FLORIDA SUPREME COURT

Advisory Opinion to the Attorney General Re: Adult Personal Use of Marijuana

Case No.: SC2023-0682

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ANSWER BRIEF

by

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Summary of Argument

The people of Florida retain ultimate political power. They can amend the Florida Constitution directly through the ballot initiative process. Art. XI, § 3, Fla. Const. While the Florida Supreme Court, legislature, and state officials can ensure ballot integrity, they cannot interfere with the will of the people.

Yet, the Florida Supreme Court sometimes prevents ballot measures from reaching voters. The Court has struck down citizen initiatives on grounds not based in the text of the Constitution. It has invited inappropriate judicial review on the merits of initiatives. Finally, it has decided cases based on certain objections while ignoring others. This all comes at great cost to citizens.

The Court must return to constitutional grounds of review under Article XI, Section 3 and Article XI, Section 5(e) of the Florida Constitution (as codified by § 101.161(1), Fla. Stat.). It must provide clear rules to enable citizens to draft valid amendments. Finally, it must identify every defect in a ballot measure to give citizens an opportunity to redraft it.

Argument

I. This Court's review of proposed amendments is limited.

The people of Florida reserved the power to amend their constitution directly through a citizen ballot initiative. Art. XI, § 3, Fla. Const.

I.A. Court opinions define legal standards for future proposals.

The Florida Supreme Court preclears the validity of ballot initiatives in advance of voters deciding on an amendment. The Florida Supreme Court's nominally "advisory" opinions are determinative. An amendment that the Court says is invalid is not placed on the ballot. The Court's opinion that the amendment is valid will defeat post-election challenges. "[O]nly under extraordinary circumstances will [the Court] revisit an issue decided in [its] earlier advisory opinions." *Ray v. Mortham*, 742 So. 2d 1276, 1284–85 (Fla. 1999), *holding modified by Cook v. City of Jacksonville*, 823 So. 2d 86

(Fla. 2002). Stare decisis binds the Court's ballot review.[1] These opinions are only characterized as advisory because the cases involve no formal parties.

Despite its role in preclearance, the Florida Supreme Court does not have the authority to alter the ballot initiative process beyond the provisions of the constitution: "alteration of the initiative process through measures that are not expressly or implicitly contemplated by article XI, sections 3 and 5 of the Florida Constitution, and are not necessary to ensure ballot integrity, must be accomplished through constitutional amendment." *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1058 (Fla. 2010). Neither do the executive or legislative branches. *Id.*

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[1] The Court can depart from precedent in extraordinary circumstances under stare decisis: "once we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason why not to recede from that precedent." *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020), *reh'g denied*, *clarification granted*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020).

I.B. The Court's restraint reserves the people's right to amendment.

The judiciary should exercise extreme restraint when reviewing ballot initiatives. "The Court 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). Thus, the Court can only strike a ballot initiative when it is "clearly and conclusively defective." *Id.* at 154. The reason for restraint is simple, as Justice Boyd observed:

> There is no judicial function more serious and important than that which relates to removal of proposed constitutional amendments from the ballot. Since all power of government flows from the people, courts should exercise extreme restraint in denying electors the right to vote on proposed changes in the government.

Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 342 (Fla. 1978) (Boyd, J., concurring). As a result, the Court "has been reluctant to interfere with the right of self-determination for all Florida's citizens to formulate their own organic law." *In re Advisory Op. to Att'y. Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 476 (Fla. 2015) (citations omitted).

Yet, in the last five years, the Florida Supreme Court struck four out of nine citizen initiatives it reviewed from the ballot (and declined to review one).[2] In contrast, the Court struck zero citizen initiatives out of the seven it reviewed in the five years before that.[3]

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[2] This data is based on the citizen initiatives reviewed by the Court from July 19, 2018 to July 19, 2023. The Court struck initiatives in: (1) *Advisory Op. to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, & Other Restrictions*, 320 So. 3d 657 (Fla. 2021); (2) *Advisory Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176 (Fla. 2021); (3) *Advisory Op. to Att'y Gen. Prohibits Possession of Defined Assault Weapons*, 296 So. 3d 376 (Fla. 2020); (4) *Advisory Op. to Att'y Gen. re Right to Competitive Energy Mkt. for Customers of Inv.-Owned Utilities*, 287 So. 3d 1256 (Fla. 2020).

The Court did not issue an opinion and declined to place an initiative on the ballot when the sponsor failed to timely file a response in *Advisory Op. to Att'y Gen. re Provide Medicaid Coverage to Eligible Low-Income Adults*, 337 So. 3d 313 (Fla. 2022).

The Florida Supreme Court approved (1) *Advisory Op. to the Att'y Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, & Cabinet*, 291 So. 3d 901 (Fla. 2020); (2) *Advisory Op. to the Att'y Gen. re Voter Approval of Const. Amends.*, 290 So. 3d 837 (Fla. 2020); (3) *Advisory Op. to the Att'y Gen. re Citizenship Requirement to Vote in Fla. Elections*, 288 So. 3d 524 (Fla. 2020); (4) *Advisory Op. to the Att'y Gen. re Raising Florida's Minimum Wage*, 285 So. 3d 1273 (Fla. 2019).

[3] This data is based on the citizen initiatives reviewed by the Court from July 19, 2013 to July 19, 2018. The Court approved (1) *Advisory Op. to the Att'y Gen. Re: Voting Restoration Amend.*, 215 So. 3d 1202 (Fla. 2017); (2) *Advisory Op. to the Att'y Gen. Re: Voter Control*

I.C. The Court's limited review does not pass on the merits.

The Court has "no authority to consider or rule on the merits of a proposed amendment." *Advisory Op. to the Att'y. Gen.*, 656 So. 2d 466, 468 (Fla. 1995). The Court can only review citizen initiatives to effect the will of the people.

The Florida Constitution identifies two issues for review for citizen initiatives: (1) Whether the proposed constitutional amendment embraces a single-subject, Art. XI, § 3, Fla. Const.,[4] and

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of Gambling, 215 So.3d 1209 (Fla. 2017) (3) *Advisory Op. to Att'y. Gen. re Rts. of Elec. Consumers regarding Solar Energy Choice*, 188 So. 3d 822 (Fla. 2016); (4) *In re Advisory Op. to Att'y. Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471 (Fla. 2015); (5) *In re Advisory Op. to Att'y. Gen. re Limits or Prevents Barriers to Loc. Solar Elec. Supply*, 177 So. 3d 235 (Fla. 2015); (6) *In re Advisory Op. to Att'y. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014); (7) *Advisory Op. to Att'y. Gen. re Water & Land Conservation--Dedicates Funds to Acquire & Restore Fla. Conservation & Recreation Lands*, 123 So. 3d 47 (Fla. 2013). It did not strike down any ballot initiative.

[4] Article XI, Section 3 of the Florida Constitution reads:

> "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise

(2) whether voters can fairly be said to have "approved" the amendment based on the language presented on the ballot, *i.e.*, are on notice of the content of the initiative, Art. XI, § 5(e), Fla. Const.[5]

Both constitutional grounds ensure voters know what they are voting for. Firstly, the Court can strike ballot initiatives under the single-subject requirement to uphold the will of the people. Art. XI, § 3, Fla. Const. The single-subject review aims to help voters understand the ballot and ensure that votes accurately reflect voter preferences. "[T]he purpose of the single-subject requirement is to

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revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen."

[5] The Constitution does not command how an amendment is presented to voters. The legislature directs that the ballot present only an amendment's title and summary, instead of the full text of the amendment. If the full text of the amendment were presented, then Florida Statutes subsection 101.161(1)'s mandate that the title and summary fairly represent the text would become irrelevant. The legislature's decision to present only a title and summary necessarily imposes this additional requirement.

prevent logrolling, pairing a popular measure with an unpopular one in order to enhance the likelihood of passing the less-favored measure." *Fine v. Firestone*, 448 So. 2d 984, 995–96 (Fla. 1984) (Ehrlich, J., concurring). Ultimately, "[a]ll that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide." *Askew*, 421 So. 2d at 155 (citing *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)).[6]

Secondly, the Court can also review to ensure voters are not misled and properly "approve[] by vote" the amendment, as required by Art. XI, § 5(e), Fla. Const. Florida Statutes subsection 101.161(1) codifies this fair notice requirement by specifying the title and summary must be printed in "clear and unambiguous language[.]"[7]

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[6] Though *Askew* concerned an amendment that originated in the legislature, it made clear "[t]he requirement for proposed constitutional amendment ballots is the same as for all ballots[.]" *Askew*, 421 So. 2d at 155.

[7] Subsection 101.161(1), Fla. Stat., reads:

> "Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word 'yes' and also by the

"This requirement provides the voters with fair notice of the contents of the proposed initiative 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 People's Prop. Rts. Amends. Providing Comp. for Restricting Real Prop. Use may Cover Multiple Subjects*, 699 So. 2d 1304, 1307 (Fla. 1997).

Under both the single-subject requirement and the fair notice ground, the Court has no broader role than facilitating the will of the people.

> word 'no,' and shall be styled in such a manner that a 'yes' vote will indicate approval of the proposal and a 'no' vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure…."

This is a two-step analysis: "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voters of the chief purpose of the amendment; and (2) whether the language of the ballot title and summary, as written, will be affirmatively misleading to voters." *In re Advisory Op. to Att'y. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 797 (Fla. 2014).

II. This Court must recede from requirements that interfere with popular will.

To comply with this limited role, the Court must recede from requirements unauthorized in the text of the Constitution, such as the multiple-functions-of-government test (erroneously derived from the single-subject requirement) and the requirement to identify federal law (erroneously derived from the fair notice requirement). In practice, these requirements are so malleable that they allow the Court to do the constitutionally impermissible: "rule on the merits of a proposed amendment." *Advisory Op. to the Att'y. Gen.*, 656 So. 2d 466, 468 (Fla. 1995). The Florida Supreme Court must recede from them.

II.A. The Court should recede from the multiple functions of government test.

III.A.1. The test does not derive from the single-subject requirement.

In 1984, the Florida Supreme Court created a new test: the multiple-functions-of-government test. The Court held that "where a

proposed amendment changes more than one government function, it is clearly multi-subject." *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984); *see also Advisory Op. to the Att'y. Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1354 (Fla. 1998) ("it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test"). This contravenes common sense, as an amendment can squarely be on one subject and regulate multiple branches. For example, an amendment could spell out a regulatory scheme on one topic involving the executive and legislative branches. There is no single-subject issue if "provisions represent two sides of the same coin: individual rights and regulation related to those rights." *Advisory Op. to Att'y. Gen. re Rts. of Elec. Consumers regarding Solar Energy Choice*, 188 So. 3d 822, 828 (Fla. 2016).

The test has now become part-and-parcel of the single-subject review by the Florida Supreme Court. *See, e.g., In re Advisory Op. to Att'y. Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 477 (Fla. 2015). ("Th[e] single-subject rule prevents a proposal 'from engaging in either of two practices: (a) logrolling; or (b)

substantially altering or performing the functions of multiple branches of state government."). Opponents to the ballot initiative in this case invoke the multiple functions of government test. Chamber Br. at 23-26. They argue that the proposed amendment "substantially alters and performs the functions of both Florida's legislative and executive branches." Chamber Br. at 26.

But "there is nothing in the constitution to warrant this interpretation of the one-subject limitation." *Evans*, 457 So. 2d at 1360 (Shaw, J., concurring). The Court can—and must—recede from it for two reasons. Firstly, the test erroneously subordinates the will of the people to the independence of the government that represents them. Secondly, the test invites inappropriate judicial discretion.

II.A.2. The test inappropriately subordinates the will of the people to government branches' independence.

The application of the multiple-functions-of-government test directly interferes with the will of the people. The Court has said that "[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." *Advisory Op. to the Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353–54 (Fla. 1998). But "all power of government flows from the people." *Floridians Against Casino Takeover v. Let's Help Fla.*, 363 So. 2d 337, 342 (Fla. 1978) (Boyd, J., concurring). It follows that the people can alter or perform the functions of various branches of government by constitutional amendment.

Yet, the Court suggests the people's will is second to government independence. When determining that an amendment launching a program regulating tobacco use did not alter or perform the functions of multiple branches of government, the Court held that though the initiative "impact[ed] the executive and legislative branches," still "these requirements are not substantial enough to be disqualifying." *Advisory Op. to the Att'y. Gen. re: Protect People, Especially Youth, from Addiction, Disease, & Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1192 (Fla. 2006). The amendment was permissible because "the branches of government [are] left with wide discretion in determining the details of the project." *Id.* (citation omitted). "[T]he proposed amendment sets forth a framework for the

program but leaves the details for implementing and administering the program to the Legislature. Requiring the Legislature to create and evaluate such a program does not usurp the legislative lawmaking function." *Id.*

But the Court turns our system of governance on its head. The government must administer the people's will, and not the other way around. All political power derives from the people. Art. I, Sec. 1, Fla. Const. Within state law, the state constitution reigns supreme. A constitutional amendment written and ratified by the people can limit the discretion of various branches, which derive their power from the people by election.

II.A.3. The test invites inappropriate judicial discretion.

The multiple-functions-of-government test does not just lack any basis in the constitution's text. In practice, it is so malleable that it allows inappropriate judicial discretion, inviting concern that it allows the Court to rule "on the merits of the amendment." *Advisory Op. to the Att'y. Gen.*, 656 So. 2d at 468. Such a "transfer [of] power

to the judiciary… is directly contrary to the underlying purpose of citizen initiatives." *Fine*, 448 So. 2d at 998 (Shaw, J., concurring).

The Court strikes down the amendments it finds to affect too many government functions, while authorizing others. In some instances, there is no apparent justification for the discrepancy. *Compare, e.g.*, *Advisory Op. to the Att'y Gen. re People's Prop. Rts. Amends. Providing Comp. for Restricting Real Prop. Use may Cover Multiple Subjects*, 699 So. 2d at 1308 (striking down an initiative for single subject violation because it "affect[ed] not just legislative appropriations and statutory enactments but executive enforcement and decision-making")[8] *with Advisory Op. to Att'y Gen. Fee on Everglades Sugar Prod.*, 681 So. 2d 1124, 1130 (Fla. 1996) (allowing an amendment because it "accomplishes a single, limited purpose: the creation of a trust to receive and disperse funds for Everglades conservation").

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[8] The Court's reasoning on a separate ballot initiative discussed in the case was later overruled on the grounds that it did not take into account Article XI, Section 3's clause exempting revenue-raising ballot initiatives from the single-subject exception. *Advisory Op. to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 973 (Fla. 2009).

The discrepancy between *Everglades Sugar Production* and *People's Property Rights* exemplifies how the test's vagueness invites the Court's review on the merits. In *Everglades Sugar Production*, opponents argued the amendment accomplished the legislative functions of establishing a trust fund and the executive function of directing the spending of the fund. Yet, the Court held the amendment was redeemed by its "single, limited purpose" despite affecting both the legislative and executive function. *Id.* In contrast, in *People's Property Rights* the Court found the "issue of property rights clearly affects the powers of the legislature" and the "subject of land use also substantially affects the executive branch of government[.]"699 So. 2d at 1308. Thus, the amendment violated the multiple-functions-of-government-test. But the amendment appeared to have a single, limited purpose: it sought to eliminate the single-subject requirement in cases requiring compensation of private property owners when government restricts the use of their land.

Both cases sought to regulate one narrow subject. Both affected two branches of government. Yet the outcomes were different. The

multiple-functions-of-government test invites the Court to substitute its will to that of the people of Florida. To be true to its role of restraint, the Court must recede from it.

II.B. The Court must recede from the federal-law-identification requirement.

The Court must also recede from its federal-law-identification requirement, which it has mistakenly grounded in the fair-notice requirement codified by § 101.161(1), Fla. Stat.[9] The Florida Constitution imposes no requirement to discuss federal law in ballot initiatives. This judicially imposed burden thwarts the will of the people.

The Court requires a ballot initiative to identify the interplay between the conduct authorized under the proposed amendment and federal law where the two may conflict in a manner misleading to

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[9] The federal-law-identification requirement is distinct from the statutory requirement that the Attorney General request the Florida Supreme Court to review "whether the proposed amendment is facially invalid under the United States Constitution." § 16.061(1), Fla. Stat.

voters. *Advisory Op. to Att'y Gen. re Adult Use of Marijuana , 315 So. 3d 1176*, 1180 (Fla. 2021).[10]

Requiring citizen initiatives to identify the current state of federal law is a step too far. Florida Statutes subsection 101.161(1) asks ballot proponents to identify the "chief purpose" of the ballot text in the summary. "'Chief purpose" means "principal or most important objective, goal, or end." *Advisory Op. to the Att'y Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, & Cabinet*, 291 So. 3d 901, 908 (Fla. 2020). This is to ensure that the ballot summary is true to the ballot text, since voters only see the ballot summary when they cast their ballot. But this fair-notice requirement does not encompass a requirement to identify every wrinkle of the law, let alone of federal law. It is a cornerstone of federalism that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments

[10] Practical problems plague the federal-law issues as well. Federal law can change during the multi-year lifespan of a ballot proposal, and no procedure exists for ballot proponents to amend their summary if federal law changes.

without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

"[V]oters are generally required to do their homework and educate themselves about the details of a proposal and about the pros and cons of adopting the proposal." *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992). Voters generally understand the nature of the federal system, *i.e.*, that legalization of conduct in Florida does not decriminalize it federally or in other states. And courts hold that ignorance of the law excuses no violation.

In this case, the Attorney General argues that the ballot summary is misleading because the ballot summary said the proposed amendment "[a]llows" marijuana, when it would remain barred under federal law. AG Br. 10, 17-24. But it is inappropriate to ask ballot proponents to identify how federal law regulates the conduct when state constitutions cannot alter federal law.

Neither the multiple-branches-of-government test nor the federal law requirement amount to "compelling constitutional reasons" warranting the exceptional removal of a proposal from the

ballot. *Askew*, 421 So. 2d at 157 (Boyd, J., concurring). The Court should explicitly recede from them.

III. The Court should give clear guidance to citizen initiative drafters.

The Florida Supreme Court's ballot-initiative jurisprudence is unique. When reviewing citizen initiatives, the Court must give "the citizens of Florida clear and coherent instructions for utilizing the citizens' initiative to amend the Florida Constitution." *Fine*, 448 So. 2d at 996 (Ehrlich, J., concurring). To do so, the Court should either recede from some of its prior inconsistent precedent or reconcile these inconsistencies. It should also indicate to drafters how to cure the defects in their rejected ballot measure.

III.A. The Court should clarify the inconsistencies in its advisory opinions.

As it stands, it is difficult for citizens to draw intelligible drafting principles from the Court's case law.

Conflicting interpretations of the single-subject requirement abound, as noted by Judge Kogan:

> [T]he erratic nature of our own case law construing article XI, section 3 shows just how vague and malleable this 'oneness' standard is. What may be 'oneness' to one person might seem a crazy quilt of disparate topics to another. 'Oneness,' like beauty, is in the eye of the beholder; and our conception of 'oneness' thus has changed every time new members have come onto this Court.

Advisory Op. to Att'y Gen.—Ltd. Pol. Terms in Certain Elective Offs., 592 So. 2d 225, 231 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part) (cited approvingly in *Ray v. Mortham*, 742 So. 2d 1276, 1286 (Fla. 1999), *holding modified by Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002) (Lewis, J., concurring); *see also Fine*, 448 So. 2d at 997–98 (Shaw, J., concurring) (noting the "impreciseness of the words 'one-subject'").

Contradictions also exist within the case law construing the fair-notice requirement. Consider the inconsistent rulings on using subcategories in the summary. In 1995, the Florida Supreme Court rejected a summary that substituted "transient lodging establishments" in the text for "hotels" in the summary. *Advisory Op. to the Att'y. Gen.*, 656 So. 2d at 468. Later, this Court approved a summary that substituted "debilitating medical conditions" in the text for "debilitating diseases" in the summary. *In re Advisory Op. to*

Att'y. Gen. re Use of Marijuana for Certain Med. Conditions, 132 So. 3d 786, 805 (Fla. 2014). In both cases, the substituted words described the heartland of circumstances. Most applicable lodging establishments were hotels; most applicable medical conditions were diseases. Yet, this Court rejected one substitution and approved the other. To explain the difference, the Court only said that the hotel/transient lodging establishment discrepancy held "legal significance[,]" but not the medical condition/disease discrepancy. *Id*. at 805.

Yet, the Court did not give any guidance that could help citizen initiative drafters determine what makes discrepancies legally significant. This leaves initiative drafters without clear standards by which to draft their ballot summaries and ballot texts.

III.B. The Court should rule on all nonfrivolous objections to ballot initiatives.

To comply with its constitutional role, the Florida Supreme Court should detail *each* nonfrivolous ground making a ballot initiative defective. This will give citizens clear guidance on how to

cure their initiative so the initiatives can ultimately reach voters. It will also help citizens draft more successful initiatives.

III.B.1. The Court rules only on dispositive grounds at great costs to citizens.

The Court often strikes ballot initiatives on one or two "dispositive" grounds without addressing the many objections raised by the Attorney General or ballot initiative opponents. *See*, *e.g.*, *Advisory Op. to Att'y Gen. re Right to Competitive Energy Mkt. for Customers of Inv.-Owned Utilities*, 287 So. 3d 1256, 1260 (Fla. 2020) ("[W]e address only one issue which is dispositive—that the ballot summary affirmatively misleads voters to believe the Initiative grants a right to sell electricity."); *Advisory Op. to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, & Other Restrictions*, 320 So. 3d 657, 668 (Fla. 2021) ("Here, we address only one of the issues raised by the opponents of the measure—an issue that is clearly dispositive.").

The Court does not address many nonfrivolous objections. Petitioners can only guess whether their ballot initiative could get to voters in the next election if they cure the only defects identified by

the Court, or if it would be struck on other grounds. Some ballot initiative proponents may undergo the onerous petition-gathering process multiple times, without a guarantee that they can ever reach voters. Initiatives can be struck down on new grounds at each round of Florida Supreme Court review.

As a practical matter, most ballot initiative proponents do not have another chance at the ballot once they are struck down by the Florida Supreme Court. Citizen initiatives rely on donors to get resources to gather petitions for ballot initiatives. In practice, donors are reluctant to support ballot initiatives that fail once, since they could fail Florida Supreme Court review on new grounds at every subsequent stage of review. Donors would be more willing to support a measure that failed once if drafters knew how to rewrite it to satisfy Florida Supreme Court review.

The practice of ruling only on dispositive grounds makes it nearly impossible for a struck initiative to ever reach voters.

III.B.2. The Court should give ballot proponents an opportunity to cure their initiatives.

The Court reviews ballot initiatives to facilitate the will of the people. This comes with another corollary: if the Court makes the extraordinary move of striking down a defective initiative, it must enable the people to correct it. This is so the initiative can eventually reach voters after the Court's review. To do so, the Florida Supreme Court should identify the specific issues with each ballot initiative. This would allow ballot proponents to cure their initiatives for the next election cycle.

Judges have long recognized the importance of creating a process to correct defective ballot language: "To avoid future situations in which this Court may again have to exercise this extraordinary power of striking an amendment from the ballot due to misleading ballot language, the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." *Askew*, 421 So. 2d at 157 (Overton, J., concurring) (for an amendment originating in the legislature); *see also Evans*, 457 So. 2d at 1356

(Overton, J., concurring) (reiterating the same language in the context of a citizen initiative). Even if raising every nonfrivolous objection does not allow ballot proponents to instantly correct their ballot measure, they could at least redraft their measure for the next election cycle.

Here, the Attorney General identified four reasons why the proposed amendment is invalid. AG Br. 10-12. The Attorney General argues the ballot summary is misleading because (A) the ballot summary says it would "[a]llow[]" marijuana when it would remain barred under federal law; (B) the summary mentions that "other state licensed entities" could enter the marijuana trade when only Medical Marijuana Treatment Centers (MMTCs) are currently licensed; (C) the summary does not properly identify that the amendment bans the possession of more than three ounces of marijuana; and (D) the summary gives the impression that the state will have regulatory authority over the recreational marijuana market when there will be a period of time where MMTCs will not be regulated if the amendment passes. AG Br. at 10-12. Other opponents raise additional grounds of invalidity. Chamber Br. 10-12, 14-32; Drug Free America Br. 8-21.

If these objections are nonfrivolous, they should be adjudicated by this Court. If they are frivolous, the Court should say so. This returns power to the people after the Court's review.

Conclusion

Current ballot initiative jurisprudence makes drafting an initiative an acrobatic exercise. The Court can restore the function of the ballot-initiative process. To do so, it must adhere to its constitutional commitment to the will of the people, provide clear guidance for ballot-initiative drafting by clarifying precedent, and rule on every nonfrivolous objection. Only thus can it fulfill its true role: letting the people of Florida decide how to amend their Constitution.

Certificate of Compliance with Rule 9.045

I certify that this petition complies with the font (Bookman Old Style 14-point) and word-count requirements. This filing contains 5,142 words (including sections permitted to be excluded).

s/Hélène Barthélemy

ATTORNEY

Certificate of Service

I certify that the foregoing document has been furnished to all persons included in case's service list on the E-filed date of this document by filing the document with service through the e-Service system (Fla. R. Gen. Prac. & Jud. Admin. 2.516(b)(1)).

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