

SC19-2116

In the Supreme Court of Florida

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

ATTORNEY GENERAL'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Introduction

In recent years, proponents of marijuana legalization have repeatedly sought to enact legislation authorizing, as a matter of state law, the recreational use of marijuana. So far, all of those efforts have failed, including six bills introduced in the Florida Legislature in the last five years alone.¹

In the wake of those legislative defeats, supporters of marijuana legalization focused their efforts on the citizen initiative process for amending the Florida Constitution. One such initiative is currently pending the Court's review in *Advisory Opinion to the Att'y Gen. re: Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions*, SC19-1536. Another is the subject of the present petition. On December 19, 2019, the Attorney General requested an advisory opinion from this Court as to the validity of this new citizen initiative, entitled "Adult Use of Marijuana," No. 19-11. *See* Art. IV, § 10, Fla. Const. The Court has jurisdiction. *See* Art. V, § 3(b)(10), Fla. Const.

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

¹ *See, e.g.*, SB 1780 (2019) (failed in Health Policy Comm.); HB 1117 (2019) (failed in Criminal Justice Subcomm.); SB 1176 (2015) (failed in Regulated Industries Comm.); HB 1297 (2015) (failed in Criminal Justice Subcomm.); SB 1562 (2014) (failed in Regulated Industries Comm.); HB 1039 (2014) (failed in Criminal Justice Subcomm.).

B. Text of the Proposed Amendment

The full text of the “Adult Use of Marijuana” amendment is as follows:

Section 33. Adult Use of Marijuana.

(a) Definitions. As pertaining to this section

(1) “Adult” means a person 21 years of age or older.

(2) “Department” means the Florida Department of Health or its successor agency.

(3) “Marijuana” shall have the same meaning as defined in Article X, Section 29.

(4) “Marijuana accessories” means any equipment, products, or materials of any kind which are for ingesting, inhaling, topically applying, or otherwise introducing marijuana into the human body.

(5) “Medical Marijuana Treatment Center” shall have the same meaning as defined in Article X, Section 29, except a licensed Medical Marijuana Treatment Center is permitted to sell, distribute, or dispense marijuana to a person 21 years of age or older for personal use for any reason in compliance with this section.

(6) “Public place” means any public street, sidewalk, park, beach, or other public commons.

(b) Public policy.

(1) An adult is permitted to possess, use, display, purchase, or transport marijuana or marijuana accessories for personal use for any reason in compliance with this section and Department regulations and is not subject to criminal or civil liability or sanctions under Florida law.

(2) A Medical Marijuana Treatment Center is permitted to sell,

distribute, or dispense marijuana or marijuana accessories to an adult for personal use for any reason in compliance with this section and Department regulations and is not subject to criminal or civil liability or sanctions under Florida law.

(c) Restrictions.

(1) An adult may possess, display, purchase, or transport up to two and a half ounces of marijuana for personal use for any reason.

(2) A Medical Marijuana Treatment Center that sells, distributes, or dispenses marijuana or marijuana accessories to an adult shall ensure any marijuana or marijuana accessories are clearly labeled and in childproof packaging.

(3) Marijuana or marijuana accessories shall not be advertised or marketed to target persons under the age of 21.

(4) Marijuana authorized by this section may not be used in any public place.

(5) The limitations set forth in Article X, Section 29(c)(4), (5), (6), and (8) shall apply to personal use of marijuana authorized by this section.

(d) Authority.

(1) The Department shall issue reasonable regulations necessary for the implementation and enforcement of this section.

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

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

Pet. 7-8.

C. Ballot Summary

The accompanying ballot summary, which is 75 words, states:

Permits adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason. Permits Medical Marijuana Treatment Centers to sell, distribute, or dispense marijuana and marijuana accessories if clearly labeled and in childproof packaging to adults. Prohibits advertising or marketing targeted to persons under 21. Prohibits marijuana use in defined public places. Maintains limitations on marijuana use in defined circumstances.

Pet. 7.

SUMMARY OF ARGUMENT

The ballot summary tells voters that the proposed amendment would “[p]ermit[]” the recreational use of marijuana. That is incorrect and misleading. If the amendment were to pass, marijuana use would remain illegal in Florida because of the federal Controlled Substances Act, which makes marijuana a Schedule I substance prohibited nationwide. Unlike previous citizen initiatives approved by this Court for ballot placement, the Adult Use of Marijuana summary does not caution voters that the effects of the amendment would be limited to “state law,” or inform voters that marijuana would remain illegal under federal law. Because the amendment would not “permit” recreational marijuana use, the ballot summary is affirmatively misleading and the initiative should be kept off the ballot.

ARGUMENT

I. THE BALLOT SUMMARY AFFIRMATIVELY MISLEADS VOTERS, RENDERING THE INITIATIVE INVALID.

A. Legal standard.

“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 646, 653 (Fla. 2004). Because voters “never see the actual text of the proposed amendment” and “vote based only on the ballot title and the summary,” the accuracy of the title and summary are paramount. *Id.* In fact, “an accurate, objective, and neutral summary” of the proposed amendment is the “sine qua non” of the citizen-initiative process for amending the state constitution. *Id.* at 653. Absent this informational safeguard, the constitution becomes “not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.” *Id.* at 653-54.

Section 101.161(1) codifies the standard for reviewing ballot titles and summaries of proposed constitutional amendments. Any measure submitted to the vote of the people must include a ballot title “not exceeding 15 words in length, by which the measure is commonly referred to or spoken of,” and a ballot summary, “not exceeding 75 words in length,” explaining “the chief purpose of the measure.” § 101.161(1), Fla. Stat. “Implicit in this provision is the requirement that the

proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity.” *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000).

The purpose of the ballot title and summary is “to provide fair notice of the content of the proposed amendment.” *Advisory Op. to the Att’y Gen.-Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996). Thus, to satisfy section 101.161, the title and summary must “state in clear and unambiguous language the chief purpose of the measure,” *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), so that the proposed amendment does not “fly under false colors” or “hide the ball” as to its legal effect. *Armstrong*, 773 So. 2d at 16 (internal quotation marks omitted).

In assessing a proposed amendment’s ballot title and summary, this Court asks two questions: “First, whether the ballot title and summary ‘fairly inform the voter of the chief purpose of the amendment,’ and second, ‘whether the language of the title and summary, as written, misleads the public.’” *Fla. Educ. Ass’n v. Fla. Dep’t of State*, 48 So. 3d 694, 701 (Fla. 2010).

B. The summary tells voters that the amendment would “permit[.]” recreational marijuana use, when in fact such use would remain a crime under federal law.

A ballot summary may not “mislead voters regarding the interplay between the proposed amendment and federal law.” *Advisory Op. to Att’y Gen. re Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 808 (Fla. 2014); *see also id.* at 819 (Polston, C.J., dissenting) (“[W]hile ballot summaries are not required

to mention the current state of federal law or a proposed state constitutional amendment's effect on federal law, they are required to not affirmatively mislead Florida voters by falsely implying the opposite of what that current state of federal law is.”); *id.* at 820 (Canady, J., dissenting) (explaining that an initiative should be kept off the ballot where “the ballot summary seriously misrepresents the interaction of the proposed amendment with federal law”).

Within our federal system, a state has no power to authorize its residents to participate in conduct that would constitute a federal crime. *See* U.S. Const., Art. VI, cl. 2; *cf. United States v. Aquart*, 912 F.3d 1, 60-61 (2d Cir. 2018). As a result, when this ballot summary tells voters that the Adult Use of Marijuana amendment would “[p]ermit[] adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason,” Pet. 7 (emphasis added), it is affirmatively misleading because recreational marijuana use is independently forbidden by federal law. *See Use of Marijuana for Certain Medical Conditions*, 132 So. 3d at 820 (Canady, J., dissenting) (concluding that a ballot summary is fatally defective if voters “are potentially hoodwinked into believing that the amendment is consistent with federal law”).

The possession, use, and sale of marijuana have for decades been prohibited nationwide by the federal Controlled Substances Act (CSA). *See* 21 U.S.C. § 801, et seq.; *see also Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying marijuana

as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.”). Among other things, the CSA creates criminal penalties for the possession of any drug listed in a series of federal drug “schedules.” Marijuana is included in Schedule I, a list of drugs with no currently accepted medical use and for which federal penalties are most severe. *See* 21 U.S.C. § 812; 21 C.F.R. § 1308.11(d)(23); 21 U.S.C. §§ 841(b), 844(a). Trafficking in marijuana is an offense punishable by up to life imprisonment, depending upon the amount. *See* 21 U.S.C. §§ 841(b)(1)(A)(vii), (b)(1)(B)(vii), (b)(1)(D). And any conspiracy to commit an offense under the CSA is punishable to the same extent as the offense itself. 21 U.S.C. § 846.

Unlike previous citizen initiatives approved by this Court, this ballot summary contains no caveat limiting the effects of the amendment to state law. In 2014, this Court held that a ballot summary satisfied Section 101.161(1) because though it purported to “[a]llow[]” the medical use of marijuana, the summary cautioned voters that the effects of the amendment “[a]pplie[d] *only to Florida law*” and would “not authorize violations of federal law.” *Use of Marijuana for Certain Medical Conditions*, 132 So. 3d at 794 (emphasis added); *see also Advisory Op. to Att’y Gen. re Use of Marijuana for Debilitating Medical Conditions*, 181 So. 3d 471, 476 (Fla.

2015) (same). Voters were therefore on notice that the amendment would not affect the legal status of medical marijuana under federal law.

This summary, by contrast, tells voters only that the amendment would “[p]ermit[]” the recreational use of marijuana, with no disclaimer that the amendment would apply only under state law and that it would not immunize federal law violations. Thus, it is substantially more problematic than the ballot summary that several members of this Court disapproved in *Use of Marijuana for Certain Medical Conditions*. See 132 So. 3d at 819 (Polston, C.J., dissenting) (“[D]espite what the summary falsely implies to voters, Floridians can still be prosecuted for the medical use of marijuana even if such use is in accordance with this amendment.”); *id.* at 820-21 (Canady, J., dissenting) (explaining that the “conduct authorized by the amendment is criminal conduct under federal law,” and that “consistency with federal law is not about some inconsequential, ancillary detail that would be unlikely to influence a reasonable voter’s evaluation of the proposed amendment”).

When a ballot summary tells voters something that is affirmatively untrue, it violates Section 101.161(1) and must be kept off the ballot.² The ballot summary for

² See *Advisory Opinion to the Att’y Gen. re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994) (finding summary invalid where it falsely implied that there was “presently no cap or limitation on taxes in the constitution”); *Advisory Op. to Att’y Gen. re: Stop Early Release of Prisoners*, 642 So. 2d 724, 726-27 (Fla. 1994) (summary stating that amendment would “ensure” state prisoners serve “at least eighty-five percent of their sentence” was misleading because “this will not be true in cases of pardon and clemency”); *Advisory Op. to Att’y Gen. re Right of Citizens*

the Adult Use of Marijuana initiative fails that test because it expressly, repeatedly, and unqualifiedly purports to “permit” conduct that is prohibited by federal law.

CONCLUSION

The proposed amendment should not be placed on the ballot.

Respectfully submitted,

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to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998) (summary used word “citizens” rather than phrase “every natural person” appearing in the amendment).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this **6th** day of January 2020, to the following:

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

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