SC19-2116

In the Supreme Court of Florida

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

ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF ON THE IMPLICATIONS OF CHAPTER 2020-15, LAWS OF FLA.

Ashley Moody
Attorney General

Amit Agarwal (FBN 125637)
Solicitor General

James Percival (FBN 1016188)
Chief Deputy Solicitor General

Jeffrey Paul DeSousa (FBN 110951)
Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
amit.agarwal@myfloridalegal.com
jeffrey.desousa@myfloridalegal.com
Tel. (850) 414-3300
Fax (850) 410-2672

Counsel for Attorney General

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Laws, and Constitutional Provisions

INTRODUCTION

This filing responds to the Court's order inviting interested parties to submit supplemental briefs addressing "the implications, if any, of chapter 2020-15, Laws of Florida, for the instant case." In the Attorney General's view, that newly enacted law does not change the outcome of this case. First, the new law does not strip this Court of jurisdiction. Second, while the new law provides that the Court may assess whether a proposed amendment is facially invalid under the United States Constitution, any such inquiry would not change how this case comes out. Now, as before, the ballot language is affirmatively misleading; and now, as before, that defect compels the conclusion that the proposed amendment should not be placed on the ballot. Because the misleading ballot language supplies an adequate and independent basis for disposing of this case, the Court need not—and, under traditional principles of sound adjudication, should not—address potential federal constitutional challenges to the proposed amendment.

Pre-enactment consideration of potential challenges to the validity of proposed constitutional amendments raises particular concerns for the Office of the Attorney General. As the chief legal officer of the State, the Attorney General is often called on to defend and enforce duly-enacted state laws, including state constitutional amendments. In keeping with that duty, the Attorney General routinely declines to pass on issues that may be the subject of future litigation

implicating the validity of state laws. Accordingly, the Attorney General does not intend to take a position on the facial validity of the proposed amendment at issue in this case. In the event this Court deems it appropriate to address that issue, however, this supplemental brief identifies some general principles which may facilitate the Court's analysis.

BACKGROUND

On April 8, 2020, Governor Ron DeSantis signed into law Senate Bill 1794, addressing the procedures governing Florida's citizen-initiative process for amending the state constitution. *See* Ch. 2020-15, Laws of Fla. Several amended provisions are relevant to petitions for advisory opinions going forward.

First, the new law increases the signature thresholds that an initiative must meet before it qualifies for this Court's advisory opinion review. *Id.* § 1. Previously, an initiative needed signatures equaling 10 percent of 8 percent of the total votes cast in the preceding presidential election, and that threshold needed to be satisfied in at least one-fourth of the State's congressional districts. *See* § 15.21(3), Fla. Stat. (2019); Art. XI, § 3, Fla. Const. Post-amendment, however, that number has increased to 25 percent of 8 percent, a threshold that must be met in one-half of the State's congressional districts. Ch. 2020-15, § 1, Laws of Fla.

Second, the new law invites the Court to address an additional issue as part of its advisory opinion review—specifically, "whether the proposed amendment is

facially invalid under the United States Constitution." *Id.* § 2.

The new law also amends the process governing financial impact statements, *id.* §§ 1, 3, 4, and signature gathering. *Id.* § 3.

Chapter 2020-15 took effect "upon becoming a law," *id.* § 8, the date it was signed by the Governor. By its terms, the new law affects pending and future citizen initiatives. It states:

> This act does not require the Financial Impact Estimating Conference to amend or revise a financial impact statement that has been submitted to the Secretary of State before the effective date of this act. The provisions of this act, including the ballot requirements for certain disclosures and statements, apply to constitutional amendments proposed by initiative which are proposed for the 2020 general election and each election thereafter; provided, however, that nothing in this act affects the validity of any petition form gathered before the effective date of this act or any contract entered into before the effective date of this act. Petition forms gathered before the effective date of this act shall be governed by the laws existing at the time that the form was initially gathered.

Id. § 6.

ARGUMENT

I. CHAPTER 2020-15 APPLIES TO PENDING INITIATIVES, SUBJECT TO CERTAIN ENUMERATED EXCEPTIONS.

Section 6 of the new law provides that "[t]he provisions of this act, including the ballot requirements for certain disclosures and statements, apply to constitutional amendments proposed by initiative which are proposed for the 2020 general election and each election thereafter; provided, however, that nothing in this act affects the

validity of any petition form gathered before the effective date of this act or any contract entered into before the effective date of this act." Ch. 2020-15, § 6, Laws of Fla.

The Adult Use of Marijuana initiative is a "constitutional amendment[] proposed by initiative," and it was "proposed for the 2020 general election." *See Adult Use of Marijuana*, No. 19-11. Thus, Chapter 2020-15 applies to the Adult Use initiative, except insofar as those provisions would "affect[] the validity of any petition form gathered before," or "any contract entered into before," April 8, 2020.

II. CHAPTER 2020-15 DOES NOT STRIP THIS COURT OF JURISDICTION.

As relevant here, Section 1 of Chapter 2020-15 amends Section 15.21 to provide that the "Secretary of State shall immediately submit an initiative petition to the Attorney General if the sponsor has . . . [o]btained a letter from the Division of Elections confirming that the sponsor has submitted to the appropriate supervisors for verification, and the supervisors have verified, forms signed and dated equal to 25 percent of the number of electors statewide required by s. 3, Art. XI of the State Constitution in one-half of the congressional districts of the state." § 15.21(3), Fla. Stat. (effective Apr. 8, 2020).

The new law does not divest this Court of jurisdiction to issue an advisory opinion on the Adult Use of Marijuana Initiative. Even assuming *arguendo* that the new law would otherwise divest this Court of its preexisting jurisdiction to review

ballot initiatives that had met the previously applicable threshold, it would not affect the Court's jurisdiction in this case because the Adult Use of Marijuana Initiative meets the new thresholds. *See Adult Use of Marijuana, 19-11*, Fla. Sec'y of State, Div. of Elections (last visited Apr. 20, 2020), https://tinyurl.com/y6w2kamy (specifying that Adult Use initiative currently has 553,064 valid signatures).

III. AN INQUIRY INTO THE FACIAL VALIDITY OF THE PROPOSED INITIATIVE WOULD NOT CHANGE THE OUTCOME OF THIS CASE.

A. Chapter 2020-15's facial validity provision raises a number of questions that could affect this Court's assessment of other ballot initiatives.

Section 2 of Chapter 2020-15 calls for this Court to render, in certain circumstances, an advisory opinion regarding "whether the proposed amendment is facially invalid under the United States Constitution." That new provision raises a number of questions, including but not limited to: (1) whether a proposed amendment "is facially invalid under the United States Constitution," within the meaning of Chapter 2020-15, if it is preempted by a valid federal regulation or statute; (2) whether any provision of a proposed amendment is so preempted; (3) whether, if a provision of a proposed amendment is preempted but that provision is severable, the entire proposed amendment is facially invalid under the U.S. Constitution; and (4) what the appropriate remedy would be when a proposed amendment is facially invalid under the U.S. Constitution.

B. The Court need not address those questions here.

Those issues need not be resolved here. Regardless of how such questions are answered, the new law does not change the outcome of this case.

Namely, Chapter 2020-15 does not alter this Court's authority to ensure that ballot language is accurate. As explained in the Attorney General's prior briefs, the ballot language here expressly and unqualifiedly tells voters that the proposed amendment "permits" the possession, sale, transport, and use of marijuana. If approved, however, the initiative would not "permit" such activities: Federal law prohibits the possession, sale, transportation, or use of marijuana, and the proposed amendment would not undo or override that law. Accordingly, the ballot language is affirmatively misleading, and the proposed initiative should not be placed on the ballot. *See generally* Att'y Gen. Init. Br. 6–10; Att'y Gen. Reply Br. 1–8.

C. The Court should not address constitutional questions where it is unnecessary to do so.

Because the misleading ballot language provides an adequate and independent ground for resolving this case, the Court need not—and, based on traditional principles of judicial restraint, should not—address the facial validity of the proposed amendment under the United States Constitution. First, this Court has, in previous ballot cases, addressed only a single issue where that issue disposed of the case. *See, e.g.*, *Advisory Op. to Att'y Gen. re Right to Competitive Energy Market for Customers of Investor-Owned Utilities*, 287 So. 3d 1256, 1260 (Fla. 2020).

Second, this Court generally avoids answering constitutional questions in cases that can be resolved on other grounds. *See In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006) ("[W]e have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds."); *accord Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 158 (1984) (explaining the "fundamental rule of judicial restraint" that courts "avoid unnecessary constitutional adjudication").

D. Additional considerations.

Given her unique role in defending and enforcing state laws, the Attorney General does not intend to take a position on the facial validity of the proposed amendment at issue in this case. The Attorney General notes, however, the following considerations and principles, which may assist the Court in any assessment of such issues.

1. In rendering an advisory opinion concerning a proposed constitutional amendment, this Court has a "duty . . . to uphold the proposal unless it can be shown to be 'clearly and conclusively defective.'" *Competitive Energy Market*, 287 So. 3d at 1260 (quotation marks and citations omitted). This Court has applied that deferential standard in assessing whether a proposed amendment satisfies the single-subject requirement of the Florida Constitution and whether the ballot language

satisfies the clarity requirements of Section 101.161. *Id.*

The same standard should apply in considering a claim that a proposed amendment is "facially invalid under the United States Constitution." This Court may exercise original jurisdiction to review the facial validity of a proposed amendment under federal law only if such an inquiry goes to the validity of the initiative petition. *See Advisory Op. to the Att'y Gen. re Raising Florida's Minimum Wage*, 285 So. 3d 1273, 1279 (Fla. 2019) ("[A]rticle V, section 3(b)(10) directs this Court to review issues provided by general law," but "that direction does not open the door for this Court to exercise original jurisdiction to review any issue provided by general law" because "issues concerning the validity of initiative petitions" are the exclusive "subject matter of both article V, section (3)(b)(10) and article IV, section 10."). This Court applies a "deferential standard of review" in assessing "the validity of a citizen initiative petition," as the Court "has been reluctant to interfere with the right of self-determination for *all* Florida's citizens to formulate their own organic law." *Competitive Energy Market*, 287 So. 3d at 1260 (quotation marks and citation omitted) (citing *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses*, 818 So. 2d 491, 494 (Fla. 2002)).

That standard makes sense in this context, as the Court would be tasked with resolving a federal constitutional challenge without any of the ordinary safeguards attending such adjudication—including a developed record, ventilation of issues in

lower court decisions, and the possibility of obtaining U.S. Supreme Court review to resolve reasonable disagreements concerning the requirements of federal law.

2. To show that a proposed amendment is facially invalid under the United States Constitution, "the challenger must demonstrate that no set of circumstances exists in which the [proposed amendment] can be constitutionally valid." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018). In other words, the proposed amendment must be unconstitutional in all its applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1255 & n.19 (11th Cir. 2012). This "heavy burden" is "the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745.

3. A state may not enforce a policy that conflicts with valid federal law. U.S. Const., art. VI, cl. 2; *see, e.g.*, *Arizona v. United States*, 567 U.S. 387, 399 (2012). If this Court, in an appropriate case, addresses whether a proposed amendment is preempted by federal law, it should ask—among other questions—whether the text of the proposed amendment is most reasonably interpreted to conflict with federal law—or whether, instead, it should be read merely to address the legal status of certain conduct under state law. In resolving that issue, the Court should construe the proposed amendment, if possible, "to effect a constitutional outcome." *Fraternal Order of Police, Miami Lodge 20*, 243 So. 3d at 897; *accord Jackson v. State*, 191

So. 3d 423, 426 (Fla. 2016); *Fla. Dep't of Revenue v. DIRECTV, Inc.*, 215 So. 3d 46, 50 (Fla. 2017).

* * *

Chapter 2020-15 raises a number of complex questions, some of which the Court may need to address in an appropriate case. But it need not resolve them here, because the ballot language expressly and unqualifiedly purports to permit conduct prohibited by federal law.

CONCLUSION

This Court has jurisdiction to issue an advisory opinion, and it should rule that the ballot language is fatally defective.

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Respectfully submitted,

Ashley Moody
Attorney General

/s/ Amit Agarwal
Amit Agarwal (FBN 125637)
Solicitor General
James Percival (FBN 1016188)
Chief Deputy Solicitor General
Jeffrey Paul DeSousa (FBN 110951)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
amit.agarwal@myfloridalegal.com
james.percival@myfloridalegal.com
jeffrey.desousa@myfloridalegal.com
Tel. (850) 414-3300
Fax (850) 410-2672

Counsel for Attorney General

CERTIFICATE OF SERVICE

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

George T. Levesque
Ashley Hoffman Lukis
GrayRobinson, P.A.
Tallahassee, Florida 32302
(850) 577-9090
george.levesque@gray-robinson.com
ashley.lukis@gray-robinson.com
vanessa.reichel@gray-robinson.com
Counsel for Sponsor, Make it Legal, Florida

Joe Jacquot
Executive Office of the Governor
State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001
(850) 717-9310
joe.jacquot@eog.myflorida.com
General Counsel to Governor Ron DeSantis

Brad McVay
Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, Florida 32399-0250
(850) 245-6536
brad.mcvay@dos.myflorida.com
General Counsel to Secretary of State Laurel Lee

Jeremiah Hawkes
Ashley Urban
The Florida Senate
The Capitol
404 S. Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237
hawkes.jeremiah@flsenate.gov
ashley.urban@flsenate.gov
Counsel to Senate President Bill Galvano

Daniel Bell
J. Michael Maida
Florida House of Representatives
The Capitol
402 S. Monroe Street
Tallahassee, Florida 32399-1300
(850) 717-5500
daniel.bell@myfloridahouse.gov
michael.maida@myfloridahouse.gov
Counsel to Florida House of Representatives

Julissa Rodriguez
Shutts and Bowen LLP
200 S. Biscayne Boulevard, Suite 4100
Miami, Florida 33131
(305) 358-6300
jrodriguez@shutts.com

Jeremy D. Bailie
Weber, Crabb & Wein, P.A.
5453 Central Avenue
St. Petersburg, Florida 33710
(727) 828-9919
jeremy.bailie@webercrabb.com
lisa.willis@webercrabb.com
Counsel for Opponents Drug Free America Foundation, Florida Coalition Alliance, National Families in Action, and Smart Approaches to Marijuana

Jason Gonzalez
Daniel Nordby
Benjamin Gibson
Amber Stone Nunnally
Rachel Procaccini
Shutts and Bowen LLP
215 South Monroe Street, SUITE 804
Tallahassee, Florida 32301
(850) 241-1717
JasonGonzalez@shutts.com
DNordby@shutts.com
BGibson@shutts.com
ANunnally@shutts.com
RProcaccini@shutts.com
Counsel for Opponents Florida Chamber of Commerce, Floridians Against Recreational Marijuana, Save Our Society From Drugs, and National Drug-Free Workplace Alliance

/s/ Amit Agarwal
Amit Agarwal
Solicitor General

CERTIFICATE OF FONT

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).

/s/ Amit Agarwal
Amit Agarwal
Solicitor General