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

RESPONDENTS' ANSWER BRIEF

KATHERINE E. GIDDINGS, BCS (949396)
katherine.giddings@akerman.com
elisa.miller@akerman.com
myndi.qualls@akerman.com
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Telecopier: (850) 222-0103

JONATHAN S. ROBBINS (989428)
jonathan.robbins@akerman.com
nancy.alessi@akerman.com
Akerman LLP
Las Olas Centre II, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
Telephone: (954) 463-2700
Telecopier: (954) 463-2224

ARI H. GERSTIN (0839671)
ari.gerstin@akerman.com
marylin.herrera@akerman.com
Akerman LLP
Three Brickell City Centre
98 Southeast Seventh St., Ste. 1100
Miami, FL 33131
Telephone: (305) 374-5600
Telecopier: (305) 374-5095

Attorneys for Respondents

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INTRODUCTION

In 2016, 71% of Florida voters fundamentally changed the way medical marijuana is provided to patients in Florida. The voters enshrined into their constitution a new medical marijuana system that significantly expanded the potential patient base, created a "horizontal market" allowing multiple businesses to perform a variety of business functions for those patients receiving treatment, and made the Department of Health (the "Department") responsible for administering this new policy for medical marijuana. The Legislature responded by simply turning back the clock and reverting to its previous oligopoly-style "vertical" medical marijuana system. The Legislature wrote a law that directly contravened the mandatory language of the Amendment, and then threatened to withhold funding from the Department until it implemented its will over the policy that the people chose to add to their constitution. That is the unrebutted record in this case.

This case is no "stunt."[1] The statutory provisions at issue have been found unconstitutional by a circuit court judge and all three judges on the First District Court of Appeal panel that heard the case. Florigrown has every right to challenge those provisions.

The record fully supports Florigrown's qualifications—but this case is not

[1] *See* IB at 1. Citations to the Department's Initial Brief and the Florida House of Representatives' amicus brief appear as IB XX and House Br. XX, respectively.

about Florigrown's qualifications. It is about statutory provisions that directly conflict with the Medical Marijuana Amendment (the "Amendment"). It is about requiring the Department to do what the Amendment mandates. It is about providing a fair process that allows prospective medical marijuana providers to register with the Department so the Department can review their qualifications to determine whether they meet the requirements for licensure.

The State has a robust system in place to ensure that the medical marijuana program is safe and regulated. But the State is unconstitutionally restricting access to that system and picking and choosing who to let in, creating what Governor DeSantis himself characterized as a "cartel." Indeed, the Governor has said that the current system does not adhere to free market principles and should be "opened up."

The Amendment expressly directs the Department to issue regulations to register Medical Marijuana Treatment Centers ("MMTCs") by October 2017. In direct violation of the Amendment, the Department failed to do so because the Legislature said it would withhold the Department's funding if it enacted such regulations. The Legislature then arbitrarily gave away a limited number of MMTC licenses. It gave licenses to pre-Amendment "dispensing organizations" who have never been evaluated to determine whether they meet the requirements for post-Amendment licensure. It gave away licenses to settle pre-Amendment litigation over who could be a provider under the pre-Amendment medical marijuana

program—some of whom were previously found to be unqualified. And, it is allowing those licensees to sell these coveted licenses for $50 million or more without ever operating to produce any marijuana at all, or serving even one single patient. These actions are not only unconstitutional—the entire scheme is a "hoax" that undermines the explicit will of the voters who chose to add horizontal licensing to their constitution in order to ensure the availability and safe use of medical marijuana.

As to the *Amici,* it is not surprising that some legislators who created this system, and some companies that are benefiting from it, would want to convince the Court that the legislation is constitutional and should remain in place. But the unrebutted record reflects that the system is failing and causing harm to the most vulnerable in our society—those that must turn to medical marijuana for relief from a debilitating or terminal condition. Just like other oligopolies, the medical marijuana cartel created by the Legislature has resulted in high prices, product scarcity, and limited product options. Every court that has looked at this scheme has said it violates the Constitution.

Florigrown has not asked any court to hand it a license. It is asking the Court to require the Legislature and the Department to comply with the Amendment's mandates—nothing less, nothing more.

STATEMENT OF THE CASE AND FACTS[2]

Pre-Medical Marijuana Amendment Background

In 2014, the Legislature allowed a small class of patients (those with cancer or a condition causing seizures or severe muscle spasms) to use low-THC cannabis. *See, e.g.*, § 381.986(2), Fla. Stat. (2014). The Legislature directed the Department to authorize a total of five "dispensing organizations" to provide qualified patients with low-THC cannabis. § 381.986(5)(b), Fla. Stat. (2014).

The Legislature defined "dispensing organization" as "an organization approved by the department [of health] to cultivate, process, **AND** dispense low-THC cannabis." § 381.986(1)(a), Fla. Stat. (2014) (emphasis added). The Legislature required the Department to develop an application form for the eventual determination of the five entities that would receive authorization to cultivate, process, **AND** dispense low-THC cannabis. § 381.986(5)(b), Fla. Stat. (2014). The Legislature also set forth qualifications for the dispensing organizations. *Id.*

The Department adopted rules governing application requirements and an application form. *See* Rule 64-4.002, F.A.C. (2015). In 2015, the Department issued five dispensing organization licenses based on a comparative review of all applications. [R. 2928] Other than this one instance, the Department has never accepted applications for a medical marijuana business (whether for a dispensary

[2] Record references are to the page number of the Supreme Court Record.

organization under the 2014 legislation or an MMTC under the legislation at issue here). As a result of problems with the Department's 2015 scoring process, which an administrative law judge characterized as a "dumpster fire," litigation ensued against the Department by those who were not granted a license. [R. 3639]

In 2016, the Legislature expanded section 381.986 to allow terminally ill patients to use full-potency marijuana. *See, e.g.*, § 381.986(1)(f), (2), Fla. Stat. (2016). The Legislature authorized three additional dispensing organizations if certain, very limited requirements were met, § 381.986(5)(c), Fla. Stat. (2016), but all licenses were given to previous applicants who originally had been denied a dispensing organization license under the 2014 legislation. The Legislature also set forth a host of requirements for dispensing organizations, including, but not limited to, requirements governing growth, inspections, processing, testing, packaging, delivery, dispensing, security, off-site storage facilities, lighting, tracking, number of employees that must be on the premises at all times, photo identification, transportation, and training. § 381.986(6), Fla. Stat. (2016).

The Medical Marijuana Amendment

On November 8, 2016, over 71% of Florida voters overwhelmingly approved the Amendment, codified in article X, section 29, of the Florida Constitution, to allow for the legal "Use of Marijuana for Debilitating Medical Conditions." [R. 2719] Pertinent here, the Amendment does three things.

First, it creates MMTCs instead of the "dispensing organizations" that were created under the earlier legislation. It also expressly expands and alters the definition the Legislature gave to "dispensing organizations" by defining an MMTC 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).

Second, the Amendment places specific mandates on the Department, not the Legislature. Art. X, § 29(d), Fla. Const. It requires the Department to promulgate regulations by July 3, 2017 (six months after the Amendment's effective date) and to begin registering MMTCs by October 3, 2017 (nine months after the Amendment's effective date). *Id.* at § 29(d)(1)-(2). The Department must develop "[p]rocedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." *Id.* at § 29(d)(1)c. (emphasis added).

Third, the Amendment provides that "[i]f the Department does not issue regulations, or if the Department does not begin issuing identification cards and

registering MMTCs within the time limits set in this section, any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department's constitutional duties." *Id.* at § 29(d)(3) (emphasis added). The Amendment allows the Legislature to enact laws related to the Amendment but only if those laws are "consistent with" the Amendment. *Id.* at § 29(e) (emphasis added).

The Analysis Of Intent Document

Before the Amendment was adopted, its drafters published an "Analysis of Intent" document ("Intent Document"), which states:

> This Amendment allows for MMTCs to register with the [Department] to engage in a variety of discrete activities, as outlined. MMTCs must be registered to engage in any of the activities listed in the definition [of an MMTC], but do not have to engage in all of them. For example, a cultivator may be registered separately from a dispensary. Some of the activities listed may overlap between the various MMTCs (such as possessing medical marijuana). The Amendment provides for multiple types of MMTCs, including, but not necessarily limited to: cultivation; processing; distributing; dispensing; transportation; and administration. This language allows cross ownership of MMTCs, but does not require any cross ownership of MMTCs. A requirement that a single MMTC must perform all MMTC functions would be contrary to the language and intent of this Amendment, which clearly calls for a variety of business functions in the language. The Amendment also allows the legislature to set reasonable limits on ownership of multiple MMTCs by any operator. This ownership structure is intended to foster and support the sufficient availability of medical marijuana, reasonable cost, and safe use for qualified patients.

[R. 2461-62 (emphasis added)] Thus, in addition to the Amendment's plain use of the word "or" when defining an MMTC, the Intent Document confirms that there are to be multiple types of MMTCs and that MMTCs cannot be required to perform

all MMTC functions. This makes perfect business sense because a market will only function efficiently and safely if participants are able to specialize in business functions for which there is a real demand that they are well positioned to fill.

Pre-Election, This Court Determined That The Ballot Language And The Amendment's Plain Language Were Not Misleading

This Court unanimously approved the Amendment, concluding: "The [ballot] language is clear and does not mislead voters regarding the actual content of the proposed amendment." *Adv. Op. to Atty. Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 478 (Fla. 2015). This Court recognized that the Amendment gave the Department "regulatory oversight," which was appropriate because such oversight would not include "policy decisions that are prohibited under the doctrine of non-delegation of legislative power." *Id.* at 477-78. The Department would simply enact regulations to "register and oversee providers, issue identification cards, and determine treatment amounts." *Id.* at 477 (emphasis added). Of course, this Court also recognized that Floridians, rather than the Legislature, would be determining "whether Floridians wish to include a provision in our state constitution permitting the medical use of marijuana." *Id*.

The Department Prepares To Implement The Amendment

Before the Amendment passed, the Department began to prepare for its anticipated passage. The Department surveyed other states with similar medical marijuana directives. It estimated there would be approximately 440,552 patients

who would qualify for, and be in need of, medical marijuana. [R. 3289] It anticipated there would need to be approximately 1,993 MMTCs to perform all of the necessary and distinct functions of cultivating, processing, distributing, dispensing, transporting, and administering medical marijuana to patients. [R. 2827]

This number of MMTCs is consistent with the Amendment's directive that the Department issue regulations "to ensure the availability and safe use of medical marijuana by qualifying patients." Art. X, § 29(d), Fla. Const. (emphasis added). The Department then began work on timely issuing such regulations. [R. 3078]

Florigrown Seeks Registration As An MMTC

In January 2017, Florigrown sought registration as an MMTC to ensure that it was in line for the MMTC registrations that the Department would be processing. [R. 2427] The Department rejected Florigrown's registration request without allowing it to submit any documentation as to its qualifications—even after Florigrown petitioned for a hearing. [R. 2432, 2435] The Department eventually told Florigrown it could seek relief in circuit court once the Department promulgated and implemented regulations per the Amendment. [R. 2438-39]

Legislature Amends Section 381.986 During A Special Session

Just before the Amendment's deadline for the Department to promulgate implementing regulations, the Legislature amended section 381.986 (the "Statute").[3]

[3] References to section 381.986, Florida Statutes, are to 2018 unless otherwise stated.

As noted above, the Statute previously housed provisions for Florida's pre-Amendment medical marijuana program for terminally ill patients with only one year remaining to live and low-THC medical marijuana program.

In direct conflict with the Amendment, which expressly defines an MMTC as an entity that may perform one of any number of services related to the cultivation, processing, OR selling of marijuana, the Statute uses the same language required earlier for "dispensing organizations," which mandates that an MMTC must perform every function in the medical marijuana supply chain (characterized as "vertical integration"). *See* § 381.986(8)(e), Fla. Stat. The Statute ignores the Amendment's express change in the definition of an MMTC by changing the word "OR" in the Amendment to "AND," thereby completely altering the Amendment's definition of an MMTC. As a result, the Statute prohibits licensure of any entity that wants to perform only one function in the supply chain—such as only cultivating marijuana—even though it is expressly permitted to do so under the Amendment.

The Statute also ignores the Amendment's requirement that the Department "register" MMTCs—requiring instead that MMTCs be "licensed."[4] Florigrown is

[4] *Compare* Art. X, § 29(d)(1)c. (Department must promulgate regulations governing procedures "for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration"), *with* § 381.986(8)(a) (Department must "license" MMTCs). Notably, the Statute uses the Amendment's term "register" in implementing all other provisions of the Amendment regarding patients and caregivers; however, it ignores "registration" of MMTCs, requiring instead that MMTCs be licensed. *Compare* § 381.986(5) & (6), *with* § 381.986(8).

not, however, challenging here the fact that MMTCs must first "register" and then be "licensed." Florigrown is challenging the scheme under which those licenses are issued and is seeking to be allowed to register in the hopes of qualifying for a license. As the trial court found following the evidentiary hearing, if the unconstitutional licensing provisions at issue are severed from the Statute, the Department still has a framework in place under which an entity can register to become an MMTC if it meets objective standards; then, if it meets additional requirements set forth in the Statute that are not at issue here, it can receive a license to operate. [R. 2723]

Under the Legislature's licensing scheme challenged here, the Statute directs the Department to issue most of the limited number of MMTC licenses by fiat to certain private entities, including entities that were previously rejected by the Department and were in current litigation with the Department regarding their failure to qualify for the pre-Amendment statutorily authorized dispensary organization licenses. *See* § 381.986(8)(a)2.a., Fla. Stat.; *see also* [R. 3325-26] Thus, the Legislature used the licensing requirements to settle cases in litigation by granting licenses to that limited class of applicants—to the exclusion of others, regardless of qualifications. Making matters worse, under the Statute, the Department had no authority to evaluate these entities before registering them and then issuing them a coveted MMTC license. [R. 3177-185, 3338]

The Statute requires a competitive "licensing" process for other MMTCs and

severely restricts the number of MMTCs that can operate. *See* § 381.986(8)(a)2, Fla. Stat. Despite the severely limited number of MMTC licenses and competitive licensing process, the legislation allows any MMTC that obtains one of these coveted licenses to immediately sell the license. § 381.986(8)(e)1., Fla. Stat. At the time of the record in this case, such licenses were reported to have sold for as much as $53 million each. [R. 2798] Because of the caps set forth by the Statute and the awarding of licenses to settle litigation, this restricted, competitive licensing process is merely hypothetical. Every license has been given away in settlement; no additional licenses are available; and the Department is refusing to accept any registration applications. [R. 3085-86]

Importantly, the Statute also contains extensive requirements as to qualifications and regulations governing MMTCs, but, again, this case challenges only the limited restrictions set forth above in sections 381.986(8)(a)1.-3., Fla. Stat. All of the other requirements remain in place if any of the licensing qualification criteria are held invalid under the Statute's severance provision. § 381.968(8)(a)5.d., Fla. Stat.

The Department Succumbs To The Legislature's Pressure To Abandon Its Constitutional Duties And Florigrown Files Suit

Initially, the Department promulgated a Constitutional Regulation Development Procedure setting forth a framework for the regulations required by

the Amendment.[5] However, the Legislature threatened to freeze the Department's funding if it did so. [R. 2866] The Department then abandoned the required constitutional regulation-making process. *See* [R. 3077-78]

The Department advised the Legislature's Joint Administrative Procedures Committee that, although "[t]he Department's constitutional regulation promulgation process is more streamlined, . . . transparent, and provides opportunity for public input," the Department would accede to the Legislature's demand that it abandon constitutional rulemaking for the Amendment. [R. 2471] The Department explained that following the Legislature's demand would "delay development of the general patient safety regulatory scheme such as rules on edibles, appropriate pesticides, fines for malfeasance by MMTCs, and patient access through the issuance of registry cards." *Id.* To date, the Department has not accepted any applications for entities who meet the objective standards in the Statute to register and then, if qualified, be licensed—despite the Amendment's requirement that it do so by October 2017.

Florigrown Moves To Compel The Department To Comply With Its Constitutional Duties

Eleven months after Florigrown submitted its notice of registration,

[5] Fla. Dept. of Health, *Article X, Section 29, of the Florida Constitution Regulation Development Procedure,* https://www.flrules.org/Gateway/View_notice.asp?id=19086610 (last visited Jan. 3, 2020).

Florigrown filed this case challenging the constitutionality of the licensing provisions under the Statute, seeking declaratory, injunctive, and mandamus relief compelling the Department to comply with its mandatory duties under the Amendment. [R. 2248-49] Five months later, after the Department still refused to comply with the Amendment's mandates, Florigrown also sought a temporary injunction: (1) enjoining the Department from "licensing" any additional MMTCs pursuant to the legislative scheme codified in the Statute; (2) requiring the Department to commence registering MMTCs in accordance with the Amendment's plain language; and (3) requiring the Department to register Florigrown as an MMTC. [R. 2491-92] Florigrown sought the injunctive relief per the Amendment's express language allowing any Florida citizen to compel the Department to comply with the Amendment's mandates. [R. 2494] Again, registration does not mean that Florigrown would be entitled to an MMTC license—it merely means that Florigrown would have an opportunity to register so that it can establish that it meets the qualifications for an MMTC license.

Originally, Florigrown named both the State of Florida and Governor Scott as defendants. However, both moved to dismiss themselves as parties, which the trial court granted. [R. 2694] After Ron DeSantis was elected governor, he publicly described the licensing scheme as "creating a cartel."[6] Governor DeSantis said "he

[6] Zac Anderson, *DeSantis Wants Legislature to Repeal Medical Marijuana Smoking*

prefers horizontal integration, which would allow medical marijuana companies to specialize in certain aspects of the business. He said the current system does not adhere to 'free market principles' and should be 'opened up.'" *Id.*

Following development of an extensive factual record that included lengthy testimony from all of the key witnesses and party representatives,[7] as well as significant documentary material that was admitted into evidence, the trial court entered an order on Florigrown's temporary injunction request. [R. 2718] The trial court found Florigrown established a substantial likelihood of success on the merits of its claims and lacked an adequate remedy at law. [R. 2724]

The trial court held that Florigrown is likely to succeed on its challenge to the constitutionality of the provisions of the Statute on three bases. First, the trial court found that "[t]hrough its use of 'and' rather than 'or,' Section 381.986 materially alters, restricts, and contradicts the definition of a[n] MMTC in the Amendment." [R. 2721] Second, it found the Statute imposed severe, arbitrary limits or "caps" on

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Ban, The Fla. Times-Union (Jan. 17, 2019), www.jacksonville.com/news/20190117/desantis-wants-legislature-to-repeal-medical-marijuana-smoking-ban.

[7] The record includes the testimony of Christian Bax who served as the Director of the Department's Office of Medical Marijuana Use ("OMMU") from the time that the position was created until recently [R. 2977-3270], Courtney Coppola who was the Deputy Director of the OMMU from the time that the position was created until Bax resigned as Director and she was appointed Director [R. 3271-436], an individual retained as an expert witness by Florigrown [R. 3497-587], and Florigrown's corporate representative, Adam Elend [R. 3437-95].

the number of MMTCs to be ultimately licensed. [R. 2721-22]

Third, the trial court found that the Statute violated Florida's constitutional prohibition against "special laws" because it required the issuance of MMTC "licenses" to a closed class of private entities that were unsuccessful applicants for a "dispensing organization" license under the pre-Amendment limited medical marijuana program. [R. 2722-23] Specifically, the trial court found sections 381.986(8)(a)1.,[8] 381.986(8)(a)2.a.,[9] and 381.986(8)(a)3.,[10] Florida Statutes, improperly granted special rights, benefits, and advantages to certain private entities in violation of article III, section 11(a)(12) of the Florida Constitution. [R. 2722-23]

For instance, rather than allowing licensure based on an entity's qualifications or the substantive merits of any application, one criteria was that the licensee be an entity that the Department had determined years earlier was not the best choice to operate as a "dispensing organization" under the pre-Amendment limited medical

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[8] Section 381.986(8)(a)1. mandates that the Department license as an MMTC those entities licensed as dispensing organizations under the prior low-THC program.

[9] Section 381.986(8)(a)2.a. mandates, *inter alia*, that the Department license as an MMTC any entity that: (1) applied to be a dispensing organization; (2) was not selected for licensure; and (a) had one or more administrative or judicial challenges pending as of January 1, 2017, regardless of the merits of the entity's application or challenge or (b) was "within one point of the highest final ranking in its region." *Id.*

[10] Section 381.986(8)(a)3. requires that for up to two MMTC licenses, the Department must "give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana."

marijuana program. *See* § 381.986(8)(a)2.a., Fla. Stat. The trial court further found that there was no evidence that the statutory provisions bore a rational relationship to ensuring the supply of safe medical marijuana to qualifying patients. *Id*.

Despite these findings, the trial court hoped the Department would begin adhering to the Amendment's mandates. [R. 2724, 2741] The court determined that irreparable harm had not yet occurred because Florigrown would have the ability to be registered once the Department complied with its constitutional mandate to begin processing the registration of MMTCs and could compete for one of the limited remaining MMTC licenses authorized under the Statute, so an injunction was not in the public interest at that time. [R. 2724] Thus, the court denied the temporary injunction without prejudice, but explained that "[t]he passing of more time may alter [its] findings [on irreparable harm]." *Id.*

The Trial Court Issues The Temporary Injunction

The trial court's earlier order made clear that it intended to enforce the Constitution's mandates if the Department did not comply with them. [R. 2724, 2741] The order gave the Department approximately two months to take action. [R. 2724] The Department took no steps whatsoever to comply, and Florigrown was unable to even apply to register to begin the licensure process. [R. 2741]

Thereafter, the trial court found the Department ignored its first order. *Id*. The court found that irreparable harm would now result absent issuance of an

injunction and that the injunction would serve the public interest. [R. 2742] The court explained that the public interest was clearly stated with the passage of the Amendment by over 70% of voters, and that the Amendment makes clear that the Department must timely do certain things to ensure the availability and safe use of medical marijuana by qualifying patients, which it has failed to do. [R. 2742-43]

The court entered a temporary injunction: (1) enjoining the Department from licensing any additional MMTCs under the unconstitutional provisions of the Statute; (2) requiring the Department to commence registering MMTCs in accordance with the Amendment; and (3) requiring the Department to register Florigrown as an MMTC, unless the Department demonstrated that such registration would result in unsafe use of medical marijuana by qualifying patients. [R. 2744]

Importantly, the trial court's injunction did not touch any of the tremendous number of regulations in section 381.986 governing qualifications required to qualify and operate as an MMTC. [R. 2740-53] Nor did the injunction touch in any way the operations or rights of the existing license-holders. *Id.* In addition, consistent with the Department's testimony at the evidentiary hearing, the injunction did not touch the administrative process in place to regulate MMTCs. *Id.* As noted, registration of an MMTC is just the beginning of the process. Once an MMTC registers, it still must establish it meets the statutory requirements and then be inspected multiple times before it gets licensed to cultivate, process, or dispense

medical marijuana. *See, e.g.*, [R. 3187]

The First District Court Of Appeal Affirms The Injunction[11]

On appeal, the Department argued the injunction was invalid both facially and on the merits. [R. 788] The Department requested that, in the interest of preserving "judicial resources" and avoiding "confusion and uncertainty," the court "also address the trial court's substantive legal errors." *Id.* at 790-91.

After an extensive oral argument, a panel of the First District Court of Appeal comprised of Judges James Wolf, Scott Makar, and Kent Wetherell, issued a *per curiam* decision in which Judges Wolf and Makar concurred. Judge Makar also authored a separate concurring opinion, and Judge Wetherell issued an opinion concurring in part and dissenting in part. All three judges agreed that Florigrown had demonstrated a substantial likelihood of success on the merits because section 381.986(8)(e) conflicts with the Amendment by changing the definition of an MMTC and imposes mandatory "vertical integration," requiring an MMTC to perform all functions from seed to sale. *Fla. Dep't of Health v. Florigrown, LLC*, -

[11] Nearly three weeks after the trial court entered the injunction, the Florida House of Representatives (the "House") filed a motion to intervene. By then, the case had been pending for almost a year, and the trial court had already held an extensive evidentiary hearing. *Fla. House of Representatives v. Florigrown, LLC,* 278 So. 3d 935, 941 (Fla. 1st DCA 2019) (Makar, J. concurring in result and concurring in part). The trial court denied the House's motion, but it was reversed on appeal with the understanding that, because the House was so belated in its intervention efforts, it could not challenge the temporary injunction at issue here. *Id.* at 936 (majority).

-- So. 3d ---, 2019 WL 2943329, at *3 (Fla. 1st DCA July 9, 2019) ("*Florigrown I*"); *id.* at *5 (Makar, J., concurring); *id.* at *6 (Wetherell, J., concurring in part and dissenting in part). All three judges also agreed that the Legislature's use of the term "and" instead of "or" in the Statute rendered the statutory cap on the number of MMTCs "unreasonable" and "clearly indefensible" such that the court did not need to address the authority to establish any caps. *Id.* at *3 (majority); *id.* at *6 n.3 (Wetherell, J., concurring in part and dissenting in part).

The majority further found: (1) Florigrown is suffering irreparable harm and will continue to without injunctive relief as a result of the Department's continuing constitutional violations [*id.* at *3-*4]; (2) Florigrown has no adequate remedy at law and the Amendment itself recognizes there is no adequate remedy at law in these circumstances [*id.* at *4]; and (3) it is in the public interest to require the Department to begin registering MMTCs without applying those portions of the statutory scheme the opinion identified as unconstitutional and "for the Department to promulgate[] rules that do not thwart the purpose of the [A]mendment," *id*. at *4-*5.

The First District upheld the injunction "to the extent it requires the Department to consider Florigrown's request for licensure without applying the portions of the statutory scheme which th[e] opinion identifies as being unconstitutional," and "allows the Department a reasonable period of time to exercise its duties under the constitutional amendment." *Id*. at *1, *5. The court

directed the Department to begin complying with the Amendment's mandates. *Id.*

Approximately ten days after the panel decision, two attorneys identifying themselves as "counsel to Governor Ron DeSantis" filed a notice of appearance as additional appellate counsel for the Department—even though the Governor's office had previously requested to be dismissed from this proceeding. [R. 3801] Shortly thereafter, the Department filed a rehearing *en banc* and certification motion. [R. 3808] The First District denied rehearing *en banc* but certified the following question as one of great public importance:

> 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?

Fla. Dep't of Health v. Florigrown, LLC, 44 Fla. L. Weekly D2182, 2019 WL 4019919, at *1 (Fla. 1st DCA Aug. 27, 2019). The First District also stayed issuance of the mandate pending this Court's review. [R. 3982]

This Court accepted jurisdiction based on the certified question.

SUMMARY OF THE ARGUMENT

Both the trial court and the First District panel correctly answered the certified question with a resounding "yes," finding that Florigrown established a substantial likelihood of success on the merits because the Statute directly conflicts with the

Amendment. The Legislature enacted the Statute under the guise of section 29(e) of the Amendment, which permits legislation that is "consistent with [the] section." But, the Statute is inconsistent with the Amendment because it: (a) requires MMTCs to be vertically integrated (reading the word "or" in the Constitution as "and"); (b) arbitrarily caps the number of MMTCs that may be registered and licensed; and (c) grants special advantages, benefits, and privileges to certain identifiable private entities in the issuance of MMTC registrations. The Statute erects barriers that needlessly increase patients' costs and access to the medical marijuana they need—it is not only not "consistent with this section," it is in direct contravention of it.

The injunction is consistent with the Amendment's plain language and has no impact on the Department's regulation of MMTCs. The Amendment's framers specifically contemplated the possibility that the Department might fail to comply with its duties under the Amendment and included a cause of action to seek relief in such circumstances. Those are the circumstances here and the basis for the injunction compelling the Department to comply with its duties.

Contrary to the Department's assertions, the injunction is not "defective." The injunction consists of two orders that must be read together—and those orders establish that the trial court made all factual findings required for irreparable harm and lack of an adequate legal remedy. The Amendment itself recognizes there is no adequate remedy at law in circumstances such as these where the Department refuses

to abide by its express constitutional duties and no monetary damages are available.

In addition, the trial court made findings regarding a balance of the public interest factors—the Department simply disagrees with those findings. As the trial court concluded, the Legislature and the Department are violating a citizen initiative that was supported by over 71% of the voters, receiving in excess of 6,500,000 votes. Any "harm" the State might suffer as a result of being enjoined from applying an unconstitutional statute pales in comparison to the harm being suffered by Floridians as a result of the State's frustration of the binding Amendment they worked so hard to enact—with terminally ill and debilitated patients being denied access to the medical marijuana they need.

The Department's "scare" tactics are wholly without merit. The multitude of statutory provisions enacted to protect against any wrongful dissemination or diversion of marijuana remain in place and are not at issue. Subsequent to registration, a prospective MMTC must meet requirements governing growth, inspections, processing, testing, packaging, delivery, dispensing, security, off-site storage facilities, lighting, tracking, number of employees that have to be on the premises at all times, photo identification, transportation, and training. Then, before it can touch any marijuana at all, an MMTC must be inspected and approved to cultivate by the Department. Thereafter, the MMTC cannot commence processing any marijuana until the Department inspects again and grants processing

authorization. Finally, before making any marijuana available to patients, the MMTC would have to be inspected again to obtain dispensing authorization and complete the licensing process with the Department. Failure to comply with the Department's requirements subjects a prospective MMTC and its employees to potential criminal prosecution as well as significant other penalties.

There is no "widespread confusion." The above regulations for registering and then licensing MMTCs are already in place and have been applied to the twenty-two existing MMTCs. The Department can simply begin applying them to any entity that seeks to register and ultimately become licensed.

Finally, the bond in this case is already covered because, under the Statute, Florigrown must post a $5 million bond when it registers with the Department.

This Court should answer the certified question in the affirmative and uphold the First District's decision so that the will of Florida's voters is implemented.

STANDARD OF REVIEW

Statutes are presumed to be constitutional and "[t]o overcome the presumption, the invalidity must appear beyond reasonable doubt." *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc*., 978 So. 2d 134, 139 (Fla. 2008). However, this Court will not predicate its ruling on a "strained reading of a statute" where the statute's plain language establishes the statute is unconstitutional. *Atwater v. Kortum*, 95 So. 3d 85, 91 (Fla. 2012). Moreover, a statute cannot contradict or

overturn a constitutional provision, and there is "no distinction between a small violation of the Constitution and a large one." *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

ARGUMENT

I. FLORIGROWN ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Statute Materially Alters, Restricts, And Contradicts The Amendment's Definition Of An MMTC.

The Florida Constitution is the supreme legal authority in Florida and cannot be ignored or overturned by the Legislature. *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 494 (Fla. 2008). The Constitution serves as a limitation upon the Legislature's power. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741 (Fla. 1961); *see also Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1063 (Fla. 2010) (citizen initiatives "w[ere] adopted to bypass legislative and executive control and to provide the people of Florida a narrow but direct voice in amending their fundamental organic law"). When a statute violates express or even clearly implied mandates of the Constitution, the statute must fall. *Holley v. Adams*, 238 So. 2d 401, 405 (Fla. 1970).

Before the Amendment's passage, the Legislature defined "dispensing organization" to mean "an organization approved by the department to cultivate, process, **AND** dispense low-THC cannabis." § 381.986(1)(b), Fla. Stat. (2016)

(emphasis added). The Amendment expressly changed this definition when defining MMTCs by using the term **OR**—but the Legislature refused to acknowledge this change. A side-by-side comparison illustrates this:

The Amendment **Art. X, § 29(b)(5), Fla. Const.**	**The Statute** **§ 381.986(8)(e), Fla. Stat.** **(2017-present)**
"Medical Marijuana Treatment Center" (MMTC) means 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" (emphasis added).	"A licensed medical marijuana treatment center shall cultivate, process, transport, **AND** dispense marijuana for medical use. A licensed medical marijuana treatment center may not contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices" (emphasis added).

Based on the Amendment's plain language, both the trial court and the First District found the Statute violates the Amendment because it materially alters, restricts, and contradicts the Amendment's definition of an MMTC by substituting the word "AND" for the word "OR" when defining an MMTC in the Statute.

The Department argues that the Legislature can change the word "AND" to "OR" so as to require an MMTC to perform all MMTC functions ("vertical integration"), rather than just any one of those functions, because "nothing in the Amendment, or any other part of the Florida Constitution, expressly prohibits the legislature from requiring vertical integration and caps on the number of MMTC

licenses." IB at 19. It further claims that the Amendment has only one regulatory directive related to MMTCs: "The Department must establish '[p]rocedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety.'" IB at 23.

The Department's strained argument ignores the Amendment's plain language and the explicit characterization of that language in the drafters' Intent Document. The Amendment directly overruled the Legislature's existing definition of the precursor to MMTCs—yet the Legislature persists in requiring MMTCs to perform all MMTC functions in direct conflict with the Amendment. As both the trial court and all three of judges on the First District panel correctly found, the Statute is inconsistent with the Amendment.

Writing for a unanimous Court in *Atwater*, Justice Canady stated that, while statutes must be read as constitutional if possible, this Court will not engage in a strained reading of a statute to find it is constitutional when its plain language establishes otherwise. 95 So. 3d at 91. Here, the Statute uses the term "and" while the Amendment uses the term "or." Those two terms have entirely different meanings. "Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives. * * * With the conjunctive list, all . . . things are required—while with the disjunctive list, at least one . . . is required, but any one (or more) of

the[m] . . . satisfies this requirement." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012). Reading the Statute as the Department urges results in a strained reading of a clearly unconstitutional law.

This is not a case about "policy" or "plenary authority." The Legislature is free to enact legislation that is consistent with the Amendment and otherwise constitutional—but it has not done so here. The best proof of the Legislature's overreach is its statement that its actions are constitutional because "the [L]egislature made a policy choice to create a vertically integrated supply chain by requiring all licensed MMTCs to 'cultivate, process, transport, and dispense marijuana for medical use.'" IB at 24 (quoting § 381.986(8)(e), Fla. Stat.). That is precisely the point. This policy decision has already been made by Florida's voters. The Legislature cannot, under the guise of "policy" or "plenary authority," redefine the Amendment's definition of an "MMTC" or otherwise act inconsistently with the plain language of a constitutional amendment the voters have adopted.

This Court has made clear that when the Constitution expressly provides the manner of doing something, the manner prescribed is exclusive. *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 139-40 (Fla. 2019); *The Fla. Bar v. Sibley*, 995 So. 2d 346, 349 (Fla. 2008). "Constitutional analysis must begin with examination of explicit language of provisions in question and, where the language is unambiguous and addresses the matter at issue, the provision should be

enforced as written." *Garcia v. Andonie*, 101 So. 3d 339, 345 (Fla. 2012). Even if the Constitution does not expressly prohibit the doing of a thing in another manner, the fact that the Constitution has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. *Citizens for Strong Sch., Inc.*, 262 So. 3d at 139; *S & J Transp., Inc. v. Gordon*, 176 So. 2d 69, 71 (Fla. 1965) ("where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways"). Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision. *Sibley*, 995 So. 2d at 349-50 ("express or implied provisions of the Constitution cannot be altered, contracted, or enlarged by legislative enactment") (citing *Sparkman v. State ex rel. Scott*, 58 So. 2d 431, 432 (Fla. 1952) (declaring invalid statute that imposed one-year residence requirement for entitlement to homestead tax exemption, even though constitutional provision authorized Legislature to "prescribe appropriate and reasonable laws regulating the manner of establishing the right to [the] exemption")).

The Department's claim that the Amendment merely sets forth "minimum" requirements for MMTCs fails because the Amendment itself sets forth the minimum requirements by expressly allowing MMTCs to perform only one MMTC function rather than all such functions. *Holmes*, 919 So. 2d at 408 (rejecting

argument that a state constitutional provision simply established a "'floor' of what the state can do" and explaining that where the constitution sets forth a mandate and provides the manner of fulfilling this mandate, additional equivalent alternatives are not authorized). Florigrown has never challenged the Department's authority to promulgate the constitutional regulations required under the Amendment—Florigrown filed this case to compel it to do so. Florigrown has not challenged the vast number of requirements in the Statute imposed by the Legislature—it has merely challenged requirements inconsistent with the Amendment. Here, the Statute improperly erects barriers that needlessly increase patients' costs and delay availability of and access to products. *See* [R. 2627-92]

B. Nothing In The Record Or The Law Supports The Arbitrary And Artificial Caps Imposed By The Statute.

The trial court and the First District also correctly determined that the Statute improperly imposes arbitrary caps on the number of MMTC licenses. At the injunction hearing, the Department acknowledged that the Statute is the only basis for the limitation on the number of MMTCs. [R. 2721, 2825-26, 2833] Subsequent to the adoption of the Statute, only 22 entities have been registered as MMTCs,[12] even though the Department itself estimated 1,993 MMTCs would be needed to

[12] *See* Fla. Dep't of Health, Office of Medical Marijuana Use, *Medical Marijuana Treatment Centers*, https://knowthefactsmmj.com/mmtc/ (listing "license date" and "authorization status" of all existing MMTCs) (last visited Jan. 3, 2020).

provide the 453,000 qualified patients with the available, safe, and affordable medical marijuana they need. [R. 2827, 3379]

Of the 22 MMTCs, 7 were existing dispensary organizations under the State's prior limited medical marijuana program while the other fifteen also participated in the 2015 dispensary organization application process, but were rejected by the Department.[13] The Department has now issued MMTCs licenses to every single entity whose application was scored by the Department in 2015, regardless of the score they received.[14] Yet, not a single entity that did not submit an application for the 2015 pre-Amendment program has been registered, and the Department has not accepted any registrations or applications for MMTCs licenses since the Amendment became effective almost three years ago. [R. 2723, 2838-39] The 22 MMTCs have complete control of Florida's entire medical marijuana market.

The *Amicus* brief filed by some of the licensed MMTCs illustrates why the caps are unconstitutionally depriving Florida's citizens of needed medical marijuana. *Amici* constitute 7 of the 22 currently licensed MMTCs. More than half of the *Amici* have never grown or dispensed any marijuana whatsoever.[15] The other

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[13] Dara Kam, The News Service of Florida, *8 More Firms to Get Pot Licenses*, https://www.news4jax.com/news/2019/04/17/8-more-firms-to-get-pot-licenses/ (Apr. 17, 2019).

[14] *Id.* ("Tuesday's joint settlement agreement . . . means that all of the original applicants . . . have now been approved as medical marijuana 'treatment centers.'")

[15] DFMMJ Investments, LLC d/b/a Liberty Health Sciences (dispensing

Amici—Harvest, Acreage, and Columbia Care—are all large Canadian or out-of-state companies that bought their licenses for tens of millions of dollars from the original awardees. Despite attesting in their settlements that they would be able to operate in 30 days, those awardees that sold those licenses made no meaningful attempt to enter the medical marijuana market with their licenses. Instead, they flipped these multi-million dollar sales without serving a single patient.[16]

The Department's data shows that, as of the week of December 6, 2019, all of the *Amici* combined sell less than 4.5% of the medical marijuana being dispensed in the state, despite making up 32% of the total number of MMTCs. *Id.* Their main interest is in ensuring the privilege of buying and selling their licenses—not in ensuring that qualified patients have affordable access to medical marijuana. The monetary value of those licenses is the direct result of a statutory scheme that, on its face, conflicts with the Constitution.

The *Amici* MMTCs claim that the injunction impacts their MMTC licenses

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authorization); Acreage Fla., Inc. (not operating); Perkins Nursery, Inc. (not operating); Mt. Dora Farms, LLC (not operating); San Felasco Nurseries, Inc. d/b/a Harvest (dispensing authorization); Better-Gro Companies, LLC d/b/a Columbia Care Florida (dispensing authorization); and Dewar Nurseries, Inc. (not operating). *See* Fla. Dep't of Health site at: http://knowthefactsmmj.com/mmtc/ (last visited Jan. 3, 2020).

[16] *See* Fla. Dep't of Health, Office of Medical Marijuana Use Weekly Update (Dec. 13, 2019), https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2019/121319-OMMU-Update.pdf, at 2 (last visited Jan. 6, 2020).

and their ability to operate, and that it will "harm" Florida's medical marijuana program. As detailed herein, this is simply not true and appears calibrated to inflame the reader. The injunction has no impact whatsoever on the existing MMTCs' ability to operate. Nor does it restrict the Department's ability to regulate them or render any of their existing operations invalid. The extensive statutory requirements governing how MMTCs must operate are not impacted at all and remain in place.

The Department defends the statutory caps by claiming that nothing in the Amendment prohibits the Legislature from "establishing the limits on the number of MMTC licenses" set forth in the Statute or "requir[es] unlimited MMTCs." IB at 26. This is true. Florigrown is not asserting that the Legislature cannot enact reasonable caps on the number of MMTCs. The Legislature can enact laws, as it claims, to ensure that medical marijuana is not diverted to other states, diverted to minors, or used for illegal purposes so long as those laws are consistent with the Amendment's mandates and are otherwise reasonable. Here, however, the unrebutted record firmly establishes that the statutory caps are unreasonable limits. Far from being a law that is "consistent with" the Amendment, the trial court correctly found the caps "directly undermine the clear intent of the Amendment, which by its language seeks to prevent arbitrary restrictions on the number of MMTCs authorized to conduct business in the State." [R. 2721-22] As the First District stated, the Legislature's change in the definition of MMTCs and refusal to

allow MMTCs to perform just one MMTC function rather than all MMTC functions, renders the caps unconstitutional. *Florigrown I*, 2019 WL 2943329, at *3.

The Department presented no evidence that the caps are "reasonable," nor can it do so. The Department's own pre-Amendment data prepared by now-Department Chief of Staff Courtney Coppola reflects that 1,993 MMTCs would be necessary to adequately serve Florida patients. [R. 2827, 3379] The caps contravene the Amendment's directives to make medical marijuana available by reducing the availability of medical marijuana for patients—which is shown by the Department's own testimony. [R. 2627-92; 2721-22]

The House's assertions that there "was no evidentiary basis for the trial court or the First District to conclude that the scheme here fails" and that this Court has been deprived of "a complete record on these issues" are demonstrably false. *See* House Br. at 11. The injunction was issued after a lengthy evidentiary hearing in which extensive evidence was presented on these factual issues, including evidence from actual patients attesting to the failure of and harms caused by vertical integration. [R. 2627-92] The Department offered nothing to contradict these facts. Further, the House has no basis to complain about the evidence in the record because the House did not even attempt to intervene in the case until nearly three weeks after the trial court had already entered the injunction, at which time the case had been pending for almost a year. As the trial court explained, the Legislature and

Department have established a "thorough, effective, and efficient framework within which to regulate medical marijuana," but "[t]hey have simply chosen to restrict access to this framework in a manner that violates the Amendment." [R. 2723]

Although the Department attempts to defend the caps by noting the Statute includes a provision that requires the issuance of additional MMTC licenses upon the registration of additional qualifying patients, IB at 25, this adds nothing to the analysis because nothing in the Amendment allows the Legislature to impose any arbitrary caps in the first instance. Quite simply, the Department offers nothing to show that the caps are rationally related to any legitimate state interest—nor can it do so because the caps are not rationally related to any state interest; the caps instead facilitate the cartel of entities that currently hold coveted MMTC licenses and artificially maintain the licenses' sky-high inflated value.

C. The Statutory Requirement For Vertical Integration Of MMTCs Violates The Amendment.

As explained above, the Amendment overruled the Legislature's previous definition for a provider of medical marijuana, expressly rejecting the "vertical integration" model required by the Legislature. The Department makes a circular argument, asserting that vertical integration is nevertheless permitted because the Amendment requires that an MMTC be "registered by the Department." IB at 29. The Department and the House assert that this requirement "invites action by the [L]egislature" because the Legislature has authority to set forth the criteria for

registration by the Department. *Id.* One need only read the Amendment's text to know that this is incorrect.

The self-executing Amendment expressly directs that the Department, not the Legislature, "shall issue reasonable regulations necessary for the implementation and enforcement of this section. The purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients." Art. X, § 29(d), Fla. Const. The Amendment goes on to state that the Department, not the Legislature, must promulgate regulations for "[p]rocedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." *Id.* The Amendment grants the Legislature the power to enact laws related to the Amendment—but, again, those laws must be "consistent with" the Amendment. *Id.* § 29(e). The Legislature is preventing the Department from carrying out its constitutional duties to promulgate regulations as required, and it is doing so in a manner that is harming Floridians.

The House erroneously claims that "[t]he First District must be reversed because its ruling depends on the incorrect assumption that [the Amendment] entitles certain entities to be registered as MMTCs." House Br. at 5. Florigrown has never asserted that anyone is "entitled" to registration. Nor did the First District's ruling depend on any such assumption. What is at issue here is entitlement to a fair process

for prospective MMTCs to seek registration and subsequent licensure. The Department, not the Legislature, was required to issue reasonable regulations to implement the Amendment; but instead, it simply doled out twenty-two MMTC licenses in an arbitrary manner (and allowed those entities to immediately sell those licenses) and has not allowed any applications since the Amendment was enacted almost three years ago. This is entirely unreasonable. Of course not every applicant must be granted a license, but the licensing process cannot be arbitrary.

Even assuming, *arguendo*, that the Amendment grants the Legislature unlimited authority to impose registration requirements on MMTCs, the Statute still violates the Amendment. This is because nothing in the Statute sets forth any criteria (or procedure) for an MMTC to become "registered by the Department." Instead, the Statute proscribes how "[t]he department shall license medical marijuana treatment centers." § 381.986(8)(a), Fla. Stat. (emphasis added). The Statute provides no path whatsoever for MMTCs to become registered. The mention of "registration" in the Statute consistent with the Amendment's mandates as to other participants in the medical marijuana process (such as caregivers and patients), but the lack of any mention of registration as to MMTCs confirms that the Legislature intended that there be no registration process at all for MMTCs.[17]

[17] *See, e.g.*, § 381.986(4)(a)7., (6)(a). In addition, the terms are not used interchangeably in the Statute. *See* § 381.986(8)(a) ("The department shall *license* medical marijuana treatment centers to ensure reasonable statewide accessibility and

The Department also asserts that the First District erroneously relied on its own case in *Notami Hospital of Florida, Inc. v. Bowen*, 927 So. 2d 139 (Fla. 1st DCA 2006), *aff'd sub nom*, *Buster,* 984 So. 2d at 493. IB at 30. The Department asserts that *Notami* is distinguishable because it creates a constitutional right for patients to access records, whereas the Amendment does not create a constitutional right for any Florida citizen or business entity. IB at 31. Setting the debate aside as to whether the Amendment establishes any rights, the Department cannot seriously contend that the Legislature can enact legislation that conflicts with a constitutional amendment unless the amendment creates a constitutional "right." As this Court stated in approving *Notami*, where restrictions imposed by the Legislature conflict with a constitutional provision, those restrictions cannot stand. *Buster*, 984 So. 2d at 493. In fact, in *Buster,* this Court did exactly what is required here—it struck portions of the statute that conflicted with the Amendment and left the remaining provisions intact. *Id.* at 493-94.

The House claims that the Court's decision in *Department of Environmental*

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availability as necessary for qualified patients *registered* in the medical marijuana use registry and who are issued a physician certification under this section.") (emphasis added). The Statute refers to qualified patients needing to be registered to purchase medical marijuana [*id.*], and requires that a prospective MMTC be "registered to do business in the state" to obtain a license [§ 381.986(8)(b)1.]. The Amendment also recognizes the distinction between the two words. The only instance of the word "license" appears as "licensed" in the definition of "physician." Art. X, § 29(b)(8), Fla. Const. Yet, in the provisions relating to MMTCs, the Amendment only speaks of "registering." *Id.* at § 29(b)(5), (d)(1)c., (d)(3).

Protection v. Millender, 666 So. 2d 882 (Fla. 1996), is inapposite because "[t]he constitutional provision at issue here, by contrast, does not specify any particular entity is entitled to a license and instead leaves that determination to the Legislature and the Department." House Br. at 9. This argument completely misses the mark. The Amendment requires the Department by July 2017 to promulgate "[p]rocedures for the registration of MMTCs that include procedures for the issuance . . . of registration," but the Statute impermissibly restricts and diminishes the medical marijuana industry by banning the registration of non-vertically integrated MMTCs, which the Amendment specifically authorizes. Art. X, § 29(b)(5), Fla. Const.

Finally, the House claims that because there are 205 dispensing locations across the State that are dispensing marijuana, "[t]here was no basis to conclude that the level of access is 'likely' inconsistent with the availability objective [in the Amendment]." House Br. at 12-13. Not only does this argument ignore the extensive evidentiary record before the trial court, but it also ignores the detailed official analysis prepared by the longest serving high-level employee with the Office of Medical Marijuana Use and the Department's Chief of Staff, Courtney Coppola, which found that 1,993 MMTCs would be necessary to adequately serve this State's population. [R. 2827, 3379] Two hundred and five dispensaries equals only about 10% of the number of MMTCs that Ms. Coppola determined would be needed.

D. The Statute Improperly Grants Special Advantages, Benefits And Privileges That Only Apply To Particular Entities.

Although the First District did not reach this issue because it ruled on other grounds, the Statute also unconstitutionally grants special advantages, benefits, and privileges that only apply to particular entities. The Department conceded this fact below, but claimed the challenged provisions "do not constitute a special law" because they "relate to the State's function under the plain language of the Amendment." [R. 800] The Department's argument is premised on a misconstruction of the Amendment as well as numerous false assumptions.

Nothing in the Amendment's "plain language" allows the Legislature to commandeer the Department's duty to promulgate constitutional regulations setting forth "[p]rocedures for the registration of MMTCs." *See* Art. X, § 29(d)(1)c., Fla. Const. Nor does anything allow the Legislature to arbitrarily determine by fiat who should be an MMTC, regardless of merit, qualifications, or any other legitimate criteria. *Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963) ("a state . . . can[not] arbitrarily interfere in private businesses or impose unreasonable and unnecessary restrictions upon them, under the guise of protecting the public"). The offending provisions are not rationally related to ensuring the supply of safe medicine for qualifying patients. Nor can they be said to be rationally related to avoiding overproduction or limiting diversion because the Statute places no maximum or minimum requirement on the amount that an MMTC may cultivate, process, sell, or deliver. [R. 2873] The Department confirmed below that: "We

don't regulate supply." [R. 3235] Thus, the limitations on the number of MMTCs have no bearing whatsoever on the quantity of marijuana being produced, limits on diversion, or a guarantee of adequate supply.

The Department also argued below that the challenged provisions are not impermissible special laws because they operate uniformly throughout the state and any special class "remains open." [R. 800-01] This is incorrect. It is impossible for Florigrown to join the special class of entities authorized to obtain MMTC licenses because Florigrown did not apply to be a part of the earlier low-THC program—and only those entities that applied to be part of that earlier program have received MMTC licenses. The Department nevertheless suggests the class is open because more MMTC licenses are supposed to be issued in the future. But, as the trial court correctly found, the entire competitive licensing process imposed by the Legislature arbitrarily favors certain identifiable private entities and therefore violates the prohibition against special laws. Art. III, § 11(a)(12), Fla. Const.

II. FLORIGROWN MET THE REMAINING INJUNCTION CRITERIA.

The Department only sought a certified question on the issue of substantial likelihood of success. The other injunction criteria do not impact that question, so this Court need not review the remaining issues. In addition, the Amendment grants any Florida citizen the right to compel the Department to comply with the deadlines set forth in the Amendment for enacting regulations—which creates a presumption

that injunctive relief is warranted; otherwise, the expressly enumerated right "to compel compliance" is rendered meaningless. Art. X, § 29(d)(3), Fla. Const. In any event, Florigrown established the other criteria.

A. The Trial Court And First District Properly Recognized The Existence of Irreparable Harm And Lack Of Adequate Remedy As A Matter Of Fact And Law.

As to irreparable harm, the trial court found that irreparable harm would occur absent issuance of a temporary injunction because "[t]he Amendment makes it clear the Department of Health must do the matters required in it to ensure the availability and safe use of medical marijuana by qualifying patients. The Department has failed to do so." [R. 2742-43] The First District affirmed this conclusion. *Florigrown I,* 2019 WL 2943329, *3-*4.

The trial court recognized that irreparable harm is occurring to both Florigrown and Florida's citizens in need of medical marijuana. The record firmly establishes, through dozens of affidavits, that patients who qualify for medical marijuana are having significant difficultly obtaining the marijuana they need. [R. 2627-92] This is in large part due to two factors.

First, the gross limitations on the number of MMTCs are preventing sufficient supply to meet demand. Second, 41% of the MMTCs that have obtained a coveted MMTC license are not producing and selling marijuana. Instead, those MMTCs are biding their time, selling their licenses for tens of millions of dollars on the open

market (as permitted by the Statute) without ever touching any marijuana at all.[18] Thus, the trial court correctly found irreparable harm because the Department is not complying with its duty to ensure adequate "availability" of medical marijuana.

In addition, the First District correctly held that irreparable harm is presumed as a matter of law because the Department is continuing to violate the Amendment's mandates. The law is well-established that anytime a governmental entity is enjoined from effectuating statutes enacted by representatives of the people, *per se* irreparable harm occurs. *See, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Manatee Cty. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012). As held in *Manatee County*, irreparable harm is presumed when the government cannot enforce duly enacted statutes. 104 So. 3d at 1121.

This same *per se* irreparable harm also occurs when a constitutional provision enacted by the citizens of Florida is being violated. "A current violation of a constitutional right is not cured by the potential for future legislative goodwill."

[18] *See supra*, n.12. Indeed, one of the *amici*, Acreage Florida, Inc. (a/k/a "The Botanist") has been registered for nearly 18 months, but has never received authorization to process or dispense marijuana. *Id.* Eight of the other current MMTCs have been registered for nearly 9 months, but have also not received such authorizations, and two of the those eight haven't even received cultivation authorization. *Id.*

Treacy v. Lamberti, 141 So. 3d 174, 178 (Fla. 2013). Since July 2015, the Department has refused to accept any applications whatsoever. It has also failed to enact any regulations within the time limits required by and provided in the Amendment. Instead, the licenses that have been granted have been awarded to settle lawsuits and have been bestowed on MMTCs that were previously deemed unqualified. While Florigrown may ultimately be denied the license it seeks, the Department must be compelled to timely perform its duties mandated by the Amendment and, at a minimum, give Florigrown and other similarly situated entities the opportunity to be a part of a constitutional registration and licensing process.

The Department asserts that irreparable harm based on a continuing constitutional violation can be established only when a "fundamental" right is involved. This Court did use the term "fundamental" when finding irreparable harm for a continuing constitutional violation in *Gainesville Woman Care, LLC v. State,* 210 So. 3d 1243, 1264 (Fla. 2017). However, the cases relied on in *Gainesville Woman Care* do not require that the violation involve a "fundamental" right.[19]

In addition, *Gainesville Woman Care* did not, as here, involve a constitutional provision that expressly directs that "any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department's constitutional duties."

[19] *See, e.g.*, *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988) (courts are to presume irreparable harm in Title VII cases).

Art. X, § 29(d)(3), Fla. Const. The Department cannot have it both ways—it cannot, on one hand, argue (as it does in its arguments on the public interest prong) that irreparable harm is presumed and public harm occurs when it is enjoined from enforcing statutes, while on the other hand, argue that the harm is not likewise irreparable when the Department and the Legislature violate the Constitution.

As to inadequate remedy, the Amendment itself recognizes that no adequate remedy at law exists where the Department refuses to abide by its express constitutional duties and no damages are available by expressly providing a cause of action to "compel compliance with the Department's constitutional duties." *Id.*

The Department argues the Amendment does not establish an adequate remedy because it "does not address the four-prong test to obtain a temporary injunction." IB at 35. Of course the Amendment does not address the prongs for an injunction. However, the Amendment grants any Florida citizen the right to compel the Department to comply with the deadlines set forth in the Amendment for enacting regulations. Art. X, § 29(d)(3), Fla. Const. Accepting the Department's argument would mean the Department can wholly ignore the constitutional deadlines and drag litigation on for years (as it has done here) to avoid compliance with those deadlines. Where time is of the essence (as the Amendment clearly provides), "relief delayed is relief denied." *Florigrown I,* 2019 WL 2943329, at *4 (quoting *Capraro v. Lanier Bus. Prods., Inc.,* 466 So. 2d 212, 213 (Fla. 1985)). Clearly, the irreparable

harm and inadequate remedy prongs have been firmly established.

B. The Public Interest Factors Support The Injunction.

The Department acknowledges that both the trial court and the First District found the balance of the public interest supports the injunction. IB at 34-37. The Department simply disagrees with that conclusion. First, the Department claims that the injunction "amounts to a radical alteration of the status quo of the medical marijuana industry" and that the trial court and First District "have rewritten existing law" causing "confusion and uncertainty." IB 36-37. Yet, neither the Department nor any *Amici* have shown how or why the status quo has been altered in any way.

The trial court specifically found that "Florigrown has established that the Legislature and the Department have a [thorough, effective, and efficient] framework and are implementing it, currently, with other registrants. They have simply chosen to restrict access to this framework in a manner that violates the Amendment."[20] [R. 2723] The injunction does nothing that impairs the

[20] An MMTC must immediately post a bond in the amount of $5 million before it can touch any marijuana at all. § 381.986(8)(b)7.a., Fla. Stat. Then, before starting cultivation, the MMTC must invest millions in infrastructure, be inspected, and receive "cultivation authorization." *See* Art. X, § 29, Const. Reg. 1-1.02(2), (6); *see also* § 381.986(10), Fla. Stat.; [R. 2822-23 (testimony of OMMU Director regarding requisite "authorization inspection[s]")]. Thereafter, the MMTC cannot commence processing any marijuana until the Department inspects again and grants "processing authorization." *Id.* at Reg. 1-1.02(2), (17). Finally, before making any marijuana available to patients, the MMTC must be inspected again and obtain "dispensing authorization." *Id.* at Reg. 1-1.02(2), (9). Failure to comply with these requirements

Department's regulatory authority as to any MMTCs. *See* [R. 2752]; § 381.968(8)(a)5.d., Fla. Stat. ("the provisions of this subparagraph are severable").

By its terms, the reach of the injunction does not impact any aspect of the regulatory scheme under the Statute, except that the Department must now comply with its constitutional duties to initiate a constitutional registration and licensing process instead of adhering to the very limited portion of the Statute that is unconstitutional. [R. 2752] The trial court twice gave the Department a chance to show that Florigrown's registration would result in unsafe use of medical marijuana before the deadline it set for the registration, but the Department made no attempt to do so—despite the extensive evidentiary hearing in this case. [R. 2752, 2757]

Second, the Department asserts the statute's provisions should be enforced because "the public has a significant interest in ensuring that democratically enacted legislation . . . is enforced." IB at 37.[21] In making this argument, the Department ignores that, as discussed above, the public has an even greater interest in ensuring the Department complies with the Constitution's mandates.

III. THE INJUNCTION IS CONSISTENT WITH THE AMENDMENT'S PLAIN LANGUAGE AND HAS NO BEARING ON THE DEPARTMENT'S REGULATION OF MMTCS.

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subjects a prospective MMTC and its employees to possible criminal prosecution as well as a host of other penalties. *See* § 381.986(10)(f), (12)(h)-(j), (13), Fla. Stat.

[21] As discussed above under II.A, *New Motor Vehicle Board of California*, 434 U.S. at 1351, *Maryland v. King,* 567 U.S. at 1301, and *Manatee County*, 104 So. 3d at 1121, actually support issuance of the injunction in this case.

The Department argues that the injunction radically alters the "status quo" because it "provide[s] the ultimate relief requested by Florigrown—an MMTC license." IB at 39. This argument fails because it arises from a fundamental misunderstanding of the distinction between registration and licensure.

The injunction merely requires the Department to "commence registering MMTCs," which is just the first step in the licensing process under the Statute. The injunction does not require the Department to grant Florigrown a "license." The injunction merely requires that Florigrown and other similarly situated entities be allowed to register and then go through the extensive process for establishing that they are entitled to a license. For example, section 381.986(8)(a)2.a., Florida Statutes, requires that, to receive a license, an applicant must meet the requirements of section 381.986(8) and provide "documentation to the Department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration." (emphasis added). As explained above, the requirements of section 381.986(8) are extensive.

Again, the trial court specifically found that there is a thorough, effective, and efficient framework in place. [R. 2723] Nothing suggests that this framework would be disrupted by the injunction. By its terms, the reach of the injunction is limited to enjoining the Department "from registering or licensing any MMTCs pursuant to the unconstitutional legislative scheme set forth in Section 381.986" [R. 2744], which

provisions have their own severability clause. § 381.986(8)(a)5.d., Fla. Stat. "[A]ny Florida citizen [has] standing to seek judicial relief to compel compliance with the Department's constitutional duties." Art. X, § 29(d)(3). Compelling compliance is exactly what the trial court did here. The Department failed to begin registering MMTCs as required, and the circuit court compelled it to comply with its constitutional duties and begin registering MMTCs—nothing more and nothing less.

IV. THE INJUNCTION ORDERS MAKE THE REQUISITE FACTUAL FINDINGS TO SUPPORT THE INJUNCTION CRITERIA.

As detailed above under II.A., the Department's continuing refusal to perform its duties under the Amendment constitutes irreparable harm as a matter of law. Moreover, when the two injunction orders are read together, the trial court made all requisite factual findings required for both irreparable harm and lack of an adequate legal remedy.[22] The trial court found irreparable harm would occur absent issuance of a temporary injunction. [R. 2742-43] Specifically, it found irreparable harm because the Department was failing to ensure medical marijuana was not only safe but available to Florida's citizens. *Id.* As the record reflects, patients cannot readily access medical marijuana in many areas of the state. *See* [R. 2627-92]

The Amendment recognizes there is no adequate remedy at law where, as

[22] In an appeal of an order under Rule 9.130 or a partial final judgment, the appellate court will review all orders entered as a necessary step or as an aspect of the order appealed. *See, e.g.*, *Ruppel v. Gulf Winds Apts.*, 508 So. 2d 534, 534 (Fla. 2d DCA 1987).

here, the Department refuses to abide by its constitutional duties and no damages are available. This is why the Amendment specifically provides a cause of action to seek to compel compliance with the Department's constitutional duties. The trial court's finding that "there is no adequate remedy at law for the harm Florigrown will suffer if it continues to be denied the opportunity to obtain MMTC registration, and consequently the ability to provide patient care to Florida citizens in need of medical marijuana treatment" [R. 2724], satisfies this element under Florida law.

As to a bond, Florigrown acknowledges Florida Rule of Civil Procedure 1.610 requires an injunction be conditioned on a bond. However, a bond is already required here because, if allowed to register and begin the process for applying for a license, Florigrown must post a bond in the amount of $5 million payable to the Department before it could ever touch any marijuana at all.[23]

CONCLUSION

For the reasons expressed, this Court should approve the First District's decision affirming the injunction with directions that the Department must begin registering MMTCs in a manner that complies with the Amendment.

[23] Even if an additional bond is required, the remedy would be to approve the injunction and remand for an evidentiary hearing on the amount of the bond—not invalidate the injunction. *See, e.g.*, *Ralicki v. 998 SW 144 Court Rd., LLC*, 254 So. 3d 1155, 1157 (Fla. 5th DCA 2018); *Aaoep USA, Inc. v. Pex German OE Parts, LLC*, 202 So. 3d 470, 472 (Fla. 1st DCA 2016).

Respectfully submitted,

/s/ Katherine E. Giddings

KATHERINE E. GIDDINGS, BCS (949396)
katherine.giddings@akerman.com
elisa.miller@akerman.com
myndi.qualls@akerman.com
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Telecopier: (850) 222-0103

JONATHAN S. ROBBINS (989428)
jonathan.robbins@akerman.com
nancy.alessi@akerman.com
Akerman LLP
Las Olas Centre II, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
Telephone: (954) 463-2700
Telecopier: (954) 463-2224

ARI H. GERSTIN (0839671)
ari.gerstin@akerman.com
marylin.herrera@akerman.com
Akerman LLP
Three Brickell City Centre
98 Southeast Seventh St., Ste. 1100
Miami, FL 33131
Telephone: (305) 374-5600
Telecopier: (305) 374-5095

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of January 2020 a true and correct copy of the foregoing has been electronically uploaded to the Supreme Court of Florida's e-Portal was furnished by E-Mail to all parties listed below.

Jason B. Gonzalez, Esq.
Amber Stoner Nunnally, Esq.
Daniel Nordby, Esq.
Rachel Procaccini, Esq.
Shutts & Bowen LLP
215 S. Monroe St., Ste. 804
Tallahassee, FL 32301
anunnally@shutts.com
jasongonzalez@shutts.com
dnordby@shutts.com
rprocaccini@shutts.com
(Attorneys for Petitioner)

Mohammad O. Jazil, Esq.
Joseph A. Brown, Esq.
Brooke E. Lewis, Esq.
Michael R. Beato, Esq.
Hopping Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
mjazil@hgslaw.com
josephb@hgslaw.com
brookel@hgslaw.com
michaelb@hgslaw.com
(Attorney for Florida House of Representatives)

Daniel William Bell, Esq.
General Counsel
Florida House of Representatives
418 The Capitol
402 So. Monroe Street

Joe Jacquot, Esq.
Colleen Ernst, Esq.
Executive Office of Governor
The Capitol, PL-5
400 S. Monroe Street
Tallahassee, FL 32399
joe.jacquot@eog.myflorida.com
colleen.ernst@eog.myflorida.com
(Attorneys for Petitioner)

Louise Wilhite-St Laurent, Esq.
Florida Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, FL 32399-1708
louise.stlaurent@flhealth.gov
(Attorney for Petitioner)

John M. Lockwood, Esq.
Thomas J. Morton, Esq.
Devon Nunneley, Esq.
The Lockwood Law Firm
106 E. College Avenue, Suite 810
Tallahassee, FL 32301
john@lockwoodlawfirm.com
tj@lockwoodlawfirm.com
devon@lockwoodlawfirm.com
(Attorney for DFMMJ Investments, LLC, d/b/a Liberty Health Sciences and Acreage Florida, Inc.)

Tallahassee, FL 32399-1300
daniel.bell@myfloridahouse.gov
(Attorney for Florida House of Representatives)

William D. Hall, III, Esq.
Daniel R. Russell, Esq.
Dean Mead & Dunbar
2015 So. Monroe Street, Suite 130
Tallahassee, FL 32301
whall@deanmead.com
drussell@deanmead.com
(Attorney for Dewar Nurseries, Inc.)

James A. McKee, Esq.
Foley & Lardner LLP
106 E. College Ave., Suite 900
Tallahassee, FL 32301
jmckee@foley.com
(Attorney 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)

Jeff Kottkamp, Esq.
Jeff Kottkamp, P.A.
3311 Dartmoor Drive
Tallahassee, FL 32312
JeffKottkamp@gmail.com
(Attorney for Triangle Capital, Inc.)

/s/ Katherine E. Giddings
KATHERINE E. GIDDINGS, BCS

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Katherine E. Giddings
KATHERINE E. GIDDINGS, BCS