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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

ATTORNEY GENERAL'S INITIAL BRIEF

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STATEMENT OF CASE AND FACTS

The Attorney General initiated this action by submitting a petition for an advisory opinion on October 24, 2013, in accordance with the provisions of Article IV, Section 10, of the Florida Constitution. This Court has jurisdiction pursuant to Article V, Section 3(b)(10), of the Florida Constitution.

SUMMARY OF ARGUMENT

The proposal at issue does not give voters the full disclosure they deserve and the Constitution demands. The proposal hides the fact that the Amendment would make Florida one of the most lenient medical-marijuana states, allowing use for limitless "other conditions" specified by any physician. With no "condition" off limits, physicians could authorize marijuana for anything, any time, to anyone, of any age. But rather than tell voters of this extraordinary scope, the summary uses language to prey on voters' understandable sympathies for Florida's most vulnerable patients—those suffering "debilitating diseases." The problem is that this language, which appears nowhere in the Amendment, misleads voters about the Amendment's true scope, purpose, and effect. If voters are asked to open Florida to expansive marijuana use, they deserve to know it.

In addition to misleading about the scope of marijuana use, the summary is invalid because it says nothing of the broad tort and disciplinary immunity the

Amendment affords physicians. The summary does not tell voters that the Amendment offers physicians constitutional immunity from civil liability, criminal liability, and any other discipline. Voters need to understand that they would be eliminating existing tort remedies and other protections—and that the Amendment would substantively affect existing constitutional provisions, most notably the constitutional right of access to courts.

Finally, the summary suggests that medical marijuana is permissible under federal law. In reality, whether the Amendment passes or not, the medical use of marijuana is a federal criminal offense. Rather than give voters this critical fact, the summary misleads them into believing the opposite.

Because the title and summary do not disclose the Amendment's true scope and effect, this Court should remove the proposal from the ballot.

ARGUMENT

I. THE AMENDMENT WOULD ALLOW FAR WIDER MARIJUANA USE THAN THE BALLOT TITLE AND SUMMARY REVEAL.

When it comes to medical marijuana, the Amendment would make Florida one of the most permissive states in the country. Unlike most other states' narrow and limited programs, this proposal would allow anyone of any age to use marijuana for any reason, so long as they found a physician to say that the benefits would outweigh the risks. It is one thing to allow marijuana for the most serious

and debilitating diseases, like several other states do. It is quite another to allow marijuana for unlimited "other conditions," like the Amendment would.

The Sponsor is free to propose such an expansive Amendment, but it is not free to mislead voters about it. Notwithstanding its desire to persuade voters, the Sponsor has an obligation to present the Amendment so that voters can "comprehend the sweep of [the] proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982). The Sponsor failed in this regard, electing instead to present the Amendment as something that it is not.

A. By Allowing Marijuana for Unlimited "Conditions," the Amendment Would Make Florida One of the Most Lenient Medical Marijuana States.

Most states with medical-marijuana laws substantially limit physicians' ability to authorize marijuana use. Many states limit use to particular ailments, while also offering limited, symptom-specific catchalls. Arizona, for example, defines eligible conditions to include cancer, glaucoma, HIV, AIDS, Hepatitis C, Crohn's disease, Alzheimer's, or "[a] chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis." Ariz. Rev. Stat. Ann. § 36-2801(3)(b)

(2013). Similarly, Colorado defines its eligible conditions to include cancer, glaucoma, HIV, AIDS or "[a] chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following . . . : cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis." Colo. Const. art. XVIII, § 14(1)(a)(ii). Many other states, like Alaska, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, have similar provisions.[1] Connecticut and Illinois define eligible conditions even more narrowly, identifying particular ailments but offering no symptom-related catchall. Conn. Gen. Stat. § 21a-408(2) (2013); 410 Ill. Comp. Stat. Ann. 130/10(h) (West 2013).

Many states also empower their health agencies or other administrative bodies to expand the list of covered conditions.[2] In Washington, for example, a

[1] Alaska Stat. § 13.37.070(4) (2013); Del. Code Ann. Tit. XVI, § 4902A(3) (2013); Haw. Rev. Stat. § 329-121 (2013); Me. Rev. Stat. tit. XXII, §2422(2) (2013); Mich. Comp. Laws § 333.26423(b) (2013); Mont. Code Ann. § 50-46-302(2) (2013); Nev. Rev. Stat. § 453A.050 (2013); 2013 N.H. Laws ch. 242, at 126-W:1(IX)(a); N.J. Stat. Ann. § 26:6I-3 (West 2013); N.M. Stat. Ann. § 26-2B-3(B) (2013); Or. Rev. Stat. § 475.302(3) (2013); R.I. Gen. Laws § 21-28.6-3(3) (2013); Vt. Stat. Ann. tit. XVIII, § 4472(4) (2013); Wash. Rev. Code § 69.51A.010(6) (2013).

[2] Alaska Stat. § 13.37.070(4)(C); Ariz. Rev. Stat. Ann. § 36-2801(3)(c); Colo. Const. art. XVIII, § 14(1)(a)(iii);, Conn. Gen. Stat. § 21a-408(2)(B); Del. Code

"[t]erminal or debilitating medical condition" includes specific diseases, plus "[a]ny other medical condition duly approved by the Washington state medical quality assurance commission in consultation with the board of osteopathic medicine and surgery." Wash. Rev. Code § 69.51A.010(6)(g). Through this process, Washington has denied requests to authorize marijuana for depression, anxiety, Tourette's syndrome, and obsessive compulsive disorder, among others.[3] Similarly, the Arizona Department of Health Services recently denied requests to add Generalized Anxiety Disorder, depression, and migraine headaches.[4]

Ann. Tit. XVI, § 4902A(3)(c); Haw. Rev. Stat. § 329-121; 410 Ill. Comp. Stat. Ann. 130/10(h)(2); Mich. Comp. Laws § 333.26423(b)(3); Mont. Code Ann. § 50-46-302(2)(k) (allowing the legislature to add covered conditions); Nev. Rev. Stat. § 453A.050; 2013 N.H. Laws ch. 242, at 126-W:1(IX)(b); N.J. Stat. Ann. § 26:6I-3; N.M. Stat. Ann. § 26-2B-3(B)(8); Or. Rev. Stat. § 475.302(3)(c); R.I. Gen. Laws § 21-28.6-3(3)(c).

[3] *In re Schoenen*, Final Order on Petition for Inclusion of Tourette's Syndrome as a Terminal or Debilitating Condition (Wash. Dep't of Health, Med. Quality Assurance Comm'n July 26, 2012); *In re Novak*, Final Order on Petitions for Inclusion of Attention Deficit Disorder and Obsessive Compulsive Disorder as Terminal or Debilitating Conditions (Wash. Dep't of Health, Med. Quality Assurance Comm'n Mar. 12, 2012); *In re Condrey*, No. 04-08-A-2002MD, Final Order on Petition for Inclusion of Depression and Severe Anxiety as Terminal or Debilitating Condition (Wash. Dep't of Health, Med. Quality Assurance Comm'n Nov. 19, 2004); *In re Robinson*, No. 00-09-A-1075MD, Final Order on Petition to Include Manic or Chronic Depression as Debilitating Conditions (Wash. Dep't of Health, Med. Quality Assurance Comm'n Nov. 22, 2000). These orders are available at http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuanaCannabis/PetitionstoAddQualifyingConditions.aspx.

[4] Arizona Dep't of Health Servs., Memorandum re Medical Advisory Committee Recommendations to the Agency Director (July 17, 2012), *available at*

By identifying specific eligible conditions, limiting catchalls to conditions with specific symptoms, or tasking health agencies with adding eligible conditions, most states allowing medical marijuana carefully limit its scope of use. In these states' policy judgments, no physician should have unfettered discretion to authorize marijuana.

California and Massachusetts, however, favor a different approach. They allow physicians to freely authorize marijuana for essentially any condition. Massachusetts defines "debilitating medical condition" to include specific diseases like cancer and HIV, as well as "other conditions as determined in writing by a qualifying patient's physician." Mass. Gen. Laws ch. 94C, § 1-2(C) (2013). Similarly, California authorizes use for AIDS, cancer, glaucoma, "or any other illness for which marijuana provides relief." Cal. Health & Safety Code § 11362.5(b)(1)(A) (West 2013). Patients in Massachusetts and California, therefore, can receive marijuana freely, including for conditions that are ineligible in other states. While other states reject anxiety and routine aches and pains, for example, Massachusetts and California leave it to each physician to decide whether these conditions—or other conditions—justify marijuana use. As a California

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http://www.azdhs.gov/medicalmarijuana/documents/debilitating/July2012Memorandum.pdf; News Release, Arizona Dep't of Health Servs., No Changes to Arizona Medical Marijuana Program (July 20, 2012), *available at* http://www.azdhs.gov/diro/pio/news/2012/120720_NoChangesToMMP.pdf.

court explained, "[t]he list ends with a catchall phrase 'or any other illness for which marijuana provides relief.' . . . A physician's determination on this medical issue is not to be second-guessed by jurors who might not deem the patient's condition to be sufficiently 'serious.'" *People v. Spark*, 16 Cal. Rptr. 3d 840, 846-47 (Cal. Ct. App. 2004). The decision is the physician's alone.[5]

In this case, the Sponsor crafted the Amendment to follow the extraordinarily lenient path that Massachusetts and California favor. The Amendment defines "debilitating medical condition" to include not only cancer, ALS, HIV, AIDS, and Parkinson's disease, but also "other conditions for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient." Amendment § 29(b)(1).[6] This open-ended catchall includes no qualification, meaning that children and adults can use marijuana for any reason, provided they find a physician to state "that in the physician's professional opinion," the person has any condition for which that

[5] California's 2003 definition of "serious medical condition," § 11362.7(h), Cal. Health & Safety Code, does not limit the scope of marijuana use voters approved. *See* Cal. Const. art. II, § 10(c) (limiting legislature's authority to revise statutes passed by initiative statutes). Rather, the 2003 addition was to "clarify the scope of the application of the act" and "promote uniform and consistent application of the act." 2003 Cal. Legis. Serv. Ch. 875, § 1(b) (S.B. 420) (West).

[6] Presumably, the Sponsor intended to refer to conditions for which a physician believes the *benefits* of marijuana might outweigh the risks—not that "*use*" would outweigh the risks. The *use* obviously encompasses any benefits and risk.

physician believes marijuana's benefits will outweigh its risks.[7] Particularly for physicians who consider marijuana's health risks low, there is no "condition" beyond the Amendment's reach.

Physicians' unfettered authority to approve marijuana would invite unfettered use. Already, studies show patients use medical marijuana "for a variety of conditions including HIV AIDS-related problems, chronic pain, depression, anxiety, menstrual cramps, migraine and narcotic addiction, *as well as everyday aches, pains, stresses and sleeping difficulties*." Mark Ware et al., *The Medicinal Use of Cannabis in the UK: Results of a Nationwide Survey*, 59 Int'l J. Clinical Prac. 291, 291 (2005) (emphasis added). In California, "relief of pain, muscle spasms, headache, and anxiety, as well as to improve sleep and relaxation were the most common reasons patients cited for using [medical marijuana]." Craig Reinarman et al., *Who are Medical Marijuana Patients? Population Characteristics from Nine California Assessment Clinics*, 43 J. of Psychoactive

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

Drugs 128, 131 (2011); *see also id*. at 130 ("physicians began to recommend cannabis to patients with chronic pain, mood disorders, and other psychiatric conditions"). In Colorado, less than three percent of medical marijuana users report having cancer, and less than one percent report having HIV or AIDS. *See* Colo. Dep't of Pub. Health & Env't, Center for Health & Envt'l Info. & Statistics, Medical Marijuana Registry Program Update (as of August 31, 2013), http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044 (last visited Nov. 8, 2013); *see also* Ariz. Dep't of Health Servs., *Medical Marijuana Act Monthly Report* 2, *available at* http://www.azdhs.gov/medicalmarijuana/documents/reports/131002-patient-application-report.pdf (reporting cumulatively from April 14, 2011, through October 2, 2013, two percent identifying cancer; one half of one percent identifying HIV/AIDS).

Although Florida's Constitution allows sponsors to propose such an expansive and permissive marijuana law, it also requires that they inform voters of the proposal's "true meaning and ramifications," *Advisory Op. to Atty. Gen. re Tax Limitation*, 644 So. 2d 486, 495 (Fla. 1994). In other words, "[t]he summary must give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots." *Smith v. Am. Airlines, Inc*., 606 So. 2d 618, 620 (Fla. 1992). This summary does not do that. Instead, it promises a narrow and limited marijuana program—the precise opposite of what the Amendment would

deliver. *See Advisory Op. to Atty. Gen.*, 642 So. 2d 724, 727 (Fla. 1994) (rejecting amendment because it "will not deliver to the voters of Florida what it says it will").

B. The Amendment's Title and Summary Promise a More Limited Scope than the Amendment Delivers.

To cast an informed ballot, voters must understand the extent to which the Amendment would allow marijuana. Permitting marijuana for serious and devastating diseases is one thing. Allowing marijuana for essentially any "condition" is quite another. But rather than provide voters with fair and accurate information, the Sponsor chose a title and summary that would mislead voters into thinking the Amendment does one thing, when it actually does the other.

According to the ballot summary, medical marijuana would be only for those "with debilitating diseases." As described in the Petition and above, though, the Amendment does not limit use to individuals with "debilitating diseases," instead allowing marijuana for imprecise "other conditions." Nowhere does the amendment even require that the individual's "condition" be a "disease" *or* "debilitating"—much less both. Most notably, the term "debilitating disease" does not appear in the Amendment's text. Indeed, the Sponsor did not even put the word "disease" in its Amendment, except to name "Crohn's *disease*" and

"Parkinson's *disease*." Therefore, the Amendment's reach is plainly not limited to "debilitating diseases," notwithstanding what the summary says.

This Court has routinely rejected ballot summaries that mislead through inconsistent or divergent terminology. For example, this Court invalidated a ballot summary because, "[w]hile 'people' and 'person' . . . appear synonymous, their legal differences are significant and are not revealed to the voter." *Advisory Op. to Atty. Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 897 (Fla. 2000). This Court likewise concluded that the "discrepancy between 'natural person' and 'citizens' is material and misleading" because the terms have different meanings. *Advisory Op. to Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998). And in another case rejecting the use of divergent terminology, this Court invalidated a gambling proposal whose summary used the term "hotels" while the amendment used "transient lodging establishments." *Advisory Op. to Atty. Gen.*, 656 So. 2d 466, 469 (Fla. 1995). As the Court explained, "the public perceives the term 'hotel' to have a much narrower meaning than the term 'transient lodging establishment.'" *Id*. "Thus, while the summary leads the voters to believe that casinos will be operated only in 'hotels,' the proposed amendment actually permits voters to authorize casinos in any number of facilities, including a bed and breakfast inn." *Id*.

Similarly, the public perceives the term "disease" to have a much narrower meaning than the term "condition." A medical condition encompasses not only diseases and disorders, but also the "physical status of the body as a whole." *Webster's Third New International Dictionary* 473 (1981). There are any number of conditions, even painful ones, that people fairly consider medical conditions but not diseases—broken bones and sprained joints among them. Victims of automobile accidents or sports injuries rarely refer to their resulting medical conditions as "diseases." Nonetheless, the Sponsor chose the narrower term "debilitating diseases" for the summary—but used a much broader term for the Amendment. This divergent terminology makes the summary misleading. *See In re Advisory Op. to Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) ("We found this [ballot] statement to be fatally inaccurate because the summary did not differentiate between two related but not synonymous terms . . . .").

In any event, even if "disease" were synonymous with "condition"—and even if the summary used the Amendment's term, "debilitating medical condition"—the summary would remain invalid. The Amendment defines "debilitating medical condition" to include virtually anything, whether debilitating or not. The summary, however, does not tell voters that the Amendment defines the term at all—much less that it defines it in such a broad and counterintuitive

manner.[8] Unaware of this definition, "voters [will] undoubtedly rely on their own conceptions of what constitutes" a debilitating condition, *Advisory Op. to Atty. Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d at 899—conceptions that will not square with the Amendment's expansive definition.

Finally, the ballot title likewise suggests a more restrictive scope than the amendment delivers. The title—"use of marijuana for certain medical conditions"—wrongly indicates the specific conditions are determined, because "certain" is understood to mean fixed, definite, or settled. *See, e.g., Am. Heritage Dictionary* 254 (2d ed. 1990) ("definite" or "fixed"); *Merriam-Webster Dictionary* ("fixed" or "settled") (available at www.m-w.com).[9] For example, the ballot title "limited political terms in certain elected offices," used the term "certain" to refer

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[8] In many other instances, summaries have referred to definitions in the text. *See, e.g., Advisory Op. to Atty. Gen. re Florida Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 118 (Fla. 2008) (approving summary that stated: "Defines terms. . . ."); *Advisory Op. to Atty. Gen. re Referenda Required For Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 938 So. 2d 501, 503 (Fla. 2006) (approving summary that stated: "Provides definitions."); *Advisory Op. to Atty. Gen. re Protect People, Especially Youth, from Addiction, Disease, & Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1190 (Fla. 2006) (same)

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

to a fixed and settled set of offices—not an open-ended group to be determined later. *See Advisory Op. to Atty. Gen.—Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991). Here, however, there is nothing "certain" about the conditions the Amendment would cover.

"A proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose." *Roberts v. Doyle*, 43 So. 3d 654, 659 (Fla. 2010). Because the ballot title and summary here hide the Amendment's true scope, this Court should remove the proposal from the ballot.

II. THE BALLOT TITLE AND SUMMARY DO NOT DISCLOSE THE BROAD TORT AND DISCIPLINARY IMMUNITY THE AMENDMENT WOULD AFFORD PHYSICIANS.

The title and summary are defective for another, independent, reason: They do not disclose the broad immunity afforded physicians who authorize medical marijuana. The Amendment provides that "[a] physician licensed in Florida shall not be subject to criminal or civil liability or sanctions under Florida law for issuing a physician certification to a person diagnosed with a debilitating medical condition in a manner consistent with this section." Amendment § 29(a)(2). The text refers to no standard of care, imposes no "bona fide relationship"

requirement,[10] and requires no effort to pursue traditional remedies first.[11] To allow marijuana, all a physician must do is "conduct[] a physical examination of the patient and a full assessment of the patient's medical history." *Id.* § 29(b)(9). At that point, the physician may certify "that in the physician's professional opinion," the patient has a "debilitating medical condition" and may use marijuana. *Id.*

In other areas of medicine, physicians are subject to an appropriate standard of care and attendant tort liability. *See, e.g., Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). They are also accountable in disciplinary proceedings, in which they can lose their licenses. *See, e.g.*, §§ 458.331(1)(t); 456.50(1)(g), Fla. Stat. In extreme instances, they may be criminally liable. *See* § 784.05, Fla. Stat.; *Azima v. State*, 480 So. 2d 184, 186 (Fla. 2d DCA 1985). But when it comes to medical marijuana—and this Amendment—physicians would enjoy broad immunity. The title and summary say nothing of this.

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[10] In contrast, numerous other states require a "bona fide" doctor-patient relationship or that the doctor see the patient multiple times before allowing marijuana. *See, e.g.*, Alaska Stat. § 13.37.010(c)(1)(A); Colo. Rev. Stat. § 25-1.5-106(5); Del. Code Ann. Tit. XVI, § 4902A(19); D.C. Code § 7-1671.04 (a) (2013); 410 Ill. Comp. Stat. Ann. 130/10(y); Me. Rev. Stat. tit. XXII, §2422(16); Mass. Gen. Laws ch. 94C, § 1-2(N); Mich. Comp. Laws § 333.26423(a); 2013 N.H. Laws ch. 242, at 126-W:1(XVI); N.J. Stat. Ann. 26:6I-3; R.I. Gen. Laws § 21-28.6-3(15).

[11] *See, e.g.*, Alaska Stat. § 13.37.010(c)(1)(C); Mont. Code Ann. §§50-46-310(2)(e)-(f); Wash. Rev. Code § 69.51A.010(6)(f).

The Amendment's departure from existing law is perhaps starkest when it comes to the treatment of children. The Amendment contains no age limit for marijuana use and no requirement that physicians consult parents before authorizing marijuana for children. Some states, by contrast, limit access to minors, either by precluding minors' use, by involving parents, or by requiring second opinions. *See, e.g.*, Alaska Stat. § 13.37.010(c); Ariz. Rev. Stat. Ann. § 36-2804.03(B); Colo. Const. art. XVIII, § 14(6); Del. Code Ann. Tit. XVI, § 4909A(b); D.C. Code § 7-1671.02 (e); Haw. Rev. Stat. § 329-122(b); Me. Rev. Stat. tit. XXII, §2425(2); Mich. Comp. Laws § 333.26426(b); Mont. Code Ann. § 50-46-307(2); Nev. Rev. Stat. § 453A.210(3); 2013 N.H. Laws ch. 242, at 126-W:3(II); N.J. Stat. Ann. § 24:6I-5(b); N.M. Stat. Ann. § 26-2B-4(C); Or. Rev. Stat. § 475.309(3); R.I. Gen. Laws § 21-28.6-6(b); Vt. Stat. Ann. tit. XVIII, § 4473(b)(1). The Amendment here does none of that, and the summary does not disclose this important feature.

In Florida, parents traditionally have held both the duty and right to make decisions concerning the care and upbringing of their minor children. *See, e.g.*, *O'Keefe v. Orea*, 731 So. 2d 680, 686 (Fla. 1st DCA 1998) ("[T]he right to consent to medical treatment for a child resides in the parent who has the legal responsibility to maintain and support the child.") (citing *Ritz v. Florida Patient's Compensation Fund*, 436 So. 2d 987, 989 (Fla. 5th DCA 1983)). Although there

are some statutory exceptions to these rights, *see*, *e.g*., § 743.064, Fla. Stat. (emergency care); *id.* § 384.30 (sexually transmitted diseases); *id.* § 397.601(4)(a) (substance abuse treatment), physicians generally may not provide medical care to a minor absent parental consent.

The summary and title say nothing of any impact the Amendment might have on these longstanding parental rights. Where "a ballot summary [does] not explain to the reader or sufficiently inform the public of important aspects of the proposed amendment," this Court must strike it. *Advisory Op. to Atty. Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (quotation marks omitted).

Similarly, the Court must strike proposals that do not disclose changes to existing constitutional provisions. *See Advisory Op. to Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d at 565-66 ("[I]t is imperative that an initiative identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations."). Here, the provision eliminating tort liability for negligence associated with medical marijuana substantially affects the right of access to courts, which protects common-law causes of action existing in 1968. *See* Art. I, § 21, Fla. Const.; *see also Kluger v. White*, 281 So. 2d 1, 3-4 (Fla. 1973). The provision eliminating

physician sanctions associated with medical marijuana substantially affects Article X, section 26, which generally provides that physicians found to have committed three or more incidents of medical malpractice must lose their licenses. The summary does not disclose any of this, and each of these failures constitutes an independent basis for striking the amendment.

III. THE BALLOT SUMMARY IS MISLEADING BECAUSE IT SUGGESTS THAT FEDERAL LAW ALLOWS MEDICAL MARIJUANA.

Finally, the summary is misleading because it wrongly suggests that the Amendment does not conflict with federal law. For decades, marijuana use—including for medical purposes—has been a federal criminal offense. *See* Drug Abuse Prevention and Control Act, 21 U.S.C. § 801, *et seq.*; *see also Gonzales v. Raich*, 545 U.S. 1, 14 (2005) ("By classifying marijuana as a Schedule I drug, . . . the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a . . . preapproved research study."). Regardless of whether the Sponsor had an obligation to disclose anything about federal law, there can be no doubt that once the Sponsor chose to address the issue, it had an obligation to do so fairly and accurately. Yet the summary, as constructed, will convey to many voters something that is not true: that medical marijuana is legal under federal law.

First, by saying the Amendment "allows the medical use of marijuana" but "does not authorize violations of federal law," the summary suggests that "the medical use of marijuana" is not "a violation of federal law." "Allow" and "authorize" are synonyms, *Roget's II: The New Thesaurus* 29-30, 64 (3d ed. 2003), so when the summary says the Amendment *does* allow one thing but *does not* allow a second thing, voters will assume the two things not equivalent. In reality, "the medical use of marijuana" *is* a "violation[] of federal law." *See Gonzales*, 545 U.S. at 27 (Congress "designate[d] marijuana as contraband for *any* purpose" and "expressly found that the drug has no acceptable medical uses." (emphasis in original)). Viewed another way, the summary is inaccurate because the Amendment cannot "allow" medical marijuana without also "allowing" violations of federal law. The summary's statements combine to mislead voters.

Second, in constructing the sentence: "Does not authorize violations of federal law or any non-medical use, possession or production of marijuana," the Sponsor suggests medical use of marijuana is distinct from a "violation[] of federal law"—just as it is distinct from "non-medical use, possession or production of marijuana." Voters understand that a law could authorize medical use of marijuana without also authorizing *non-medical* use. By grouping "violations of federal law" with "non-medical use, possession or production," the summary suggests that a law

could likewise authorize medical use of marijuana without also authorizing a violation of federal law.

Notably, as with other parts of the summary, the Sponsor chose different words when drafting the Amendment's text. The Amendment's text states that "[n]othing in this section . . . purports to give immunity under federal law." Amendment § 29(c)(4). The summary omits the "purports to give immunity" language. If voters were told that the Amendment would not "purport[] to give immunity under federal law," they would be alerted to the *need* for immunity under federal law—and to the federal prohibition against medical marijuana.

In addition, while the summary says the Amendment "[d]oes not *authorize* violations of federal law," the text says the Amendment does not "*require*[] the violation of federal law." The text's "require" provision has important legal effects, particularly regarding any federal preemption analysis. Indeed, the Marijuana Policy Project, which advocates for medical marijuana, warns sponsors to "avoid provisions that would *require* physicians or government employees to violate federal law in order for patients to legally use medical marijuana." *See* Marijuana Policy Project, *Overview and Explanation of MPP's Model State Medical Marijuana Bill*, *available at* http://www.mpp.org/assets/pdfs/library/ExplanationofMPPModelBill.pdf (emphasis added). But in writing the summary,

the Sponsor chose to use the word "authorize," which more closely parallels "allow," suggesting that medical marijuana is not prohibited by federal law.

CONCLUSION

"The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy." *In re Advisory Op. to Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d at 653. Because voters "never see the actual text of the proposed amendment" and "vote based *only* on the ballot title and the summary," the title and summary are paramount. *Id.* Indeed, "an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas." *Id.* at 653-54.

In this instance, the Sponsor chose words that do not convey the Amendment's true scope or meaning. It chose a title and summary that fly under false colors. And it chose to hide from voters information they need to make informed, intelligent decisions. Because voters deserve the truth, this Court should remove the proposal from the ballot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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