SC19-2116

In the Supreme Court of Florida

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

REPLY BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES

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In its initial brief, the House advances a single, narrow argument: If adopted, the proposed amendment would give adults and certain entities the right to engage in specified marijuana-related activities free of civil or criminal liability "under Florida law." The covered activities are, however, federal crimes, and the Amendment would not change that. By telling voters, without qualification, that the amendment would "permit[]" those activities, the corresponding ballot language conveys that they would be free of legal consequence. Because the covered activities would in fact carry a federal prison term, the ballot language is affirmatively misleading, and ballot placement must be denied.

ARGUMENT

A. As a threshold matter, the sponsor argues that "a conflict between current federal law and a proposed amendment is not justiciable in initiative petition proceeding[s]." Sponsor's Brief ("SB") at 12. That is plainly wrong. Section 101.161, Florida Statutes requires the Court to determine whether the ballot language is misleading as to "the legal effect of the amendment," *Evans v. Firestone*, 457 So. 2d 1251, 1355 (Fla. 1984), and the Court cannot address alleged deficiencies in the ballot language without first determining, in pertinent part, the amendment's legal effect. To address the defect alleged here—an undisclosed "conflict between federal law and a proposed amendment," SB at 12, renders the ballot language misleading by omission—the Court can and must address the alleged conflict.

This is nothing new. As the Chief Justice explained in *Medical Marijuana I*, "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. On the contrary, it is a circumstance to which many voters may attach considerable significance." *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions* ("*Medical Marijuana I*"), 132 So. 3d 786, 821 (Fla. 2014) (Canady, J., dissenting).

The sponsor's reliance on *Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991), is misplaced. Article V, Section 3(1) of the Florida Constitution limits this Court's review to "issues as provided by general law." *Limited Political Terms* merely reaffirms that "general law" currently authorizes the Court to address just two issues: whether "the proposed amendment meets the single-subject requirement of article XI, section 3, Florida Constitution" and "the ballot title and summary requirements of section 101.161, Florida Statutes." *Id.* at 226-27. The latter question is all the House asks this Court to consider. *Limited Political Terms* further observes that general law does not authorize the Court to strike an amendment because, if adopted, it would violate federal law. *Id.* But, again, the House asks the Court to strike the Amendment not because it conflicts with federal law, but because the ballot language is misleading by omission.

B. Although the sponsor concedes that the activities covered by the amendment constitute federal crimes, SB at 19 (agreeing that the amendment "conflicts with federal law"), the sponsor contends that the ballot language nevertheless passes muster because "a ballot summary is not required to educate voters on the current state of federal law" "or a proposed amendment's effect on federal law." SB at 12. That assertion, if correct, is irrelevant because "[t]he problem here is not with what the summary omits but with what it contains." *Medical Marijuana I*, 132 So. 3d at 820 (Canady, J., dissenting). The unqualified statement that the amendment "permits" the covered activities "impl[ies] that [adults] may *lawfully* use and possess marijuana if the amendment passes," *id.* at 819 (Polston, C.J., dissenting) (emphasis added), in the sense that those activities will be shielded from any and all liability—*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. "[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 819 (Polston, C.J., dissenting).

The sponsor's answer is that "[t]he inability to revise federal statutes through a state constitutional amendment" is "an elementary civics principle" that voters

should be presumed to know. SB at 12. 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 this Court should proceed with caution when considering whether such "common understanding" includes knowledge of legal principles. The sponsor correctly observes that, in a criminal prosecution, "[a]ll citizens are presumed to know the law." SB at 20 (quoting *Hart v. Hart*, 377 So. 2d 51, 52 (Fla. 2d DCA 1979)). That presumption, however, is a necessary predicate to the administration of the criminal justice system. And the presumption has sound logical roots, as virtually all crime is *malum in se*. Neither of those justifications applies to this Court's review of a proposed amendment to the Florida Constitution via citizen initiative. Instead, when reviewing ballot language that is misleading in the absence of key legal background, crediting voters with pre-existing knowledge of that background entails a grave risk of amending our State's charter document without the meaningful consent of the electorate. Accordingly, the Court should not attribute such knowledge to voters unless there is a sound factual basis to believe that the knowledge is truly pervasive.

For example, when considering whether ballot language adequately disclosed the effect that a proposed amendment would have on existing smoking statutes, the Court "presume[d] that most, if not all, voters are aware that smoking is presently limited in certain public places, given the pervasiveness of signs and other

remonstrations against smoking in those areas, and that people work in places such as restaurants." *Advisory Opinion to Attorney Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002). The decision appropriately turned on the "pervasiveness" of voters' experience in "public places" that restrict smoking. It is dubious at best to characterize the relationship between state and federal criminal statutes as an "elementary civics principle" in the sense that young students ubiquitously study and internalize it. But even if many students learn that information for purposes of a middle or high school civics exam, the principle certainly is not "pervasive" among voters, many of who will have forgotten the principle since learning it as a child.

The sponsor asks this Court to presume further that voters "are [aware] of the existing legal framework surrounding marijuana" because, "[i]n 2014 and 2016, Floridians voted on initiatives to amend Florida's Constitution to allow the use of medical marijuana" and "[t]he ballot summaries for both initiatives referenced federal law." SB at 19. But the sponsor is seeking ballot placement for the proposed amendment in 2022, by which time the Florida electorate will include an entire generation of new voters who were as young as 10 and 12 years old, respectively, during the 2014 and 2016 election cycles.

Moreover, from 2013 to 2018, the U.S. Department of Justice famously embargoed the enforcement of federal marijuana laws against activities that were

lawful at the state level.[1] Many voters will have at least passing familiarity with that well-known policy and, accordingly, will believe that the federal illegality of marijuana depends on its status under state law. Faced with ballot language conveying only that the amendment "permits" marijuana-related activities, those voters will be "potentially hoodwinked into believing that the amendment is consistent with the requirements of federal law." *In re: Medical Marijuana*, 132 So. 3d at 820 (Canady, J., dissenting). That "the Department of Justice's policy of enforcing the CSA has flip-flopped numerous times," SB at 21, only reinforces the point.

C. The sponsor also asks the Court to "reject[] the notion that a ballot summary must disclose something that does not appear in the text of the Amendment." SB at 15 (citing *Medical Marijuana I*, 132 So. 3d at 808). But that is not the House's argument. The amendment itself includes language clarifying that the covered activities are "not subject to criminal or civil liability or sanctions *under Florida law*." SB at 2 (emphasis added). The House asks no more, and no less, of

[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); *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).

the ballot language.

Indeed, in *Medical Marijuana II*, this Court unanimously approved ballot language conveying that the amendment would "[a]ppl[y] only to Florida law" and "not immunize violations of federal law." *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Debilitating Med. Conditions* (*Medical Marijuana II*), 181 So. 3d 471, 476 (Fla. 2015); *see also Medical Marijuana I*, 132 So. 3d at 821 (Canady, J., dissenting) (agreeing with the majority that the phrase "[a]pplies only to Florida law" was accurate). In crafting the ballot language at issue here, the sponsor chose to set aside that model language and instead convey to voters only that the Amendment would, if adopted, "permit[]" the covered activities. Inexplicably, the sponsor found it necessary to include language in the amendment itself clarifying that the specified conduct "is not subject to criminal or civil liability or sanctions *under Florida law*," SB at 2 (emphasis added), yet believed this "elementary civics principle" would be sufficiently well-known to voters that inclusion in the ballot summary was unnecessary.

The sponsor likewise contends that the possibility of changes "in the status of federal law and federal enforcement underscores the futility of reciting in a ballot summary the current state of federal law, which the Amendment is entirely powerless to change." SB at 21. Again, however, the House asks only that the sponsor afford voters the same clarity that it would afford the courts charged with

enforcing the Amendment's immunity provision—a statement that the covered activities would be shielded from liability "under Florida law." SB at 2.

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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