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,

PETITIONERS' REPLY BRIEF

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

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INTRODUCTION

With the passage of what is now article X, section 29 of the Florida Constitution (the "Amendment"), Florida voters sought to "ensure the availability and safe use of medical marijuana by qualifying patients." Art. X, § 29(d), Fla. Const. They did so by constitutionalizing limited state-law civil and criminal immunity for certain entities, known as medical marijuana treatment centers ("MMTCs"), that enable use of a substance that remains illegal under federal law.[1] Art. X, § 29(a), Fla. Const. After the Amendment's passage, the Legislature enumerated criteria for the licensure of MMTCs charged with implementing the will of Florida's voters. Section 381.986, Florida Statutes (the "Statute"), includes a sensible vertical-integration requirement and a reasonable cap on the number of licenses the Department of Health may grant to MMTCs. This framework is consistent with the goal that medical marijuana be *both* available *and* safe. *See* Art. X, § 29(d), Fla. Const.

In creating the licensure requirements, the Legislature exercised its police power, long recognized and frequently reaffirmed by this Court, "to enact legislation in [*sic*] behalf of the general welfare, health, morals, safety, or business

[1] Marijuana, medical or otherwise, remains an illegal Schedule I controlled substance under federal law. *See* 21 U.S.C. § 812(b)(1)A-C, Schedule 1(c)(1). *See* art. X, § 29(c)(5), Fla. Const. ("Nothing in this section requires the violation of federal law or purports to give immunity under federal law.").

or property affected with a public interest," *Scarborough v. Webb's Cut Rate Drug Co.*, 8 So. 2d 913, 915 (Fla. 1942). The Legislature also harmonized MMTC licensure with the licensure schemes of alcoholic beverages, *see* § 561.17, Fla. Stat., and flue-cured tobacco, *see* § 574.03, Fla. Stat. And critically, the Legislature acted consistently with the Amendment's text, including its definition of MMTCs.

In challenging the Statute's vertical-integration and licensure-cap requirements, Florigrown misconstrues the Amendment and asks the Court to disregard the inherent power of the Legislature and the well-established, harmonious relationship between the Legislature and Executive agencies. This Court should reject that invitation and answer the certified question in the negative.

REPLY ARGUMENT

I. THE LEGISLATURE HAS PLENARY AUTHORITY TO CREATE AN MMTC LICENSURE SCHEME.

A. Article X, section 29 of the Florida Constitution grants immunity from state civil and criminal liability to "registered" MMTCs. Art. X, § 29(a)(3), Fla. Const. An entity will enjoy immunity if it satisfies two criteria: the entity (1) "acquires, cultivates, possesses, processes . . . , transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers," and (2) "is registered by the Department [of Health]." Art. X, § 29(b)(5), Fla.

Const. Performing a listed function under the first prong, without more, does not render an entity an "MMTC" within the meaning of section 29. Such performance is a *necessary* condition for an entity that wishes to avail itself of the Amendment's state-law immunity, but it is not *sufficient*. The potential scope of immunity under the Constitution is broad, but to qualify as an MMTC, an entity also must be "registered by the Department." Art. X., § 29(b)(5), Fla. Const.

This registration requirement makes sense in light of the Amendment's full text, which clearly contemplates a robust regulatory regime. The Amendment does not limit the Department, as Florigrown would have it, to the ministerial task of accepting paperwork and maintaining a list of industry participants. The text mandates that the Department set procedures and "standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." Art. X, § 29(d)(1)c., Fla. Const. A licensure scheme serves and flows from this purpose. Indeed, when approving the ballot initiative, this Court observed that "the proposed amendment's provision regarding the specific role for the Department of Health in overseeing *and licensing* the medical use of marijuana" directly connected to the purpose of permitting medical marijuana in the State. *In re Adv. Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 477 (Fla. 2015) (emphasis added).

B. Florigrown recognizes this principle, but it argues that the Amendment

foreclosed the Legislature from setting conditions, such as licensure requirements, for registration by the Department. Florigrown is wrong. This Court has already concluded that section 29(d) does "*not . . . have a substantial impact on legislative functions or powers*" and does not supplant the Legislature's authority to make "primary policy decisions." *See Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d at 478; *see also infra* 8-14. Setting criteria for MMTC registration plainly falls within that primary policymaking authority.

Unlike the United States Congress, which may act only if given authority by the United States Constitution, the Florida Legislature has inherent plenary legislative power. This Court has long reiterated that the Legislature may exercise *any* lawmaking authority consistent with the Constitution. *See Stone v. State*, 71 So. 634, 635 (Fla. 1916). The Legislature may legislate in any area not expressly forbidden. *See State ex rel. Jones v. Wiseheart*, 245 So. 2d 849, 853 (Fla. 1971).

Indeed, Florida's Legislature has a constitutional prerogative to serve as the state policymaker and to protect the welfare of the citizenry. "The police power of the Constitution grants to the Legislature the power to enact legislation in [*sic*] behalf of the general welfare, health, morals, safety, or business or property affected with a public interest." *Scarborough*, 8 So. 2d at 915. This Court has acknowledged that the State thus "may by statute or other appropriate means, regulate any enterprise, trade, occupation or profession if necessary to protect the

public health, safety, welfare or morals." *Golden v. McCarty*, 337 So. 2d 388, 389 (Fla. 1976). The Legislature has exercised this prerogative by creating a mandatory licensure system and setting requirements for various controlled substance industries. For example, Florida law requires any person "engaging in the business of manufacturing, bottling, distributing, selling, or in any way dealing in alcoholic beverages" to apply for and satisfy licensure requirements. § 561.17, Fla. Stat. Likewise, Florida law states that a warehouse for the sale of flue-cured tobacco must obtain from the Department of Agriculture a state license for the privilege of operating. § 574.03, Fla. Stat. In neither circumstance does the Florida Constitution expressly authorize the Legislature to take this initiative. Instead, the nature of the activity, combined with the inherent power of the Legislature, allows the action. *See Silver Show, Inc. v. Dep't of Bus. & Prof'l Reg.*, 763 So. 2d 348, 350 (Fla. 4th DCA 1998) (recognizing that the alcohol-sale licensing scheme stemmed from the State's police power to regulate). The same policy concerns allow for, and indeed necessitate, legislative action mandating and setting parameters for licensure here.

C. Lest there be any doubt about the propriety of legislative action to define requirements for the registration process, the text of the Amendment conclusively resolves the matter. *See* art. X, § 29(e), Fla. Const. ("Nothing in this section shall limit the legislature from enacting laws consistent with this section."). For this provision to have meaning, it must be understood to invite the Legislature to guide

the agency tasked with industry regulation by defining the parameters of the regulatory scheme. *See Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d at 478 (commenting that the Department merely "perform[s] regulatory oversight"); *Fla. Dep't of Health v. Florigrown*, LLC, 44 Fla. L. Weekly D2182, 2019 WL 4019919, at *4 (Fla. 1st DCA Aug. 27, 2019) (Thomas, J., dissenting) (explaining that the legislature and executive branch have roles in regulating medical marijuana). Even the sponsors of the ballot initiative acknowledged as much. Sponsor's Br. at 20, *In re Adv. Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471 (Fla. 2015) (Nos. SC15-1796; SC15-2002) ("[T]he amendment also provides the Legislature an opportunity to enact laws that further the purposes of the constitutional provision.").

Moreover, if, as Florigrown suggests, the Amendment foreclosed legislative action, an entirely new constitutional concern would be injected into the analysis. When reviewing the ballot initiative, this Court would have been constrained to determine that the Amendment did not embrace a single subject. *See* art. XI, § 3, Fla. Const. (forbidding a citizen-initiative proposal from substantially altering or performing the functions of multiple branches of state government); *see also Adv. Op. to Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353-54 (Fla. 1998). But this Court rejected a single-subject challenge after determining that the Amendment, if passed, would "not substantially alter or

perform the functions of multiple branches" because the text made clear that "the Department of Health would not be empowered . . . to make the types of primary policy decisions" reserved for the Legislature. *Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d at 478.

Bereft of express textual support, Florigrown cites *Bush v. Holmes*, 919 So. 2d 392, 408 (Fla. 2006), for its argument that, "where the constitution sets forth a mandate and provides the manner of fulfilling th[e] mandate, additional equivalent alternatives are not authorized." AB at 29. But this Court has cautioned that the *expressio unius est exclusio alterius* canon of construction, on which Florigrown relies, should be "sparingly used in construing the constitution" and only "applied with great caution" for constitutional construction. *Taylor v. Dorsey*, 19 So. 2d 876, 881 (Fla. 1944) (quoting *State v. Bryan*, 39 So. 929, 956 (Fla. 1905)). *Expressio unius* is particularly inapt here because a grant of power to the Executive branch cannot be understood to limit the plenary power of the Legislature. *See Holmes*, 919 So. 2d at 420 (Bell, J., dissenting) (quoting *State ex rel. Jackman v. Court of Common Pleas of Cuyahoga Cty.*, 224 N.E. 2d 906, 910 (Oh. 1967)).

II. THE MMTC LICENSURE STATUTE IS CONSISTENT WITH THE TEXT OF THE AMENDMENT.

Duly enacted laws enjoy a presumption of constitutionality that can only be overcome where their invalidity appears "beyond a reasonable doubt." *Franklin v.*

State, 887 So. 2d 1063, 1073 (Fla. 2004). This presumption reaches its pinnacle when the Legislature passes a law geared towards the health and safety of its citizens. *See Orange Cty. v. Costco Wholesale Corp.*, 823 So. 2d 732, 739 (Fla. 2002); *Burnsed v. Seaboard Coastline R.R. Co.*, 290 So. 2d 13, 18 (Fla. 1974). In those circumstances,

> [*e*]*very* presumption is to be indulged in favor of the validity of a statute and each cause should be considered in light of the principle that the State is the primary judge, and may by statute or other appropriate means, regulate any enterprise, trade, occupation or profession if necessary to protect the public health, safety, welfare or morals.

Golden, 337 So. 2d at 389 (emphasis added). Indeed, "[a] great deal of discretion is vested in the Legislature to determine public interest and measures for its protection," *Newman v. Carson*, 280 So. 2d 426, 428 (Fla. 1973), and this Court has steadfastly refused to "substitute its judgment for that of the Legislature insofar as the wisdom or policy of [a statute] is concerned," *Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1978).

Under these foundational principles, the Statute cannot be found unconstitutional unless it is irreconcilable with the Amendment. *See Franklin*, 887 So. 2d at 1073. The Statute does not even approach that standard, and Florigrown therefore provides no basis for this Court to find it unconstitutional.

A. Florigrown's attack on the vertical integration requirement fails.

Florigrown argues that the statutory provisions requiring vertical integration are inconsistent with the Amendment's text. AB at 25-27. In support of this claim, Florigrown offers only a superficially attractive but ultimately inapt comparison between the Florida Constitution's MMTC definition and the statutory licensure requirement. Florigrown's argument fails because the two provisions it seeks to compare serve two distinct purposes.

As noted above, the first prong of the MMTC definition in article X, section 29 establishes the maximum boundaries of state-law immunity for participants in the medical marijuana field—the universe of entities that *may* have immunity for their marijuana-related activities *if* they are also registered by the Department. Art. X, § 29(b)(5), Fla. Const. The first prong of the MMTC definition does not define all criteria for market participation, and it does not entitle any entity to operate in the State. This meaning is made clear by the second prong of section 29's MMTC definition, which expressly provides that entities qualify as MMTCs *only* if they also are "registered by the Department." *Id.* This second prong leaves ample room for the Legislature to establish the licensure criteria entitling an entity to registration, and to determine what other qualifications an entity within the broad group described by the first prong must satisfy before it may be registered as an MMTC. The Legislature's requirement that an entity "cultivate, process, transport,

and dispense" marijuana, despite the parallels to the language of article X, section 29(b)(5), does not affect the first prong of the constitutional MMTC definition at all. It speaks only to the second prong.

In short, Florigrown's argument fails because the Statute and the Amendment do not conflict. The Legislature acted within the scope of policy discretion afforded to it by the Florida Constitution in setting requirements for licensure and initial market participation. The criteria are consistent with and fall within the broader boundaries of immunity set by the Amendment. *See Florigrown*, 44 Fla. L. Weekly D2182, 2019 WL 4019919, at *4 (Thomas, J., dissenting) ("The statute at issue is 'consistent with this section' because it properly implements the constitutional amendment by correctly limiting the registration of [MMTCs].").

Because the Legislature acted under its plenary legislative power and consistent with the Amendment, the only remaining question is whether the requirement of vertical integration is rational. *See Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963). It is. If, as Florigrown concedes, the Legislature could limit the initial market to a set number of licensed MMTCs, *see infra* at 13-14, the decision to require initial participants to engage in every aspect of marijuana production and distribution makes sense. The Legislature reserved initial market participation only for those entities that could perform all phases of

marijuana production and distribution. In this way, each license produces maximum efficiency for the State and for the patients requiring medical marijuana.

The Legislature retains the authority to expand eligibility for licensure up to the maximum universe of potentially immune MMTCs described in section 29. The Legislature could one day set forth a regulatory framework in which each distributor of "educational materials" to "qualifying patients" must obtain a license from the Department and register as an MMTC before receiving constitutional immunity. But just because that possibility would be consistent with the Constitution does not mean it is required.

Florigrown contends that the Statute's vertical integration requirement is inconsistent with the Amendment because vertical integration allegedly "restricts and diminishes" the medical marijuana industry. AB at 39. For this premise, Florigrown, like the First District Court of Appeal, cites to *Department of Environmental Protection v. Millender*, 666 So. 2d 882 (Fla. 1996). But *Millender* does not stand for that sweeping idea. Indeed, the words "restrict" and "diminish" do not appear in the opinion. At most, *Millender* stands for the dubious proposition that a Court may rely on extrinsic evidence of "commercial[] infeasib[ility]" to ascertain the ultimate meaning of constitutional text where commercial infeasibility of an industry would be an "absurd result." *Id.* at 886-87.

Here, there is no evidence and, even now, no argument that the medical

marijuana industry in Florida is commercially infeasible. Evidence in the record suggests that it is a highly profitable enterprise, (R. 3545), and Florigrown's substantial investment in protracted litigation only underscores this point. In any event, the First District's reliance on *Millender* imposed a restriction on the Legislature's policymaking authority that is extraconstitutional and contravenes the text of article X, section 29 of the Florida Constitution. As discussed above, "[t]he Legislature may exercise any lawmaking power that is not forbidden by organic law." *Savage v. Bd. of Pub. Instruction for Hillsborough Cty.*, 133 So. 341, 344 (Fla. 1931). The licensing scheme survives Florigrown's attack because limiting initial participation to vertically integrated entities strikes a rational balance between, among other things, the competing demands of patient access and safe distribution of medical marijuana.

Finally, Florigrown asks the Court to consider a self-serving "Analysis of Intent" document. The Court should reject this invitation. "[A]ny inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986). Where, as here, the language in question is unambiguous, extrinsic interpretive tools "are not allowed to defeat" it. *Brinkmann v. Francois*, 184 So. 3d 504, 510 (Fla. 2016) (quoting *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992)); *see also Adv. Op. to Governor re*

Implementation of Amendment 4, 45 Fla. L. Weekly S10, 2020 WL 238556, at * 6 (Fla. Jan. 16, 2020) (explaining that this Court adheres to the "supremacy-of-text principle"). Even if the Amendment's text left room for debate, the Analysis of Intent document has no interpretive worth. The only document Florida voters saw when they voted on the Amendment was the statutorily required ballot summary and that language adds nothing to Florigrown's argument.

B. Florigrown's attack on the caps lacks merit.

Florigrown now concedes that the Legislature may, consistent with the Amendment, impose limits on the number of market participants. AB at 33. Having abandoned its prior argument that the Legislature lacked inherent authority to impose a limit on the number of MMTC licenses, Florigrown instead challenges the particular limits chosen by the Legislature in section 381.986. At no point does Florigrown suggest a different limit that would pass constitutional muster under its legal theory. One is left with the impression any licensure cap that allows Florigrown's participation as a registered MMTC would suffice for Florigrown.

Florigrown concedes, as it must, that the Amendment says nothing about the number of licenses the Department must issue. AB at 33. The license cap chosen by the Legislature therefore fails to pass constitutional muster only if it is entirely irrational. But the cap readily satisfies this low burden. The creation of a narrow initial market with growth commensurate with need allows the State to balance the

demand for medical marijuana against the State's ability to ensure safe production and distribution. Incremental and steady increases in the number of authorized licenses serves the ends that even Florigrown recognizes are valid: it ensures that medical marijuana is not diverted to other states, that marijuana is not diverted to minors, and that marijuana is not used for illegal purposes. *See* AB at 33.

Florigrown cites nothing remotely suggesting that the statutory license caps do not suffice to meet the needs of qualifying patients. The record is devoid of any evidentiary basis that the scheme falls short. Faced with this dearth of proof, Florigrown misconstrues a single statement from Department Chief of Staff Courtney Coppola by conflating the number of MMTC *licenses* with the number of MMTC *facilities*. AB at 35. The record reflects that Ms. Coppola did not suggest that 1,993 MMTC *licenses* would be needed to provide access to medical marijuana for qualifying patients. She instead made clear that this number of *facilities—i.e.*, distributing locations owned and operated by the larger corporate MMTCs—would satisfy the demand. (R. 2827-28, 3379). Properly understood, the record in this case provides no factual basis for Florigrown's constitutional attack.

* * *

Contrary to Florigrown's arguments—and the First District's decision under review—the Amendment is not an exhaustive, field-preemptive framework preempting the Legislature's traditional and constitutionally recognized role in

establishing Florida's regulatory policy over controlled substances through its exercise of the police power. The Amendment provides limited state-law immunity for MMTCs that are registered with the Department of Health, but it does not lay down the criteria under which an entity is entitled to registration. Those "primary policy decisions" are left to the discretion of the Legislature, as this Court recognized in approving the Amendment for ballot placement. *Use of Marijuana for Debilitating Med. Conditions*, 181 So. at 478. This Court should reject Florigrown's request for the imposition of different policy judgments in the place of those adopted by the Legislature.

CONCLUSION

Because section 381.986 is consistent with the Amendment, Florigrown did not and cannot demonstrate a substantial likelihood of success on the merits.[2] This Court should answer the certified question in the negative, quash the First District's decision, and remand with directions the case be further remanded to the circuit court for an order denying Florigrown's motion for a temporary injunction.

[2] Florigrown's brief raises several arguments beyond the scope of the question certified by the First District, including arguments regarding whether section 381.986 is a special law. AB at 39. As for Florigrown's arguments related to other criteria for issuing an injunction, *see* AB at 41, the effect of the trial court's injunction, *see* AB at 27, and factual findings underlying the court's injunction, *see* AB at 49, the Department rests on its arguments raised below and in its initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 5th day of February, 2020, through the Florida Courts E-Filing Portal to:

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