SC19-2116

In the Supreme Court of Florida

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

INITIAL BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES

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STATEMENT OF THE CASE AND FACTS

If approved by the electorate, the proposed amendment would add a new section, Section 33, to Article X of the Florida Constitution. That section would read 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.

The ballot title for the proposed amendment is: "Adult Use of Marijuana." The ballot summary for the proposed amendment 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.

Upon referral from the Secretary of State, the Attorney General initiated this action by submitting a petition for an advisory opinion. This Court has jurisdiction under Article V, Section 3(b)(10) of the Florida Constitution.

SUMMARY OF ARGUMENT

If adopted, the proposed amendment would give adults and Medical Marijuana Treatment Centers the right to engage in enumerated marijuana-related activities free of civil or criminal liability under state law. However, the same activities are illegal under federal law and would remain so regardless of the drug's status under Florida law. By telling voters that the amendment "permits" those activities, without qualification, the corresponding ballot language leads voters to the incorrect conclusion that the activities would be free of legal consequence. Because the ballot language conveys an illusory right and is therefore affirmatively

misleading, ballot placement should be denied.

ARGUMENT

I. LEGAL BACKGROUND

When the Attorney General invokes this Court's jurisdiction to review the validity of an initiative petition, the Florida Constitution directs the Court to "address[] issues as provided by general law." Art. V, § 3(b)(10), Fla. Const. Those issues include the accuracy and clarity of the proposed amendment's corresponding ballot language:

> 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 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 . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure . . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.
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> § 101.161(1), Fla. Stat.

Pertinent here, the statute requires a "clear and unambiguous" ballot summary. As this Court has explained, "[t]he 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-driven process of amending our constitution." *Id.* at 653-54. "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 654. Accordingly, the proposed amendment must not "fly under false colors" or "hide the ball" as to its legal effect. *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000) (internal quotation marks omitted).

II. THE BALLOT LANGUAGE MISLEADS VOTERS BY SUGGESTING THAT THE PROPOSED AMENDMENT WOULD "PERMIT" ACTIVITY THAT WOULD IN FACT REMAIN ILLEGAL.

If the proposed amendment is adopted, adults will be "permitted" to possess, use, purchase, and transport marijuana "for personal use for any reason" in the sense that such conduct will no longer be "subject to criminal or civil liability or sanctions *under Florida law*." (emphasis added). Likewise, Medical Marijuana Treatment Centers will be "permitted" to sell marijuana to adults "for personal use for any reason" in the sense that such activity will no longer be "subject to criminal or civil liability or sanctions *under Florida law*." (emphasis added). The corresponding ballot language is misleading because it says, without qualification, that the amendment "permits" adults and businesses to engage in the listed marijuana-related

activities, when in fact all of those activities are (and would remain) federal crimes.

While the proposed amendment eliminates liability only "under Florida law," the corresponding ballot language is, at best, ambiguous on that point. The most natural reading of the unqualified statement that the amendment "permits" the covered activities is that, post-amendment, those activities will be free of any and all legal consequences—*i.e.*, that the amendment will "authorize," "warrant," or "license" them. *See* Permit, *Merriam-Webster's Dictionary* (2020), https://www.merriam-webster.com/dictionary/permit; *Advisory Op. to Gov.–1996 Amend. 5 (Everglades)*, 706 So. 2d 278, 282 (Fla. 1997) (explaining that this Court may look to dictionary definitions of terms used in ballot language because, "in general, a dictionary may provide the popular and common-sense meaning of terms presented to the voters").

But the proposed amendment would not have that effect. To the contrary, "any manufacture, distribution, or possession of marijuana is a criminal offense under federal law." *In re Advisory Opinion to Atty. Gen. re: Use of Marijuana for Certain Med. Conditions* ("*In re: Medical Marijuana*"), 132 So. 3d 786, 819 (Fla. 2014) (Polston, J., dissenting) (citing *Gonzales v. Raich*, 545 U.S. 1, 14 (2005)). By its own terms, the amendment would not change that. Nor could it. "The federal Controlled Substances Act ('CSA') 'designates marijuana as contraband for any purpose,' "characterizing marijuana as a Schedule I drug.'" *Id.* (citing *Raich*, 545 U.S. at 27).

"[I]n 2005, the United States Supreme Court expressly held that Congress has the power to prohibit the local, intrastate cultivation and use of marijuana under the CSA," and it is not a defense that "such cultivation and use complied with a state's medical marijuana law." *Id.* (citing *Raich*, 545 U.S. at 29); *see*, *e.g.*, *United States v. Stacy*, 734 F. Supp. 2d 1074, 1084 (S.D. Cal. 2010) (rejecting defenses that accused was cultivating marijuana in compliance with state law and that he had a good faith belief it was lawful). By conveying that the amendment "permits" conduct that would in fact remain *prohibited*, the amendment conveys an "illusory right" that renders "the proposed amendment . . . fatally defective." *Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998).

To be sure, the average voter is presumed to have "a certain amount of common understanding and knowledge." *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010). But voters will not even be able to identify the ambiguity discussed above unless they know, at a minimum, that marijuana is illegal under federal law. And to resolve that ambiguity and ascertain the amendment's true effect, voters must also know that the drug's federal illegality is independent of its status under state law. The average voter simply will not bring that level of knowledge and sophistication to the ballot box.

Instead, to the extent voters know that marijuana is illegal under federal law, many of them will assume that marijuana-related activities permitted by state law are exempt from federal prosecution. That assumption, while mistaken, would be understandable in any area of dual state-federal regulation. It is especially understandable here, in light of recent government policy effectively tying the enforcement of federal marijuana laws to the legality of the drug at the state level.[1] That well-known policy stood for five years leading up to the drafting of the amendment at issue, was widely covered by the media,[2] and was rescinded just 18 months ago.[3] Voters with less than complete knowledge and understanding of these issues, faced with ballot language conveying only that the amendment "permits" marijuana-related activities, will be "potentially hoodwinked into believing that the

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[1] *See* James M. Cole, *Guidance Regarding Medical Marijuana Enforcement*, U.S. Dept. of Justice at 1 (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf (purporting to "focus [the Department's] efforts on certain enforcement priorities" and implying the existence of certain safe harbors for marijuana-related activities consistent with state law).

[2] *See*, *e.g.*, A. Southall & J. Healy, *U.S. Won't Sue to Reverse States' Legalization of Marijuana*, *N.Y. Times* (Aug. 29, 2013), https://www.nytimes.com/2013/08/30/us/politics/us-says-it-wont-sue-to-undo-state-marijuana-laws.html (characterizing the Department's 2013 guidance as "get[ting] the criminal element out of the marijuana trade" and taking "an "important step toward ending the prohibition of the drug").

[3] *See* Jefferson B. Sessions, III, *Marijuana Enforcement*, U.S. Dept. of Justice (Jan. 4, 2018), *available at* https://www.justice.gov/opa/press-release/file/1022196/download (rescinding the Department's 2013 guidance).

amendment is consistent with the requirements of federal law," *In re: Medical Marijuana*, 132 So. 3d at 820 (Canady, C.J., dissenting), and that the covered activities will not be subject to criminal prosecution at any level of government.

In sum, the ballot language at issue would garner "yes" votes from Floridians who may well take umbrage at an amendment that purports to "permit" activities that carry a federal prison term. Ballot placement should be denied.

CONCLUSION

For the foregoing reasons, the proposed amendment should not be placed on the ballot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I 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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CERTIFICATE OF SERVICE

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