IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF HEALTH,
OFFICE OF MEDICAL MARIJUANA USE,
et al,

Petitioners,

v.

FLORIGROWN, LLC, a Florida limited Liability company and VOICE OF FREEDOM, INC., d/b/a FLORIGROWN,

Respondents.
_____/

Case No. SC19-1464
DCA Case No.: 1D18-4471
L.T. Case No. 2017-CA-2549

AMICUS CURIAE BRIEF OF DFMMJ INVESTMENTS, LLC, D/B/A LIBERTY HEALTH SCIENCES, ACREAGE FLORIDA, INC., PERKINS NURSERY, INC., SAN FELASCO NURSERIES, INC., D/B/A HARVEST, MOUNT DORA FARMS, LLC, BETTER-GRO COMPANIES, LLC, D/B/A COLUMBIA CARE FLORIDA, AND DEWAR NURSERIES, INC. IN SUPPORT OF PETITIONERS

On Discretionary Review from a Decision of
the First District Court of Appeal

John M. Lockwood
Florida Bar No. 28056
john@lockwoodlawfirm.com

Thomas J. Morton
Florida Bar No. 13771
tj@lockwoodlawfirm.com

Devon Nunneley
Florida Bar No. 46234
devon@lockwoodlawfirm.com

THE LOCKWOOD LAW FIRM
106 East College Avenue, Suite 810
Tallahassee, Florida 32301
Tel: 850.727.5009
Fax: 850.270.2610

Counsel for DFMMJ Investments, LLC, d/b/a Liberty Health Sciences and Acreage Florida, Inc.

James A. McKee
Florida Bar No. 638218
Primary: jmckee@foley.com
Secondary: mlong@foley.com

FOLEY & LARDNER LLP
106 E. College Ave., Suite 900
Tallahassee, FL 32301
Tel: 850-222-6100

Counsel for Perkins Nursery, Inc., San Felasco Nurseries, Inc. d/b/a Harvest, Mount Dora Farms, LLC, and Better-Gro Companies, LLC, d/b/a Columbia Care Florida

William D. Hall, III
Florida Bar No. 67936
whall@deanmead.com

Daniel R. Russell
Florida Bar No. 63445
drussell@deanmead.com

DEAN MEAD & DUNBAR
215 South Monroe Street, Suite 130
Tallahassee, Florida 32301
Tel: 850-425-7800

Counsel for Dewar Nurseries, Inc.

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STATEMENT OF IDENTITY AND INTEREST IN THE CASE

DFMMJ Investments, LLC d/b/a Liberty Health Sciences, Acreage Florida, Inc., Perkins Nursery, Inc., San Felasco Nurseries, Inc. d/b/a Harvest, Mount Dora Farms, LLC, Better-Gro Companies, LLC, d/b/a Columbia Care Florida, and Dewar Nurseries, Inc. (collectively "Amici") are medical marijuana treatment centers ("MMTCs") that were granted licenses from the Department pursuant to section 381.986, Florida Statutes. As licensed MMTCs, the Amici are authorized, and required, to cultivate, process, and dispense medical marijuana (the "Vertical Integration Requirement"). *See* § 381.986(8)(e), Fla. Stat. ("A licensed medical marijuana treatment center shall cultivate, process, transport, and dispense marijuana for medical use.")

The Amici obtained their respective MMTC licenses in reliance on the Vertical Integration Requirement and have invested millions of dollars into their existing facilities to in order to comply with the law. The Amici made these investments, and continue to make substantial capital investments, to ensure they have the facilities and infrastructure necessary to cultivate, process, and dispense safe medical marijuana to qualified patients.

As operators in a highly-regulated industry, it is essential that the Amici have a stable and robust state regulatory framework to follow. Without such a framework, MMTCs are left in a legal grey area that threatens their ability to obtain ancillary services such as financial services.

The First District Court of Appeal's July 9, 2019, decision concluded that the Vertical Integration Requirement "directly conflicts with the constitutional amendment and, [Respondent] has demonstrated a substantial likelihood of success in procuring a judgment declaring [the Vertical Integration Requirement] unconstitutional." *Fla. Dep't of Health v. Florigrown*, 44 Fla. L. Weekly D1744, 2019 WL 2943329, at 3 (Fla. 1st DCA July 9, 2019) ("*Florigrown I"*). As recognized by Judge Wetherell in his opinion concurring in part and dissenting in part, the panel decision "will effectively mandate an immediate change in the entire structure of the medical marijuana industry in Florida." *Id*. at 6 (Wetherell, J., concurring in part and dissenting in part). Further, it will "create a regulatory vacuum that will need to be immediately filled by an entirely new regulatory scheme in order to avoid an unregulated marketplace for medical marijuana." *Id*. at n.4.

Florigrown I implicates the Amici's interests in protecting their vertically integrated operations and Florida's vertically integrated marketplace, as well their interests in ensuring that Florida has a safe, strong, and effective medical marijuana regulatory system.

SUMMARY OF THE ARGUMENT

A temporary injunction is an extraordinary remedy that should only be granted when it will preserve the status quo and serve the public interest. The First District's decision in *Florigrown I* fails to meet this high bar.

In drafting section 381.986, Florida Statutes, the Florida Legislature made the policy decision to require MMTCs to be vertically integrated. Vertical integration provides for strict control over product quality and ensures a reliable supply of products. The Florida Constitution mandates that Florida's medical marijuana program ensure the availability and safe use of medical marijuana by qualifying patients. A vertically integrated system is a reasonable means of accomplishing the constitutional requirements.

Additionally, vertical integration with caps on the number of MMTC licenses that increase as the patient population increases allows for the supply of medical marijuana to grow in proportion to the demand. This is designed to prevent an excess supply, or shortage, of medical marijuana. This existing system is working as Florida's patient base, the number of MMTC licensees and facilities, and the amount of medical marijuana dispensed are steadily growing.

The First District's decision requires a complete overhaul of Florida's medical marijuana regulatory framework, injects a great deal of uncertainty into the program, and does not serve the public interest. It is improper to use a temporary injunction to

disrupt the status quo and the uncertainty flowing from the First District's decision will negatively impact the program and the qualified patients.

For these reasons, the First District's decision does not serve the public interest and should be quashed.

ARGUMENT

I. THE TEMPORARY INJUNCTION WILL NOT SERVE THE PUBLIC INTEREST BECAUSE IT WILL HARM FLORIDA'S SAFE AND EFFECTIVE MEDICAL MARIJUANA PROGRAM.

A. The standard of review.

The legal conclusions contained in a ruling on a temporary injunction are reviewed de novo. *SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012).

"The purpose of a temporary injunction is not to resolve a dispute on the merits, but rather to preserve the status quo until the final hearing when full relief may be granted." *Grant v. Robert Half Intern., Inc.,* 597 So. 2d. 801, 801-802 (Fla. 3d DCA 1992). A temporary injunction can only be granted after the party seeking the injunction satisfies a four-part test: a substantial likelihood of success on the merits; the unavailability of an adequate remedy at law; irreparable harm absent entry of an injunction; and that the public interest supports the injunction. *Reform Party of Fla. v. Black*, 885 So. 2d 303, 305 (Fla. 2004). A court should evaluate whether the party seeking the issuance of a temporary injunction has satisfied each of the above elements with the understanding that a temporary injunction is "an extraordinary remedy which should be granted sparingly." *Sch. Bd. of Hernando Cty. v. Rhea*, 213 So. 3d 1032, 1040 (Fla. 1st DCA 2017); *see also Provident Mgmt.*

Corp. v. City of Treasure Island, 796 So. 2d 481, 485 (Fla. 2001) (recognizing that a temporary injunction constitutes extraordinary relief).

B. The Vertical Integration Requirement and caps on the number of MMTC licenses ensure the safe and available use of medical marijuana.

The Vertical Integration Requirement represents the Legislature's policy determination regarding its preferred supply chain arrangement for the medical marijuana industry. It has been suggested that requiring vertical integration, not just in the medical marijuana context but in any industry, is nearly unheard-of. *See Dep't of Health v. Florigrown*, 44 Fla. L. Weekly D2182, WL 4019919 at 3 (Fla. 1st DCA Aug. 27, 2019) ("*Florigrown II*") ("Indeed, one looks in vain for *any* modern American commodities industry which *all* sellers are fully-vertically integrated….") (Makar, J., concurring in denial of rehearing en banc). However, a brief review of medical marijuana programs in other states reveals that Florida is not an outlier in requiring vertical integration. In fact, it is not uncommon for states to require vertically integrated medical marijuana programs.[1]

[1]The following is a brief, non-exclusive list of states that have required vertical integration: Massachusetts (*see Guidance for Municipalities Regarding the Medical Use of Marijuana*, available at: https://mass-cannabis-control.com/wp-content/uploads/2017/12/CNBPSCMmunicipal-guidance-august-2016.pdf); New York (see description of New York medical marijuana program noting that registered organizations manufacture and dispense medical marijuana, available at https://www.health.ny.gov/regulations/medical_marijuana/application/applications.htm); Hawaii (see §§11-850-6, 11-850-7, & 11-850-31(d) & (e), Hawaii Administrative Rules, available at: https://health.hawaii.gov/opppd/files/2015/06/11-850.pdf).

Vertical integration is a viable model for implementing Florida's new and emerging medical marijuana market for several reasons. First, a vertically integrated supply chain allows for strict control over quality and ensures reliability of supply.[2] In a fully-vertically integrated market, the goods remain under the control of the same company throughout all stages of the supply chain. This is especially important in the medical marijuana industry as it limits diversion and ensures a consistently safe product. The safety of medical marijuana products is of paramount importance as MMTCs provide products to a vulnerable patient population, many of which suffer from compromised immune systems.

Vertical integration ensures a reliable supply of products by permitting the increased coordination of the manufacturing, distributing, and retail aspects of an industry. This results in the efficient scheduling of production and distribution and reduces supply disruptions. A consistent and reliable supply of product is necessary to establish trust in Florida's medical marijuana program and to allow patients the access to this important medicine.

The Florida Constitution contemplates a highly regulated marketplace with regulations that "ensure the availability and safe use of medical marijuana by qualifying patients." Art. X, §29(d), Fla. Const. (the "Amendment"). As discussed

[2] *See, e.g.,* David A. Beyer, "Chapter 2: Considerations in the Development of Franchise System", in *Franchise Law and Practice*, §§2.11 – 2.13, The Florida Bar, 1996.

above, a vertically integrated system is an effective means of assuring that consistently safe medical marijuana is available to Florida's qualified patients. The Florida Legislature's policy decision to create a vertically integrated medical marijuana program was entirely reasonable and properly implements the Amendment.

Next, vertical integration, along with statutory caps on the number of MMTC licenses, provide for the controlled growth of Florida's medical marijuana market. A cap on the number of MMTC licenses is important to prevent an excess supply of medical marijuana from flooding the market. An excess supply would only serve to increase the opportunities for diversion from the unlimited number of MMTCs and may catch the ire of regulators and law enforcement.[3]

Florida's qualified patient population has steadily increased since the Amendment was approved by voters in 2016.[4] Section 381.986(8)(a)4., Florida

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[3] *See, e.g.,* Oregon Liquor Control Commission, *2019 Recreational Marijuana Supply and Demand Legislative Report,* p. 14 (2019), available at: https://www.oregon.gov/olcc/marijuana/Documents/Bulletins/2019%20Supply%20and%20Demand%20Legislative%20Report%20FINAL%20for%20Publication(PDFA).pdf ("Growing supply and declining prices create market pressures that may over time increase the likelihood of licensees turning to illegal diversion and arbitrage opportunities out-of-state in order to keep businesses afloat."); *see also* Kristian Foden-Vencil, *Oregon is Producing Twice as Much Cannabis as People are Using*, Oregon Public Broadcasting (Jan. 31, 2019), available at: https://www.opb.org/news/article/oregon-cannabis-surplus-2019/

[4] On June 7, 2017, the first date that the Department published the number of qualified patients, there were 16,760 qualified patients in Florida. On January 5, 2018, there were 65,310 qualified patients. On January 4, 2019, there were 168,981 qualified patients. As of December 13, 2019, there are 293,847 qualified

Statutes, provides for the issuance of four new MMTC licenses with each increase of 100,000 qualified patients. The requirement for the issuance of additional vertically integrated MMTC licenses as the patient population increases reflects the Florida Legislature's intent to ensure the reasonable availability of medical marijuana for qualified and active patients.

Indeed, the existing framework is working. Commensurate with the increase in qualified patients, there has been a steady increase in the amount of medical marijuana dispensed and in the number of dispensing facilities. The amount of medical marijuana that is being dispensed weekly has almost doubled from the time the trial court entered its temporary injunction.[5] On the date of the trial court's injunction, there were 58 approved dispensing facilities between 14 MMTCs.[6] As of December 13, 2019, there are now 209 approved dispensing facilities between 22

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patients. *See* Fla. Dep't of Health, Office of Medical Marijuana Use, *Weekly Updates*, available at: https://knowthefactsmmj.com/about/weekly-updates/

[5] From September 28, 2018, to October 5, 2018, the date of the trial court's temporary injunction, 41,631,920 milligrams of medical marijuana were dispensed. *See* Fla. Dep't of Health, Office of Medical Marijuana Use, *Weekly Updates* (Oct. 5, 2018), available at: https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2018/100518-OMMU-Update.pdf
From December 6, 2019, to December 12, 2019, 74,086,880 milligrams of medical marijuana were dispensed. This does not include the over 20,000 ounces of smokable marijuana that were also dispensed during that time period. *See* Fla. Dep't of Health, Office of Medical Marijuana Use, *Weekly Updates* (Dec. 13, 2019), available at: https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2019/121319-OMMU-Update.pdf

[6] *See* Fla. Dep't of Health, Office of Medical Marijuana Use, *Weekly Update* (Oct. 5, 2018), available at: http://s27415.pcdn.co/wp-content/uploads/ommu_updates/2018/100518-OMMU-Update.pdf

MMTCs.[7] Currently, each MMTC is authorized to open up to 35 dispensing facilities based on the number of active registered patients in the medical marijuana use registry. *See* §381.986(8)(a)5.a., Fla. Stat.[8] Thus, the existing regulatory framework allows for potentially 770 dispensing facility statewide, with additional increases provided for in the existing statute. While there is still significant room for growth, the increase in dispensing facilities over the past year signals that the existing regulatory framework is allowing for the growth of the marketplace in a controlled manner and assurance that no qualified patients' needs are unmet by the currently licensed MMTCs, as envisioned by the legislature.

The legislature allocated to the Department resources for the administration and enforcement of section 381.986 in accordance with the legislature's desired scope of the program. A rapid expansion in the number of MMTC licensees would overburden the Department's limited resources. A greater number of licensees increases the likelihood of diversion and the dispensation of unsafe products. This increased potential, coupled with the Department's lack of resources to regulate unlimited licensees, could result in a program that runs afoul of the Amendment's mandate to have safe medical marijuana.

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[7] *See* Fla. Dep't of Health, Office of Medical Marijuana Use, *Weekly Update* (Dec. 13, 2019), available at: https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2019/121319-OMMU-Update.pdf

[8] The cap on the number of dispensing facilities a MMTC may operate expires on April 1, 2020. *See* §381.986(8)(a)5.d., Fla Stat.

The Vertical Integration Requirement and the caps on the number of MMTC licenses represent the legislature's important policy choices concerning how Florida's medical marijuana program should operate. Those choices were designed to ensure that the safe and available supply of medical marijuana to qualified patients in accordance with the Amendment. The steady and controlled growth of the program indicate that the program is fulfilling the legislature's intent.

C. The temporary injunction will place Florida's medical marijuana program in turmoil.

Florigrown I upheld the trial temporary injunction to the extent it prevents the Department from enforcing the "unconstitutional provisions" in section 381.986, Florida Statutes. *Florigrown I* at 5. However, the decision rejected the trial court's requirement that the Department begin registering MMTCs because "the public interest would not be served by requiring the Department to register MMTCs pursuant to a preliminary injunction without applying other regulations to uphold the safety of the public." *Id.* The decision modified the trial court's temporary injunction by giving the Department a reasonable period of time to promulgate rules which uphold the safety of the public before requiring the Department to begin registering MMTCs. *Id.* In giving the Department a reasonable period of time to promulgate rules that uphold the safety of the public, the decision acknowledged that its holding has the effect of requiring the development of an entirely new regulatory framework.

In his opinion concurring in part and dissenting in part, Judge Wetherell expressly recognized the impact the regulatory void will have on Florida's medical marijuana program, noting that the decision "will create a regulatory vacuum that will need to be immediately filled by an entirely new regulatory scheme in order to avoid an unregulated marketplace for medical marijuana." *Id.* at 6, n.4. (Wetherell, J., concurring in part and dissenting in part).

As discussed above, section 381.986 was crafted with the understanding that MMTCs must be vertically integrated. The conclusion that the Vertical Integration Requirement is unconstitutional undermines the entire regulatory framework contained in section 381.986. Further, the First District's decision does not provide the Department or existing MMTCs with any guidance as to which, if any, provisions in section 381.986 remain enforceable. The uncertain nature of what this "entirely new regulatory scheme" could look like and which provisions of section 381.986 will remain in effect negatively impacts the medical marijuana program, including the large population of qualified patients whose medical needs may suffer during the creation of this entirely new regulatory scheme. Further, existing MMTCs would be in the untenable position of operating in a highly-regulated industry without the certainty of unambiguous regulations.

The First District's decision will cause a seismic shift in Florida's medical marijuana program. Radically altering the status quo at this preliminary stage of the

case is an improper use of a temporary injunction and weighs heavily against the public interest.

In sum, the Florida Legislature created a vertically integrated medical marijuana program and established limits on the number of MMTC licenses in an effort to ensure the availability and safe use of medical marijuana as required by the Amendment. These policy decisions are sound and consistent with medical marijuana programs in other states. By all indications, Florida's program is growing successfully and appropriately. The First District's decision will disrupt Florida's program, without providing clear guidance as to which provisions of section 381.986 remain applicable, resulting in uncertainty and a complete change in the status quo. For these reasons, the temporary injunction does not serve public interest and the First District's decision should be quashed.

CONCLUSION

For the foregoing reasons, the Amici respectfully request that the Court answer the certified question in the negative, quash the First District's decision, and remand with the directions that the case be further remanded to the circuit court for an order denying Florigrown's motion for a temporary injunction.

Respectfully submitted on this 16th day of December 2019.

/s/ Thomas J. Morton
John M. Lockwood
Florida Bar No. 28056
Thomas J. Morton
Florida Bar No. 13771
Devon Nunneley
Florida Bar No. 46234
THE LOCKWOOD LAW FIRM
106 East College Avenue, Suite 810
Tallahassee, Florida 32301
Tel: 850.727.5009
Fax: 850.270.2610
john@lockwoodlawfirm.com
tj@lockwoodlawfirm.com
devon@lockwoodlawfirm.com

Counsel for DFMMJ Investments, LLC, d/b/a Liberty Health Sciences, and Acreage Florida, Inc.

/s/ James A. McKee
James A. McKee
Florida Bar No. 638218
FOLEY & LARDNER LLP
106 E. College Ave., Suite 900
Tallahassee, FL 32301
Tel: 850-222-6100
jmckee@foley.com

Counsel for Perkins Nursery, Inc., San Felasco Nurseries, Inc. d/b/a Harvest, Mount Dora Farms, LLC, and Better-Gro Companies, LLC, d/b/a Columbia Care Florida

s/ William D. Hall, III
Florida Bar No. 67936
Daniel R. Russell
Florida Bar No. 63445

DEAN MEAD & DUNBAR
215 South Monroe Street, Suite 130
Tallahassee, Florida 32301
Telephone: 850.425.7800
whall@deanmead.com
drussell@deanmead.com

Counsel for Dewar Nurseries, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief has been provided to the following via electronic mail this 16th day of December 2019:

Katherine E. Giddings, BCS katherine.giddings@akerman.com elisa.miller@akerman.com michele.rowe@akerman.com Akerman LLP 106 East College Avenue, Suite 1200 Tallahassee, Florida 32301 (850) 224-9634 Jonathan S. Robbins jonathan.robbins@akerman.com nancy.alessi@akerman.com Akerman LLP Las Olas Centre II, Suite 1600 350 East Las Olas Blvd. Fort Lauderdale, Florida 33301 (954) 463-2700 Ari H. Gerstin ari.gerstin@akerman.com marylin.herrera@akerman.com Akerman LLP Three Brickell City Centre 98 Southeast Seventh St.,	Jason Gonzalez Daniel Nordby Amber Stoner Nunnally Rachel Procaccini Shutts & Bowen, LLP 215 S. Monroe Street, Suite 804 Tallahassee, Florida 32301 (850) 241-1717 JasonGonzalez@shutts.com DNordby@shutts.com ANunnally@shutts.com RProcaccini@shutts.com Joe Jacquot Colleen Ernst Executive Officer of Governor The Capitol, PL-5 400 S. Monroe Street Tallahassee, Florida 32399 (850)717-9310 Joe.Jacquot@eog.myflorida.com Colleen.Ernst@eog.myflorida.com Louise Wilhite-St Laurent

Suite 1100 Miami, Florida 33131 (305) 374-5600 *Counsel for Respondents*	General Counsel Florida Department of Health 4052 Bald Cypress Way, Bin A-02 Tallahassee, Florida 32399 (850)245-4956 Louise.StLaurent@flhealth.gov *Counsel for Petitioners*
Mohammad O. Jazil Joseph A. Brown Brooke E. Lewis Michael R. Beato Hopping Green & Sams, P.A. 119 South Monroe Street, Suite 300 Tallahassee, Florida 32301 (850)222-7500 mjazil@hgslaw.com josephb@hgslaw.com brookel@hgslaw.com michaelb@hgslaw.com *Counsel for Florida House of Representatives*	

/s/ Thomas J. Morton

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Thomas J. Morton