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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2006

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

INITIAL BRIEF OF OPPONENTS THE FLORIDA HOUSE OF REPRESENTATIVES; WILL WEATHERFORD, in his official capacity as Speaker of the Florida House of Representatives; THE FLORIDA SENATE; and DON GAETZ, in his official capacity as President of the Florida Senate

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INTRODUCTION

This case involves the validity of an initiative petition entitled "Use of Marijuana for Certain Medical Conditions." Neither the right of the people to amend the Florida Constitution nor the merits of the underlying policy expressed in the proposed amendment are before the Court. The people of this state have a fundamental right to amend their constitution through the proper exercise of the initiative process.

But the people also have a right to a ballot that clearly sets out the true meaning and ramifications of any proposed amendment to the Florida Constitution. The people are entitled to a ballot that is not misleading and that provides voters with the opportunity to cast an intelligent and informed vote on each proposal. And the people have a constitutional right to an initiative process that does not permit multiple subjects to be "logrolled" into a single ballot proposal. This Court has not hesitated to reject proposed amendments that contravene these exacting legal requirements.

Because the proposed amendment here violates the clarity, accuracy, and single-subject requirements imposed by the laws of this State and by this Court's

precedents, the Legislature[1] files this brief in opposition to the proposed amendment's placement on the ballot.

STATEMENT OF THE CASE

On October 24, 2013, the Attorney General petitioned this Court for an advisory opinion regarding the validity of an initiative petition sponsored by "People United for Medical Marijuana," a political committee organized under Chapter 106 of the Florida Statutes. The Attorney General requested this Court's opinion as to whether the proposed amendment complies with the single-subject requirement of Article XI, section 3, of the Florida Constitution and as to whether the amendment's ballot title and summary comply with section 101.161, Florida Statutes (2013). This Court has jurisdiction under Article IV, section 10, and Article V, section 3(b)(10), of the Florida Constitution.

The proposed amendment includes a ballot title and summary as required by section 101.161(1), Florida Statutes:

BALLOT TITLE: Use of Marijuana for Certain Medical Conditions

[1] This brief uses the term "Legislature" to refer collectively to the Florida House of Representatives; the Florida Senate; and the presiding officers of the two chambers: Will Weatherford, as Speaker of the Florida House of Representatives; and Don Gaetz, as President of the Florida Senate.

> BALLOT SUMMARY: 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 proposed amendment would add a new section 29 to Article X of the Florida Constitution. The full text of the proposed amendment is set forth on pages 2-5 of the Attorney General's Petition.

The Legislature submits this Initial Brief in opposition to the proposed amendment in response to this Court's Order inviting interested parties to submit briefs.

SUMMARY OF THE ARGUMENT

The proposed amendment is clearly and conclusively defective. It violates Florida's ballot-placement laws in at least three ways, each of which is sufficient to require the proposal's exclusion from the ballot. Together, the defects present an overwhelming case for this Court to reject the proposed amendment's placement on the ballot.

First, the ballot title and summary use misleading and inaccurate rhetoric to obscure from the voters the proposed amendment's true purpose and effect in at

least three ways. Although the ballot title refers to the use of marijuana for "certain medical conditions" and the ballot summary refers to "debilitating diseases," *nothing* in the proposed amendment limits the authorization of marijuana use to a defined or "certain" set of debilitating medical diseases or conditions. Instead, the proposed amendment authorizes physicians to recommend marijuana use for *any* condition for which the physician "believes that the medical use of marijuana would likely outweigh the potential health risks for a patient." This open-ended authorization, which is not disclosed by the ballot title or summary, applies whether or not the particular condition at issue is actually "debilitating" as that term would be understood by the voters.

The ballot summary also misleads voters by using the term "caregiver" without informing voters that the proposed amendment defines that term in a manner that is inconsistent with its common meaning and its use in the Florida Statutes. Under the proposed amendment, *any* person over twenty-one years old who registers with the Department of Health to assist others with the medical use of marijuana is defined as a "personal caregiver." Contrary to the common definition of "caregiver" that would be understood by the voters, a "personal caregiver" under the proposed amendment need not have any personal or medical

relationship with the patient or any responsibility for the patient's care; the only "care" at issue is assistance in the medical use of marijuana.

Third, the ballot summary leaves voters with the impression they will be able to use marijuana lawfully for the described purposes if the amendment is adopted. But current federal law criminalizes the possession, manufacture, and distribution of cannabis. The very activities that the proposed amendment purports to "allow" are violations of federal law. The ballot summary, however, only notes that the proposed amendment "does not authorize violations of federal law." The ballot summary's attempted explanation of the relationship between state and federal law only obscures the effect of the proposed amendment and misleads voters.

In addition to its use of misleading terms, the ballot summary is also deficient in completely failing to disclose the proposed amendment's effect on two existing provisions contained within the Florida Constitution's Declaration of Rights: the right of access to the courts and the right of access to public records. As to the right of access to the courts, the ballot summary fails to disclose that a licensed physician who recommends the medical use of marijuana under the amendment's "physician certification" procedure would be granted blanket

immunity from "criminal or civil liability and sanctions under Florida law." By its plain terms, the physician's exemption from "civil liability and sanctions" would preclude an injured patient from recovering damages in a civil lawsuit against a physician whose negligent recommendation of marijuana use caused harm to the patient. The non-disclosed exemption from civil sanctions for physicians who recommend marijuana use would also bar the Board of Medicine from initiating a disciplinary action against a physician who recommended marijuana use to patients in a manner contrary to accepted professional standards. The ballot summary is completely silent regarding the proposed amendment's abrogation of the right of an injured patient to access the courts to seek redress of injury.

The ballot summary omits any mention of the proposed amendment's effect on the Florida Constitution's broad guarantee of access to public records. The proposed amendment creates a new *constitutional* exemption from the public records law for records identifying individuals authorized to use marijuana for medical purposes. Whether the proposed amendment's effect on the right of access to the courts, or the right of access to public records, is worthwhile as a *policy* matter is immaterial—this Court's precedents require a ballot initiative's effects on existing constitutional rights to be disclosed to the voters so they may make an

intelligent and informed decision in casting their ballots.

The proposed amendment also violates the Florida Constitution's single-subject requirement in two ways. First, it impermissibly addresses at least three logically-separable subjects: (1) the removal of criminal liability and civil sanctions on individuals, caregivers, and physicians related to the medical use of marijuana; (2) the exemption from civil liability to others related to the medical use of marijuana; and (3) the creation of a new state regulatory structure designed to affirmatively promote the production, distribution, availability, and use of marijuana for medical purposes. This classic example of "logrolling" denies voters the opportunity to vote in favor of a simple decriminalization of medical marijuana use by individuals suffering from serious illnesses without also expanding the regulatory reach of state government or providing immunity from civil liability. Conversely, the proposed amendment denies voters the opportunity to vote in favor of a regulatory system to control the distribution and use of medical marijuana without also voting in favor of the particular open-ended authorization of marijuana use set out in the amendment.

Finally, the proposed amendment violates the single-subject requirement by substantially altering the functions of multiple branches of government. Under the

Florida Constitution, a person belonging to one branch of government may not exercise powers belonging to another branch. The proposed amendment, however, authorizes executive branch officials within the Department of Health to establish fundamental policy choices regarding the implementation of the amendment, stripping the Legislature of its constitutional role as the state's principal policy-making body.

ARGUMENT

I. The Proposed Amendment's Ballot Title and Summary are Misleading and Do Not Fairly and Accurately Inform Voters of the Proposed Amendment's Chief Purpose.

When reviewing the validity of a ballot title and summary under section 101.161 of the Florida Statutes, this Court asks two questions: 1) whether the ballot title and summary fairly and accurately inform the voter of the chief purpose of the amendment; and 2) whether the language of the title and summary, as written, is likely to mislead the public. *See, e.g.*, *Advisory Op. to the Att'y Gen. re Water and Land Conservation—Dedicates Funds to Acquire and Restore Florida Conservation and Recreation Lands*, 38 Fla. L. Weekly S682 (Fla. Sept. 26, 2013); *Fla. Dept. of State v. Slough*, 992 So. 2d 142 (Fla. 2008). The ultimate purpose of the ballot title and summary requirements is "to provide fair notice of

the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to the Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998). "Reduced to colloquial terms, a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an amendment." *Fla. Dept. of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008). Finally, the ballot summary must inform the voter about any effects the proposed amendment has on existing constitutional provisions. *Advisory Op. to the Att'y Gen. re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009).

The proposed amendment's ballot title and summary clearly and conclusively violate these standards. By misstating the scope of marijuana use authorized by the proposed amendment, the ballot title and summary are affirmatively misleading as to the proposed amendment's chief purpose and "hide the ball" from the voters. The ballot summary also misleads voters by using the term "caregiver" without disclosing that the proposed amendment defines that common term in an uncommon manner, one that stands in sharp contrast to the way the term "caregiver" is defined in dictionaries and the Florida Statutes. And the ballot summary fails to inform voters of the effect the proposed amendment

will have on the public's existing constitutional rights of access to the courts and access to public records.

A. The ballot summary and title are misleading regarding the scope of marijuana use authorized by the proposed amendment.

The ballot title and summary are affirmatively misleading to the voters regarding the proposed amendment's actual purpose and effect. A reasonable voter reviewing the ballot title and summary prepared by the sponsor of the proposed amendment in the privacy of a voting booth would conclude that an affirmative vote would result in a limited authorization of marijuana for medical purposes: use of marijuana, as recommended by a physician, only for individuals with "certain" medical conditions that amount to "debilitating diseases." That reasonable voter would be wrong.

This Court's evaluation of a proposed amendment's ballot title and summary "includes consideration of the amendment's 'true meaning, and ramifications.'" *Fla. Dept. of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 667 (Fla. 2010) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Here, the proposed amendment's ballot title and summary mislead as to the amendment's true effect: an open-ended and unreviewable license for physicians to recommend marijuana use for the treatment of literally any physical

or mental condition. By using the ballot title "Use of Marijuana for *Certain* Medical Conditions" and a ballot summary referring to "medical use of marijuana for individuals with *debilitating diseases*," the ballot statement indicates that the proposed amendment includes specific limitations on the types of conditions for which the medical use of marijuana is authorized. But the actual text of the proposed amendment contains no such limitations.

The text of the proposed amendment identifies nine specific medical conditions within its definition of "debilitating medical condition": 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, and multiple sclerosis. Each of these conditions is readily identifiable as "debilitating" as that term is commonly understood. *See*, *e.g.*, Webster's New Collegiate Dictionary (1977 ed.) (defining "debilitate" as "to impair the strength of; enfeeble"). But the proposed amendment's definition is not exclusive; it also includes a catch-all provision that is drafted broadly enough to capture many conditions that are not "debilitating." Under the proposed amendment, any and all "other conditions for which a physician believes that the medical use of marijuana would likely outweigh the

potential health risks for a patient" are defined as "debilitating medical conditions." As the Attorney General accurately noted in her Petition to this Court, for a physician who considers marijuana's health risks insignificant, there is literally no "condition" beyond the proposed amendment's reach.

This Court has stricken proposed amendments whose ballot summary implies limitations that go beyond the actual text of the amendment. *See, e.g.*, *Advisory Op. to the Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (invalidating amendment whose ballot summary stated that casinos would be authorized at "hotels" where the actual amendment would have allowed casinos in "transient lodging establishments"—a term with a much broader definition). And in recent years, this Court has repeatedly decried the use of "wordsmithing" intended to cloak the true purpose of an amendment in an effort to win voter approval. Writing for a unanimous court in *Slough*, Justice Lewis condemned "advantageous but misleading 'wordsmithing' in the crafting of ballot titles and summaries." 992 So. 2d at 149. The *Slough* court described the practice at length, along with the response sponsors employing this technique should expect from the courts:

> Sponsors attempt to use phrases and wording techniques in an attempt to persuade voters to vote in favor of the

> proposal. When such wording selections render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot—regardless of the substantive merit of the proposed changes.
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> * * *
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> If a sponsor—whether it be a citizen-initiative group, commission, or otherwise—wishes to guard a proposed amendment from such a fate, it need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous. The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions.

Id.

The ballot title and summary here employ the trademark characteristics of "advantageous but misleading 'wordsmithing.'" They employ the misleading terms "certain" and "debilitating diseases" in an attempt to portray the proposed amendment as a modest and limited authorization of medical marijuana exclusively for seriously ill patients. As in *Casino Authorization, Taxation and Regulation,* the ballot summary here fails to reflect the true scope of the proposed amendment: an open-ended authorization for marijuana use whenever

recommended by a physician for any condition. The ballot title and summary improperly "hide the ball" from the voters by misrepresenting the proposed amendment's true effects and ramifications.

B. The ballot summary's use of the term "caregiver" is misleading.

The ballot summary's use of the term "caregiver" is similarly misleading. By failing to inform voters that the proposed amendment provides a definition of "caregiver" that is contrary to the term's common usage and its statutory definitions, the ballot summary "hides the ball" as to the true effects of the proposed amendment.

The proposed amendment's ballot summary uses the term "caregiver" on two occasions. First, the ballot summary states that the proposed amendment "[a]llows caregivers to assist patients' medical use of marijuana." The ballot summary also states that the Department of Health "shall issue identification cards to patients and caregivers." Based on the common dictionary meaning of the term "caregiver," its meaning as used in the Florida Statutes, and its close proximity to the term "patient" on two occasions in the ballot summary, a reasonable voter might presume that the amendment's provisions related to "caregivers" are limited to individuals who provide "care" to a patient—perhaps a relative, health care

worker, or trusted friend. Once again, the reasonable voter would be mistaken.

The proposed amendment defines "personal caregiver" as "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 [of Health]." A "caregiver" under the proposed amendment, therefore, is simply a term used to describe *anyone* at least 21 years old who has registered with the Department of Health to assist others in the medical use of marijuana. Other than providing assistance in consuming marijuana, no prior or subsequent "caregiving" relationship between the "caregiver" and the patient is contemplated (or required) by the proposed amendment.

The proposed amendment's definition of "caregiver" is contrary to the common definition of the term that would likely be understood by the voters. Merriam-Webster.com defines "caregiver" as "a person who gives help and protection to someone (such as a child, an old person, or someone who is sick)." And at least eight sections of the Florida Statutes define the term "caregiver" for various statutory purposes.[2] The statutory definitions are consistent with the

[2] *See* § 39.01(10), Fla. Stat. ("'Caregiver' means the parent, legal custodian, permanent guardian, adult household member, or other person responsible for a

common usage of the term: a caretaker is a person who is responsible for the welfare, care, or property of another person, typically a child or disabled adult. Examples of statutory "caregivers" include parents, relatives, legal guardians, and health care providers. The proposed amendment's definition of "caregiver" bears little resemblance to the way the term is likely to be understood by a voter reading the ballot summary.

By using the common term "caregiver" without disclosing the uncommon

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child's welfare…."); § 39.4091(2)(b), Fla. Stat. ("'Caregiver' means a person with whom the child is placed in out-of-home care, or a designated official for group care facilities licensed by the Department of Children and Families…."); § 409.145(3)(a)2., Fla. Stat. ("'Caregiver' means a person with whom the child is placed in out-of-home care, or a designated official for a group care facility…."); § 409.256(1)(b), Fla. Stat. ("'Caregiver' means a person, other than the mother, father, or a putative father, who has physical custody of a child or with whom the child primarily resides."); § 409.2563, Fla. Stat. (*same*); § 415.102(5) , Fla. Stat. ("'Caregiver' means a person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person or disabled adult. 'Caregiver' includes, but is not limited to, relatives, court-appointed or voluntary guardians, adult household members, neighbors, health care providers, and employees and volunteers of [day or residential care or treatment facilities for vulnerable adults]."); § 825.101(2), Fla. Stat. ("'Caregiver' means a person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person or disabled adult. 'Caregiver' includes, but is not limited to, relatives, court-appointed or voluntary guardians, adult household members, neighbors, health care providers, and employees and volunteers of [day or residential treatment facilities for elderly or disabled adults]."); and § 827.01(1),

meaning accorded to that term by the proposed amendment, the ballot summary is misleading regarding the true effect and ramifications of the amendment. As with the misleading and undisclosed definition of "debilitating medical condition" discussed above, the ballot summary engages in "wordsmithing" to misrepresent the proposed amendment as more limited in scope than its text actually provides.

C. The ballot summary is misleading in implying that the proposed amendment is consistent with federal law.

The ballot summary is additionally misleading because it leaves voters with the impression that the proposed amendment legalizes the production, possession, and use of marijuana in certain circumstances when, in fact, those activities will continue to be illegal under federal law.

Congress, finding "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people," has established a system to regulate—and in some circumstances, prohibit—the possession, manufacture, and distribution of controlled substances. 21 U.S.C. § 801(b); *see also* 21 U.S.C. § 801 *et seq*. Under the federal regulatory scheme,

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Fla. Stat. ("Caregiver" means "a parent, adult household member, or other person responsible for a child's welfare.").

Congress has designated marijuana as a Schedule I controlled substance, a category of controlled substances with a high potential for abuse for which there is no currently accepted medical use in treatment in the United States, and for which there is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812(b), (c). Congress has therefore criminalized the possession, manufacture and distribution of marijuana, except in the instance of government-approved research projects. *See* 21 U.S.C. §§ 841(a)(1), 844(a); *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 491 (2001).

Interpreting and applying these restrictions, the United States Supreme Court has upheld Congress's authority to regulate marijuana, including prohibiting and criminalizing its possession, manufacture, and distribution. *Gonzales v. Raich*, 545 U.S. 1 (2005). Federal law, unlike Florida law[3], does not recognize a "medical necessity" exception to the prohibition on possession and use of marijuana.

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[3] *See, e.g., Jenks v. State*, 582 So. 2d 676 (Fla. 1st DCA 1991); and *Sowell v. State*, 738 So. 2d 333 (Fla. 1st DCA 1998). The elements of the medical necessity defense are: 1) the defendant did not intentionally bring about the circumstance that precipitated the unlawful act; 2) the defendant could not accomplish the same objective using a less offensive alternative available to the defendant; and 3) the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it. *Jenks*, 582 So. 2d at 679.

Oakland Cannabis Buyers' Co-op, 532 U.S. at 491.[4] The *Raich* and *Oakland Cannabis Buyers* decisions make clear that the possession, manufacture, and distribution of marijuana, even for personal use, violates federal law.

Despite the clear dictates of federal law, the proposed amendment's ballot summary states that the amendment "allows the medical use of marijuana for individuals with debilitating diseases" and "[a]llows caregivers to assist patients' medical use of marijuana." These statements clearly indicate to voters that qualifying patients and caregivers under the proposed amendment may lawfully use or facilitate the use of marijuana. As both *Raich* and *Oakland Cannabis Buyers* demonstrate, these statements in the ballot summary are simply false. The precise activities that the proposed amendment purports to "allow" are criminal violations subject to prosecution under federal law.

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[4] The *Oakland Cannabis Buyers* court observed that, because federal crimes are defined by statute rather than by common law, "[w]hether, as a matter of policy, an exemption should be created is a question for legislative judgment, not judicial interference." 532 U.S. at 490 (citing *United States v. Rutherford*, 442 U.S. 544, 559 (1979)). While the Court in *Raich* did not reach the issue, Justice Stevens, writing for the majority, observed that the Controlled Substances Act authorizes the reclassification of Schedule 1 drugs, but "perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress." *Raich*, 545 U.S. at 33.

Although the ballot summary later informs the voter that the amendment "[d]oes not authorize violations of federal law," this disclosure can hardly be said to remedy the blatant mischaracterization of the law contained in the ballot summary's first two sentences. Under the most generous reading, a disclosure that the amendment does not "authorize violations of federal law" merely recognizes the authority of the United States Constitution and its Supremacy Clause. But the statement still leaves a reasonable voter with the patently erroneous impression that the proposed amendment's authorization for the use of marijuana is consistent with the requirements of federal law. The ballot summary's duplicity obscures the true effect of the proposed amendment and misleads voters into believing that the medical use of marijuana will be permitted in a manner that is consistent with federal law, when exactly the opposite is true.

D. The ballot summary fails to inform voters of the proposed amendment's effects on existing constitutional rights.

Finally, the ballot summary is defective in completely failing to mention the effect of the proposed amendment on two existing constitutional provisions contained in the Florida Constitution's Declaration of Rights: the right of access to public records contained in Article I, section 24; and the right of access to the courts contained in Article I, section 21.

This Court has often noted that identifying existing sections of the Florida Constitution that would be affected by a proposed amendment is "important with respect to the clarity requirement of section 101.161." *Advisory Op. to the Att'y Gen. re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009) (quoting *Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 490 n. 1 (Fla. 1994)). "It should hardly be a controversial proposition that voters must be able to cast an intelligent and informed vote on the proposed constitutional amendment and understand whether the proposed amendment adds to their existing rights, alters existing rights, or dilutes existing rights provided to them by their constitution." *Florida State Conf. of NAACP Branches*, 43 So. 3d at 670 (Pariente, J., concurring).

In the seminal case of *Armstrong v. Harris*, an amendment to the Florida Constitution was invalidated *after* approval by the voters principally on the basis that "voters were not told on the ballot that the amendment will nullify the Cruel or Unusual Punishment Clause, an integral part of the Declaration of Rights since our state's birth." 773 So. 2d 1, 22 (Fla. 2000). Given the "venerable role the Declaration of Rights … plays in our tripartite system of government," this Court has directed "special vigilance whenever the Declaration of Rights is in issue." *Id*.

The ballot summary here fails to identify two existing sections of the Declaration of Rights that would be affected by the proposed amendment. The proposed amendment's impact on the existing constitutional rights of access to the courts and access to public records should be disclosed to the voters so that they may cast an intelligent and informed vote.

1. The ballot summary fails to inform voters of the proposed amendment's effect on injured patients' right of access to the courts.

The Florida Constitution's Declaration of Rights currently provides a right of access to the courts, stating that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const. The ballot summary fails to inform voters that the proposed amendment strips this right from injured patients seeking redress of injuries caused by a physician's wrongful issuance of a physician certification for marijuana use.

In *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, this Court invalidated an initiative petition that the Court concluded would alter the right of victims of discrimination to access the courts to seek redress for their

injuries. 778 So. 2d 888 (Fla. 2000). The Court found that the absence of a reference to Article I, section 21's right of access to the courts rendered the initiative petition "constitutionally infirm." *Id*. at 894. Likewise, in *Florida Department of State v. Florida State Conference of NAACP Branches*, this Court struck down a proposed amendment related to redistricting because the ballot language did not inform voters of the proposed amendment's effect on Article III, section 16(a)'s existing requirement for contiguous legislative districts. 43 So. 3d at 669; *see also Advisory Op. to Att'y Gen. re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d at 976 (finding a ballot summary misleading because it did not inform voters of the amendment's effect on Article VII, section 9(b), an existing constitutional provision governing millage assessments by various units of local government).

Under the proposed amendment, "[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." By its plain terms, the proposed amendment's exemption of physicians from "civil liability and sanctions" precludes an injured patient from recovering damages in a civil action against a

physician whose wrongful issuance of a physician certification recommending marijuana use resulted in damages to the patient. The term "civil liability" is defined by Black's Law Dictionary as "[t]he amenability to civil action as distinguished from amenability to criminal prosecution."

The prohibition against "sanctions" on a physician would likewise bar the Board of Medicine from initiating a disciplinary action against a physician for recommending marijuana use to patients in a manner contrary to accepted professional standards. The proposed amendment's special and extraordinary protections for physicians recommending marijuana use also run contrary to the protections against poor medical care established in the Florida Constitution. *See* Art. X, § 26, Fla. Const. (prohibiting licensure as a medical doctor of any person who has been found to have committed three or more incidents of medical malpractice). Nothing in the ballot summary informs the voter of these significant and substantial changes made by the proposed amendment.

The proposed amendment here, like the initiative petition at issue in *Treating People Differently*, substantially affects the right of access to the courts but fails to disclose that effect in its ballot summary. The right of access to the courts, part of the Florida Constitution's Declaration of Rights, is no less

important to the people than the contiguity requirement at issue in *Florida State Conference of NAACP Branches* or the millage assessment provision at issue in *1.35% Property Tax Cap, Unless Voter Approved*. The failure to identify the proposed amendment's effect on the existing right of access to the courts renders the ballot summary misleading.

2. The ballot summary fails to inform voters of the proposed amendment's effect on the right of access to public records.

The Declaration of Rights also contains a right of access to public records. Under Article I, section 24, of the Florida Constitution, "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." The proposed amendment's ballot summary fails to disclose to the voters that the amendment creates a new constitutional exemption from the public records law.

The Florida Constitution's strong bias in favor of access to public records includes substantial procedural protections against the creation of exemptions. For the Legislature to enact a public records exemption, the Constitution requires: (1) the enactment of a general law; (2) passed by a two-thirds vote of the Florida

House of Representatives and a two-thirds vote of the Florida Senate; (3) stating with specificity the public necessity justifying the exemption; (4) that is no broader than necessary to accomplish the stated purpose of the law; and (5) that addresses no subjects other than exemptions from the requirements of the public records or open meeting requirements of the Florida Constitution. Art. I, § 24(c), Fla. Const. Under the Open Government Sunset Review Act, legislative exemptions from the public records law generally expire by operation of law in the fifth year after their enactment, unless the Legislature acts to reenact the exemption. § 119.15, Fla. Stat.

In sharp contrast to these protections favoring access to public records, the proposed amendment creates an *entirely undisclosed* constitutional exemption from the public records law. The proposed amendment requires the Department of Health to keep confidential and exempt from public disclosure "[a]ll records containing the identity of qualifying patients."

It may be that there are sound policy reasons for the proposed amendment's public records exemption. In considering the adequacy of the ballot summary, however, those policy merits are immaterial. This Court's precedents require a ballot initiative's effects on existing constitutional rights to be disclosed to the

voters so that they may make an intelligent and informed decision. The ballot summary here makes no mention of the proposed amendment's effect on Article I, section 24, of the Florida Constitution. This omission renders the ballot summary misleading.

* * *

Rather than providing a clear and unambiguous statement of the proposed amendment's chief purpose, the ballot title and summary here provide incomplete, inaccurate, and misleading information to the voters. The ballot title and summary are affirmatively misleading regarding the scope of marijuana use that the proposed amendment would authorize. The ballot summary misleads voters by using the term "caregiver" in a manner that is inconsistent with its commonly understood meaning. The ballot summary falsely states that the amendment "allows" activities that are plainly illegal under federal law. And the ballot summary fails to disclose the proposed amendment's impact on the existing constitutional rights of access to the courts and access to public records. This Court should hold that the ballot summary is clearly and conclusively defective.

II. The Proposed Amendment Violates the Florida Constitution's Single-Subject Requirement Because It Addresses Multiple Logically Separable Issues and Substantially Affects the Functions of Multiple Branches of Government.

Article XI, section 3, of the Florida Constitution governs the power to propose constitutional amendments through the initiative process, including a restriction limiting constitutional amendments proposed by initiative petition to "one subject and matter directly connected therewith." The single-subject requirement "was designed to protect against multiple precipitous and cataclysmic changes in the constitution by limiting to a single subject what may be included in any one amendment proposal." *Ray v. Mortham*, 742 So. 2d 1276, 1282 (Fla. 1999) *(internal quotations omitted)*. The single-subject requirement therefore prevents sponsors of initiative petitions from combining distinct issues in a single proposal, leaving voters with an "all or nothing" choice. And the single-subject requirement prohibits initiative petitions from proposing amendments that would alter the functions of multiple branches of government. The proposed amendment here violates both aspects of the single-subject requirement.

When considering whether an initiative petition complies with the single-subject requirement, this Court will declare an amendment invalid only if the record shows that the proposal is "clearly and conclusively defective." *Fla.*

Education Ass'n v. Fla. Dept. of State, 48 So. 3d 694, 701 (Fla. 2010). Because the proposed amendment is clearly and conclusively defective, this Court should reject the proposal and deny it a place on the ballot.

A. The proposed amendment violates the single-subject requirement because it combines multiple subjects that lack a logical "oneness of purpose."

The proposed amendment combines at least three logically-separable subjects in a single proposal: (1) the removal of criminal liability and civil sanctions on individuals, caregivers, and physicians related to the medical use of marijuana; (2) the exemption from civil liability to others related to the medical use of marijuana; and (3) the creation of a new regulatory and enforcement regime within the Florida Department of Health to oversee the marijuana production industry, ensure the availability of marijuana, and collect information on users of medical marijuana. Voters who favor one or two of these subjects while opposing others are presented with an "all or nothing choice" and must accept the parts of the proposal they oppose to obtain the parts they support.

This Court has repeatedly explained its standard of review for the single-subject requirement. In *Advisory Opinion to the Attorney General re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and*

Exclusions Serve a Public Purpose, this Court described its "oneness of purpose" standard: "A proposed amendment meets this test when it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test....'" 880 So. 2d 630, 634 (Fla. 2004) (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)). The ultimate purpose of the single-subject requirement is to "allow the citizens to vote on singular changes in our government that are identified in the proposal and to avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support*." Fine v. Firestone*, 448 So. 2d 984, 993 (Fla. 1984).

In *Advisory Opinion to the Attorney General-Save Our Everglades*, this Court enforced the single-subject requirement in striking down a proposed amendment to "restore the Everglades" by compelling the sugar industry to fund the restoration. 636 So. 2d 1336, 1341 (Fla. 1994). The Court explained that the initiative "embodies precisely the sort of logrolling that the single-subject rule was designed to foreclose" because many voters sympathetic to restoring the Everglades might disagree with forcing the sugar industry to fund the cleanup. *Id.* Because the ballot initiative would compel voters to choose all or nothing, the

Court held that the amendment violated the single-subject requirement. *Id*.; *See also Advisory Op. to the Att'y Gen. re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1225-26 (Fla. 2006) (holding proposed amendment impermissibly combined two distinct subjects by creating a new redistricting commission and changing the standards for apportioning the districts, thereby providing voters with an "all or nothing" choice).

The proposed amendment here lacks the requisite "oneness of purpose" and suffers from the same single-subject flaws that this Court identified in *Save the Everglades* and *Independent Nonpartisan Commission*. The proposed amendment violates the single-subject requirement by forcing voters into an all-or-nothing choice on at least three distinct subjects: (1) the removal of criminal liability and civil sanctions on individuals, caregivers, and physicians related to the medical use of marijuana; (2) the exemption from civil liability to others related to the medical use of marijuana; and (3) the creation of a new regulatory and enforcement regime within the Florida Department of Health to oversee the marijuana production industry, ensure the availability of marijuana, and collect information on users of medical marijuana.

Just as in *Fine*, the proposed amendment forces voters to make the choice that the single-subject requirement is intended to prevent: whether to accept part of a proposal that they oppose in order to obtain a change that they support. Many voters (particularly those who identify with a libertarian political philosophy) may reasonably favor the decriminalization of marijuana use for medical purposes while strongly opposing the creation of a new state regulatory regime to oversee marijuana production and collect medical information from patients. Conversely, many voters may favor the creation of a governmental system to ensure a safe, highly-regulated marijuana product while strongly opposing the open-ended manner in which the proposed amendment authorizes patients to obtain a physician certification for marijuana use. Or a voter may favor both of these subjects but oppose the provisions of the amendment immunizing physicians and caregivers from civil liability and sanctions and precluding an injured patient from filing a civil lawsuit for the negligent recommendation of marijuana for medical purposes or negligent assistance in its use. As in *Save the Everglades* and *Independent Nonpartisan Commission*, the proposed amendment violates the single-subject requirement by forcing voters into an "all or nothing" choice on subjects that lack a "oneness of purpose."

It is telling that People United for Medical Marijuana, the same political committee sponsoring the proposed amendment here, originally sponsored a different initiative petition that did *not* combine these subjects in a single proposal. The operative section of that original ballot initiative[5], entitled "Right to Marijuana for Treatment of Certain Medical Diseases and Conditions," stated:

> No person shall be deprived of life, liberty or property or otherwise penalized for the cultivation, purchase, use or possession of marijuana in connection with the treatment of Alzheimer's, cachexia, cancer, chronic pain, chronic nervous system disorders, Crohn's disease, epilepsy and other seizure disorders, glaucoma, HIV/AIDS, multiple sclerosis, Parkinson's, diseases causing muscle spasticity, or other diseases and conditions when recommended by a physician.

The sponsor's original initiative petition did not attempt to establish a state-level regulatory system to govern marijuana production in the same proposal. Instead, it would have authorized the Legislature to provide for "regulation of the distribution and sale of marijuana" by general law. This alternative approach illustrates that the multiple subjects addressed in the proposed amendment are logically separable and lack a "oneness of purpose." The sponsor could have

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[5] The original ballot initiative is accessible on the Secretary of State's website at http://goo.gl/vcNoyY.

similarly avoided logrolling in the proposed amendment that is before this Court. This Court should reject the proposed amendment's attempt to force voters into the "all or nothing" choice embraced by the proposed amendment.

B. The proposed amendment substantially alters the functions of multiple branches of government by transferring legislative power to an executive branch agency.

The proposed amendment substantially alters the functions of both the legislative and executive branches of government by stripping the Legislature of its primary authority to establish fundamental policy decisions regarding the proposed amendment's implementation—a quintessentially legislative function—and vesting that principal policy-making authority in the Department of Health, an agency of the executive branch.

When evaluating whether a proposed amendment complies with this aspect of the single-subject requirement, this Court considers how the proposal affects other articles or sections of the constitution. In *Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, this Court noted, "[a] proposal that affects several branches of government will not automatically fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it

violates the single-subject test." 778 So. 2d 888, 892 (Fla. 2000).

In *Save Our Everglades*, this Court invalidated a ballot initiative for performing the functions of all three branches of government. 636 So. 2d at 1340-41. The *Save Our Everglades* amendment performed a legislative function by making a public policy decision of statewide significance and granting trustees the authority to establish boundaries within which a fee could be levied. *Id*. at 1341. The amendment also "contemplate[d] the exercise of vast executive powers," including the administration of a trust and the management and operation of water storage and sewer systems. *Id*. Finally, the *Save Our Everglades* amendment performed a "quintessential judicial function" by "render[ing] a judgment of wrongdoing and de facto liability" by imposing a fee on the sugar cane industry. *Id*.; *see also Advisory Op. to the Att'y Gen. re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1308 (Fla. 1997) (holding that initiative substantially impacted multiple branches of government where it affected both legislative appropriations and statutory enactments and also executive enforcement and decision-making) (receded from on other grounds by *Advisory Op. to Att'y Gen. re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d

968, 972-74 (Fla. 2009)).

The proposed amendment violates the single-subject requirement by substantially altering the functions of the executive and legislative branches. The Florida Constitution expressly divides the powers of state government among the executive, legislative, and judicial branches. Art. II, § 3, Fla. Const. Under the nondelegation doctrine, "fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978); *see also id*. at 919 (finding statutory criteria for designating areas of critical state concern "constitutionally defective" because the criteria left a "fundamental legislative task" in the hands of an executive branch agency).

The proposed amendment contravenes these standards by assigning the responsibility for fundamental and primary policy decisions regarding the implementation of the amendment—that is, the legislative power—to an executive branch agency. This Court recently declared, in unmistakable terms, that "rulemaking is a legislative function." *Whiley v. Scott* 79 So. 3d 702, 711 (Fla.

2011). Executive branch officials may engage in rulemaking only pursuant to a lawful delegation of authority from the Legislature accompanied by "definite valid limitations." *Id*. (quoting *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000)).

Under the proposed amendment, the Department of Health is directed to issue "regulations necessary for the implementation and enforcement" of the amendment. More specifically, the department is directed to promulgate, within six months after the amendment's effective date, regulations addressing:

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.

Beyond a general statement that the regulations' purpose is "to ensure the

availability and safe use of medical marijuana by qualifying patients," the proposed amendment provides no guidance as to how the Department of Health should approach the fundamental and primary policy decisions involved in implementation. For example, how should the Department determine the standards that should apply to the renewal of a "qualifying patient identification card or "personal caregiver identification card"? Should the cards be valid for a term of months? Years? Could the Department require documentation of a continuing need for marijuana use at regular intervals in order to maintain eligibility? What safety and security standards should apply to Medical Marijuana Treatment Centers?

The proposed amendment is also unclear as to whether the protections of Florida's Administrative Procedure Act would apply to the regulations promulgated by the Department of Health. *See Whiley*, 79 So. 3d at 711-712 (summarizing the rulemaking process under the Administrative Procedure Act); *see also* § 120.54 (providing public notice of rule development and proposed rulemaking, requiring public hearing on request of any affected person); § 120.56, Fla. Stat. (authorizing administrative rule challenge to validity of proposed or existing rules); *Cf. NAACP, Inc. v. Fla. Bd. of Regents*, 876 So. 2d 636, 640 (Fla.

2004) (stating, in *dicta*, that rules adopted by Board of Governors under its constitutional authority "cannot be challenged under the Administrative Procedure Act").

But it is not only the Legislature that is stripped of authority by the proposed amendment. The removal of civil liability and sanctions for a physician's certification of medical use of marijuana effectively remove the Department of Health's ability to discipline physicians who fail to meet the requisite standard of care. Furthermore, the proposed amendment strips the authority of a court to provide a remedy when a physician fails to meet the appropriate standard of care and injures a patient through the improper certification of marijuana for medical use. *See Treating People Differently Based on Race*, 778 So. 2d at 894-95 (invalidating ballot initiative that "strip[ped] the judiciary of its powers to provide redress for injuries emanating from discriminatory practices"); *see also id*. at 894 (noting that the absence of a reference in the ballot summary to Article I, section 21, rendered the initiative petitions "constitutionally infirm").

By establishing significant statewide policy, stripping the Legislature of its fundamental and primary authority to establish policy regarding the amendment's implementation, vesting legislative power in the Department of Health to be

exercised by executive branch officials, and limiting the authority of both the executive and judicial branches to address medical malpractice, the proposed amendment goes too far in altering the functions of the branches of state government. The proposed amendment violates the single-subject requirement.

* * *

The proposed amendment combines multiple subjects in a single proposal, forcing voters into an "all or nothing" choice. It also alters the functions of both the legislative and executive branches of state government by assigning to the Department of Health the Legislature's fundamental and primary authority to establish policy choices in the implementing of the non-self-executing provisions of the amendment. This Court should hold that the proposed amendment violates the single-subject requirement of Article XI, section 3, of the Florida Constitution.

CONCLUSION

"The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions." *Slough*, 992 So. 2d at 149. For the reasons stated above, the proposed amendment and its ballot title and summary fail to provide the clarity

that the voters deserve when considering whether to amend their constitution. This Court should issue an advisory opinion directing that the proposed amendment not be placed on the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 8th day of November, 2013, by electronic mail to:

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