In the Supreme Court of Florida

CASE NO. SC19-1464
Lower Tribunal Case No. 1D18-4471

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.

BRIEF OF *AMICUS CURIAE*, THE FLORIDA HOUSE OF REPRESENTATIVES, IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

This Court has accepted jurisdiction to resolve the following question:

> WHETHER THE PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS THAT THE STATUTORY REQUIREMENTS OF VERTICAL INTEGRATION AND CAPS ON THE NUMBER OF MEDICAL MARIJUANA TREATMENT CENTER LICENSES AS SET FORTH IN SECTION 381.986(8), FLORIDA STATUTES, ARE IN DIRECT CONFLICT WITH ARTICLE X, SECTION 29, OF THE FLORIDA CONSTITUTION.

As one of the two chambers of the Florida Legislature that passed Section 381.986, Florida Statutes, and as one of the two chambers of state government exclusively vested with policymaking authority under the Florida Constitution, the Florida House of Representatives has an interest in this case. *See* Art. III, § 1, Fla. Const.

Before this Court accepted jurisdiction, the Second Circuit had denied the House's motion to intervene below. The First District Court of Appeal reversed, holding that "the Legislature has a clear and actual cognizable interest in defending this challenge." *Fla. House of Representatives v. Florigrown, LLC*, 278 So. 3d 935, 940 (Fla. 1st DCA 2019). The First District explained:

> The Legislature has the authority and responsibility to protect the public from harm by regulating the availability of a controlled substance that the federal government has determined is not safe for medical use, is susceptible to abuse, and presents a harm to the public. The underlying declaratory action challenges the manner in which the Legislature has attempted to exercise its broad constitutional authority to enact policies to protect the public.

Id. As the First District determined, the House has an interest in this case.

The House now writes to assist this Court in understanding the policy choices underlying the statute enacted in response to the adoption of Article X, Section 29, including the new constitutional provision's directive that the Department of Health establish standards for registration of Medical Marijuana Treatment Centers ("MMTCs") "to ensure proper security, record keeping, testing, labeling, inspection, and safety." Art. X, § 29(d)(1)c., (e), Fla. Const.

SUMMARY OF ARGUMENT

The First District invalidated Section 381.986(8)(e), Florida Statutes, because, in the court's view, that provision conflicts with Article X, Section 29(b)(5) of the Florida Constitution. For the reasons stated in Petitioner's Initial Brief and for those stated herein, the First District's ruling must be reversed.

First, the statute at issue is entirely consistent with the text of Article X, Section 29. In concluding otherwise, the court below relied exclusively on a provision that defines the term "Medical Marijuana Treatment Center," while ignoring the textual command that an entity qualifies as a MMTC only if it is "registered by the Department." Nothing in the provision says that any particular entity is entitled to registration with the Department. Accordingly, nothing in the provision limits the Legislature's power to establish by law which entities may be licensed, as the Legislature did here.

Second, the First District erred insofar as it faulted the statute for "severely restrict[ing] or diminish[ing]" the medical marijuana industry. That standard has no basis in the Florida Constitution and is indeed contrary to Article X, Section 29(e), which provides that "[n]othing in this section shall limit the legislature from enacting laws consistent with this section." Art. X, § 29(e), Fla. Const. The question of whether the statute "severely restrict[s] or diminish[es]" the industry, moreover, threatens to enmesh the courts in a political quagmire. And even if that issue *were* properly before the First District, the court had no evidentiary basis to conclude that the statute has (or likely has) such an effect.

STANDARD OF REVIEW

The constitutionality of a statute and the interpretation of a constitutional provision are questions of law subject to de novo review by this Court. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005); *see also Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004). Likewise, legal conclusions made by a lower court when reviewing an order granting a temporary injunction are reviewed de novo. *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 471 (Fla. 1st DCA 2018). Statutes do, however, "come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." *Lewis v. Leon Cty.*, 73 So. 3d 151, 153 (Fla. 2011). "To overcome the presumption [of constitutionality], the [constitutional] invalidity must

appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law." *Franklin v. State*, 887 So. 2d 1063, 1071 (Fla. 2004) (quoting *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184 (Fla. 1957)). "[A] determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." *City of Gainesville*, 918 So. 2d at 256.

ARGUMENT

I. THE CHALLENGED PROVISION IS CONSISTENT WITH THE TEXT OF ARTICLE X, SECTION 29.

Article X, Section 29 of the Florida Constitution defines a "Medical Marijuana Treatment Center" as:

> an entity that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, *or* administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department.

Art. X, § 29(b)(5), Fla. Const. (emphasis added). Section 381.986(8)(e), Florida Statutes, provides that "[a] licensed medical marijuana treatment center shall cultivate, process, transport, *and* dispense marijuana for medical use." § 381.986(8)(e), Fla. Stat. (emphasis added). Because the constitutional provision uses the disjunctive "or" and the statute uses the conjunctive "and," the First District concluded that "the statutory language directly conflicts with the constitutional amendment" "by requiring an entity to undertake several of the activities described

in the amendment before the Department [of Health] can license it" as a MMTC. *Fla. Dep't of Health v. Florigrown, LLC*, 2019 Fla. App. LEXIS 10705, *6-8 (Fla. 1st DCA July 9, 2019). The First District must be reversed because its ruling depends on the incorrect assumption that Section 29 entitles certain entities to be registered as MMTCs—namely, those that "undertake [at least one] of the activities described in the amendment." *Id.*

Because "[c]ontext is a primary determinant of meaning," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012), language must be "construed as a whole in order to ascertain the general purpose and meaning of each part." *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996). The First District violated that maxim, focusing exclusively on one part of Section 29's definition of "Medical Marijuana Treatment Center" (the requirement that a MMTC perform at least one of the enumerated functions related to medical marijuana) while ignoring the limiting clause that appears in the last four words of the definition (the requirement that a MMTC also "be registered by the Department"). Nothing in the definition says the Department must register any (or all) of the entities that perform the listed functions. Rather, the listed functions establish a potential universe of entities that may become MMTCs if "registered by

the Department," and the presence of that limiting clause presupposes that not all of those entities will be registered. [1]

Beyond the definition itself, the term "Medical Marijuana Treatment Center" appears just once in the Florida Constitution. Article X, Section 29(a)(3) provides that:

> Actions and conduct by a Medical Marijuana Treatment Center registered with the Department, or its agents or employees, and in compliance with this section and Department regulations, shall not be subject to criminal or civil liability or sanctions under Florida law.

Art. X, § 29(a)(3), Fla. Const. By its plain terms, Article X, Section 29(a)(3), immunizes "[a]ctions and conduct" when an entity is "a Medical Marijuana Treatment Center" and "registered by the Department." Art. X, § 29(a)(3), Fla. Const. Like the definition itself, nothing in that language requires the Department to register any particular entity as a MMTC. *Cf. Fla. Dep't of Health v. Redner*, 273 So. 3d 170 (Fla. 1st DCA 2019) (holding that interpretation of Article X, Section 29 as providing a qualified patient the right to grow, possess and use marijuana "is not supported by the plain language of the constitution").

[1] Focusing on the disjunctive "or" also threatens to render meaningless the word "treatment." If the First District is correct and undertaking any one of several tasks listed in the definitional section entitles one to a license, then a trucking company engaged only in "transportation," not the actual treatment of patients, would qualify as a Medical Marijuana *Treatment* Center. That should not be.

Because Section 29 does not entitle particular MMTCs to licensure, the Legislature's plenary power to regulate for the health, safety, and welfare of the people necessarily includes the authority to establish by law which MMTCs may be "registered by the Department." Art. X, § 29(a)(3), Fla. Const.; *Savage v. Bd. of Pub. Instruction*, 133 So. 341, 344 (Fla. 1931) (holding that the Legislature may "exercise any lawmaking power that is not forbidden by" the constitution). And that is precisely what the statute at issue does: Only "medical marijuana treatment center[s]" that "cultivate, process, transport, and dispense marijuana for medical use" may be "licensed." § 381.986(8)(e), Fla. Stat.; *see id.* § 381.986(8)(a)(1) ("[T]he department shall license as a medical marijuana treatment center any entity that holds an active, unrestricted license to cultivate, process, transport, *and* dispense low-THC cannabis, medical cannabis, and cannabis delivery devices. . . ." (emphasis added)).

Should there be any residual doubt as to whether Article X, Section 29 curtailed the Legislature's authority to regulate medical marijuana, that doubt should be resolved in favor of legislative power. Section 29(e) expressly says that "[n]othing in this section shall limit the legislature from enacting laws consistent with this section." Art. X, § 29(e), Fla. Const. But it is, of course, universally true that the Legislature may "exercise any lawmaking power that is not forbidden by" the Constitution. *Savage*, 133 So. at 344. For Section 29(e) to have any meaning at

all, it must be understood to call for the narrow construction of any purported restriction the provision purportedly puts on legislative power. *See Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 215 (Fla. 2009) ("[W]ords in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words." (quotation omitted)).

II. THE FIRST DISTRICT ERRED INSOFAR AS IT SECOND-GUESSED THE LEGISLATURE'S POLICY DECISIONS.

The First District appears to have invalidated the challenged statute on the independent basis that, in the court's view, the provision "regulate[s] an industry governed by a constitutional amendment in such a manner that would severely restrict or diminish the industry." *Florigrown*, 2019 Fla. App. LEXIS 10705, at *8 (citing *Millender*, 666 So. 2d at 887). That conclusion is defective for at least three independent reasons.

First, the court imposed a restriction on the Legislature's policymaking authority that is both extraconstitutional and contravenes the text of Article X, Section 29. As discussed above, "[t]he Legislature may exercise any lawmaking power that is not forbidden by organic law." *Savage*, 133 So. at 344; *see Stone v. State*, 71 So. 634, 635 (Fla. 1916). At the very least, that is equally true in the context of medical marijuana regulation. *See* Art. X, § 29(e), Fla. Const. ("Nothing in this section shall limit the legislature from enacting laws consistent with this section."). Indeed, this Court has already concluded that Article X, Section 29 does not supplant

the Legislature's policymaking authority. *See Advisory Opinion to the AG Re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 478 (Fla. 2015) ("Moreover, the Department of Health would not be empowered under this proposed amendment to make the types of primary policy decisions that are prohibited under the doctrine of non-delegation of legislative power." (citing *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978))).

The First District cited *Millender* for the proposition that "the industry-accepted definition of a term trumps a statutory or rule-based definition when the effect of the statutory or rule-based definition would severely restrict or diminish the industry the constitutional amendment is designed to regulate." *Florigrown*, 2019 Fla. App. LEXIS 10705, at *6. *Millender* is inapposite. Before the Court was the Marine Fisheries Commission's informal determination that a particular fishing net failed to comply with the specifications for acceptable nets found in the text of Article X, Section 16 of the Florida Constitution. *Millender*, 666 So. 2d at 887. That provision directly establishes the specifications at issue and directs the commission to enforce them. Art. X, § 16(b)(1)-(3), Fla. Const.

The constitutional provision at issue here, by contrast, does not specify that any particular entity is entitled to a license and instead leaves that determination to the Legislature and the Department. Specifically, the provision tasks the Department

(which is subject to legislative oversight) with adopting "standards" for MMTC registrants. *See* Art. X, § 29(d)(1)c., Fla. Const.

Second, the determination of whether an industry is "severely restrict[ed] or diminish[ed]" would enmesh the court in political questions reserved to the other branches of government. The First District appears to have concluded that Article X, Section 29 substantively requires a specific kind of medical marijuana industry, pointing to Article X, Section 29(d), which says that the Department shall issue "reasonable regulations necessary for the implementation and enforcement of this section" and that "[t]he purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients." Art. X, § 29(d), Fla. Const. Assuming *arguendo* that that language imposes a substantive requirement, the language "fail[s] to present any manageable standard by which to avoid judicial intrusion into the powers of the other branches of government." *Citizens for Strong Schs., Inc. v. Fla. Bd. of Educ.*, 262 So. 3d 127, 129-30 (Fla. 2019). There is no objective way for the courts to assess whether a statutory regime ensures "availability" and "safe use" of medical marijuana; that is plainly a question for the political branches.

Moreover, to the same extent Section 29(d) calls for "availability" and "safe use" of medical marijuana, the provision also calls for additional, comprehensive regulation, including "procedures for the registration of MMTCs . . . and standards

to ensure proper security, record keeping, testing, labeling, inspection, and safety." Art. X, § 29(d)(1)c., Fla. Const. It is uniquely the province of the political branches, not the courts, to assess whether a comprehensive regulatory regime achieves those objectives or any particular balance of them.

Third, even if there were an objective standard by which to assess whether the statute is consistent with the goals described in Section 29(d), *i.e.*, whether the vertical integration requirement ensures "availability" of medical marijuana, there was no evidentiary basis for the trial court or First District to conclude that the scheme here fails (or likely fails) to do so. Compounding that error, the trial court denied the House's motion to intervene, depriving this Court and the First District of the benefit of a complete record on these issues.

In response to the adoption of Article X, Section 29, the Legislature amended Section 381.986, Florida Statutes, to require the Department to convert the licenses of low-THC cannabis dispensing organizations into MMTC licenses so long as the relevant organization satisfied all statutory criteria. § 381.986(8)(a)1. The Legislature also provided for ten additional MMTC licenses for applicants that meet certain criteria, *id.* § 381.986(8)(a)2.-3., and for additional MMTC licenses in increments of four as the medical marijuana use registry expands.[2] *Id.*

[2] As amended, Section 381.986(8) initially provided for registration of seventeen MMTCs, followed by registration of another four MMTCs within six months after the registration of each additional 100,000 active qualified patients in

§ 381.986(8)(a)4. Finally, the Legislature retained the vertically integrated supply chain for low-THC cannabis dispensing organizations by requiring all licensed MMTCs to "cultivate, process, transport, *and* dispense marijuana for medical use." *Id.* § 381.986(8)(e) (emphasis added).[3]

As of November 30, 2019, there are 205 dispensing locations across the State,[4] which have dispensed more than 3.2 billion milligrams of medical marijuana this year.[5] There was no basis to conclude that that level of access is "likely" inconsistent

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the medical marijuana use registry. *See* § 381.986(8)(a)1., 2., 4. Under subparagraph (8)(a)5. of the statute, each MMTC is authorized to operate up to twenty-five dispensing facilities statewide until the medical marijuana use registry reached 100,000 active registered qualified patients. *See id*. § 381.986(8)(a)5.a. Thereafter, each licensed MMTC may operate five more dispensing facilities for each additional 100,000 active registered qualified patients. *Id*. The cap on the number of dispensing facilities expires April 1, 2020. *See* § 381.986(8)(a)5.d.

[3] The drafters of Article X, Section 29 knew that the existing low-THC cannabis program was vertically integrated (Section 381.986(5)(b), Florida Statutes (2014)), and could have easily included different regulatory directives had it been their intent to do so. They did not.

[4] *See* Florida Department of Health, Office of Medical Marijuana Use, *Weekly Update* (Nov. 29, 2019), *available at* https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2019/112919-OMMU-Update.pdf.

[5] *See* Courtney Coppola, Chief of Staff, Florida Department of Health, *Presentation to the Florida House of Representatives Health Quality Subcommittee* (December 11, 2019), *available at* https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3021&Session=2020&DocumentType=Meeting Packets&FileName=hqs 12-11-19.pdf.

with the availability objective, particularly in light of the other competing objectives that appear in the Amendment's language.

While doing its best to achieve access to medical marijuana, the Legislature also addressed the safety issues associated with the drug (*i.e.*, the expressly stated objective of "safe use"). It is undisputed that "[t]he federal government has categorized marijuana as a Schedule I drug, meaning it has a *high potential for abuse*, there is *no currently accepted medical use of the drug* in treatment in the United States, and there is a *lack of accepted safety* for use of the drug under medical supervision." *Fla. House of Reps.*, 278 So. 3d at 939 (citing 21 U.S.C. § 812(b)(1)A-C, Schedule 1(c)(10)) (emphases in original). Adopted against that background of federal illegality, the text of Article X, Section 29 expressly refers to the need for "proper security, record keeping, testing, labeling, inspection, and safety" of medical marijuana.

In light of all these considerations, it was paramount for the Legislature to create a *medical* marijuana program, as called for by the text of the provision, rather than a *recreational* marijuana program, and also to ensure "proper security, record keeping, testing, labeling, inspection, and safety" of medical marijuana." To achieve and balance those objectives, the Legislature determined that licensure was appropriate only for vertically integrated entities, enabling the State to hold a single entity accountable for each phase of the industry from cultivation to dispensation.

That approach combats product diversion from a legal medical market to the illegal recreational black market.[6] States with diffuse licensure systems, low market barriers, and unlimited licenses provide a cautionary tale.[7] Such states have significant oversupply and persistent diversion and exportation of marijuana.[8] The Legislature also required vertical integration to help curtail diversion to minors and

[6] *See* Patrick Murphy & John Carnevale, *Regulating Marijuana in California*, (April 2016), *available at* https://www.ppic.org/content/pubs/report/R_416PMR.pdf.; *see* Rosalie Liccardo Pacula, et al., *Developing Public Health Regulations for Marijuana: Lessons From Alcohol and Tobacco*, 104 Am. J. of Pub. Health 10221, 1026-1027 (June 2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4062005/pdf/AJPH.2013.301766.pdf (counseling states to open up marijuana markets slowly, with tight controls to prevent high outlet density and public health ills).

[7] Subsequent experience has shown that low market barriers, horizontal licensure and no license caps can lead to oversupply and persistent illegal production and exportation of marijuana. *See, e.g.*, Oregon Liquor Control Commission, *2019 Recreational Supply and Demand Legislative Report* (Jan. 31, 2019), *available at*: https://www.oregon.gov/olcc/marijuana/Documents/Bulletins/2019%20Supply%20and%20Demand%20Legislative%20Report%20FINAL%20for%20Publication(PDFA).pdf; *see also An Initial Assessment of Cannabis Production, Distribution, and Consumption in Oregon 2018 – An Insight Report* (Aug. 6, 2018), *available at* https://static1.squarespace.com/static/579bd717c534a564c72ea7bf/t/5b69d694f950b7f0399c4bfe/1533662876506/An+Initial+Assessment+of+Cannabis+Production+Distribution+and+Consumption+in+Oregon+2018_OR-ID+HIDTA_8-6-18.pdf.

[8] *See*, *e.g.*, Oregon Liquor Control Commission, *supra*, at footnote 6; *see also* Oregon-Idaho High Intensity Drug Trafficking Area, *An Initial Assessment of Cannabis Production, Distribution, and Consumption in Oregon 2018 – An Insight Report* (Aug. 6, 2018), *available at* https://static1.squarespace.com/static/579bd717c534a564c72ea7bf/t/5b69d694f950b7f0399c4bfe/1533662876506/An+Initial+Assessment+of+Cannabis+Production+Distribution+and+Consumption+in+Oregon+2018_OR-ID+HIDTA_8-6-18.pdf.

diversion to other states where marijuana remains illegal or is regulated differently, which addresses the concerns the federal government expressed regarding the legalization of marijuana at the state level.[9]

CONCLUSION

For the reasons stated above and in Petitioner's Initial Brief, the decision below should be reversed.

[9] *See* James M. Cole, *Guidance Regarding Medical Marijuana Enforcement*, U.S. Dept. of Justice, (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (providing guidance regarding the areas of focus for federal enforcement of the Controlled Substance Act in states with legalized marijuana and implying certain safe harbors); 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 above-cited guidance and reinstating traditional prosecutorial discretion).

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December 16, 2019

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with the Florida Rule of Appellate Procedure 9.210.

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CERTIFICATE OF SERVICE

I certify that on this 16th day of December 2019, the foregoing was filed electronically via the Florida Court's E-Filing Portal, which will send a copy of this filing to the following:

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