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

PEOPLE UNITED FOR MEDICAL MARIJUANA; FLORIDA FOR CARE, INC.; DIANA DODSON; And CATHERINE JORDAN,

Plaintiffs,

v. CASE NO: 2017-CA-1394

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.
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ORDER AND FINAL JUDGEMENT

THIS CAUSE came before the Court for final hearing on various motions and for a final evidentiary hearing/non-jury trial. The plaintiffs seek a declaratory judgement finding section 381.986, Florida Statutes (2017), inconsistent with Section 29, Article X [Amendment]. The plaintiffs also seek an affirmative

declaration that patients qualifying to use marijuana for medical treatment for their debilitating conditions may use marijuana in the smokable form in private. The Amendment does not restrict the location of use of any form of medical marijuana other than smoking. The Amendment recognizes there is no right to smoke in public places, thereby implicitly recognizing the appropriateness of using smokable medical marijuana in private places consistent with the Amendment. *See* Article X, Section (c)(6).

The defendants contend that the legislature'S powers to pass any legislation it deems necessary for the safety, health and well-being of Floridians make the 2017 statutory revisions to section 381.986 valid and that there is no express or implied conflict with the Amendment.

Having considered the relevant testimony and other evidence and the witnesses' demeanor, credibility, frankness, and lack of frankness, and based on the finding herein, the court finds that the statute is

invalid because it conflicts with the Florida Constitution and prohibits a use of medical marijuana that is permitted by the amendment: smoking in private.

General Constitutional Background

1. In his 1796 Farewell Address, some 222 years ago, President George Washington noted that:

> The basis of our political systems is the right of the people to make and alter their constitutions of government. **But the constitution which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.**

(Emphasis supplied). President George Washington, Farewell Address, September 1796.[1]

2. President Thomas Jefferson commented that:

> Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.

President Thomas Jefferson, in letter to Wilson C. Nicholas, September 7, 1803.[2]

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[1]Cited in Speaker's Lifetime Library, compiled by Spinrad and Spinrad, published by Parker Publishing Company, Inc., © 1979, p.61.

Modern Florida Constitutional Background

3. Florida's modern era written Constitution dates to 1968, with numerous revisions and amendments since. Article XI of the Florida Constitution provides methods of amendment of our Constitution, with Section 3 relating to citizen initiatives [limited to a single subject] and Section 5 relating to the election at which amendments will be considered, regardless of the initiator or proponent of a proposed amendment or revision.

The "Medical Marijuana Production, Possession and Use" Amendment[3]

4. In November 2016, Floridians exercised their sacrosanct right to amend the Florida Constitution, this time to give those with specified medical needs the right to access, possess and use marijuana for

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[2]Cited in Speaker's Lifetime Library, *supra* at p. 60. Also findable through Google on internet on May 24, 2018: www.constitution.org/tj/ltr/1803/ltr_18030907_nicholas.html.

[3]The Florida Constitutional Amendment does not remove civil or criminal liability or sanctions for violations of federal law, but is limited solely to immunity under Florida law. *See also* Section 29(c)(5), Article X.

their recommended medical treatment in accordance with the Amendment provisions. The adopted amendment became Section 29 of Article X of the Florida Constitution. The Amendment addresses the role of each of the three branches of Florida's government in making sure that those who need marijuana for treatment of their pertinent medical issues are able to have safe access to it, without restriction except that there is no right to smoke in public places

Role of Executive Branch

5. The drafters of the now-adopted Amendment specified that the executive branch would, through the Department of Health, be responsible for issuance of ID cards that would allow those with qualifying diseases and debilitating conditions to acquire, possess and use the marijuana for their treatment.

6. Article X, Section 29(d) ["Duties of the Department"] requires the Department to "issue reasonable regulations necessary for the implementation

and enforcement" of the Amendment. The Amendment provides that "[t]he purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients" and that the Department is "to promulgate regulations in a timely fashion." *Id.*[4]

7. Four subsections of the Section 29(d) "Duties of the Department" section deal with issuance and annual renewal of qualifying patient identification cards; [subsection (d)(1) a], procedures relating to caregivers, [subsection (d)(1) b], procedures regarding registration of the MMTCs, [subsection (d)(1) c],the requirement that the Department adopt a regulation defining "the amount of marijuana that could reasonably be presumed to be an adequate supply for qualifying patients' medical use", with the presumption as to quantity susceptible of being overcome with evidence as

[4]The Amendment contains clear, unambiguous, concise definitions of "marijuana" [Section 29(b)(4)], "qualifying patient" [Section 29(b)(10)], "medical use" [Section 29(b)(6)], "debilitating medical condition" [Section 29(b)(1)], "physician" and "physician certification" [Section 29(b)(8) and (9), respectively], "caregiver" [Section 29(b)(7) and "medical marijuana treatment center (MMTC)" [Section 29(b)(5)].

to a particular patient's appropriate medical use, and [subsection(d)(1) d], patient confidentiality protection.

Role of the Judicial Branch

8. The Amendment vests all Florida citizens with "standing to seek judicial relief to compel" the Department to comply with the constitutional duties imposed on it in Section 29(d). Section 29(d)(3), Article X.

9. Other than as to the duties of procedural implementation placed on the Department, the Amendment is self-executing[5], and reflects the civil and criminal immunity under state law bestowed in the public policy section, Section 29(a) on qualifying patients and certified physicians.

[5] An amendment is self-executing when it "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. . . . The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing." Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960).

Role of Legislature

10. Unlike other Constitutional Amendments[6], no legislation is needed to implement the Amendment. Floridians specified that the legislature may enact related laws only if "consistent with" the Amendment, and thus limited further legislative action in the area; "Nothing in this section shall limit the legislature from enacting laws consistent with this section". See, Section 29(e), Article X.

The Medical Marijuana Amendment and Smoking

11. The Florida Medical Marijuana Amendment recognized the ability of the government to regulate smoking medical marijuana in public places. Subsection 29(c)(6) provides:

> Nothing in this section shall require any accommodation of any on-site medical use of

[6]See, e.g., Article II, Section 8, "ethics in government" in which the Florida Supreme Court has found the financial disclosure subsections [(8)(a) and (h)] to be self-executing and subsections (8)(c) and (d) to not be self-executing, and to require implementing legislative action. See *St. John Medical Plan v. Gutman*, 721 So.2d 717 (Fl. 1998) (Subsection (8)(c) not self-executing), citing *Williams v. Smith*, 360 So.2d 417, 420-421 (Fl. 1978) (Subsection (8)(d) not self-executing); see also *Plante v. Smathers*, 372 So.2d 933, 938 (Fl. 1979).

> marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place.

Article X, Section 29(c)(6). This is similar to the Constitutional prohibition in Article X, Section 20 of tobacco smoking in indoor workplaces.

12. It is a traditional canon of construction "*expressio unius est exclusio alterius*" ["when one or more things of a class are expressly mentioned others of the same class are excluded"]. Merriam-Webster Law Dictionary. This principle controls the Court's interpretation of the Amendment. The ability to smoke medical marijuana was implied in this constitutional language and is therefore a protected right.

FINDINGS AND CONCLUSIONS OF LAW

Defendants' Motions to Strike

13. The defendants filed two motions [relative to the summary judgement motions] to strike certain exhibits from certain affidavits, and the related paragraphs in the affidavits.

14. First, the defense moved [D.E.91] to strike parts of the affidavit of plaintiff Catherine Jordan and four exhibits to the affidavit, and parts of the affidavit and related exhibits of plaintiff entity representative Ben Pollara. The affidavits in question were offered in support of the plaintiffs' motion for summary judgement and are not considered by the Court relative to the plaintiffs' motion. [Ms. Jordan's affidavit and the attachments appear to relate more to Ms. Jordan's state of mind than to "hearsay" information, but are irrelevant to determination of the plaintiffs' motion for summary judgement regarding the unconstitutionality of the 2017 challenged statute and the constitutionally protected rights of qualifying patients to access, possession and use of marijuana for their medical conditions. Section 29 has no restriction as to method of administration of the marijuana other than the ability to regulate smoking in public. Similarly, while the challenged portions of Mr. Pollara's affidavit and related exhibits do not appear

to be hearsay offered for the truth of the matters referenced, they appear irrelevant to determination of the unconstitutionality of the challenged statute and the constitutionally protected rights of qualifying patients].

15. Second, the defendants moved [D.E.101] to strike Dr. Stein's affidavit, which accompanied the plaintiffs' response to the defense motion for summary judgement. The Court does not find that Dr. Stein's affidavit must be stricken on the grounds cited, but does find the affidavit irrelevant to determination of the defendants' motion for summary judgement, and so does not consider the Stein affidavit in deciding the defense motion for summary judgement.

Cross Motions for Summary Judgement

16. In their respective motions, each side contends there are no disputed factual questions as to the merits of the case. Demonstrating entitlement to a summary judgement is a high burden, as a summary

judgement may properly be granted only if there are no disputed genuine issues of fact or inferences suggesting genuine issues of material fact, and the law supports the requested relief.

17. In their motion, the defendants rely on the legislative authority to adopt legislation it deems appropriate and necessary to the protection of Florida's citizens. The general authority for the legislature to enact laws is not unfettered[7]; the legislature does not have the authority to overrule or ignore the "sacred obligation" referred to by President George Washington. Just as no person is above the law, the legislature must heed the constitutional rights Floridians placed in the Constitution in 2016. The Medical Marijuana Amendment includes the definitions of marijuana and medical use, adopting in Section 29(b)

[7] "Where, in adjudicating litigated rights under a statute, it appears beyond all reasonable doubt that the statute is in conflict with some express or implied provision of the Constitution, it is then within the power and duty of the court, in order to give effect to the controlling law, to adjudicate the existence of the conflict between the statute and the organic law, whereupon the Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative ab initio, so that the Constitution and not the statute will be applied by the court in determining the litigated rights." *State v. Greer*, 102 So. 739 (Fla. 1924).

the 2014 statutory definitions from section 381.986 as well as 893.02(3). The 2017 amendments to section 381.986 render the statute inconsistent with the "marijuana" definition incorporated in and part of Article X. Section 29(b)(4) and, as specified in Section 29(e), are not proper, and the statute must be stricken as unconstitutionally inconsistent.

18. In their motion and related argument, the defendants ignore the doctrine of "*expressio unius est exclusio alterius*", and ignore the restriction on legislative authority in Section 29(e) to enactments that are consistent with Floridians' protection of the rights of qualifying patients to treat their conditions with marijuana. The defendants' interpretation would turn the rights enshrined by Floridians in Article X, Section 29 into nothing more than a "blank paper by construction" of which President Jefferson warned. The conflicting, overreaching 2017 statute, while presumably adopted in good faith and with good

intentions, cannot be allowed to overrule the authority of the people to protect rights in the Constitution.

19. Focusing on the rights protected in section 29, the plaintiffs seek a summary judgement confirming the right under the Florida Constitution to treat their debilitating medical conditions with marijuana in any form, with no restriction on the method of administration and with the only locational restriction being that the legislature can regulate smokable marijuana in private locations, and only as used consistently with their certifying physicians' recommendations. The plaintiffs also seek judgement striking the 2017 provisions of section 381.0986 as unconstitutional, a request the record, the law, and most importantly, the Constitution support.

The Trial

20. The burden of proof at trial is generally different than that applicable to consideration of a summary judgement motion. However, questions of law

pertinent to construction of statutes that cannot be interpreted consistently with a controlling Constitutional provision must be assessed other than on the burden of proof relative to "the greater weight of the evidence" standard applicable to factual evidence.

21. The defendants' toxicology expert's opinion about whether smokable marijuana is a good way for those with debilitating conditions to get relief is, quite frankly, irrelevant. Floridians have already given the rights of qualifying patients Constitutional protection in section 29.

22. If the case were to be decided solely on factual evidence, Ms. Jordan's compelling testimony as to how she gets relief of her ALS symptoms more than 15 years after being diagnosed, with the relief being maximized by use of the smokable marijuana is more credible than the toxicology opinions of Dr. Huestis. Similarly, Ms. Dodson's testimony of the extent to which she went, trying the various forms of marijuana to get relief of her neuropathy and HIV condition,

being subjected to pain as part of a clinical study, is also worthy of credibility. Further, because Floridians, in adopting the amendment, put no restriction on the method of marijuana use, Dr. Huestis' opinion that the smokable form should not be allowed, is contrary not to law, but to the Constitution, and must be disregarded.[8]

Standing

23. The defendants challenge the standing of individual plaintiff Ms. Dodson [who meets the debilitating medical condition requirement, but who has not found the money to pay for the identification card yet] and the two organizational plaintiffs, PUMM [the political committee involved in sponsoring and supporting the Amendment throughout the process], and Florida For Care, Inc. [the corporate plaintiff helping support those whose rights are now protected in Section 29].

[8] If the Court were to consider intent of the voters and framers, the Court finds there is ample evidence to conclude that the Amendment was intended to allow smokable medical marijuana.

24. The defendants' standing arguments are without merit. Ms. Dodson and "any Florida citizen" have standing pursuant to Section 29(d)(4) and chapter 86 to pursue declaratory relief. *May v. Holley*[9] established the four-element test for determining standing in a declaratory judgment action; (1) there is a bona fide, actual, present practical need for the declaration, (2) the declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts, (3) there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law, and (4) the antagonistic and adverse interest[s] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

[9] *May v. Holley*, 59 So.2d 636, 639 (Fla. 1952).

25. Dodson has a "bona fide, actual, present practical need for the declaration" because she has a desire to pursue her right to smoke medical marijuana and meets the threshold requirement of having a "debilitating medical condition." These facts are "present" and "ascertained" because they are not disputed. Her interests are "actual, present, adverse and antagonistic" in that the government is preventing her from seeking a certain type of medical treatment for her condition. This declaration would not be mere "legal advice" because she meets the threshold requirement under the amendment and, while she could go as far as Jordan and obtain her card, would be unable to proceed past that point because of the alleged conflict between the constitution and statute, putting her rights "in doubt."

26. For associational standing, the test has three prongs; "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b)

the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Com'n*, 432 U.S. 333, 343 (U.S. 1977). This standard has been recognized in Florida. *Florida Home Builders Ass'n v. Dep't of Labor & Employment Sec.*, 412 So. 2d 351 (Fla. 1982).

27. On the first prong of associational standing, at least some of their members "would otherwise have standing to sue in their own right" because at least some of them have "debilitating medical conditions." In fact, some of the members have a stronger interest than Dodson because they have become "qualifying patients" with medical marijuana cards. On the second prong, Both PUMM's and FCC's interests in this action are "germane to the organization's purpose." PUMM sponsored the medical marijuana amendment, making their interest clear. As to FCC, it has supported legalization of medical marijuana and some of their members have not

attempted to become "qualifying patients" because smoking medical marijuana is illegal. As to the final prong, there is no reason why any individual members would be indispensable parties to this declaratory judgment action.

28. Further, the United States Supreme Court, in *Citizens United*[10], made clear that associations and other entities have rights comparable to those of individuals regarding free speech.

FINAL JUDGEMENT

Based on the foregoing findings, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Section 381.986, Florida Statutes (2017) unconstitutionally restricts rights that are protected in the Constitution, and so that statutory prohibition against the use of smokable marijuana permitted by

[10] *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 364 (2010)

Section 29 qualifying patient is declared invalid and unenforceable.

2. The marijuana definition incorporated in and protected by Article X, Section 29(b)(4) includes the 2014 version of section 381.986 which has continuing viability by virtue of Floridian's having put it in the Constitution. Qualifying patients have the right to use the form of medical marijuana for treatment of their debilitating medical conditions as recommended by their certified physicians, including the use of smokable marijuana in private places.

3. As the prevailing party, the plaintiffs are entitled to recover taxable costs on timely filed motion and order.

IT IS SO ORDERED this 25th day of May, 2018 in Tallahassee, Leon County, Florida.

KAREN GIEVERS
Circuit Judge

2017 CA 1394

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