IN THE SUPREME COURT OF FLORIDA

Case No. SC13-2006

Upon Request From the Attorney General
For An Advisory Opinion As To The
Validity Of An Initiative Petition

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: USE OF MARIJUANA FOR CERTAIN MEDICAL CONDITIONS

INITIAL BRIEF OF OPPONENTS, FLORIDA CHAMBER OF COMMERCE, FLORIDA MEDICAL ASSOCIATION, FLORIDA POLICE CHIEFS ASSOCIATION, FLORIDA SHERIFFS ASSOCIATION, and SAVE OUR SOCIETY FROM DRUGS

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STATEMENT OF THE CASE AND FACTS

The Florida Attorney General has requested this Court's advisory opinion on the validity of an initiative petition filed under article XI, section 3 of the Florida Constitution. The title of the proposed amendment is "Use of Marijuana for Certain Medical Conditions" (the "Medical Marijuana Amendment"). The sponsor of the amendment is a political committee called "People United for Medical Marijuana." The two issues before the Court are whether the Medical Marijuana Amendment encompasses a single subject and matter directly connected therewith, and whether the ballot title and summary fairly and accurately advise voters of the chief purpose of the measure, are not misleading, and comply with specified word limits.[1] The Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const.[2]

[1] Article IV, section 10, of the Florida Constitution requires the Attorney General to "request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI." Section 16.061, Florida Statutes (2013), requires the Attorney General to petition this Court within 30 days after receiving a qualifying initiative from the Secretary of State, "regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161."

[2] Article V, section 3(b)(10), of the Florida Constitution provides that "The supreme court … [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law."

IDENTITIES OF THESE OPPONENTS

These interested parties appear in opposition to the Medical Marijuana Amendment pursuant to this Court's Scheduling Order dated October 28, 2013. A description of each of these opponents' respective identities and interest is set forth below.

The Florida Chamber of Commerce is a statewide business advocacy organization, representing the interests of Florida businesses and industry, the state's largest federation of employers, and chambers of commerce and associations across the state. Each year, the Florida Chamber develops a Florida Business Agenda identifying changes seen as critical to secure Florida's future, then works within all branches of government to effect those changes. The Chamber seeks to protect the nature of our Florida Constitution as a foundational document meant to provide for our basic rights and organization of government. The Florida Chamber therefore has a long-standing position of opposing constitutional amendments that can be handled by the legislature in statute or in the state budget, and opposes amendments that are deceptive and misleading to the public, such as the Medical Marijuana Amendment.

The Florida Medical Association is a professional association dedicated to the service and assistance of Doctors of Medicine and Doctors of Osteopathic Medicine in Florida, who are medical doctors licensed under Chapters 458 and 459

of the Florida Statutes, respectively. The FMA represents more than 20,000 physicians on issues of legislation and regulatory affairs, medical economics and education, public health, and ethical and legal issues. The FMA advocates for physicians and their patients to promote the public health, ensure the highest standards of medical practice, and to enhance the quality and availability of health care in the Sunshine State.

The Florida Police Chiefs Association is the fourth largest state police chiefs association in the United States, and is composed of more than 750 of Florida's top law enforcement executives. The FPCA promotes laws that enhance public safety and police protection; and provides expertise on public safety, criminal justice issues, and crime-fighting strategies for lawmaking, police training, and private security purposes. The FPCA has adopted a legislative position statement that it strongly opposes any and all proposals that would legalize or decriminalize the sale, possession, or use of marijuana.

The Florida Sheriffs Association is a nonprofit association of Florida's 67 sheriffs, thousands of private businesses, and over 70,000 individuals. Its purpose is to enhance law enforcement goals and policies, including protecting Florida's youth and promoting public safety, through legislative, educational, and charitable efforts throughout Florida. The Florida Sheriffs Association supports the status of real and synthetic marijuana and all related products, forms, substances, and

compounds as Schedule I drugs under the Federal Controlled Substances Act, for which the purchase, possession, sale, or distribution can result in a felony arrest.

Save Our Society From Drugs is a national nonprofit organization based in St. Petersburg, Florida. It is committed to establishing, promoting, and enabling sound drug laws and policies that will reduce illegal drug use, drug addiction, and drug-related illness and death.

TITLE, BALLOT SUMMARY, AND TEXT OF THE MEDICAL MARIJUANA AMENDMENT

The ballot title for the proposed Medical Marijuana Amendment is "Use of Marijuana for Certain Medical Conditions."

The ballot summary provides as follows:

> Allows the medical use of marijuana for individuals with debilitating diseases as determined by a licensed Florida physician. Allows caregivers to assist patients' medical use of marijuana. The Department of Health shall register and regulate centers that produce and distribute marijuana for medical purposes and shall issue identification cards to patients and caregivers. Applies only to Florida law. Does not authorize violations of federal law or any non-medical use, possession or production of marijuana.

The full text of the amendment provides as follows:

> ARTICLE X, SECTION 29. Medical marijuana production, possession and use.—
>
> (a) PUBLIC POLICY.
>
> (1) The medical use of marijuana by a qualifying patient or personal caregiver is not subject to criminal or civil liability or sanctions under Florida law except as provided in this section.
>
> (2) A physician licensed in Florida shall not be subject to criminal or civil liability or sanctions under Florida law for issuing a physician certification to a person diagnosed with a debilitating medical condition in a manner consistent with this section.
>
> (3) Actions and conduct by a medical marijuana treatment center registered with the Department, or its employees, as permitted by this section and in compliance with Department regulations, shall not be subject to criminal or civil liability or sanctions under Florida law except as provided in this section.

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

(1) "Debilitating Medical Condition" means cancer, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis or other conditions for which a physician believes that the medical use of marijuana [sic][3] would likely outweigh the potential health risks for a patient.

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

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

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

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

(6) "Medical use" means the acquisition, possession, use, delivery, transfer, or administration of marijuana or related supplies

[3] The subsequent definition of "Physician certification" provides that the physician must state that the "*potential benefits of* the medical use of marijuana would likely outweigh the health risks for the patient." (Emphasis added.) The description of the physician's role within this definition of "Debilitating Medical Condition," however, omits the phrase "potential benefits of."

by a qualifying patient or personal caregiver for use by a qualifying patient for the treatment of a debilitating medical condition.

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

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

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

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

(c) LIMITATIONS.

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

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

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

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

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

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

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

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

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

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

c. Procedures for the registration of Medical Marijuana Treatment Centers that include procedures for the issuance, renewal,

suspension, and revocation of registration, and standards to ensure security, record keeping, testing, labeling, inspection, and safety.

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

The Court must strike the Medical Marijuana Amendment from the ballot because it violates the single-subject rule; and also because its ballot title and summary violate the requirements of clear and accurate disclosure and instead "fly under false colors" and "hide the ball." The Amendment is guilty of logrolling in at least five different respects. Each of these logrolling provisions requires voters to accept something they may not want, in order to gain what they do want. Any one of these single-subject violations is sufficient to render the Amendment clearly and conclusively defective.

First, the amendment adds a broad grant of immunity from civil liability as a second subject. As written, no one involved in the process of providing or using marijuana for medical purposes can be subjected to liability in any civil cause of action. That is far beyond, and unnecessary to, the chief purpose of the amendment. Second, the amendment confers immunity from criminal liability for more than just the actual use of marijuana for medical purposes. This exceeds the legal effect necessary to protect patients, and immunizes participants from the potentially criminal *consequences* of use – again, a second subject in violation of the Constitution's prohibition.

Third, the Amendment purports to cover a specific and limited class of serious illnesses, but in fact it creates an undefined and unrestricted catch-all

category of conditions that would qualify for medical use of marijuana, subject only to any individual physician's discretion. Voters may agree with allowing the use of marijuana only for the specified, serious conditions, but not agree with the very different concept of allowing its use for any condition whatsoever, without restrictions on the nature or severity of the condition. This is impermissible logrolling.

Fourth, the Amendment changes the law of standing, allowing any citizen to sue the Department of Health to enforce the Amendment, without any requirement of showing substantial interests, special injury, or status within the zone of interest intended to be protected by the law. That is a distinctly separate change in the law of Florida, neither incidental nor necessary to the chief purpose, and therefore it is an impermissible second subject. Fifth, the Amendment expands the scope of practice of chiropractors and podiatric physicians, who currently are not authorized to diagnose or treat illnesses such as those within the scope of the Amendment. They nevertheless appear to fall within the scope of the term "physician" as used in the Amendment, which term is not limited to medical doctors licensed under chapters 458 or 459, Florida Statutes. This broad expansion of the scope of practice of non-medical-doctor "physicians" is another instance of improper logrolling. The Court should strike the Amendment as in violation of the single-subject rule.

The ballot title and summary are equally invalid under Florida law. The title is *not* how the measure "is commonly referred to or spoken of" as required by statute. The measure is known as the "Medical Marijuana Amendment" in every context except on the printed petition forms. This violates the plain language of the statute.

In addition, the title and summary violate the statutory requirements of fair, accurate, non-misleading disclosure in several ways. They "fly under false colors" and "hide the ball" about the proposal's true legal effect and ramifications. This deception begins with the fact that neither the title nor the summary uses the phrase "medical marijuana," though the text uses it nine times and it saturates the public discussion of the measure. By not disclosing the term in the title or summary, and by not defining the term in the text, the sponsor is able to capitalize on a public misperception that "medical" is an adjective modifying the noun "marijuana," connoting some different, pharmaceutical-like form of the drug (which actually exists but is not at issue in the amendment); and not merely smoked marijuana, which is what is really at issue.

The title and summary again mislead the voter and "hide the ball," by failing to disclose the additional subjects identified under the single-subject analysis as already noted. They are also misleading by promising that marijuana may be used only for "certain" medical conditions (title) and only for "debilitating" diseases

(summary). In contrast, the text allows such use for any and every unspecified and unrestricted medical condition a physician may decide might benefit from the use. Finally, the title and summary are materially misleading, and inconsistent with the text, with respect to the status of Federal law and its application to the acts authorized by the Amendment. The summary says no violation of Federal law is "authorized," while the text says no violation is "required" – two different things. The summary fails to inform the voter that every step of the process contemplated by the Amendment is a violation of Federal law. For any or all of these reasons, the Court should strike the Amendment as in violation of the requirements for ballot titles and summaries.

ARGUMENT AND AUTHORITIES

Standard of Review. The issues before the Court are questions of law. *Fine v. Firestone,* 448 So. 2d 984, 987 (Fla. 1984). Accordingly, the standard of review is *de novo*. *Armstrong v. Harris,* 773 So. 2d 7, 16 (Fla. 2000), *cert. den.*, 532 U.S. 958 (2001).

The Court has stated that it "must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Askew v. Firestone,* 421 So. 2d 151, 156 (Fla. 1982). Having said that in *Askew*, however, the Court immediately applied the countervailing principle requiring that the initiative then in question be stricken from the ballot for violating

the legal restraints to which it was subject. *Id.* The Court cannot apply its own restraint if the proposal under review fails to comply with the restraint required of it. An initiative petition must be stricken from the ballot if it is "`clearly and conclusively defective.´" *Weber v. Smathers*, 338 So. 2d 819, 822 (Fla. 1976) (quoting *Goldner v. Adams*, 167 So. 2d 575, 575 (Fla. 1964)), *receded from on other grounds, Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337 (Fla. 1978)). Also relevant to the Medical Marijuana Amendment is this Court's previous holding that a severability clause, such as that of subsection (f) of the Amendment, applies only in post-adoption challenges to an amendment. *Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999) ("The issue of severability arises only ***after*** an amendment already approved by voters has been challenged.") (emphasis added). A severability clause will not cure a single-subject violation in a proposed constitutional amendment. *See id.*

I. THE MEDICAL MARIJUANA AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT.

Article XI, Section 3, of the Florida Constitution restricts most citizens' initiatives, including the Medical Marijuana Amendment, to "one subject and matter directly connected therewith." The single-subject rule is "a *rule of restraint* designed to insulate Florida's organic law from precipitous and cataclysmic change." *In re Advisory Op. to Att'y Gen.-Save Our Everglades*, 636 So.2d 1336, 1339 (Fla.1994) (emphasis added). One purpose of the single-subject rule is to

prevent "logrolling," which is combining different issues into one initiative so that people have to vote for something they might not want, in order to gain something different that they do want. *Advisory Op. to Att'y Gen. Re: Florida Transportation Initiative for Statewide High Speed Monorail*, 769 So. 2d 367, 369 (Fla. 2000); *Save Our Everglades*, 636 So. 2d at 1339.

Also, and significantly for purposes of the present proposal, the Court has described "matters directly connected therewith," as that phrase is used in article XI, section 3 of the Florida Constitution, to mean matters that are "incidental and reasonably necessary to effectuate the purpose of the proposed amendment." *Advisory Op. to Att'y Gen. Re: Limited Casinos*, 644 So. 2d 71, 74 (Fla. 1994). Under this test, matters that are not merely "incidental," and matters that are not "reasonably necessary to effectuate" the chief purpose of the amendment, violate the single-subject rule.

The "rule of restraint" imposed by the single-subject rule of article XI, section 3 of the Florida Constitution means that some changes in Florida law cannot be accomplished through this process, unless they are carefully curtailed in scope and they stay within the boundaries prescribed by law. The sponsor of an amendment may not be able to dictate within a single proposed amendment the sponsor's preferences as to every extended ramification or impact of the proposal, or direct the specific interaction of the proposal with other areas of the law.

Attempting to do so outside the restraint of the single-subject rule is overreaching that will render the proposal "clearly and conclusively defective." *Weber*, 338 So. 2d at 822. That is the case here.

The Medical Marijuana Amendment is guilty of logrolling that violates the single-subject rule in at least five ways, as follows:

A. It creates a broad grant of immunity from civil liability.

B. It creates a broad grant of immunity from criminal liability beyond authorizing medical use itself.

C. It adds a broad catch-all category of unspecified medical conditions that will qualify for marijuana use, beyond the listed "certain" and "debilitating" conditions.

D. It adds a change in the legal requirements for standing to bring an action to enforce state agency action.

E. It expands the scope of practice of "physicians" not licensed as medical doctors under chapters 458 or 459 of the Florida Statutes.

These violations of the single-subject rule are discussed individually below. They cause the Amendment to "fly under false colors," because these additional subjects are far outside the scope of the chief purpose that is presented to the voters, and of such a nature that they require voters to accept provisions they disfavor in order to support the provisions they may want to adopt. *See Askew*, 421

So. 2d at 156 ("A proposed amendment cannot fly under false colors; this one does."). Individually or collectively, they render the amendment clearly and conclusively defective. The Court must strike this amendment from the ballot.[4]

A. The Amendment Is Guilty Of Logrolling By Creating Broad Immunity From Civil Liability.

The chief purpose of the Medical Marijuana Amendment is to legalize the medical use of marijuana. However, the amendment goes beyond such authorization and adds broad grants of immunity from "civil liability." Immunity from "civil liability" is an impermissible second subject and a classic instance of logrolling. Voters might want to allow individuals suffering from debilitating medical ailments to use marijuana without fear of criminal repercussions, but might not want to approve a broad grant of civil liability. Yet they must accept both here. Immunity from "civil liability" resulting from the medical use of marijuana is not a matter "directly connected with" the chief purpose of the Medical Marijuana Amendment. It is not incidental, and it is not reasonably necessary to legalize medical use of marijuana. It requires that the amendment be stricken.

Three provisions of the amendment create "civil liability" for acts and conduct that the amendment authorizes, immunizing patients, personal caregivers,

[4] Each of the single-subject violations also violates the requirements for the ballot title and summary, by failing to disclose to voters these significant and distinct changes in Florida law. *See* the second main argument point, *infra*.

physicians, and employees of Medical Marijuana Treatment Centers. These three provisions appear in section (a), entitled "Public Policy," as follows (emphasis added):

> (a) PUBLIC POLICY.
>
> (1) The medical use of marijuana by a qualifying patient or personal caregiver is not subject to criminal ***or civil liability*** or sanctions under Florida law except as provided in this section.
>
> (2) A physician licensed in Florida shall not be subject to criminal ***or civil liability*** or sanctions under Florida law for issuing a physician certification to a person diagnosed with a debilitating medical condition in a manner consistent with this section.
>
> (3) Actions and conduct by a medical marijuana treatment center registered with the Department, or its employees, as permitted by this section and in compliance with Department regulations, shall not be subject to criminal ***or civil liability*** or sanctions under Florida law except as provided in this section.

In addition, the definition of "personal caregiver" in the proposed amendment allows "[a]n employee of a hospice provider, nursing [sic], or medical facility" to serve as a personal caregiver. Amendment, (b)(7). This use of the lone word "nursing" creates an ambiguity as to whether the amendment intends to reference a "nursing *home*," or whether "nursing" modifies the word "facility" used two words later in the sentence. Ambiguity aside, the definition of "personal caregiver" apparently also brings within the promise of immunity from civil liability *employers* of personal caregivers, including hospice providers, some kind of nursing facilities, and medical facilities (undefined). Taken together, then, these

provisions of the amendment purport to immunize from "civil liability" patients, personal caregivers, physicians, Medical Marijuana Treatment Centers, employees of such Centers, and employers of personal caregivers.

The amendment does not define the phrase "civil liability," and therefore it must be given its ordinary meaning. *Wilson v. Crews*, 160 Fla. 169, 34 So. 2d 114, 118 (1948) (words in constitution are "to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense") (quoting *City of Jacksonville v. Glidden Co.,* 124 Fla. 690, 169 So. 216, 217 (1936)); *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla.1986) ("If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written.").

The phrase "civil liability" is understood to mean legal responsibility in civil legal proceedings. This would encompass a broad array of causes of action, including tort claims, contract claims, workers' compensation claims -- any form of direct or vicarious liability arising out of the acts or conduct that the amendment authorizes. Immunity from liability for such claims would mean that if a patient is under the influence of marijuana and commits a crime or a tort that victimizes another individual, the victim and his or her family, dependents, and survivors would have no civil claim against the patient or the patient's legal representative;

nor any claim against any person or entity involved in the process of recommending and supplying the patient with the marijuana.

The victim of an act or omission by any individual immunized by the amendment would have no legal recourse against anyone immunized – not the caregiver, not the physician, not facilities that hired and retained the caregiver or the physician, not Treatment Centers. Patients themselves, and their families and legal representatives, would have no legal recourse against caregivers, physicians, Treatment Centers, or the employers of any individuals involved in this process, even if such individuals acted with negligence or committed intentional wrongful acts that harmed the patients. If patients suffer aggravation or worsening of pre-existing conditions, increased risk of future harm, lung and heart damage from smoking marijuana, adverse reactions from interactions with other medications, reduced or impaired immune function, addiction, progression to even more damaging drugs through the marijuana gateway, accidents or other adverse incidents due to impaired judgment and reduced coordination – all of which are known effects of marijuana use regardless of the purported intent to use it for medical purposes -- they nevertheless have no civil legal recourse against anyone involved in the process, and neither do their families, survivors, or other legal representatives.

The amendment's promise of immunity from civil liability would extend to questions arising in workers' compensation claims, employment discrimination claims, termination of employment and unemployment claims; questions of breach of standard of care and direct and vicarious liability in medical negligence and wrongful death claims, and all manner of potential liability in all manner of civil claims. It is not necessary (and may be impossible) to identify the entire universe of claims that may be precluded by this civil immunity, but this grant of immunity is express, clear, legally significant, and most importantly for present purposes, a second subject outside the chief purpose of the amendment.

The amendment cannot be saved from this or any of its other impermissible second subjects by casting a broad cloak of generalities over it and arguing that in a broad sense, immunity from civil liability "relates" to the medical use of marijuana. The law will not countenance such an argument. *Evans v. Firestone,* 457 So. 2d 1351, 1353 (Fla. 1984) (noting the Court's earlier decision in *Fine v. Firestone,* 448 So. 2d 984 (Fla. 1984), "stands for the axiomatic proposition that enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement.").

The amendment's promise of immunity from civil liability is sharply different from the chief purpose of legalizing medical use of marijuana. Making the use of marijuana state-law legal for some purposes does not also require that all

potential civil liability be eliminated – and this broad immunity would be *unprecedented*. Voters may want to allow such medical use but not want to eliminate all civil legal recourse for the potentially enormous consequences of such use. This is an impermissible second subject, and it requires the Court to strike the amendment from the ballot.

The sponsor may argue that it did not intend to create this broad grant of immunity from civil liability, and that the phrase as it appears in context, within the phrase "not subject to criminal or civil liability or sanctions" was merely intended to emphasize that use of marijuana as authorized by the Amendment would not instigate any form of "punishment" in the broad sense.[5] But if this is not what the sponsor meant, it should not have been what the sponsor said. This or any similar argument would contravene the plain language that the sponsor wrote for inclusion in our State Constitution (in addition to misleading voters by leaving them guessing as to the meaning). Language added to the Florida Constitution must be construed as written. *Fla. Soc'y of Ophthalmology*, 489 So. 2d at 1119. It would violate fundamental tenets of construction to fail to give the phrase "civil liability" its plain meaning, or to give it a construction that is merely redundant of the other terms near it. *See Burnsed v. Seaboard Coastline R. Co*., 290 So. 2d 13,

[5] The fact that readers are left to guess what the sponsor intended by this material language is in itself a clear and conclusive defect in the Amendment. *See infra* Point II.

16 (Fla. 1974) (“It is a fundamental rule of construction of our constitution that a construction of the constitution which renders superfluous, meaningless or inoperative any of its provisions should not be adopted by the courts.”). If the sponsor claims not to have intended to grant immunity from civil liability, the only available cure is for the sponsor to rewrite the proposal and try again. This proposal, as currently written, violates the single-subject rule, and the Court must strike it from the ballot.

B. The Amendment Is Guilty Of Logrolling By Creating Broad Immunity From Criminal Liability.

The Medical Marijuana Amendment also violates the single-subject rule by combining its primary subject -- immunity from criminal liability for individuals who use marijuana for medical purposes – with added immunity from criminal liability for acts and omissions arising out of that use, and immunity from criminal liability for others involved in the process defined by the Amendment. The Amendment states in subsection (a)(1) that "medical use" by patients and caregivers is protected from all criminal liability "except as provided in this section." But there is no exception at all. The language under subsection (a)(3) is even more broad, stating that all "actions and conduct" by a treatment center or its employees "shall not be subject to" criminal liability "except as provided in this section." Again, no exception is included anywhere in the section. Immunizing all “actions and conduct” of a treatment center and its employees is staggeringly

broad. It creates sweeping legalization to potentially endless criminal acts by a registered treatment center and its employees. These immunity provisions are far, far beyond the chief purpose of the measure, and constitute clear and clearly improper logrolling.

The chief purpose of the amendment, and the chief selling point the sponsor promotes, is the idea that it should not be a crime for seriously ill individuals to use marijuana for relief from their medical symptoms. A voter may agree with that chief purpose, but *not* agree (indeed, likely not even be aware) that someone who chooses to use marijuana should also be immune from criminal liability if their use causes them to commit crimes; or that treatment centers and their employees are immune regardless of their "actions and conduct." A qualifying patient's immunity for merely using the product is a very different consideration than broad criminal immunity as defined in the Amendment, and the latter is not a natural or expected result of the former. The Amendment goes beyond what is necessary to protect patients, and in so doing is guilty of logrolling. It cannot withstand this Court's review under the governing legal tests, and the Court should strike it.

C. The Amendment Is Guilty of Logrolling By Adding An Unlimited Class Of Medical Conditions That May Qualify For Medical Use of Marijuana.

The amendment is clearly and conclusively defective because it improperly combines two very different categories of medical conditions that may qualify for

the medical use of marijuana. Whereas the title and summary provide for such use as to "certain medical conditions" (title), further described as "debilitating diseases" (summary), in fact the text of the amendment lists nine (9) specific conditions and then adds a catch-all phrase that in application would open up the class of covered conditions to an almost unlimited and indefinite extent. The definition of "Debilitating Medical Condition" in the amendment text provides as follows (emphasis added):

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

There is no qualifier in the catch-all phrase that requires that such "other conditions" be similar in nature or severity to the preceding list of nine specific conditions. The conditions that may come within the scope of this phrase are not defined or restricted at all except that a physician believes they are appropriate for use of marijuana. These are two very distinct subjects. A voter who agrees with the medical use of marijuana for the nine listed conditions might not want to authorize its use for less serious conditions or diseases. A voter who wants to authorize medical use of marijuana for limited purposes might want a state agency or board to determine whether and when to expand the authorized uses, and might not want

to leave it up to individual physicians to do so without uniform guidelines, oversight, regulation, or consistency in application.[6] This is a classic case of logrolling. It is similar to the flaw that caused this Court to strike the anti-discrimination amendment in 1994, in which a catch-all phrase broadened the amendment. *In re Advisory Op. to Att'y Gen.--Restricts Laws Related To Discrimination,* 632 So. 2d 1018, 1020 (Fla. 1994). This violates the single-subject rule and requires that the Court strike the amendment from the ballot.

D. The Amendment Is Guilty Of Logrolling By Adding A Change In The Legal Requirements For Standing.

The Medical Marijuana Amendment also violates the single-subject rule by adding a change in the legal requirements for standing to compel the Department

[6] Except for Massachusetts, no other state provision purporting to authorize marijuana use for medical purposes leaves it up to individual physicians' discretion to determine what medical condition may qualify for such use. The Massachusetts measure was a ballot initiative, but significantly, the initiative petition provisions of Article 48 of the Massachusetts Constitution (article 48, part II, section 3) do not impose a single-subject rule like that imposed by article XI, section 3, of the Florida Constitution. The Massachusetts superior court has noted that Massachusetts only requires "relatedness," which that court expressly described as "less restrictive" than a single-subject rule. *Massachusetts Teachers Ass'n v. Secretary of Com.*, 384 Mass. 209, 220, 424 N.E.2d 469, 476-77 (Mass. 1981) ("If, however, one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane, ***the relatedness test*** is met. … ***Unlike the situation in other States***, the single subject concept has not been a part of the legislative process in this Commonwealth, and we see no justification for importing that concept into the ***less restrictive*** limitation of 'related subjects.'") (Emphasis added; footnote omitted.) All other states with comparable laws on medical use of marijuana either have a closed list of qualifying medical conditions, or allow expansion of the list only through state agency or board action or a similar evaluative filtering process. *See, e.g.*, state chart at medicalmarijuana.procon.org.

of Health or successor agency to comply with the amendment. Changing the law of standing for this amendment is not directly connected with, or reasonably necessary to, the chief purpose of the amendment. It is another subject, it is logrolling, and it requires that the Court strike the amendment from the ballot.

The new law on standing appears near the end of the amendment text, in section (d)(3), entitled "Duties of the Department," as follows (emphasis added):

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

The plain meaning of this new standard for legal standing contains three features that differ dramatically from the existing Florida law of standing. First, it confers standing on any Florida citizen to bring suit against the State agency, without requiring, as current law requires, any showing of substantial interest, special injury, or that the complainant is within the zone of interests intended to be protected by the amendment. § 120.69(1)(b), Fla. Stat. (2013) ("A petition for enforcement of any agency action may be filed by any substantially interested person who is a resident of the state."). Second, it limits standing to "citizens" of Florida, whereas under the current Administrative Procedure Act, standing extends to "residents" of Florida – subject to the requirement of showing substantial interest. *Id.* Third, it eliminates the requirement under current law of prior notice to

the agency. Thus, this standing provision in the Medical Marijuana Amendment is clearly a departure from existing law, clearly a change in the law, clearly significant – and clearly separate and apart from the chief purpose of the measure.

Florida law has consistently required some showing of direct or special interest as a prerequisite to standing to sue the state or a state agency, with limited exceptions. *See Florida Wildlife Fed'n v. State Dep't of Envtl. Prot.,* 390 So. 2d 64, 67 (Fla. 1980) (no special injury required to sue under the Environmental Protection Act but noting the general rule requiring it in other actions). The APA uses the term "substantially interested," which has been defined as requiring a showing of injury in fact of the kind the proceeding is designed to protect. *Agrico Chemical Co. v. Department of Environmental Reg.,* 406 So. 2d 478, 482 (Fla. 2d DCA 1981) ("We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury."), *rev. den.*, 415 So. 2d 1359 (Fla. 1982). The Medical Marijuana Amendment changes this preexisting law of standing to eliminate, for purposes of suing the Department of Health under this

Amendment, any requirement of substantial interest or special injury or zone of interests.

While a constitutional amendment is permitted to change state statutory and common law, an amendment proposed through the initiative process of article XI, section 3, of the Florida Constitution may not make such a change *in addition to* a completely separate change in the law. The single subject of this amendment purports to be the authorization of the medical use of marijuana. Adding a separate change to the law of standing is outside the permissible scope of that single subject. It is not incidental to the chief purpose of the amendment, and it is not reasonably necessary to effectuate the chief purpose. It is, instead, a kind of *in terroram* clause, apparently intended to intimidate the Department under threat of a multiplicity of lawsuits – the avoidance of which is the very reason this Court instituted reasonable limits on standing in the first place. *See Florida Wildlife Federation,* 390 So. 2d at 67 ("This Court originally formulated the special injury rule as a method of forestalling a multiplicity of suits.") (citing *Brown v. Florida Chautauqua Ass'n,* 59 Fla. 447, 52 So. 802 (1910)). This additional second subject requires that the Amendment be stricken from the ballot.

E. The Amendment Is Guilty Of Logrolling By Expanding The Scope Of Practice Of Physicians Not Licensed As Medical Doctors Under Chapters 458 Or 459, Florida Statutes.

The Amendment is guilty of logrolling for yet another reason, because it expands the scope of practice of chiropractors and podiatrists, and any other healthcare provider not licensed as a medical doctor under Chapters 458 or 459 of the Florida Statutes who might fall within the scope of the word "physician" as used in the Amendment. The Amendment defines "physician" vaguely as "a physician who is licensed in Florida." However, this definition is not limited to medical doctors licensed under chapters 458 or 459 of the Florida Statutes, which are the medical doctors licensed to diagnose and treat illnesses, and whom voters most likely think the Amendment authorizes to recommend the use of marijuana. Other professionals such as chiropractors and podiatrists are also referred to as "physicians" under Florida law. *See* § 460.403(5) (defining "chiropractic physician"), and § 461.003(1) (defining "podiatric physician"), Fla. Stat. (2013).

Assuming the Amendment applies to these other categories of "physicians" as its plain meaning would indicate it does, it authorizes chiropractors and podiatrists to make the assessments and treatment recommendations contemplated by the "physician certification" process set forth in the Amendment. This means chiropractors and podiatrists, and perhaps other healthcare providers who fall within the broad term "physician" as used in the Amendment, would for the first

time be authorized to diagnose and treat the illnesses within the definition of "debilitating medical condition" in the Amendment. This would be an enormous expansion of these professionals' authorized scope of practice, and it would directly contravene present Florida law, which prohibits them from prescribing drugs, with only minimal exceptions. *See* § 460.403(9)(c)1, Fla. Stat. (2013) ("chiropractic physicians are expressly prohibited from prescribing or administering to any person any legend drug except as authorized under subparagraph 2"), and § 461.003(5), Fla. Stat. (2013) (limiting podiatry to certain foot and leg conditions and prohibiting the prescribing of drugs except within the scope of practice authorized by the statute for such foot and leg conditions).

This expansion in the scope of practice of "physicians" not licensed as medical doctors under chapters 458 or 459 of the Florida Statutes is a far-reaching change in the law, and is neither directly related to the chief purpose of the Amendment nor necessary to it nor incidental to it. Voters may think it permissible to have licensed medical doctors, who are authorized to diagnose and treat illness, recommending the use of marijuana for medical purposes; but they may not want to have healthcare practitioners who lack that licensure and training performing that same task. People who approve of the core concept of a medical doctor making a certification are not likely to approve the separate concept of allowing a podiatrist or chiropractor to certify the use of marijuana for one of the medical

conditions covered by the Amendment. This is impermissible logrolling, and it is yet another reason why the Court must strike this Amendment.

II. THE BALLOT TITLE AND SUMMARY ARE MISLEADING, AMBIGUOUS, AND INACCURATE.

Florida law mandates that the ballot title of an amendment proposed through the initiative process of Article XI, section 3, of the Florida Constitution must reflect how the measure "is commonly referred to or spoken of." The ballot summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. Re: Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998); § 101.161(1), Fla. Stat. (2013).[7] The accuracy and clarity of the ballot title and summary are of "paramount importance" because they are all the voter sees in the voting booth; the text is not on the ballot. *Armstrong*, 773 So. 2d at 12-13.

This Court refuses to approve ballot language that "flies under false colors" or "hides the ball." *Florida Educ. Ass'n v. Florida Dep't of State*, 48 So. 3d 694 (Fla. 2010); *Florida Dep't of State v. Florida State Conf. of NAACP Branches*, 43 So. 3d 662, 667-68 (Fla. 2010); *Armstrong*, 773 So. 2d at 16; *Askew v. Firestone*, 421 So. 2d at 156. Instead, the ballot summary must disclose the chief purpose and

[7] The statute also limits the title to 15 words and the summary to 75 words. § 101.161(1), Fla. Stat. (2013). This title and summary comply with those requirements.

legal effect of the amendment in language that is clear, unambiguous, and not misleading. *Advisory Op. to Att'y Gen. Re: Land Use Plans*, 902 So. 2d 763, 770 (Fla. 2005); *Advisory Op. to Att'y Gen. Re: Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So. 2d 972, 976 (Fla. 1997); *Askew v. Firestone*, 421 So. 2d at 154-55. The voter must be given fair notice of the decision to be made, *Roberts v. Doyle*, 43 So. 3d 654, 658-59 (Fla. 2010); and must be fairly informed about the substance and effect of the amendment. *Advisory Opinion to Attorney General re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009).

The Medical Marijuana Amendment fails all of these substantive requirements. The ballot title, "Use of Marijuana for Certain Medical Conditions," is not how the measure "is commonly referred to or spoken of." § 101.161(1), Fla. Stat. (2013). The ballot summary, even taken together with the title, is materially misleading because it fails to inform voters accurately about material features of the Amendment. It hides the fact that the Amendment capitalizes on the fundamentally misleading and undefined phrase "medical marijuana." It fails to disclose the broad grants of civil and criminal immunity created in the amendment text. It conceals the fact that the class of medical conditions for which marijuana may be used is virtually unlimited. It fails to advise the voter that standing to sue the State is made broader than current law would allow, and that the scope of

practice of physicians not licensed to diagnose or treat illnesses covered by the Amendment would be expanded dramatically. Finally, the ballot summary fails to inform the voter accurately about the current state of Federal law governing the use of marijuana, and uses language inconsistent with the language of the Amendment text in describing the interaction between this amendment and Federal law. It plainly and improperly "hides the ball" as to material aspects of the amendment. As this Court recently held with respect to a similarly defective ballot summary, this summary does not give "fair notice of the purpose and effect of the amendment." *Florida Dep't of State v. Mangat*, 43 So. 3d 642, 648 (Fla. 2010). These clear and conclusive defects require the Court to strike this amendment from the ballot.

A. The Title Violates The Statute.

The title of the Medical Marijuana Amendment is not how the measure "is commonly referred to or spoken of" as required by section 101.161(1), Florida Statutes (2013). The title is "Use of Marijuana for Certain Medical Conditions," but one will search in vain for any instance in which the measure is "commonly referred to" by this title (except on the printed petition forms). The sponsor's website (unitedforcare.org), advertising, media releases and interviews, other online and media references to the amendment – and, importantly, the text of the amendment itself – instead uniformly and consistently refer to the measure in some

way that includes the phrase "medical marijuana." On Twitter, both the campaign manager (Ben Pollara, @bfgpollara) and the principal spokesman and financier (John Morgan, @johnmorganESQ), tweet about the amendment and campaign using #medicalmarijuana and #unitedforcare, consistently and repeatedly, and to the notable *exclusion* of the ballot title. Likewise, the sponsor's Facebook page at United For Care refers to the proposal as the "medical marijuana campaign," "medical marijuana initiative," and "the petition for medical marijuana," never using the ballot title. (See recent posts of October 14, 22, 24, 29, and November 6, 2013, among numerous examples.) Other supportive groups and individuals on social media and traditional media, nationwide, refer to this amendment as well as the entire nationwide marijuana legalization movement by the phrase "medical marijuana." When this Court docketed this case, it gave it the title "Medical Marijuana" initiative. [Public Information page][8] This is the Medical Marijuana Amendment, and that is how people refer to it – *not* by the ballot title the sponsor chose to use. The title on the petition forms violates the plain meaning of section 101.161(1), Florida Statutes (2013).

[8] The Clerk's office also initially docketed the case using the name of the sponsoring political committee, People United For Medical Marijuana. The Court amended the case style to use the formal ballot title by an Order dated October 31, 2013. The listing on the Public Information page still calls it the "Medical Marijuana" initiative.

The use of a sterile and obscure title that makes *no reference* to "medical marijuana" has special significance in this case because it reflects what must have been the intentional avoidance of the very phrase that realistically describes how this amendment is referenced. And that act of avoidance is legally significant because it allows the amendment to cultivate and capitalize on a false public perception that the adjective "medical" modifies the noun "marijuana," and that "medical marijuana" is a better, cleaner, safer, more socially acceptable, more sanitized product than what is really at issue, which is smoked marijuana, plain and simple. In fact, there is such a thing as "medical marijuana" or "medical cannabis," which is a pharmaceutically-produced medicine utilizing the helpful compounds contained within the plant without the unhelpful and affirmatively harmful compounds and without requiring smoking as the method of administration. A voter searching for a definition of "medical marijuana" could find out about this pharmaceutical drug on Wikipedia among other sources. But that is clearly *not* what this Amendment is about.

If the title used the phrase "medical marijuana" like it should have, then the sponsor would have been compelled to define the phrase, and to do so accurately, and would have lost the public relations cachet derived from the false connotation of the phrase. The failure of the ballot title to reflect the real way this amendment

is referenced allows it to fly under false colors, which the Court should not countenance.

The failure of the title to comply with this threshold statutory requirement is also revealed to be misleading in light of the contrasts between the title and summary, neither of which uses the phrase “medical marijuana,” and the text of the amendment itself, which uses that phrase nine (9) times, even in the title that would appear in the Florida Constitution. The text uses the constitution section title “Medical marijuana production, possession, and use.” The phrase “medical marijuana” is then used eight (8) more times in the text of the amendment (several times in the defined term “medical marijuana treatment center”). The phrase “medical marijuana” appears in subsections (a)(3), (b)(5), (c)(2), (c)(5), (d), (d)(1)c, (d)(2), and (d)(3). In order for the title and summary together to reflect the text accurately and fairly, they should have used the phrase “medical marijuana,” and the phrase should have been defined – accurately and not euphemistically - in the text. Neither of those attempts at fair and accurate terminology and disclosure occurred. Because of these omissions, the amendment “flies under false colors” and is misleading as to its most basic premise: what “medical marijuana” really is. This, too, renders the amendment clearly and conclusively defective, for which the Court must strike it from the ballot.

B. The Summary "Flies Under False Colors" and "Hides The Ball" By Omitting Material Information Necessary To Fairly Inform Voters.

The law is clear that a ballot summary cannot either "fly under false colors" or "hide the ball." *Armstrong*, 773 So. 2d at 16, 18. This ballot summary does both and is materially misleading in three respects. First, it deceives the voter into believing that the medical conditions for which marijuana may be used are "certain," implying specified and identifiable; and "debilitating," meaning serious and enfeebling. Neither is true. The amendment itself includes a catch-all category of illnesses subject only to the "belief" of any Florida physician that marijuana is likely helpful – a virtually bottomless pit. Second, the ballot summary misleads the voter with respect to the state of Federal law on the use of marijuana and the interaction between this amendment and Federal law. Third, the summary fails to disclose accurate information about the scope of the amendment. All of these deceptions are material, and require the Court to strike the amendment from the ballot.

The sponsor will fall back on the 75-word limit for ballot summaries to excuse the material omissions in this summary, and in truth the law does not require "an exhaustive explanation of the interpretation and future possible effects of the amendment." *Advisory Op. to Att'y Gen. Re: Protect People from the Health Hazards of Second–Hand Smoke by Prohibiting Workplace Smoking*, 814 So. 2d

415, 419 (Fla.2002). However, the word limit is no excuse for leaving out what ought in fairness be disclosed, nor an excuse for including affirmatively misleading information. Indeed, the word limit makes it all the more important to make every word count. Other drafters of other complex proposals have managed to include all information necessary to ensure that the summaries are accurate and not misleading. But that was not accomplished here, and the resulting summary is incomplete and even affirmatively misleading. The Court must strike it.

1. The Title And Summary Are Misleading As To The Medical Conditions That Qualify For Medical Use Of Marijuana.

The ballot title and summary mislead the voter about the nature and scope of medical conditions that may qualify for medical use of marijuana. The title states that marijuana may be used for "certain medical conditions," implying by the use of the word "certain" that the conditions are limited and definite and can be defined. The primary definition of the word "certain," and the common understanding of its meaning, is "fixed, settled." Merriam-Webster Online Dictionary. But the title's promise of certainty is false.

The falsehood in the title is made worse in the ballot summary. The ballot summary states as follows: "Allows the medical use of marijuana for individuals with ***debilitating diseases as determined by a licensed Florida physician***." (Emphasis added.) Neither the summary nor the text defines the word "debilitating," and the summary does not advise the voter that the text provides

other definitions that control the amendment. The plain meaning of the word "debilitate" is to make weak, to impair the strength of, or to enfeeble. Merriam-Webster Online Dictionary. Voters commonly understand "debilitating" to refer to a very serious illness or disease that leaves a patient unable to function normally. Thus, voters reading the title's promise that only fixed or settled conditions will qualify for medical use of marijuana, and the summary's description of those conditions as "debilitating," must conclude that the amendment would limit the medical use of marijuana to specified and identified conditions that cause weakness and loss of strength. But that impression would be false.

Although the ballot summary fails to inform the voter that terms used in the amendment are specially defined within the text, the text of the amendment itself defines "debilitating medical condition" as follows (Amendment (b)(1), emphasis added):

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

The catch-all phrase at the end of this definition is a quantum leap beyond anything that can fairly be described as either "certain" or "debilitating." It extends the universe of qualifying medical conditions indefinitely and imprecisely. It defies

the very concept of certainty. Further, it departs from the limitation otherwise imposed by the term "debilitating," and brings within the scope of the amendment the use of marijuana for any condition that any physician believes might benefit more than suffer from such use. As already noted, this definition omits the first half of the balancing test, which is defined in the definition of "physician certification" as whether the "potential benefits of" the use would "likely outweigh" the health risks for the patient. Amendment (b)(9). Whether this omission was substantive or unintended, and what it means about the physician's analysis, is uncertain. What is clear, though, is that the definition of qualifying medical conditions in the text goes far, far beyond what is promised in the title and summary. Anyone with an ache or pain or anxiety or stress or – anything, really – who can get a single doctor to say it is more likely good than bad to use marijuana, will be qualified to use it. But that is not what the title and summary tell the voter, and that is a violation of the standards imposed on initiatives under Florida law. § 101.161(1), Fla. Stat. (2013).

The ballot summary makes this problem worse, not better, by stating that medical use will be allowed for debilitating diseases "as determined by a licensed Florida physician." The sponsor might argue that this "as determined" phrase advises the voter that in the final analysis, the identity of conditions for which marijuana may be used is up to a physician. If that was the drafters' intent, it fails

miserably because it is inconsistent with the title's promise of certainty, it is inconsistent with the dictionary definition and connotation of "debilitating" diseases, and it introduces even more ambiguity into the analysis. Instead, a voter reading this sentence in the summary, after having read that the title promises only "certain" medical conditions will qualify, is likely to read the "as determined" phrase as being limited to "debilitating diseases." In other words, the reasonable meaning of the phrase "debilitating diseases as determined by a licensed Florida physician" is that a physician will act as gatekeeper and make the determination of whether or not any given condition qualifies as a "debilitating disease." But the definition in the text is to the contrary, creating an open class of medical conditions that may qualify for medical use of marijuana, and not limiting that class to "debilitating" conditions at all. This creates an enormously significant inaccuracy and it is certain to mislead voters. It causes the amendment to "fly under false colors," and it is not permissible. The Court must strike this amendment from the ballot.

2. <u>The Title And Summary Are Misleading About Federal Law</u>.

The amendment is clearly and conclusively defective in another respect because it misleads the voter about the status of Federal law and the interaction between this amendment and Federal law with respect to the use of marijuana. In addition, there is an inconsistency between the summary and the text in reference

to Federal law. The ballot summary states that the amendment "[d]oes not ***authorize*** violations of federal law … ." (Emphasis added.) But the text of the amendment states that "Nothing in this law section [sic] ***requires*** the violation of federal law or purports to give immunity under federal law." (Emphasis added.) "Authorize" and "require" are not the same thing. "Authorize" means to give legal authority or to empower. Black's Law Dictionary, 9th ed. "Require" means to make necessary or mandatory. Merriam-Webster Online Dictionary. Because the summary uses one word and the text uses the other, it is not clear which meaning the drafters intended to convey. This introduces a material ambiguity that may mislead voters with an incorrect understanding of the interplay of this amendment with Federal law. Similar flaws have required the Court to strike previous amendments. *See, e.g., Advisory Op. to Att'y Gen. Re: Right To Choose Healthcare Providers,* 705 So. 2d 563, 586 (Fla. 1998) ("citizen" and "person" are different terms, introducing unacceptable ambiguity); *Advisory Op. to Att'y Gen. Re: People's Property Rights,* 699 So. 2d 1304 (Fla. 1997) (difference in language between summary and text, together with undefined terms, caused court to strike the amendment); *Save Our Everglades,* 636 So. 2d 1336 (among other flaws, use of inconsistent words "save" and "restore" rendered amendment clearly and conclusively defective). This amendment suffers from the same clear and conclusive defects.

Even worse, the ballot summary gives a false impression of the legality of marijuana use under Federal law, because it fails to disclose the current state of Federal law but implies that the use authorized under this amendment would not violate Federal law. It is undisputed, and the sponsor does not deny, that marijuana is a schedule 1 drug under the federal Controlled Substances Act. *See* 21 U.S.C. § 812(b)(1). This means that it is illegal under Federal law to grow, distribute, possess, or use marijuana. It is illegal to manufacture, distribute, or possess it with intent to distribute. *See* 21 U.S.C. § 841. It is illegal to knowingly open, lease, rent, maintain or use any property for the manufacture, storage, or distribution of a controlled substance. *See* 21 U.S.C. § 860. It is illegal to use any communication facility to commit a felony violation of the Controlled Substances Act. *See* 21 U.S.C. § 843. The fact that the Department of Justice, under the current administration, has elected to focus its limited resources on large-scale violations of these laws, rather than prosecuting individual violators, does not change the fact that it is illegal. Everyone in the chain of custody of the marijuana used as contemplated by this Amendment would be violating Federal law. Furthermore, marijuana is categorized as it is because it has not been determined to be either safe or effective. It is not a medicine. Only the Food and Drug Administration can re-categorize a substance and determine how it can be used, and it has not done so.

Yet the sponsor chose not to disclose the current state of the law to voters, and that is improper. *See Askew*, 421 So. 2d at 156 (amendment fatally defective for its failure to explain current law on lobbying ban or that the proposal weakened current law); *Advisory Op. to Att'y Gen. Re: Casino Authorization*, 656 So. 2d 466, 469 (Fla. 1996) (what the amendment *failed* to disclose rendered it misleading and required that it be stricken).

How this amendment can fairly be said to not violate Federal law defies explanation. At a bare minimum, the employees of a treatment center who dispense marijuana are violating Federal law and are both "authorized" to do so by the Amendment and "required" to do so by the terms of their employment. The voter is legally entitled to a clear and not misleading explanation of the measure, and the title and summary fail to provide it with respect to Federal law. For this additional reason, the Court must strike this amendment from the ballot.

3. The Title And Summary Omit Material Information About The Scope Of The Amendment, Rendering Them Misleading.

As noted in the first argument point, the Medical Marijuana Amendment improperly includes at least five subjects that are not necessary to the chief purpose of the amendment nor directly connected to it: immunity from civil liability, immunity from criminal liability beyond liability for using marijuana itself, an unrestricted category of unspecified medical conditions that may qualify for

medical use of marijuana, a change in the law of standing, and an expansion of chiropractors' and podiatrists' practice act. The failure to disclose these additional subjects in the ballot summary is enough to render the amendment fatally defective. If voters are being asked to give up substantial legal rights to pursue civil claims, to accept broad immunity from criminal liability, to approve marijuana use for an unlimited class of medical conditions that are not required to be "debilitating," and to approve a material change in the law of standing and scope of medical practices, at a minimum they should be advised of those issues. They were not, and that is impermissible. The ballot summary is clearly and conclusively defective for failing to make these material disclosures.

CONCLUSION

The Medical Marijuana Amendment violates the single-subject rule, and is guilty of multiple instances of logrolling. Its title and ballot summary fly under false colors and hide the ball; they are inaccurate and misleading. The Court must strike this Amendment from the ballot.

Respectfully submitted this 8th day of November, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished electronically to Attorney General Pamela Jo Bondi at pam.bondi@myfloridalegal.com; Solicitor General Allen Winsor at allen.winsor@myfloridalegal.com; Daniel Nordby, General Counsel to the Florida House of Representatives and House Speaker Will Weatherford, at daniel.nordby@myfloridahouse.gov; George T. Levesque, General Counsel to the Florida Senate and Senate President Don Gaetz, at levesque.george@flsenate.gov; and counsel for the Sponsor, Jon L. Mills, at jmills@bsfllp.com, this 8th day of November, 2013.

/s/ Susan L. Kelsey
Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced and in compliance with Florida Rule of Appellate Procedure 9.210.

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