SC19-2116

In the Supreme Court of Florida

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

ATTORNEY GENERAL'S REPLY BRIEF

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I. THE PROPOSED AMENDMENT WOULD NOT "PERMIT[]" MARIJUANA USE, AS THE SUMMARY PURPORTS.

1. The Sponsor concedes that it is a "legal impossibilit[y]" for a State to empower its citizens to use recreational marijuana within its borders, Ans. Br. 4, 12, 18, since federal law bans the possession, use, and sale of marijuana, *id.* at 11-12, and "the Amendment could never change federal law." *Id.* at 4. Consistent with that incontrovertible precept, the text of the proposed amendment does not purport to permit recreational marijuana use. If passed, the amendment would instead ensure that marijuana is "permitted . . . under *Florida* law," Pet. 2 (emphasis added), a critical limitation. The ballot summary, however, is not so limited. Rather, it expressly and unqualifiedly states that the amendment "[p]ermits 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. 3.

As commonly understood, the verb "permit" means "to give leave: authorize" or "to make possible." *Permit*, Merriam-Webster Dictionary (last visited Feb. 10, 2020), https://www.merriam-webster.com/dictionary/permit; *see also Permit*, Black's Law Dictionary (11th ed. 2019) ("1. To consent to formally; to allow (something) to happen, esp. by an official ruling, decision, or law <permit the inspection to be carried out>. 2. To give opportunity for; to make (something) happen <lax security permitted the escape>. 3. To allow or admit of <if the law so

permits>."). Its synonyms include "authorize," "enable," "license," and "sanction." *Permit*, Merriam-Webster Thesaurus (last visited Feb. 10, 2020), https://www.merriam-webster.com/thesaurus/permit.

Thus, any law claiming to "permit" the use of marijuana would, as understood by an ordinary speaker of the English language, make lawful its use. Yet this amendment neither attempts to nor could achieve that result.

Accordingly, the Sponsor is incorrect that "[t]he Amendment does exactly what the ballot summary says it does." Ans. Br. 11. In truth, it does far less than what the summary says, rendering the summary defective under this Court's recent pronouncements. *See, e.g.*, *Advisory Op. to the Att'y Gen. re Right to Competitive Energy Market for Customers of Investor-Owned Utilities*, No. SC19-328, 2020 WL 103665 (Fla. Jan. 9, 2020). The summary in *Competitive Energy Market* promised voters that the amendment would "[g]rant[] customers of investor-owned utilities the right to choose their electricity provider and to generate and sell electricity." *Id.* at *2. But the amendment itself conveyed no such right to sell electricity, providing only that "nothing in this section shall be construed to limit the right of electricity consumers to . . . sell . . . electricity." *Id.* at *3 (emphases omitted). Given that the ballot summary "tells voters that the proposed amendment grants a personal right to 'sell electricity,' when in fact the amendment does no such thing," this Court concluded that the measure could not be placed on the ballot. *Id.*

The same analysis applies here. The ballot summary for the Adult Use initiative "tells voters that the proposed amendment [permits]" recreational marijuana use, "when in fact the amendment does no such thing." *Id.* Accordingly, the ballot language is clearly and conclusively defective. *See id.*

Contrary to the Sponsor's assertion, the Attorney General does not "demand[] that the ballot summary remind Florida voters that marijuana is currently prohibited under federal law." Ans Br. 11-12. The most glaring defect in the summary is not that it *omits* information about federal law, but that it *includes* a word—"permits"—that affirmatively misleads as to the chief legal effect of the amendment. While Section 101.161(1) does not require "coddling an elector," Ans. Br. 12, it does require telling voters the truth. *See, e.g.*, *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 648 (Fla. 2010) ("Because the misleading statements in the ballot summary here do not reflect the true legal effect of the proposed amendment, the ballot summary does not comply with the requirements of section 101.161(1) . . . .").

Nor would it have been difficult to accurately convey the chief purpose of the amendment in the ballot summary. For example, the Sponsor could have selected ballot language informing voters that the amendment would "eliminate state-law prohibitions on the sale, possession, and use of recreational marijuana for persons over the age of 21," with the caveat that the amendment "has no effect on federal

law." Similarly, the Sponsor might have employed language mirroring that in the text of the amendment itself. Unlike the summary, the text provides that marijuana shall be "permitted . . . under *Florida law*." Pet. 2 (proposed Art. X, §§ 33(b)(1)-(2)) (emphasis added). Indeed, *both* of the amendment's Public Policy provisions are careful to specify that the amendment's sweep is limited to "Florida law." *Id.*

2. It is no answer to say that "a conflict between current federal law and a proposed amendment is not justiciable in [an] initiative petition proceeding." Ans. Br. 12. The Attorney General does not contend that the *amendment* is substantively invalid as the result of a conflict with federal law; only that the *ballot summary* violates Section 101.161(1) by misleading voters as to the amendment's chief purpose. *See* Att'y Gen. Init. Br. 5-10.

This Court's decision in *Advisory Op. to the Att'y Gen.—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991), is not to the contrary. In the Sponsor's view, the Court there approved an initiative petition even though its summary "affirmatively represented that the amendment would impose term limits on U.S. representatives and senators, despite the impossibility of that result." Ans. Br. 13. The Sponsor misreads that decision. Federal law factored into the Court's analysis only to the extent that the Court summarily dismissed the opponents' "constitutional challenges" to the measure's "validity"—based on the "Supremacy Clause"—as "not justiciable in the instant proceeding." *Limited*

Political Terms, 592 So. 2d at 227 & n.2. That is, the opponents sought to litigate the merits of the proposed amendment in a manner that could only be done in a post-voter-approval challenge. With respect to the holding of this Court actually relevant here—its rejection of the opponents' Section 101.161(1) challenge—federal law was not even discussed, let alone central to the decision. *See id.* at 228-29 (section of the Court's opinion addressing "BALLOT TITLE AND SUMMARY REQUIREMENTS"). In short, *Limited Political Terms* is inapposite because the Court did not pass upon the question at issue here.

Moreover, the facts of *Limited Political Terms* are readily distinguishable. That proposed amendment purported to impose term limits on certain federal elected offices, *id.* at 226, and the summary faithfully tracked that legal effect by informing voters that the amendment would "prohibit[] incumbents who have held the same elective office for the preceding eight years from appearing on the ballot for re-election to that office," including for "U.S. Senator and Representative." *Id.* at 228. Thus, on its face, that amendment would have done what the summary said it would do—even though a reviewing court might later invalidate the amendment under the Supremacy Clause. A core difference here, however, is that the Adult Use ballot summary does *not* track the text of the proposed amendment. As discussed above, the Adult Use amendment dictates only that recreational marijuana use and possession will be "permitted . . . under Florida law," Pet. 2, whereas the summary

incorrectly states that recreational marijuana use and possession would be "[p]ermit[ted]," Pet. 3, without qualification.

3. Nor is it fair to say, as the Sponsor does, that the ballot summary is not misleading because "it implies nothing about federal law at all." Ans. Br. 15. When the summary tells voters that the amendment "permits" marijuana use, it communicates that marijuana use would not be prohibited by federal law, either because federal law does not independently prohibit the sale, possession, and use of marijuana or because a State has the power to override such federal prohibitions in some circumstances. Neither is true.

If anything, the Sponsor's reliance on the dissenting opinions in *Use of Marijuana for Certain Medical Conditions* undermines its position. *See, e.g.*, Ans. Br. 14. In his dissent, Chief Justice Polston wrote that "while 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 by falsely implying the opposite of what the current state of federal law is." *Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 819 (Fla. 2014) (Polston, C.J., dissenting). The problem here is not that the summary fails to mention federal law; it is that the summary's unqualified use of the term "permits" is "affirmatively mislead[ing]." *Id*.

4. Finally, the Sponsor urges ballot placement by invoking the general

presumption that "the average voter has a certain amount of common understanding and knowledge." Ans. Br. 18 (quoting *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010)). The issue, though, is whether that presumption should be used not merely to *fill gaps* in a ballot summary that leaves out some level of detail, but to *correct an affirmatively misleading statement* in a ballot summary. Put differently, the Sponsor argues that voters must be presumed to know that the ballot summary does not really mean what it says.

The Sponsor cites no case in support of that novel theory, and the plain text of Section 101.161(1) compels a contrary conclusion. That statute requires that a ballot summary appear in "clear and unambiguous language" and include an "explanatory statement" of the measure's chief purpose. § 101.161(1), Fla. Stat. Any wording that affirmatively misleads voters cannot, by definition, constitute an adequate "explanatory statement," and Section 101.161(1) contains no exception for misleading language where some voters may conclude, based on their knowledge of facts not disclosed in the ballot language, that the summary is inaccurate.[1]

[1] At any rate, it is far from clear that voters should be "presumed" to know that the proposed constitutional amendment would not *really* "permit[]" the recreational use of marijuana. *See* Ans. Br. 22. As the Sponsor itself notes, it has been widely (if inaccurately) reported that some states have made cannabis "legal," *e.g.*, Ans. Br. 5 n.1 (citing article entitled, "*Legal* marijuana just went on sale in Illinois. *Here are all the states where cannabis is legal*.") (emphases added), and this widely-reported fact may confuse voters as to a state's authority to reach independent policy judgments within our federal system. Moreover, some voters, like the three dissenting Justices in *Gonzales v. Raich*, may be of the view that the

Because the problem here is not what the summary omits but what it erroneously includes (the word "permits"), the Sponsor cannot resort to any presumption regarding voters' common knowledge.

CONCLUSION

The proposed amendment should not be placed on the ballot.

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Respectfully submitted,

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purely in-state use of marijuana is a matter properly left to state legislatures. *See* 545 U.S. 1, 42-57 (2005) (O'Connor, J., dissenting). At a minimum, voters need not be presumed to have greater knowledge of pertinent law than the sponsors of such initiatives; and, of particular relevance here, the sponsor of another initiative seeking to legalize the use of recreational marijuana recently advised this Court that its proposed amendment was an attempted "act of nullification of federal law." *See* Ans. Br., *Advisory Op. to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions*, SC19-1536, at *23 (filed Dec. 2, 2019).

CERTIFICATE OF SERVICE

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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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