SC19-1464

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.

BRIEF OF *AMICUS CURIAE* TRIANGLE CAPITAL, INC, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST IN THE CASE

Triangle Capital, Inc. is a Florida Corporation which has been registered to do business in Florida for at least five consecutive years. On or about February 15, 2019 Triangle Capital, Inc. submitted a Request for Registration to the Florida Department of Health, Office of Medical Marijuana Use specifically requesting that they be registered to operate a Medical Marijuana Treatment Center.

In their Request for Registration Triangle specifically noted they:

a. Will meet any safety standard required for security, inventory and control including the use of video surveillance, alarms and physical barrier to control access to their facilities;

b. Will comply with any record keeping requirements for inventory control, tracking and chain of custody, and will use software that can be audited by an independent third party;

c. Will comply with testing requirements for medical marijuana including internal testing and maintaining batch samples for auditing and/or testing by an independent third party;

d. Will maintain records necessary to meet any standard for labeling of products including lists of ingredients and THC content, as well as any necessary product safety warnings;

e. Will make its facilities, processes and records available for inspection by the appropriate government entity;

f. Will consider the safety of its products and the well-being of patients to be a paramount concern;

g. Will satisfy and exceed any safety requirement established by the State of Florida;

h. Will satisfy any zoning requirements of the jurisdictions in which it will operate facilities;

i. Will hire and maintain a professional staff including a Medical Director that advances their core principle of patient safety.

j. Triangle principles have a ten-year track record in the medical marijuana business in other states (holding 9 licenses in Colorado as "Green Medicine LLC" and 3 vertical licenses in Arizona doing business as "Territory Dispensaries") and financial ability to successfully operate a Medical Marijuana Treatment Center in Florida. In addition, they are prepared to immediately tender a check for $60,830 to the State of Florida as a registration fee.

After the Office of Medical Marijuana Use failed to respond, or even acknowledge, Triangle's Request for Registration, Triangle Capital, Inc. filed a Motion to Intervene in the underlying action filed in Circuit Court by Respondent Florigrown, LLC against Petitioners. The Court granted the motion and thereafter Triangle Capital, Inc. filed a Complaint which closely mirrors the Complaint filed by Florigrown, LLC.

In reliance on the passage and wording of the medical marijuana constitutional amendment, Triangle Capital, Inc. has invested significant financial resources toward their effort to enter the medical marijuana industry in Florida. Triangle Capital, Inc. has a direct interest in the outcome of this matter and knows from experience in other states that creating competition in the medical marijuana market in Florida will benefit patients.

SUMMARY OF ARGUMENT

The First District Court of Appeal correctly concluded that the §381.986, Florida Statutes, violates the clear language, as well as the intent, of the constitutional amendment passed by the voters of Florida to authorize medical marijuana. The amendment, codified in Article X, §29 of the Florida Constitution specifically defines Medical Marijuana Treatment Centers (MMTC) as entities that acquire "…cultivates, possesses, processes (including development of related products such as food, tincture, aerosols, oils or ointments), transfers, transports, sells, distributes **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).

Thus, the unambiguous terms of the Florida Constitution make it clear that the current statutory scheme requiring a MMTC to engage in every aspect of the medical marijuana business (vertical integration), from growing to dispensing, is unconstitutional. This position is fully supported by the "Analysis of Intent" document [R. 2461-62] widely disseminated by the drafters of the medical marijuana constitutional amendment before it was passed by the voters.

The amendment limits the ability of the Florida Legislature to regulate medical marijuana. The amendment specifically requires that such regulation be consistent with the amendment. Article X §29 (e) Fla. Const. The statutory requirement that

a MMTC operate as a vertically integrated business is not consistent with the amendment and is therefore unconstitutional.

Finally, the idea that the current statutory scheme for medical marijuana in Florida ensure the safe and available use of medical marijuana is simply not true. As a direct result of the current regulatory scheme the supply of medical marijuana in Florida is woefully inadequate to meet the needs of patients. This had led to the price of medical marijuana being up to four times more than the price in other states. Because of the lack of supply and high cost there is a very strong likelihood that many patients are seeking marijuana from illegal sources. Products purchased from such sources are not tested and can contain harmful chemicals or even be laced with other dangerous drugs.

Thus, the current statutory scheme enacted by the Legislature not only violates the Constitution---it has led to a short supply of medical marijuana, higher prices, and increased the likelihood that the safety of patients is in jeopardy by forcing them to seek lower priced medical marijuana from illegal sources.

ARGUMENT

I. THE DECISION OF THE LOWER COURT SHOULD BE UPHELD BECAUSE THE STATUTE REGULATING MEDICAL MARIJUANA IN FLORIDA IS UNCONSTITUTIONAL.

A. The Constitution Says What it Says

In 2014 during a speech before the Georgia State Bar Association titled "Interpreting the Constitution: A View From the High Court" former Supreme Court Justice Antonin Scalia famously said the U.S. Constitution is a legal document "…and it says what it says and doesn't say what it doesn't say". [1] This is a simple and straight forward approach to interpreting the Constitution--- just look at the text. This is exactly the approach taken by the First District Court of Appeals in this case.

At the core of the lower court's decision to issue a temporary injunction in this case is whether Florigrown has a substantial likelihood of success on the merits. If you apply the Scalia approach to constitutional interpretation it is clear that Florigrown will succeed on the merits of the case. Clearly, the statute passed by the Legislature to regulate medical marijuana violates the Florida Constitution.

Article X Section 29 of the Constitution says that a MMTC may cultivate, process, OR sell medical marijuana. In contrast, Florida Statute §381.986 (8) (a) 1. requires a MMTC to cultivate, process, transport AND sell medical marijuana. The First District Court of Appeal correctly determined that requiring a MMTC to engage in all functions of the medical marijuana business from seed to sale

[1] https://www.foxnews.com/politics/justice-scalia-constitution-is-not-a-living-organism

(vertical integration) violates the Florida Constitution. Fla. Department of Health v. Florigrown, LLC, ---So. 3d---, 2019 WL 2943329, (Fla. 1st DCA July 9, 2019).

"The words and terms of a Constitution are to be interpreted in their most usual and obvious meaning". Johnson v. McDonald, 269 So. 2d 682, 683 (Fla. 1972). The "fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people…" Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960).

In this case ascertaining the "intent of the framers" can easily be determined not only by the plain language of the medical marijuana amendment—but by looking to the intent document prepared by the drafters of the amendment. The Florida Constitution says what it says…and doesn't say what it doesn't say. In this case, the use of the word "or" as opposed to "and" to describe the activities a MMTC must engage in makes it clear that vertical integration is not required to operate as a MMTC in Florida. Therefore, the statute requiring vertical integration for MMTCs violates the Constitution of the State of Florida.

B. The Constitution Limits the Power of the Legislature

It is a foundational principle of our system of government that the power of government is limited. Both the U.S. Constitution and Florida Constitution are

expressions of the will of the people. Government derives its power from the governed and only has that power which we, the people, give it.

The powers granted the Florida Legislature are contained in Article III of the Florida Constitution. Those powers are limited. Moreover, amendments to the constitution which have been passed by the voters since the 1968 Florida Constitution was adopted further limit the power of the Legislature and mandate certain activities.

The Petitioner and others appear to take the position that the power of the Legislature to regulate medical marijuana in Florida supersedes the will of the people. They also appear to take the position that "government knows best".

The medical marijuana amendment passed by the voters is an additional expression of the will of people in Florida. The amendment expressly limits the authority of the Legislature to enact legislation regulating medical marijuana. Any Legislative enactment beyond the boundaries set forth in the Constitution is contrary to the will of the people and is unconstitutional.

II. THE ARGUMENTS MADE IN FAVOR OF MAINTAINING THE CURRENT LICENSING SCHEME ARE NOT SUPPORTED BY THE FACTS

A. The current system has led to shortages in supply and high prices

The Petitioner argues that maintaining the current regulatory scheme that requires vertical integration and limits the number of MMTC licenses is in the best

interest of medical marijuana patients. However, a closer look at the rationale used by the state to impose the current unconstitutional regulatory scheme on the citizens of Florida reveals that the very reasons for requiring vertical integration is not in the best interest of patients.

First, it is argued that mandating a vertically integrated medical marijuana market allows the state to better regulate the industry and ensure that patients have access to a reliable supply of safe and affordable medical marijuana. In reality—a cap on licenses and vertical integration of the market has had the opposite effect. The expensive distribution model of a mandated vertical integration program has been identified and confirmed as a key factor in such programs having limited supply. According to the Americans for Safe Access 2019 State of the State Report, 68% of vertically integrated medical marijuana programs have supply problems. The same report indicates that only 32% of non-vertically integrated medical marijuana programs have supply problems.[2]

Since the ability to grow and sell medical marijuana in Florida is limited to a small number of companies (many of which have never demonstrated the ability to successfully grow and process a cannabis crop in our state) the supply of medical marijuana is very limited and unreliable. This supply problem is gravely affecting the patient experience in Florida. Some patients are taking to social media and

[2] https://american-safe-access.s3.amazonaws.com/sos2019/sos19web.pdf

dispensary review sites to share their negative experience. One patient noted "Many times when I visit the dispensary I leave heartbroken" while another patient noted "Ninety-five percent of the time when you go [to a medical marijuana dispensary] they're not going to have something you want." Yet another patient said "I wasted a 50 minute drive and 20 minute wait in the online order line to be told, nope, we don't have it when it was time to pay."[3]

These patient experiences in Florida are not surprising. An analysis and comparison of the current 13 operational MMTCs in Florida with leading license holders in Colorado and Arizona further demonstrates that Florida patients to not have access to a reliable supply of medical marijuana. The diversity of products offered in Florida is one-fourth of the assortment of products offered in Colorado. Even the limited number of products offered by MMTCs to Florida patients are often out of stock. A recent snapshot of product availability (January 12, 2020) showed upwards of 50% of products of the Florida MMTCs were out of stock, with the top three license holders in Florida having 70% of products out of stock. License holders in Colorado (average of 10% of products out of stock) and Arizona

[3] https://www.miamiherald.com/news/health-care/article236977295.html; https://www.yelp.com/biz/trulieve-orlando-orlando?hrid=Bbbk3R58XSnlrXmqHpUkKw&utm_campaign=www review share popup&utm_medium=copy_link&utm_source=(direct)

(average of 15% of products out of stock) do a far better job of keeping products available for patients[4].

As would be expected, the limited supply of medical marijuana has consequently caused the price of medical marijuana to be significantly higher than in other states. By way of example, the cost of a typical 30-day supply of medical marijuana in Florida is four times higher than the same 30-day supply in Colorado. That means the average Florida patient is spending $385 per ounce, versus an open competitive market like Colorado where the average ounce is sold for $90, or Arizona where the cost of an ounce averages $155.[5] These are dramatic pricing burdens that patients in Florida currently must bear due to the limited supply chain of the current medical marijuana "cartel".

Because the cost of medical marijuana is so high in Florida---it very likely that many patients in Florida are seeking marijuana from illegal sources. This has been a common problem for states that legalized medical marijuana but then face a supply shortage.[6] Marijuana purchased on the black market is not tested for

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[4] Supply analysis completed with data collected from 7 license holders each in Arizona, Colorado and Florida.

[5] Pricing analysis completed with data collected from https://client.bdsanalytics.com/default; https://www.colorado.gov/pacific/cdphe/2019-medical-marijuana-registry-statistics; https://www.azdhs.gov/licensing/medical-marijuana/index.php#reports; https://knowthefactsmmj.com/2018/12/21/2019-ommu-updates/

[6] https://thinkprogress.org/the-high-price-of-medical-marijuana-is-forcing-people-back-to-the-black-market-955b1481e234/

chemicals or pesticides and may be laced with other dangerous drugs. This means the safety of patients who purchase marijuana from illegal sources is in jeopardy. This is particularly problematic for patients who are immune compromised.

The Florida Department of Health has estimated that Florida needs nearly 2,000 MMTCs to meet patient demand [R. 2827, 3379]. Currently, the Department has only issued licenses to 22 MMTCs (9 of those license holders do not operate a single dispensary).[7] As of January 9, 2020 there are only 216 medical marijuana dispensaries in Florida to serve over 300,000 currently qualified medical marijuana patients.[8] That's one dispensary for every 1,388 patients. In comparison, in October of 2019 the State of Colorado with a population of under 5.3 million people had 1,150 active license holders and 438 dispensaries to serve 81,899 medical marijuana patients or one dispensary for every 187 patients.[9] Florida has a population of 21 million citizens and is growing by 640 new citizens each day.[10] The number of license holders and dispensaries is woefully inadequate to meet not only the current needs of Florida's patients but the future needs as well.

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[7] https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2020/011020-OMMU-Update.pdf

[8] https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2020/011020-OMMU-Update.pdf

[9] https://www.colorado.gov.cdphe/medicalmarijuana October 2019 Program Statistics

[10] https://www.news-journalonline.com/news/20200103/census-2020-how-high-will-floridas-population-go

It has been estimated that as many as 4% of Florida's population will be qualified as medical marijuana patients by 2021.[11] If the growth estimates for the number of medical marijuana patients in Florida is correct, we will soon have over 800,000 patients. This will create even greater demand for medical marijuana and further amplify the current problems with supply and price.

B. Mandatory Vertical Integration Is a Flawed Regulatory Model

It should also be noted that the former Drug Czar for the State of Colorado testified before the Florida House of Representatives and indicated that he initially believed that vertical integration was a better way to regulate medical marijuana.[12] However, after several years of experience in working with the industry the former Drug Czar said there is virtually no difference in regulatory effectiveness between vertical and horizontal integration. As of July 1, 2019, after the passage of HB 18-1381 the Colorado Legislature stopped requiring medical marijuana businesses to be vertically integrated.[13]

The Petitioner and others attempt to convince the court that by upholding the First District Court of Appeal chaos will ensue in the medical marijuana market. There is no reason whatsoever to believe this. If the temporary injunction issued

[11] https://www.orlandomedicalnews.com/article/584/florida--one-of-the-fastest-growing-medical-marijuana-programs-in-the-usa
[12] https://floridapolitics.com/archives/230981-house-health-quality-panel-hears-former-colorado-pot-czar
[13] https://leg.colorado.gov/bills/hb18-1381

by the trial court is reinstated the Department of Health would maintain its ability to issue reasonable regulations necessary to implement the constitutional amendment passed by the voters of Florida. It should also be noted that the ruling of the trial court does not limit the ability of the state to allow MMTCs to be vertically integrated---the state just can't require it. Therefore, there is no reason the current MMTCs, as well as others that follow, cannot operate as vertically integrated businesses as long as they meet the minimum standards established by the state necessary to register as a MMTC.

The Florida House of Representatives also seems to suggest in their amicus brief that the state has no choice but to impose severe regulatory restrictions on medical marijuana in Florida because marijuana is still illegal at the federal level. They make reference to the directives of the Cole Memo issued by Deputy U.S. Attorney General James Cole in 2013. This argument is flawed. It cannot be credibly claimed that the Legislature was required to impose vertical integration on MMTCs "to account for federal drug policy".

The Cole Memo was an internal guidance Memo for the Department of Justice—it is not federal law. The Memo essentially acknowledged that marijuana is still illegal at the federal level but gave federal prosecutors permission to focus their resources on other issues. Perhaps most important of all----the Cole Memo was withdrawn by former U.S. Attorney General Jeff Sessions on January 2,

2018.[14] Thus, even if the Memo did apply to the issues at hand (and it does not) the Memo is now irrelevant.

CONCLUSION

The statute regulating medical marijuana in Florida violates the clear terms of Article X §29 of the Florida Constitution. In addition, the current system of regulating medical marijuana in our state is not working. Dispensaries are in short supply of product. Moreover, the price of products far exceeds the price of similar medical marijuana products in other states. The medical marijuana amendment was passed for the benefit of patients and yet the current system appears only to benefit the limited number of companies with licenses---not patients. For all of the foregoing reasons Triangle Capital, Inc. respectfully request that this Court approve the First District's decision affirming the injunction issued by the Trial

Respectfully submitted this 15th day of January 2020.

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[14] https://www.justice.gov/opa/press-release/file/1022196/download

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of January 2020 a true and correct copy of the foregoing has been electronically uploaded to the Florida Courts E-Filing Portal and was furnished by e-mail to all parties listed below:

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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).

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