13] "legalize marijuana for recreational use,"[14] "authoriz[e] adult use,"[15] and the like. Few media outlets have noted that marijuana would remain illegal "at the federal level"; and even those fail to elaborate on the

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"decriminalize[d]" marijuana in a bill that "was passed in 2022." "Florida Marijuana Laws," Florida Cannabis Information (last visited June 26, 2023), https://tinyurl.com/353y62ne. In fact, that bill passed the House of Representatives but not the Senate. *See* "H.R.3617 - Marijuana Opportunity Reinvestment and Expungement Act," Congress.gov (last visited June 26, 2023), https://tinyurl.com/ykkw4wv7.

[12] Jackie Mitchell, *Florida marijuana legalization initiative has 94% of signatures needed to appear on 2024 ballot*, Ballotpedia (May 2, 2023), https://tinyurl.com/43u46uwn.

[13] Victoria Lewis, *Florida recreational marijuana initiative hopes to land on 2024 ballot*, WPTV (Aug. 9, 2022), https://tinyurl.com/yuzfrp5d.

[14] Greg Fox, *Recreational marijuana legalization getting closer to Florida ballot*, WESH 2 (May 16, 2023), https://tinyurl.com/2r29xx6x.

[15] *Florida recreational marijuana initiative launched*, CBS News Miami (Aug. 8, 2022), https://tinyurl.com/4aasn97f.

interaction between state and federal law, offering voters no appreciation for the federal consequences of marijuana use.[16]

Trulieve's own public comments have made things worse. Its CEO recently declared that the initiative would give Floridians "the freedom to use cannabis for personal consumption"—"a freedom which is currently enjoyed by more than half of America's adults."[17] The initiative's chairperson has echoed that talking point, telling voters that "[m]ore than 140 million Americans already have the freedom to partake in responsible cannabis use" and that "it is past time for Florida to provide its law-abiding adults the same privilege."[18] None of that is true.

Because the ballot summary misleadingly implies that the amendment would make marijuana possession and use lawful, the

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[16] *See, e.g.*, James Call, *Recreational marijuana may be on Florida ballot; here's why leading pot advocate isn't happy*, Tallahassee Democrat (June 12, 2023), https://tinyurl.com/fttrunha.

[17] A.J. Herrington, *Florida Marijuana Legalization Measure Has Enough Signatures To Qualify For Vote*, Forbes (June 5, 2023), https://tinyurl.com/5hyww5sz.

[18] Lewis, *supra* (remarks of David and Howard Bellamy); *see also Recreational Marijuana Initiative Launched*, Video at 0:33–0:40, *supra* ("Floridians are ready—more than ready—to finally stop arresting adults who use marijuana.").

Court should hold that the initiative violates Section 101.161(1) and should be struck.

### B. The ballot summary misleadingly suggests that it would authorize "other state licensed entities" beyond MMTCs to cultivate and distribute marijuana.

Next, the ballot summary is misleading in its discussion of the entities that the amendment would license to engage in the marijuana trade in Florida. The proposed amendment states a truism about the Legislature's already-existing authority to empower more businesses to enter the marijuana market, specifying that "[t]he legislature may provide for the licensure of entities that are not Medical Marijuana Treatment Centers to acquire, cultivate, possess, process, transfer, transport, sell, and distribute marijuana products and marijuana accessories for personal use by adults." Pet. 16 (amending Art. X, § 29(e), Fla. Const.). But the proposed amendment does not itself authorize any existing or new licensed entities or require the Legislature to provide for additional licensure.

The ballot summary, however, suggests that the amendment would "*allow*[] Medical Marijuana Treatment Centers, *and other state licensed entities*, to acquire, cultivate, process, manufacture, sell, and distribute" marijuana. Pet. 13. The amendment itself "allows" no

such thing—it merely declines to disturb the Legislature's preexisting authority to license additional such entities. The amendment thus suffers from the same defect as in *Advisory Op. to Att'y Gen. re: Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions*, 320 So. 3d 657 (Fla. 2021). There, the ballot summary told "voters that the proposed amendment limit[ed] the use of recreational marijuana." *Id.* at 668. In fact, the proposed amendment "itself 'd[id] no such thing.'" *Id.* At most, it would have permitted *businesses* to "limit or prohibit the use of marijuana on their property." *Id.* So too here: the amendment itself would not "allow[]" additional licensure, but merely would declare that the Legislature may do so in the future.

That misleading implication is no small matter. Marijuana proponents have complained that Florida's medical-marijuana regime stifles competition and promotes monopolies held by the relatively few licensed MMTCs in the State.[19] The initiative has therefore been

[19] Call, *Recreational marijuana may be on Florida ballot; here's why leading pot advocate isn't happy*, *supra*; *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1113–15 (Fla. 2021) (discussing plaintiff's affidavits complaining of "difficulties in finding the products [consumers] need, high prices when they do find the products

criticized for not doing enough to create a free market, thereby ensuring lower retail prices, for recreational marijuana.[20] The implication that the amendment would provide for "other state licensed entities" thus misleads voters into thinking that the amendment would address those criticisms, when really it would not address the domination of the marijuana market by a select few MMTCs, including—tellingly—the sponsor, Trulieve.

Relatedly, the summary misleadingly implies that the proposed amendment would change—*i.e.*, "allow[]"—*something* about the current marijuana regime's licensure of business entities that is not currently allowed. Yet it would not. As things stand, the Legislature is fully authorized to approve additional marijuana licenses for businesses that are not MMTCs. *See* Art. X, § 29(e), Fla. Const. ("[n]othing in this section shall limit the legislature from enacting laws consistent with this section"); *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1111 (Fla. 2021) ("[t]he Legislature may exercise any

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they need, and lack of knowledge and professionalism in MMTC employees they have dealt with").

[20] Call, *Recreational marijuana may be on Florida ballot; here's why leading pot advocate isn't happy*, *supra*.

lawmaking power that is not forbidden by" the Constitution). All the amendment would do is add superfluous language to existing Article I, Section 29(e) reiterating the Legislature's authority in that regard. Pet. 6. That additional language is simply a pretext for placing into the ballot summary language that misleads voters into believing that the amendment would open up the current marijuana market to competition from other licensees, when in truth it would not.

### C. The ballot summary misleadingly suggests that the amendment "limits" the scope of the immunity for possession, when it actually outright bans possession of more than 3 ounces.

The ballot summary also misleads voters with respect to the amendment's ban on possessing certain quantities of marijuana. The text of the adult-use amendment would provide that "a[n] 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." Pet. 15 (creating Art. X, § 29(b)(13), Fla. Const.) (emphasis added). That does not simply cap the scope of the immunity created by the amendment; it affirmatively outlaws the possession of more than 3 ounces of marijuana. As a result, the Leg-

islature under the amendment would have no power to permit Floridians to possess more than 3 ounces of marijuana, with the practical effect that the proposed amendment bans all or most marijuana home cultivation by individuals.

The ballot summary does not accurately tell voters of that effect. Of that language in the proposed amendment, the summary says only that the initiative "[e]stablishes possession limits for personal use." Pet. 13. Given that the citizen initiative purports to be rights-*creating*, not rights-*restricting*, *see, e.g.*, Pet. 13–16 ("Allows . . ."), and that constitutional provisions generally operate to protect, not limit, individual liberties, a reasonable voter would understand the ballot summary to represent that the proposed amendment would simply place an outer bound on the *scope of immunity* created by the proposed amendment—not that the amendment would affirmatively limit marijuana possession in a way that the Legislature could not expand.

Voters are especially likely to be misled by this language because of the way this Court has previously described the effect of Article X, Section 29. In *Florigrown*, this Court explained that the medical marijuana amendment "provides state-law *immunity* from

criminal or civil liability for actions taken by an MMTC in compliance with the Amendment and the Department's regulations." 317 So. 3d at 1106 (emphasis added). That is, when Article X, Section 29 speaks of a person or entity possessing marijuana being "not . . . subject to criminal or civil liability or sanctions under Florida law," Art. X, § 29(a)(1), (3), Fla. Const., it means that such a person or entity is "immun[e]" from liability or sanction. *Florigrown*, 317 So. 3d at 1106.

A voter would therefore understand the Adult Personal Use of Marijuana summary's reference to the creation of "possession limits for personal use" simply to limit the immunity that persons or entities will enjoy under Article X, Section 29. But the Adult Personal Use of Marijuana does much more than that—it bans the possession of more than 3 ounces of marijuana.

This likelihood of confusion matters. A proponent of greater access to marijuana in Florida might well, based on the ballot summary, vote in favor of the amendment not realizing that the amendment would outlaw possession of greater than 3 ounces of marijuana.[21] On the other hand, a voter properly informed about the true

[21] Marijuana cultivation is popular in places where marijuana

effect of the amendment might well reject the citizen initiative and wait for an initiative that is less restrictive of marijuana use, or to prefer a legislative approach to the issue.[22] *See Medical Marijuana I*, 132 So. 3d at 821 (Canady, J., dissenting) (observing that the summary was misleading with respect to a "circumstance to which many voters may attach considerable significance").

This effect of the "shall not exceed 3.0 ounces of marijuana" language was almost certainly not inadvertent. By limiting an individual's personal possession of marijuana to 3 ounces, the amendment aids corporate interests like Trulieve in entrenching their monopoly of the marijuana market. A ban on possessing more than 3 ounces will make it difficult, if not impossible, for individuals to cultivate marijuana for their own consumption and for the consumption

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has been decriminalized at the state level, with 8.1% and 9.6% of individuals cultivating marijuana at home in 2019 and 2020. Elle Wadsworth, Gillian L. Schauer & David Hammond, *Home cannabis cultivation in the United States and differences by state-level policy, 2019-2020,* 48 Am. J. of Drug & Alcohol Abuse, no. 6, 2022, at 706.

[22] *E.g.*, James Call, *Trulieve spending big on Florida recreational ballot measure*, Tallahassee Democrat (Dec. 29, 2022), https://tinyurl.com/bdz99pt6 (discussing marijuana proponents "pushing for the right for Floridians to grow their cannabis at home" and urging the Legislature to clear a path for "home grow").

of friends and family, forcing those users into the retail marketplace. The ballot summary does not clearly convey to the voters that the amendment would, in this respect, reinforce the stranglehold MMTCs have on the marijuana market in Florida.

### D. The ballot summary fails to advise voters that the amendment would leave MMTCs unregulated with respect to recreational marijuana.

The summary is deficient in one final respect. Existing Article X, Section 29 grants the Department of Health the authority—indeed, the "dut[y]"—to "issue reasonable regulations necessary for the implementation and enforcement of this section." Art. X, § 29(d), Fla. Const. "The purpose of the regulations," the amendment continues, "is to ensure the availability and safe use of medical marijuana by qualifying patients." *Id.* Though the proposed amendment would expand Article X, Section 29 to cover recreational uses of marijuana, it would not extend the Department's regulatory authority over that use. *See* Pet. 15–16. At best, the proposed amendment is ambiguous about the Department's regulatory authority in that new area; at worst, the Department would lack any such authority. *See* Art. X, § 29(d), Fla. Const. (specifying that the "purpose" of the Department's regulations pertains to medical use). Nor would the amendment grant

any other regulatory agency authority to oversee MMTCs in their recreational businesses.

Yet the summary says nothing of this. If anything, its reference to "other state licensed entities" suggests that the Department would possess recreational regulatory authority comparable to its authority to regulate the medical marijuana market. Entities that are "licensed," after all, are also typically regulated by the licensing agency. Thus, voters familiar with existing Article X, Section 29 (and even those who are not) would assume that the proposed amendment would extend the Department's regulatory authority to recreational marijuana—which it does not.[23]

But even assuming the proposed amendment would permit the Department to regulate the recreational marijuana industry, the summary fails to tell voters that the industry would necessarily be unregulated for at least some substantial period. Because the

[23] As a practical matter, the proposed amendment would also water down the Department's existing authority over the medical marijuana market. Though the letter of the law would still provide the Department the power to regulate medical marijuana, those regulatory protections would lose much of their force if consumers and suppliers could evade them by turning instead to the unregulated recreational market for similar products.

Amendment would not *require* legislative or regulatory implementation of its new provisions at all, let alone by any particular date, the effect of the Amendment would be to allow MMTCs to cultivate, process, and distribute recreational marijuana with no guarantee of regulatory oversight.

The Legislature and Department may well do their best to head off this problem by implementing a regulatory regime for recreational marijuana as quickly as they can, but that is no small ask. The existing regulatory scheme for MMTCs concerns *medical* marijuana and is therefore inextricably linked to the treatment of qualified patients with debilitating medical conditions. That regime has been evolving for years and cannot be imported wholesale into the recreational marijuana context. Unlike medical marijuana, the use of recreational marijuana would not be overseen by medical professionals, necessitating especially careful regulation to render the use of the drug as safe as possible. It also stands to reason that there will be a much larger market for non-medical marijuana, presenting still greater regulatory challenges.

In sum, it could take years for the Legislature and Department of Health to implement a comprehensive regulatory regime for the

recreational use of marijuana, and—unlike the Medical Marijuana Amendment—the amendment here does nothing to guarantee such a regime will be in place when it takes effect. The ballot language is therefore misleading for the additional reason that it suggests MMTCs will be "licensed" (and thus regulated) in their recreational marijuana operations while failing to disclose that there may indeed be a significant period when that is not the case.

## CONCLUSION

The Adult Personal Use of Marijuana ballot summary is misleading, and the initiative does not belong on the ballot.

June 26, 2023

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## CERTIFICATE OF COMPLIANCE

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), and contains 9,391 words.

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