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

PEOPLE UNITED FOR MEDICAL
MARIJUANA, INC.; DIANA DODSON;
CATHERINE JORDAN; and
ROBERTO PICKERING

Plaintiffs, Case No.: 2017-CA-001394

v.

STATE OF FLORIDA; FLORIDA DEPARTMENT
OF HEALTH; CELESTE PHILIP, M.D., in
her official capacity as Secretary of Health for the
State of Florida; OFFICE OF COMPASSIONATE USE;
CHRISTIAN BAX, in his official capacity as Director
of the Office of Compassionate Use; FLORIDA BOARD
OF MEDICINE; JAMES ORR, M.D., in his official
capacity as Chair of the Florida Board of Medicine;
FLORIDA BOARD OF OSTEOPATHIC MEDICINE;
and ANNA HAYDEN, D.O., in her official capacity
as Chair of the Florida Board of Osteopathic Medicine,

Defendants.
____/

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INTRODUCTION

This action challenges the Legislature's adoption of the implementing statute for the voter approved constitutional amendment permitting medical marijuana, Art. X, § 29. The Florida Legislature, in adopting Fla. Stat. § 391.986 (2017), chose to prohibit smokeable medical marijuana despite constitutional approval for smokeable marijuana as one of the permissible treatments for patients with debilitating medical conditions. The legal standard for reviewing any statute typically accords deference to the legislative act. That presumption vanishes when a statute is in direct conflict with the constitution. As stated in *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006): "Acting within its constitutional limits, the Legislature's power to resolve issues of civic debate receives great deference. Beyond those limits, the Constitution must prevail over any enactment contrary to it." Here, because of the direct conflict between Art. X, § 29 and Fla. Stat. § 391.986, it is the duty of the courts to protect the constitution and the rights of citizens.

In short, the statute at issue in this case abolishes the right of patients with debilitating medical conditions to seek constitutionally authorized medical treatment. Specifically, the plaintiff patients in this case each have medical condition - ALS, AIDS and PTSD - which authorizes them to utilize medical marijuana in their treatment if they are certified by a Florida physician to receive the treatment. Under the constitution, their physician may authorize smoking marijuana as a treatment option

In the scores of cases where Florida courts have found a Florida statute unconstitutional, the court determines that the state has passed a law that conflicts with the constitution. There is no requirement for evil intent. The statute may be an enactment that fulfills a state purpose. However, the constitution defines the limits of legislative power and protects individual rights of citizens.

LEGAL STANDARD

In determining a motion to dismiss the allegations of the complaint must be accepted as true and the court should only look at the four corners of the complaint. *Sealy v. Perdido Key Oyster Bar & Marina, LLC*, 88 So. 3d 366, 368 (Fla. 1st DCA. 2012), citing *Nevitt v. Bonomo,* 53 So. 3d 1078, 1081 (Fla. 1st DCA 2010). A motion to dismiss tests the legal sufficiency of the complaint, it does not permit findings as to factual issues. *Sealy*, 88 So.3d at 367 – 368, citing *Felder v. Dep't of Mgmt. Servs., Div. of Retirement.*, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008). Indeed, for the purposes of a motion to dismiss for failure to state a claim, "'allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff.'" *Wallace v. Dean*, 3 So. 3d 1035, 1042 – 1043 (Fla. 2009) (emphasis omitted), quoting, *Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983).

ARGUMENT

I. This Case Presents An Actual, Present and Practical Need For A Declaratory Ruling That Section 381.986, Florida Statutes (2017), Deprives Plaintiffs By An Unconstitutional Statute the Rights Guaranteed Under the Constitution.

Defendants argue there is no case and controversy until Plaintiffs seek and are actually denied access to medical marijuana in a form for smoking, *then* seek to enjoin prosecution for violation of Fla. Stat. § 381.986 or Florida's criminal statutes regarding the use of marijuana. This is simply not the case.[1] The Declaratory Judgment Act is specifically designed to allow the courts to provide relief from a denial of an immunity, power, privilege or right.

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[1] The Declaratory Judgment Act specifically provides that a Court may render declaratory judgments on the existence, or nonexistence;

(1) Of any immunity, power, privilege, or right; or

Here, the statute prohibits the ability of a patient and their physician to determine that a particular medical use of marijuana (smoking) is appropriate for treatment. This statutory prohibition means that patients have a specific and immediate question as to their immunity, powers, privileges and rights under the Constitution. Therefore, the issue is a clear example of the type of question that the Declaratory Judgment Act is designed to adjudicate.

To avoid any doubt, the Florida Declaratory Judgment Act further provides that persons may invoke the Court's power to construe in the following circumstances:

> Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

Fla Stat. § 86.021 (emphasis added). Indeed, as the Court stated in *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952), if the Plaintiffs meet the requirements to seek a Declaratory Judgment, "there is almost no limit to the number and type of cases that may be heard under this statute." Plaintiffs in this case are interested parties whose rights are affected by a statute. They are patients

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> (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.
>
> Fla. Stat. § 86.011.

diagnosed with ALS, AIDS and PTSD, "debilitating medical conditions" as defined by Art. X, § 29(b)(1) seeking treatment as well as an organization that represents patients and industry participants and which has medically qualified individuals on its board at least one of whom intend to seek treatment.

Fla. Stat. § 86.051 provides that the fact that certain events will occur in the future is no defense to an action for a declaratory judgment: "Any declaratory judgment rendered pursuant to this chapter may be rendered by way of anticipation with respect to any act not yet done or any event which has not happened, and in such case the judgment shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already happened before the judgment was rendered." The plaintiffs need not be actually rejected for treatment because the law denies them access to utilizing smoking medical marijuana as a treatment option.

The declaratory judgment statute is to be liberally construed to effect its purpose "to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991); *Chiles v. Children A, B, C, D, E, and F,* 589 So. 2d 260, 263 (Fla. 1991). While declaratory judgments are not for "questions propounded from curiosity," they are for questions that "should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; the law applicable to the facts, that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic in the interest in the subject matter. . . ." *Id.* In the instant case, the plaintiffs have debilitating medical conditions as defined by the constitution. It is indisputable that the current statutory law prohibits them from seeking treatment that is constitutionally authorized. The instant case is the quintessential example of a present and actual controversy under the

declaratory judgment statute. There is a present actual, controversy for patients with debilitating medical conditions who have a constitutional right to seek medical treatment with medical marijuana -- including smoking medical marijuana -- because the implementing statute denies them that constitutional right.

Implementing the Florida Constitution is an essential governmental function because it secures through legislation and regulation the rights and liberties expressed in Florida's highest law. Courts have long upheld the granting of declaratory relief where the issues involved "the public interest in the settlement of controversies in the operation of essential governmental functions and in the disbursement of public funds." *Chiles v. Children A, B, C, D, E, and F.*, 589 So. 2d 260, 263 (Fla. 1991), citing *Overman v. State Bd. of Control*, 62 So. 2d 696 (Fla. 1952).

II. **Plaintiffs PUMM and each of the medical marijuana patients have specific and direct interests in the ability for qualified patients to have access to the treatment option of smoking medical marijuana.**

In order to have standing to bring this action, "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. *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 453 (Fla. 1943); *see also*, *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980) (plaintiff should have a direct and articulable stake in the outcome). Unquestionably, each plaintiff is threatened by implementation of the new statute and each has a current interest in enforcing their constitutional interest.

PUMM has an interest in enforcing this right on behalf of the patients as well as the growers, medical providers, and advocates that it represents. The individual Plaintiffs have a right in

enforcing their own right to seek treatment through physician approved use. Their constitutionally-protected right to seek treatment has been legislated out of existence.[2]

A. Each of the Individual Plaintiffs Has Standing to Pursue this Action.

Each of the individual Plaintiffs has a specific constitutionally "qualifying medical condition" that permits them to seek medical marijuana treatment through a qualifying physician.[3] Each of them also has the current intention to pursue their options for smokeable marijuana as permitted by the Florida Constitution. Because the Declaratory Judgment Act specifically foresees the resolution of current doubts about future events, courts have permitted suits for declaratory judgments where the plaintiff intends to pursue a specific course of action. *Holley v. Adams*, 238 So. 2d 401, 404 (Fla. 1970) (Plaintiff alleged that he intended to be a candidate for the office of Justice of the Florida Supreme Court). *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002), is instructive. In that case, an attorney who sought appointment as counsel through Florida Registry for death row post-conviction proceedings had standing and the court had jurisdiction to examine and enter a declaratory judgment regarding a contract, even though the attorney had never signed contract. The Court held that "[t]o say that Olive, a registry attorney, who simply stopped short of signing the contract, lacks standing to seek a declaratory judgment is to narrow the proper interpretation which has been consistently given to the Declaratory Judgment Act. *Id.*, 811 So. 2d at 649-650.

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[2] This Court should address actual controversies and can do so in the context of declaratory judgment. This case pits individuals who intend to seek medical marijuana as permitted by the Florida Constitution against state actors who have eliminated the constitutionally protected right to smokeable marijuana, and, therefore, the Plaintiffs' have a direct interest in the outcome. Defendants' citation to *Montgomery v Dep't of Health & Rehabilitative Servs.*, 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985), does not assist the Court with its determination of standing in this case because that case addresses standing in the context of mootness.

[3] Indeed, although not necessary for standing, Plaintiff Jordan is a qualified medical patient pursuant to Art. X, § 29(b)(10) and Fla. Stat. § 381.986(1)(l).

The forward looking nature of relief under the Declaratory Judgment Act specifically grants plaintiffs such as the individual plaintiffs here the right to make their intention to seek treatment through the smoking of medical marijuana known and to obtain a declaration of their rights.[4] There is absolutely no doubt that these patients will seek relief for their conditions. To obtain that right they must seek to become a qualifying patient. To become a qualifying patient under Art. X, § 29 a person must have a debilitating medical condition, a physician certification and a valid qualifying patient identification form. Art. X, § 29(b)(10). To obtain a physician certification, the patient must specifically have a physical examination, a review of the patient's medical history and a consideration of the appropriateness of medical marijuana for that patient. The individual plaintiffs are denied their right to seek a treatment that is authorized and may be the appropriate treatment determined by their physician.

There is no doubt that each of the Plaintiffs suffers a special injury that grants them standing to pursue this action. The individual plaintiffs each have a constitutionally qualifying debilitating medical condition that permits them in particular, but not the vast majority of Floridians, the right to seek treatment with medical marijuana. Art. X, § 29 and Fla. Stat. § 391.986 were created to benefit those, such as Plaintiffs, with these medical conditions. The plaintiffs and many others with debilitating medical conditions are dramatically affected by the unconstitutional restriction of the right to seek treatment that includes smoking marijuana in 391.986. This direct impact fulfills

[4] For this same reason, this case is unlike those such as *Apthorp v. Detzner*, 162 So. 3d 236, 240-241 (Fla. 1st DCA 2015) where the dispute is merely hypothetical. In that case, there was no controversy before the court because no public officer had ever used the type of blind trust that was challenged and plaintiff's intention and future actions could not change the hypothetical nature of the case. *See also*, *Helfrich v. City of Jacksonville*, 204 So. 3d 39 (Fla. 1st DCA 2016); *Santa Rosa Cty. V. Admin. Comm'n Div. of Admin. Hearings*, 661 So. 2d 1190, 1192 (Fla. 1995) (after settlement there was no controversy between the parties).

standing requirement under Florida law. *Alachua Cty. v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st DCA 2003).[5] Each plaintiff is denied their individual constitutional right to seek authorized medical treatment. Art. X, § 29(b)(9).

B. PUMM Has Standing to Pursue this Action.

PUMM is not merely a political interest group as argued by the State. PUMM is also a Florida non-profit corporation that represents patients, growers, producers, medical professionals and medical marijuana advocates all of whom are directly affected by the Florida Legislature's restriction of the rights secured by Art. X, Section 29. PUMM's board members include at least one patient with a qualifying medical condition who intends to seek permissible treatment pursuant to Art. X, Sec. 29. In addition to the economic interests of the growers that are affected by the Fla. Stat. § 381.986; the patients PUMM represents and at least one board member are directly affected by the Florida Legislature excluding marijuana in a smoking form from the types of medical marijuana permitted by Art. X, Section 29. For the same reasons as discussed above, there is no doubt that the patients PUMM represents and its board member with a debilitating medical condition have a right to bring an action in their own names. Producers are restricted on the type of medical marijuana they may make. Therefore, PUMM satisfies the requirement for associational standing that the members themselves would have the right to bring a suit on their own behalf. *See*

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[5] Defendant cites several cases that are not precedent for the instant case. For example, *State v. Fla. Consumer Action Network*, 830 So. 2d 148 (Fla. 1st DCA 2002)Helf is not on all fours with this case because in that case, the plaintiffs did not allege the denial of a direct constitutional right, but instead alleged "nonspecific" and "hypothetical" injuries including that a statute "denied Floridians the right of having an effective means 'of assuring product, family and personal safety through the civil justice system. . . .'" *Id.* at 153 quoting complaint. Similarly, *Fla. Soc'y of Ophthalmology v. State, Dep't of Prof'l Regulation*, 532 So. 2d 1278, 1279 (Fla. 1st DCA 1988) is not relevant to this dispute because in that case the Plaintiff alleged a conflict between two statutes without any factual basis and alleged the potential for a decline in eye care without any factual allegations that such a decline had occurred.

State v. Fla. Worker's Advocates, 167 So. 3d 500, 506 (Fla. 3d DCA 2015); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

PUMM would also have standing under Florida's second standard for associational standing. "The three-prong test[1]-for associational standing in the context of administrative proceedings, *Florida Home Builders Ass'n v. Dep't of Labor & Employment Sec.,* 412 So. 2d 351 (Fla.1982), is equally applicable" to other legal contexts. (See *Hillsborough County v. Florida Restaurant Ass'n, Inc.,* 603 So. 2d 587, 589 (Fla. 2d DCA 1992), applying the associational standing tests in administrative challenges to a challenge of the constitutionality of a county ordinance).[6] In *Florida Home Builders,* the Supreme Court of Florida adopted an associational standing test for an administrative rule challenge: "an association must demonstrate that a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members." *Id.* at 353–54.

The Florida Supreme Court revisited associational standing in *NAACP, Inc. v. Florida Bd. of Regent,* 863 So. 2d 294 (Fla. 2003) and held that the NAACP had standing to challenge rule amendments affecting affirmative action programs because "a substantial number of the association's members were both prospective applicants to the State University System and were minorities." This class of affected persons, which does not constitute the majority of NAACP membership, were still a "substantial number" for the association to assert standing. "The cost of instituting and maintaining a rule challenge proceeding may be prohibitive" for members of some

[6] See also *Walton County v. Stop Beach Nourishment, Inc.,* 998 So. 2d 1102, fn.15 (Fla. 2008) applying the *Florida Home Builders* three-prong test for associational standing in a facial challenge to the constitutionality of a state statute.

groups and associational standing obviates those policy concerns. Patients with debilitating medical conditions are in a similarly difficult position. Associational standing would remedy the inequity of having individual members endure personal adjudication of their constitutional rights. PUMM represents the thousands of patients who have debilitating medical conditions who will be restricted by the implementation of 381.986.

PUMM's standing is also based on the relief PUMM seeks -- to declare a government action void. The action in the instant case seeks a declaratory judgment that Section 381.986 is unconstitutional. The Florida Supreme Court differentiated the standing necessary to enforce or attack a valid zoning ordinance ("a legally cognizable interest") and the standing necessary to attack an allegedly void ordinance ("Any affected resident, citizen or property owner of the governmental unit in question…"). *Renard v. Dade County,* 261 So. 2d 832, 838 (Fla. 1972). Courts in Florida have conferred standing for groups not "substantially affected" when the issue involves an adjudication over the validity of a government body's action. See *Upper Keys Citizens Ass'n, Inc. v. Wedel*, 341 So. 2d 1062, 1063 (Fla. 3rd DCA 1977) (holding that a private non-profit citizens' association did not need to meet the "specialized injury" requirement when ordinance was being attacked on grounds that it was enacted illegally). Here, PUMM is seeking to declare legislative action void.

The composition of PUMM therefore satisfies the requirements for associational standing. *State v. Florida Worker's Advocates,* 167 So.3d 500, 506 (Fla. App. 2015); *citing Warth v. Seldin*, 422 U.S. 490, 510 (1975). Defendants state: "it is well settled that money spent by an advocacy group on generalized lobbying is not an injury in fact." However, Defendant cites *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 980 (11th Cir. 2005), which involved a third party unsuccessfully asserting standing to challenge a town's rescission of a contract with another property owner that

affected rights of the third party. PUMM's interest is much more substantial in that it is challenging a legislative act as void and unconstitutional and, further, that the individuals it represents and at least one member of its board would have standing as individuals.

III. The Department of Health and The Office of Medical Marijuana Use and Their Officers Are Proper Parties

The state concedes that the Florida Department of Health is a proper party. Plaintiffs consent to the dismissal of the State of Florida, the Florida Board of Medicine and the Florida Board of Osteopathic Medicine and those entities' officers. Plaintiffs will file a dismissal of those parties shortly. Defendants also argue that the Office of Medical Marijuana Use is not subject to suit and does not have the necessary enforcement authority to make that Office a proper defendant. Each of Defendants' arguments is incorrect as a matter of law as addressed below.

A. Office of Medical Marijuana Use

Defendants argue that the Office of Medical Marijuana Use ("OMMU") should be dismissed from this action because it has "no authority for OMMU to *enforce* anything at all." Defendants' argument is simply contrary to Fla. Stat. § 385.212 that provides that the OMMU "shall administer and enforce" Section 381.986 (the implementing statute for the constitutional provision). Because the OMMU is the designated body to enforce the medical marijuana statute, there is no question that it is a proper defendant pursuant to *Atwater v. City of Weston*, 64 So. 3d 701, 703 (Fla. 1st DCA 2011), both because of OMMU's specific enforcement responsibilities under the statute and actual, cognizable interest in the subject matter of this action.

Indeed, even if the OMMU did not have the statutory responsibility to enforce Fla. Stat. § 381.986, the courts have found that parties beyond the one(s) designated to enforce the statute can be proper defendants to constitutional challenges. Where the defendants have taken an adverse and antagonistic position to that of the plaintiffs or would be necessary parties to determine the State's

responsibility under the constitution, those parties have been held to be proper parties. *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 402-403 (Fla.1996) *citing Florida Dep't of Educ. v. Glasser*, 622 So. 2d 944, 948 (Fla. 1993) (Declaratory action should join "all persons who have an actual, present, adverse, and antagonistic interest in the subject matter."). *Brown v. Butterworth,* 831 So.2d 683, 689–90 (Fla. 4th DCA 2002), is also instructive. In *Brown* the Senate President was held to be a proper party in declaratory action challenging constitutionality of Legislature's congressional redistricting scheme because of the official's interest in defending the scheme against claims of discriminatory effect).

Where a governmental defendant is not the enforcing authority, the courts look to two additional factors to determine whether a defendant is a proper party: (1) whether the action involves a broad constitutional duty of the state implicating specific responsibilities of the state official; and (2) whether the state has an actual, cognizable interest in the challenged action. *Atwater v. City of Weston*, 64 So. 3d 701, 703 (Fla. 1st DCA 2011); *see also Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 (Fla. 1996); *Brown v. Butterworth*, 831 So. 2d 683, 689-690 (Fla. 4th DCA 2002). Applying this standard to this case, the OMMU has the specific responsibility of enforcing Fla. Stat. § 381.986 and it has an actual, cognizable interest in the outcome of this action.

Defendants also argue that the OMMU does not have the capacity to be sued, however, the cases asserted by the Defendants do not support the proposition for which they are cited. Defendants assert that under *Daniels v. State Rd. Dep't*, 170 So. 2d 846, 849 (Fla. 1964) a government body must be a "body corporate" to which the Legislature accords the power to sue or be sued. Yet there the Court was examining whether an agency was subject to suit under Section 29 of Article XVI of the 1885 Constitution (a provision dealing with just compensation for takings) and even concluded that the court "had in mind private corporations only, and not a public body" in enacting the provision. *Id.* at 849.

Defendants incorrectly cite case law as supporting the position that a suit is authorized against a state entity "only because" a statute conferred the "usual powers of a body corporate." The case cited for this is *Fla. Livestock Bd. v. Gladden*, 86 So. 2d 812, 813 (Fla. 1956). This case does not use the term "only" and does not state this conferral as the exclusive way to bring suit against a state entity. Furthermore, the issue in the case was whether a prevailing livestock owner was entitled to interest on his judgment from a state Board, not whether he had standing to sue. Defendants also incorrectly cite *Kizar v. Wittenberg*, 398 So. 2d 1002, 1003 (Fla. 5th DCA 1981) in the same sentence. The issue here is whether a state board or commission may *be sued*, but the citation refers to the legal rule limiting a state entity's ability *to sue*.

Defendants also incorrectly cite *State, Dep't of Elder Affairs v. Caldwell*, 199 So. 3d 1107, 1110 (Fla. 1st DCA 2016), and it is not analogous to the facts in the instant case. In *Caldwell*, the Court found no waiver of sovereign immunity because the statute under which the plaintiff brought the action applied to a "person" or "other entity." In contrast, this case challenges a statute under a constitutional provision, one-fifth of which is devoted to delineating the "Department's Duties" in protecting the medical use of marijuana. As the enforcing body for the statute, the OMMU is a proper defendant, acting under the authority of the Department of Health which indisputably has the capacity to be sued.

IV. Plaintiffs' Complaint States a Cause of Action that Section 381.986 Fla Stat. Directly Conflicts with Article X, Sec 29.

The discussion below demonstrates that the statutory redefinition and prohibition of smoking medical marijuana as a treatment option directly conflicts with the plain meaning, context and intent of Article X section 29.

The defendants make three arguments each of which fails because of the direct conflict of the statute in question with the constitution:

1. Defendants argue that Legislative actions are presumed to be valid. There is no presumption in favor of legislation that explicitly conflicts with the constitution. It is axiomatic that the constitution prevails and that courts have a duty to protect the constitution's mandates.

2. Defendants argue that Article X section 29 does not "authorize the use of medical marijuana." That is not the issue. The constitution gives the right to seek treatment for debilitating diseases with the certification of a doctor. The statute has limited that right in direct conflict with the text of the constitution.

3. Defendants argue that the legislature may redefine medical marijuana. However, in the statute at issue, the legislature has redefined medical marijuana to directly conflict with the authorization for treatment in Article X section 29. The redefinition prohibits a doctor from prescribing smoking as a treatment and abolishes a patient right to seek treatment through the smoking of medical marijuana.

The arguments below demonstrate the irreconcilable conflict between the statute and Article X section 29. The conflict is created when the statute, 381.986, defines medical use and then creates an exception.

> "(j) "Medical use" means the acquisition, possession, use, deliver, transfer, or administration of marijuana authorized by a physician certification. The term does not include:
>
> …
>
> 2. Possession, use or administration of marijuana **in a form for smoking**, in the form of commercially produced food items other than edibles, or of marijuana seeds or flower, except for flower in a sealed, tamper-proof receptacle for vaping."

(Emphasis added.) The exception created in subsection 2 creates the direct conflict with Article X section 29 in several ways including the definition of marijuana and the definition of the role of the physician. In fact, the exception attempts to re criminalize the possession, use or administration of marijuana in a form for smoking.

A. The Statutory Definition of "Medical Use" in Section 381.986, Fla. Stat. (2017), is Inconsistent with the Constitutional Definitions Passed by Voters as Art. X, Sec. 29(B)(4).

The statute excludes "possession, use or administration of marijuana in a form for smoking" from the statutory definition of "medical use." This definition is inconsistent and in direct conflict with the definition "medical use" as defined in Art. X, § 29(b)(6) which does not exclude smokeable medical marijuana. It is also in conflict with the definitions of "cannabis" and "low-THC cannabis," which incorporate the 2014 Florida Statutes' definitions of each term.[7]

By redefining "medical use" to exclude "possession, use or administration of marijuana in a form for smoking," section 381.986, in effect, restricts the constitutional definition of "cannabis" and "low-THC cannabis" because it prohibits the medical use of marijuana in the whole-leaf or whole-flower form, both of which are included in the 2014 statutory definitions. By incorporating a specific statutory definition into the Constitution in Section 29(b)(4), the voters have prohibited any modification of that constitutional definition. In doing so, section 381.986 violates the constitutional provision.

Defendants argue that the Legislature has the authority to adopt a more restrictive definition of "medical use" than appears in the Constitution. The term "medical use" was defined in Art. X, Section 29. The constitutional definition places no limitation on the use of marijuana in a form for smoking:

> "Medical use" means the acquisition, possession, use, delivery, transfer, or administration of an amount of marijuana not in conflict with Department rules, or of related supplies by a qualifying patient or caregiver for use by the caregiver's designated qualifying patient for the treatment of a debilitating medical condition."

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[7] See Fla. Stat. § 893.02(3) (2014) and Fla. Stat. § 381.986(1)(b) (2014).

Clearly the statute that says explicitly that "medical use" does not include "marijuana in a form for smoking" conflicts with the constitutional definition that incorporates the definition of marijuana that is not restricted by the term "in a form for smoking." Because the constitutional definition incorporates explicitly the definitions of cannabis that are broader, a statute that incorporates a narrower definition that redefines and restricts "medical use" is clearly in conflict and unconstitutional.

The Constitution specifically incorporates the term marijuana to include the definition of cannabis and Low-THC cannabis as defined in the Florida Statutes.[8] Constitutional codification of statutory language ensures consistency in the immunities, powers, privileges and rights protected under the Constitution. Also, the plain language of the provision does not permit the legislature or the Department to regulate in a way that is inconsistent with Section 29.

Furthermore, the Defendants' interpretation of Section 29's reference to the Department of Health is simply incorrect. The Defendants suggests that the grant of authority to the DOH to determine the amount of medical marijuana that is adequate empowers the legislature to define medical use and treatment. (Motion, p. 23) The reference to the Department of Health in the actual medical use definition of Section 29 is a reference to the Departments right to ***regulate the <u>amount</u>***

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[8] Cannabis is defined in Fla. Stat. § 893.02(3) (2014): "All parts of any plant of the genus *Cannabis,* whether growing or not, the seeds thereof; the resin extracted from any part of the plant ; and every compound, manufacture, salt derivative, mixture, or preparation of the plant of its seeds or resin . . . ." There is no dispute that § 893.02(3), part of Florida's criminal code, includes smokeable marijuana. Since the passage of the Medical Marijuana Amendment, this statute has been amended to add the following language: "The term ["cannabis"] does not include "marijuana," as defined in s. 381.986, if manufactured, possessed, sold, purchased, delivered, distributed, or dispensed, in conformance with s. 381.986." Low-THC cannabis is defined in Fla. Stat. § 381.986(1)(e) (2014): "A plant of the genus *Cannabis*, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight; the seeds thereof; the resin extracted from any plant of such plant; or any compound, manufacture, salt, derivative, mixture or preparation of such plant or its seeds or resin that is dispensed only from a dispensing organization."

of marijuana to be certified for use -- not the medical procedure for use of medical marijuana.' Defendants read the incorporation of Department rules as "inherently contemplat[ing] legislative action and direction," but Section 29 does no such thing. The text of (subsection) does not empower the DOH or the legislature to restrict medical treatment. In fact, section 29 (e) specifically says that legislative actions may only be taken *consistent* with the constitution. The statutory exception from medical use for marijuana in a form for smoking is a direct irreconcilable conflict with the constitution.

Defendant argues that the implementation law is all about medicine and the legislature has the power to enact laws relating to the health and safety of their citizens. Of course, they do. But, as the provisions of section 29 make certain minimums explicit, including smokeable medical marijuana, the legislature may not enact laws inconsistent with the constitution. Police powers cannot be exercised in a vacuum and are always defined and limited, by the Constitution. The legislature is entitled to debate and resolve policy differences through legislation. There are policy differences on the use of medical marijuana. Other states resolve the issues involving smoking in different ways. Defendant cites that there are differences. Indeed, there are. However, none of the states cited by defendant involved a state statute restricting smoking that conflicted with a constitutional amendment.[9] A statute such as 381.986 that is in conflict with a provision of the constitution cannot stand. As the Florida Supreme Court said: "Acting within its constitutional limits, the Legislature's power to resolve issues of civic debate receives great deference. Beyond

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[9] See Motion, p. 35 (citing Minn. Stat. Ann. § 152.22, Subd. 6(a)(4) (2016); N.Y. Pub. Health Law § 3360 (1) (2014); Ohio Rev. Code Ann. § 3796.06(B)(1) (2016); 35 Pa. Stat. Ann. § 10231.304(b)(1) (2016); W. Va. Code Ann. § 16A-3-3(b)(1) (2016).

those limits, the Constitution must prevail over any enactment contrary to it." *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006)

Policy differences continue in a changing landscape. In fact, even with federal restrictions the federal government allows smoking for medical reasons for some in Florida.[10]

Defendants admit that Section 29 defines medical use of marijuana. [Motion, p. 23] They state that the term medical use "is given an explicit definition" in Section 29 [Motion, p 23]. Of course they do not concede that section 29 preempts 381.986's contradictory limited definition of medical use. The defendants suggest that if the framers wanted to define smoking as a legalized use, the framers should have said so. They argue: "Had the framers or voters intended to legalize smoking by adopting the Amendment, they could have done so." (Motion, p. 25) This argument simply misses the point of the amendment. The admission that Section 29 defines medical use is the central issue. The purpose of Art. X, § 29 was to define medical use and place the judgment for treatment in the hands of patients and their physicians. That is precisely what Section 29 of the constitution does. The statute takes that discretion out of the hands of the patients and physicians and makes a statutory rather than medical judgment that excludes smoking as a treatment. That legislative action is in direct conflict with the constitution.

[10] Indeed, even the Federal government permits the use of smokeable marijuana for a limited number of conditions, including by residents of the state of Florida pursuant to the Compassionate Investigational New Drug Program. *See* https://www.cbsnews.com/pictures/free-pot-federal-program-ships-marijuana-to-four/

B. Section 381.986, Fla. Stat. (2017) Defines the "Physician Certification" Process in a Way that Directly Conflicts with the Right to Seek Treatment in Section 29.

In addition to being in conflict with the definition of medical use, the implementing legislation is also in direct conflict with the physician certification process. Physicians have the ability to authorize the use of smoking medical marijuana as a treatment for debilitating medical conditions under Section 29. Subsection (a)(2) of Art. X, § 29 of the Florida Constitution provides: "A physician shall not be subject to criminal or civil liability or sanctions under Florida law solely for issuing a physician certification with reasonable care to a person diagnosed with a debilitating medical condition in compliance with this section." The constitution confers broad discretion on qualifying physicians. The constitutional definition of "Debilitating Medical Condition" further establishes the essential role that physician discretion plays in the constitutional scheme: ". . . or other debilitating medical conditions of the same kind or class as or comparable to those enumerated, and *for which a physician believes* that the medical use of marijuana would likely outweigh the potential health risks" (emphasis added) Art. X, § 29(b)(1).

The implementing bill prohibits the physician from exercising the option of authorizing smokeable medical marijuana. The relevant section of the Implementing Bill, Section 381.986(1)(j)(2.), Fla. Stat. (2017), excludes from the definition of "medical use" marijuana in a form for smoking. This provision unconstitutionally restricts physicians in providing treatment to their patients. It places a substantial qualification on the constitutional right of physicians to "issue a physician certification with reasonable care" by excluding a major type of use from the definition of "medical use." This necessarily restricts the right of patients to seek treatment under the Constitution and is invalid.

C. Section 381.986, Fla. Stat. (2017) Exceeds Constitutional Limitations By Prohibiting Smoking of Medical Marijuana in Public *and* in Private Places in Direct Conflict with the Plain Language of Art. X, Sec. 29(c)(6).

In conferring a specific right to use medical marijuana, the drafters could not have been clearer as to the constitutional meaning of the key terms animating this new right. To that end, the drafters provided for specific definitions of terms like "medical use" in the Constitution itself, which did not exclude marijuana in a smokeable form. The drafters did authorize limitations on smoking in public places.

Section 29, aside from declaring qualifying patients and physicians as "not subject to liability" for accessing treatment for debilitating medical conditions, specifically enumerates the limits of this immunity. Subsection (c)(6) states: "Nothing in this section shall require any accommodation…of smoking medical marijuana in any public place." This provision authorizes limitations on **locations** where the constitutional right may be exercised. However, it implicitly forbids legislative limitations on **delivery mechanisms** for authorized treatment. Specifically, the provision does not authorize a limitation on smoking medical marijuana in any private place for treatment authorized under section 29.

Subsection (c)(6) of Article 29 permits policies to prohibit smoking in a "public place." This limitation operates as a location-based restriction on what is otherwise a constitutionally-codified right: the right to the authorized use of medical marijuana. The Legislature violated the Constitution, and infringed on the exercise of these rights, by restricting the constitutional definition to not include a form of medical use that is specifically contemplated in the Amendment. The authorization to restrict physical locations for smoking does not limit treatment options. In fact, the principle of statutory construction known as *expressio unius est exclusio alterius,* clearly demonstrates the intent to allow restrictions on location but not on delivery mechanisms. If the

Constitution prescribes the manner in which to conduct an act, then that manner is exclusive, and the legislature does not have the power to enact a statute that would defeat the purpose of the constitutional provision. *Weinberger v. Bd. of Pub. Instruction*, 112 So. 253, 256 (1927) (citations omitted).

Article X, § 29 clearly allows the legislature to prohibit the smoking of medical marijuana in a public place. However, if that language is also construed as to allow the prohibition on smoking in a private place, then the provision as a whole has no purpose. This illogical result is impermissible under the doctrine of *expressio unius est exclusio alterius*. Because the drafters were explicit in granting the state authority to limit smoking in public, that authority does not extend to limiting smoking in private. And because the legislature cannot restrict any smoking of medical marijuana in any private place, it cannot restrict smoking as a delivery mechanism.

D. The Intent of the Voters and the Drafters Supports the Plain Meaning of the Provisions of Section 29 that Smoking Medical Marijuana is an Available Treatment Option.

The Analysis of Intent published prior to the election by the drafters of section 29 provides a thorough discussion of the goals, intent and effects of the constitutional amendment. The intent document specifically addressed the smoking issue in the instant case. The statement of intent said Art X sec 29 (c) (6) :"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."

While the plain meaning of section 29 establishes the right of patients to seek smoking of medical marijuana as a treatment option, the intent of the drafters also provides support for that conclusion. Defendant suggested that plaintiffs could not establish date of publication of the intent statement. In fact, the intent statement was included in a press release and also available through

United for Care's website and the document was republished in full by a general news website on October 24, 2016 -approximately two weeks before the election.[11] In addition, there were numerous public debates where the issue of smoking was hotly contested.[12] In the debates the issue was not whether the proposed amendment would allow smoking for medical purposes. Both sides acknowledged that it would. The debate was regarding such issues as whether citizens should vote for or against a provision that allowed smoking. At the election, the voters approved Art. X, § 29 and voted for it by 71%.

Also contrary to the Defendants' arguments, courts indeed look at the drafting history and statements of intent of drafters of constitutional provisions. For example in, *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, (Fla. 1996), the Court receded from *State v. Creighton*, 469 So. 2d 735 (Fla. 1985), because of a failure of the court in *Creighton* to review the history and intent of the constitutional provision at issue there. The court then did a thorough review of the intent of the framers and drafters and reversed *Creighton.* Clearly, this court may look to timely and clear statements of intent as support for the plain meaning of section 29.

Finally, defendants quote *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992) to say that "extrinsic interpretive tools 'are not allowed to defeat the plain language." The sentence continues, "when constitutional language is precise." Plaintiffs completely agree. The intent cited here is entirely consistent with the precise language of Article X, § 29. The language is but one more indicia that Fla. Stat. § 391.986 impermissibly contradicts Art. X, § 29 and must be ruled

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[11] *See* http://floridapolitics.com/archives/225309-intent-statement-medical-pot.

[12] *See* https://m.youtube.com/watch?v=qgh3YhVu6V4;
https://m.youtube.com/watch?v=Y6wgkoVn52E; and
https://m.youtube.com/watch?v=5ZEqZzHfdTI

unconstitutional. The intent shows that the intent of the framers is completely consistent with the language of the constitution.

CONCLUSION

For the reasons set forth in the foregoing response, Plaintiffs request that Defendants Motion to Dismiss be denied.

Respectfully submitted this 31st day of October, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court by using the Florida Courts e-Filing Portal and that a true and correct copy of the foregoing document was served by electronic mail on all counsel listed below on this 31st day of October, 2017.

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