IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

PEOPLE UNITED FOR MEDICAL
MARIJUANA, INC., et al,
Plaintiffs,

v. CASE NO.: 2017-CA-001394

FLORIDA DEPARTMENT OF HEALTH;
CELESTE PHILIP, M.D., in her official capacity
as Secretary of Health for the State of Florida;
OFFICE OF MEDICAL MARIJUANA USE;
CHRISTIAN BAX, in his official capacity as
Director of the Office of Medical Marijuana Use.
Defendants.
_____/

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

I. THIS COURT LACKS JURISDICTION BECAUSE PLAINTIFFS LACK STANDING AND THE AMENDED COMPLAINT FAILS TO PRESENT A JUSTICIABLE CONTROVERSY.

At the outset of their response, Plaintiffs acknowledge that this Court may consider only allegations set out within the "four corners of the complaint" in determining a motion to dismiss, Resp. at 2; however, the response then proceeds to rely almost entirely on new allegations to bolster the amended complaint. These unpleaded allegations cannot save Plaintiffs' action from dismissal. As a matter of law, Plaintiffs lack standing, and their amended complaint fails to establish any present, justiciable controversy sufficient for invoking this Court's jurisdiction under Chapter 86, Florida Statutes. The amended complaint should be dismissed.

A. The Three Individual Plaintiffs Lack Standing.

Although alleging that the three individual plaintiffs each have been diagnosed with a "Debilitating Medical Condition," as defined in Article X, section 29 of the Florida Constitution, the amended complaint fails to allege that any one of them has taken steps to become a "qualifying patient" for medical use of marijuana. *See* Art. X, § 29(b)(3), (6), (10), Fla. Const. In the absence of any allegation indicating a present and actual need for a declaration of rights, this case presents no ascertainable state of facts upon which a declaration of rights could be based. *See Helfrich v. City of Jacksonville*, 204 So. 3d 39, 42 (Fla. 1st DCA 2016), *review denied*, No. SC16-2000, 2017 WL 875866 (Fla. Mar. 6, 2017) (vacating and remanding to trial court for dismissal with prejudice where "appellant's request for a declaratory judgment posed nothing more than a hypothetical question raised to assist her in deciding which election to make under the Plan").

The response notes in a footnote that Plaintiff Jordan is a "qualified medical patient," Resp. at 6 n.3, but this assertion is extrinsic to the amended complaint and cannot be considered. *See Nevitt v. Bonomo*, 53 So. 3d 1078, 1082 (Fla. 1st DCA 2010) (reversing where trial court considered material "extrinsic to the amended complaint" in ruling on a motion to dismiss). But even if this new allegation were proper for consideration at the motion to dismiss stage, the individual Plaintiffs would still fall short of sufficiently alleging standing. Notably, the response couches Plaintiffs' standing on the speculative assertion that the smoking of marijuana "*may* be the appropriate treatment" recommended by a physician. Resp. at 7. Given the amended complaint's silence as to whether the individual Plaintiffs possess prescriptions from a licensed Florida physician to smoke marijuana for medical purposes or even that they could qualify for prescriptions to use medical marijuana in any form at all, it falls far short of alleging any

concrete imminent legal injury or present controversy as to a non-hypothetical state of facts relating to the individual plaintiffs. *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002) ("[A]n aggrieved party must nonetheless make some showing of a real threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future."). Because this Court would be required to speculate to fill in the gaps of the individual Plaintiffs' allegations, dismissal is required.

Plaintiffs' reliance on *Olive v. Maas* undercuts their standing argument. *See* Resp. at 6. Critical to the Supreme Court's determination that an attorney had standing to challenge the capped fee schedule for capital postconviction representation was the fact that the attorney had been "placed on the [capital postconviction] registry, accomplished all the necessary steps to be placed on the list and was in fact included on the list." 811 So. 2d 644, 649 (Fla. 2002). Moreover, the attorney was in fact appointed off the registry to provide representation "and began performing his duties as counsel . . . , even initiating a meeting with the client." *Id.* at 649 & n.4 ("Olive did everything possible to represent [the client]—except signing a legally questionable contract."). Here, the amended complaint is devoid of any allegations establishing actual injury or the threat of an imminent harm stemming from the challenged law. Each of the individual Plaintiffs, therefore, lacks standing.

B. PUMM Lacks Standing.

Plaintiffs likewise attempt to bolster PUMM's lack of standing with new allegations regarding its organizational purpose, its membership, and the composition of its board. *See* Resp. at 8. Specifically, Plaintiffs' response asserts that PUMM has representational standing because it "represents patients, growers, producers, medical professionals and medical marijuana advocates." *Id.* Moreover, the response references the "economic interests" of the growers

PUMM represents as sufficient to establish the organization's standing. *Id.* But this is at odds with the allegations of the amended complaint, which does not allege PUMM's representation on behalf of anyone (let alone its representation of the economic interests of marijuana growers). Rather, the amended complaint alleges that PUMM is a "not for profit corporation" organized "to provide research, expert opinions and feedback on a range of medical marijuana issues" and "advocate for the legalization of medical marijuana." Am. Complaint at 2.[1] In addition, PUMM asserts for the first time that its board is composed of "at least one patient with a qualifying medical condition," Resp. at 8, but this new allegation, along with PUMM's new characterization of its role, must be disregarded as extrinsic to the four corners of its pleading.

Even assuming, arguendo, that this Court could consider these new and extrinsic allegations, they do not sufficiently overcome the associational standing hurdle. Just as the individual Plaintiffs failed to allege any actual or imminent injury to establish standing, PUMM's reliance on the hypothetical and speculative circumstances of its members is insufficient to establish standing. Specifically, with regard to PUMM's board members or any other person with a qualifying medical condition that PUMM purports to represent, there still is nothing indicating whether these individuals satisfy the requirements to be a "qualifying patient." The suit remains entirely devoid of any present and particularized controversy, and PUMM fails to satisfy the minimum requirement that it is "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members

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[1] Notably, the amended complaint's allegations are in line with the specified purpose set forth in PUMM's June 9, 2017, Electronic Articles of Incorporation, which note that it is organized to "educate the public on the benefits of medical marijuana." *See* Electronic Articles of Incorporation for People United for Medical Marijuana, Inc. (June 9, 2017), *available at* http://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR%5C2017%5C0614%5C80204268.tif&documentNumber=N17000006228

themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *see also State v. Fla. Workers' Advocates*, 167 So. 3d 500, 506 (Fla. 3d DCA 2015) (for associational standing, association must allege it is "suffering immediate or threatened injury of the kind comprising a justiciable issue had an individual member of the association . . . brought the action").

Apart from PUMM's problem of unalleged facts surfacing for the first time in its response, it advances a standing theory not supported by Florida case law. Plaintiffs assert that Florida has a "second standard for associational standing" stemming out of caselaw addressing when an association has standing in the context of administrative challenges. All the cases relied upon by Plaintiffs originated as administrative actions under Florida's Administrative Procedure Act, and addressed standing requirements in light of the governing statutes.[2] That precedent is inapplicable to this case, which does not implicate an administrative proceeding under Chapter 120. Indeed, the Florida Supreme Court has expressly limited the "modified version of associational standing" in administrative challenges: "[O]ur recognition of associational standing in the Chapter 120 context was not a blanket adoption of the doctrine." *Palm Point Property Owners' Assoc. of Charlotte Cty., Inc. v. Pisarki*, 626 So. 2d 195, 197 (Fla. 1993). Rather, the purpose was to "expand public access" to contest the validity of agency rules in administrative proceedings. *See Fla. Home Builders Ass'n v. Dep't of Labor & Employment Sec.*, 412 So. 2d 351, 352–53 (Fla. 1982) (explaining that "[e]xpansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative

[2] Plaintiffs cite *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008) as "applying the *Florida Home Builders* three-prong test for associational standing in a facial challenge to the constitutionality of a state statute." Resp. at 9 n.6. But *Walton County* originated from administrative petitions under Chapter 120 and, as the First District noted, jurisdiction was properly invoked because the associational plaintiff, for standing purposes, had "satisfied the requirements of section 120.68(1)." *Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot.* 27 So. 3d 48, 56 (Fla. 1st DCA 2006), *quashed by Walton Cty.*

Procedure Act" and applying "an excessively narrow" reading of Chapter 120 would "defeat[] this purpose by significantly limiting the public's ability to contest the validity of agency rules"). Because this is not an administrative action, Plaintiffs must meet the well-settled standing requirements to bring a Chapter 86 declaratory judgment action. *See Fla. Workers' Advocates*, 167 So. 3d at 506 (concluding that trial court lacked a justiciable controversy where, among other things, two plaintiff associations failed to satisfy the standing requirements of *Warth v. Seldin*).

But even under the associational standing test urged by PUMM, the amended complaint falls short. The *Florida Home Builders*'s three-prong test requires that: (1) a substantial number of the association's members are substantially affected by the challenged rule; (2) the rule's subject matter is within the association's general scope of interest and activity; and (3) the requested relief is the type appropriate for the association to receive on behalf of its members. *Fla. Home Builders Ass'n*, 412 So. 2d at 353-54. The amended complaint alleges nothing about PUMM's purported members, let alone that a "substantial" number are directly and concretely affected by the challenged legislation. As a matter of law, the first prong cannot be met without allegations of how many members PUMM has and how many of them are substantially affected by the challenged statute. The third prong is not met because the amended complaint does not show how the requested relief of declaring unconstitutional and unenforceable the definition of "medical use" is appropriate for PUMM to seek on behalf of its members. In short, the insufficiency of PUMM's allegations to establish its standing or state a justiciable controversy deprives this Court of jurisdiction over PUMM's claims.

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In the absence of any plaintiff with sufficient standing, this Court lacks a justiciable controversy. As a result of that significant and fatal defect under Chapter 86, "notwithstanding . . . substantial interest in this case," this Court is "constrained to leave for another day the resolution of [the] constitutional question" it presents. *Apthorp v. Detzner*, 162 So. 3d 236, 240 (Fla. 1st DCA 2015). This Court should dismiss the amended complaint.

II. Plaintiffs Have Voluntarily Dismissed Various Improper Defendants

In light of the Plaintiffs' response and voluntary dismissal of various improper defendants, *see Plaintiffs' Notice of Voluntary Dismissal* (Nov. 7, 2017), the Office of Medical Marijuana and its Director withdraw the arguments concerning whether they are proper defendants on pages 16-19 of the Motion to Dismiss.

III. The Amended Complaint Fails to State a Cause of Action Because the Amendment Does Not Require the Legislature to Authorize Smoking of Marijuana.

The amended complaint should likewise be dismissed for the independent reason that it fails to state a claim for which relief can be granted. Although Plaintiffs repeatedly assert the existence of "direct" and "irreconcilable conflict" between section 381.986, Florida Statutes, and the Medical Marijuana Amendment, *see* Resp. at 13-14, they fail to identify any express requirement that medical marijuana be smokeable. By contrast, the Legislature is expressly authorized to enact laws, so long as they are consistent with the Amendment. Art. X, § 29(e) ("Nothing in this section shall limit the legislature from enacting laws consistent with this section."). Under that express grant of authority, the Legislature implemented a legislative scheme that advances the purposes of the Amendment based on reasonable considerations and conclusions about the public's health, safety, and welfare. *See* Motion to Dismiss at 25-29

(detailing legislative record including evidence of health-related considerations germane to the smoking of marijuana).

A. Section 381.986's Definition of "Medical Use" Is Consistent With the Amendment.

Under Plaintiffs' argument, because the Amendment defines "medical use" (§ 29(6)) and incorporates a specific definition of marijuana (§ 29(4)), the Legislature is powerless to enact any legislation governing the medical use of marijuana. Resp. at 15-16. But this ignores that the Legislature may, without limitation, "enact[] laws consistent with this section." Art. X, § 29(e), Fla. Const. Although Plaintiffs repeatedly assert there is a direct and explicit conflict, they cannot identify any express requirement that smoking is required under the Amendment. In short, there is no conflict or inconsistency between the Amendment's nonspecific definition of "medical use" (that in no way mandates the smoking of marijuana) and a legislative definition that excludes smoking as a harmful delivery method.

Indeed, Plaintiffs' all-inclusive view of the definition of "medical use" ignores that the Amendment evinces an overriding purpose that any medical use be implemented with a focus on health and safety. To that end, the plain language of the Amendment permits the Legislature to enact a range of statutory frameworks implementing production, distribution, and use of medical marijuana. The Amendment, in plain terms, states that "medical use" is use that is "not in conflict with" the regulatory guidelines the State sets. Art. X, § 29(b)(6), Fla. Const. Although Plaintiffs would cabin the State's authority to regulate medical use to merely establishing the appropriate "amount of marijuana to be certified for use," Resp. at 16-17, this approach does not track the plain text of the Amendment. Where the Amendment addresses "administration of an amount of marijuana," as part of the definition of medical use, it does so without specifying—and certainly without mandating—any particular method of administration. *See id.* Moreover, the

Amendment expressly conditions the "use . . . or administration of an amount of marijuana" on the basis that it be in accordance with rules promulgated by the Department of Health. Art. X, § 29(b)(6), Fla. Const. This directly implicates not only administrative action by the Department, but also legislative guidance and direction.

In addition, Plaintiffs' attempt to challenge section 381.986 as a restriction upon physicians' ability to "provid[e] treatment to their patients," Resp. at 19, fails on several grounds. As a threshold matter, none of the Plaintiffs are alleged to be physicians, and therefore none have standing to raise this claim on behalf of parties not present to the action. *McCarty v. Myers*, 125 So. 3d 333, 336 (Fla. 1st DCA 2013) ("It is well-established 'that a party seeking adjudication of the courts on the constitutionality of statutes is required to show that *his* constitutional rights have been abrogated or threatened by the provisions of the challenged act.'" (quoting *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 453 (1943))). On the merits, Plaintiffs' attempt to shoehorn their right "to seek treatment" in the form of smoking marijuana into a physician's "right" to "authoriz[e] smokeable marijuana," Resp. at 19, still falls short. The "physician certification" process set forth in the Amendment authorizes only "medical use" of marijuana, Art. X, § 29(b)(9), Fla. Const.; accordingly, a physician can only authorize a patient's use of marijuana in compliance with what constitutes "medical use." As detailed above, the Legislature's exclusion of the smoking of marijuana as an authorized form of medical use is consistent with the Amendment, and must be upheld as a valid restriction.

Finally, the Amendment's express limitation that it shall not be construed to "require an accommodation . . . of smoking medical marijuana in any public place." Art. X, § 29(c)(6), Fla. Const., fails to establish that the Legislature is prohibited from excluding smoking from medical use. It is one thing to expressly clarify that something is not mandated (i.e., the accommodation

of smoking marijuana in public places); it is entirely a separate matter to mandate something through unstated implication and speculative deduction (i.e., creating a right to smoke marijuana anywhere other than public places). Subsection (c) can be read as accomplishing the former, but not the latter. Indeed, Plaintiffs' reliance on the principle of *expressio unius est exclusio alterius* and *Weinberger v. Board of Public Instruction* illustrates the unsoundness of their position. At issue in *Weinberger* was the direct conflict between an annual bond installment payment schedule set forth in the Florida Constitution and the proposed issuance of bonds by a county board which were concededly contrary to the express schedule set forth in the Constitution. 112 So. 253, 254 (Fla. 1927). The Supreme Court explained that because there was an *express* and *exclusive* limitation in the Constitution on the manner of issuing bonds, there was likewise an implicit prohibition on flouting that explicit limitation through different means. *Id.* at 256. Here, as detailed above, Plaintiffs cannot identify any express and exclusive limitation upon the Legislature's ability to exclude smoking as an authorized form of medical use (regardless of the public or private location of that use), therefore the question of any implied limitation is never implicated.

Plaintiffs' repeated assertion that section 381.986 expressly and directly conflicts with the Amendment's definitions, physician certification process, and limitations section is unsupported by the plain language and overall structure of the Amendment. The Legislature's exclusion of smoking as a permissible form of medical use of marijuana falls squarely within the realm of public health, safety and welfare, and "[e]very presumption is to be indulged in favor of [its] validity." *Golden v. McCarty*, 337 So. 2d 388, 389 (Fla. 1976). The Legislature crafted section 381.986 in a way that is not only faithful to the text of the Amendment but also serves the purposes of the Amendment. In other words, the Legislature has approved a comprehensive array

of methods for medical use of marijuana, geared towards "ensur[ing] the availability and *safe* use of medical marijuana by qualifying patients." Art. X, § 29(d), Fla. Const. (emphasis supplied). Section 381.986 meets these objectives, and Plaintiffs' challenge should be dismissed with prejudice. *See Crews v. Ellis*, 531 So. 2d 1372, 1377 (Fla. 1st DCA 1988) (noting dismissal with prejudice is appropriate where "it is clear that the pleading cannot be amended so as to state a cause of action." (quoting *Albrecht v. Board of Trustees of the Internal Improvement Trust Fund*, 481 So. 2d 555, 556 (Fla. 2d DCA 1986))).

B. Plaintiffs' "Analysis of Intent" Should Be Disregarded Because It Neither Reflects Voter Intent, Nor Does It Even Indicate that the Amendment Requires Smoking.

Plaintiffs' continued reliance on the "Analysis of Intent" attached to the amended complaint should be rejected for several reasons. First, even if the document were issued as a press release by the Amendment sponsor and posted on a "general news" website two weeks before the election, Resp. at 22, that still does not transform it into a reliable source of voter intent. Put simply, there is no way to authenticate how many voters actually reviewed this document before casting their ballot. Plaintiffs' contention that the issue of smoking under the Amendment was "hotly contested" and publicly debated is likewise unsupported. Although Plaintiffs offer citation to three online videos of debates, Resp. at 22 n.12, which have collectively garnered over 45,000 viewings,[3] this number does little to nothing to establish whether the 9.14 million Florida voters[4] who cast a vote on whether or not to approve the Amendment had any inkling of the existence of the self-serving "Analysis of Intent" document.

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[3] This number is based on YouTube.com view totals for each cited video, as of November 30, 2017.

[4] The 2016 General Election vote totals are available from the Florida Department of State, Division of Elections at https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/2016&DATAMODE=.

Second, any resort to external statements and documents is highly problematic when it comes to constitutional provisions enacted through the citizen initiative process. Citizen initiatives are subject to mandatory Florida Supreme Court review that is "designed to insulate Florida's organic law from precipitous and cataclysmic change." *In re Advisory Op. to the Atty. Gen.-Save Our Everglades,* 636 So. 2d 1336, 1339 (Fla. 1994). That review exists to ensure that a proposed citizen initiative does not run afoul of the Florida Constitution's single-subject provision, and to also address whether the ballot title and summary accurately inform the voters of the chief purpose of the proposed amendment "so that the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Id.* at 1341 (Fla. 1994). This pre-ballot placement vetting by the Florida Supreme Court is crucial "because the citizen initiative process does not afford the same opportunity for public hearing and debate that accompanies the other constitutional proposal and drafting processes (i.e., constitutional amendments proposed by the Legislature, by a constitutional revision commission, or by a constitutional convention)." *Advisory Op. To Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1224 (Fla. 2006) (citing *Advisory Op. to the Att'y Gen. re Fish & Wildlife Conservation Comm'n,* 705 So. 2d 1351, 1353 (Fla.1998)).[5] In this instance, allowing the sponsor of a proposed amendment to rely on a self-serving document—issued post-ballot placement approval by the Supreme Court and just two weeks before an

[5] For this reason, Plaintiffs' reliance on *Amendments to the Florida Rules of Appellate Procedure* is misplaced, because that case addressed the Court's failure to consider the "voluminous documents which reflect the history and intent of the 1972 revision of article V," 696 So. 2d 1103, 1104 (Fla. 1996). The 1972 Amendment had originated as a joint resolution enacted by both chambers of the Legislature, and thus was subject to a deliberative drafting and revision process. *See* Manning J. Dauer, *Proposed Amendments to the Florida Constitution, March 14, 1972 Florida Election*, at 1 (1972) (analyzing Senate Joint Resolution No. 52D).

election—to establish what voters understood and intended the language of an amendment threatens the integrity of the citizen initiative process. Nowhere did the ballot title or ballot summary or text of the proposed Amendment suggest to voters that it would require the legalization of the *smoking* of marijuana for "medical use."

Finally, even if it were appropriate for this Court to consider the intent statement (which it should not), the document itself does not support Plaintiffs' contention that the Amendment requires smoking marijuana as medical use. Rather, the statement merely explains that the provision "makes clear that the Amendment does not require that the smoking of medical marijuana be allowed in public unlike the proper use of medical marijuana in a private place which is not illegal." Nowhere, though, does the intent statement say that "proper use" of medical marijuana under the Amendment must include smoking at all.

In sum, the intent statement should be disregarded because it is improper for consideration in construing the Amendment, and it ultimately adds nothing to reflect any voter intent that the Amendment require smoking marijuana as medical use.

CONCLUSION

Because Plaintiffs have failed to allege a justiciable case or controversy and have failed to state a cause of action upon which relief can be granted, the amended complaint should be dismissed. And because there exists no state of facts which Plaintiffs could allege to overcome the constitutional and statutory text, the dismissal should be with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing was e-filed via the Florida Portal which serves all counsel of record and was served by e-mail to Jon L. Mills, Esq., Boies, Schiller Flexner LLP, 100 S.E. 2nd Street, Suite 2800, Miami, FL 33131-2144 at jmills@bsfllp.com and to Karen C. Dyer, Esq., and George R. Coe, Esq., Boies, Schiller Flexner LLP, 121 South Orange Avenue, Suite 840, Orlando, FL 32801 at kdyer@bsfllp.com, and gcoe@bsfllp.com, and to John Morgan, Esq., Morgan & Morgan, 20 North Orange Avenue, Suite 1600, Orlando, FL 32801 at jmorgan@forthepeople.com on this 30th day of November, 2017.

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