1D18-2206

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

FLORIDA DEPARTMENT OF HEALTH, *et al.*,
Appellants,

v.

PEOPLE UNITED FOR MEDICAL MARIJUANA, *et al.*,
Appellees.

APPELLANTS' INITIAL BRIEF

ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY
Case No. 2017-CA-1394

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INTRODUCTION

In 2016, Florida voters adopted Amendment 2, a ballot initiative creating a constitutional provision addressing the "Use of Marijuana for Debilitating Medical Conditions." The text of the Amendment was clear about its purpose—authorizing medical use of marijuana for certain debilitating conditions—but also clear that the medical use would be subject to extensive regulation of patients, physicians, caregivers, dispensaries, and the marijuana itself, with a focus on health and safety. The Amendment explicitly authorized the Department of Health to "issue reasonable regulations" in order "to ensure the availability *and safe use* of medical marijuana by qualifying patients." Art. X, § 29(d), Fla. Const. (emphasis added). Consistent with that express grant of regulatory authority, the Amendment clarified that "[n]othing in [the Amendment] shall limit the legislature from enacting laws consistent with this section." *Id.* § 29(e). In other words, the Amendment recognized the State's broad authority to set parameters governing medical use of marijuana in Florida.

During a special session culminating in the enactment of section 381.986, Florida Statutes (2017), the Legislature implemented a statutory framework delineating medical use of marijuana in accordance with the Amendment. At issue here is the statutory definition of "medical use" which means "the acquisition, possession, use, delivery, transfer, or administration of marijuana authorized by a

physician certification." § 381.986(1)(j), Fla. Stat. Expressly excluded from the definition is the "[p]ossession, use, or administration of marijuana in a form for smoking." *Id.* § 381.986(1)(j)2.

Appellees brought suit facially challenging the constitutionality of the Legislature's exclusion of marijuana "in a form for smoking" from the statutory definition of medical use. After a consolidated proceeding consisting of summary judgment arguments, followed immediately by a same-day bench trial, the trial court issued its Order and Final Judgment declaring facially invalid the Legislature's prohibition on smoking medical marijuana. R. 1767–87. Appellants now seek reversal of that Order and Final Judgment because the trial court misconstrued the plain language of the Medical Marijuana Amendment, disregarded expert testimony detailing the negative health effects of smoking marijuana, and misapplied other relevant legal principles regarding standing and constitutional interpretation.

STATEMENT OF THE CASE AND FACTS

Amendment 2 and Its Implementing Legislation

At the November 2016 general election, Florida's electorate approved Amendment 2, a citizens' initiative that amended the Florida Constitution by creating Article X, section 29—"Medical marijuana production, possession and use." Specifically, the Amendment provides that "[t]he medical use of marijuana

by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law." Art. X, § 29(a)(1), Fla. Const. The Amendment included several definitions, including the term "medical use"—"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." *Id.* § 29(b)(6).

Notably, the Amendment expressly contemplated State implementation of the new constitutional provision. For example, the Amendment expressly directed the Department of Health to "issue reasonable regulations necessary for the implementation and enforcement of this section." *Id.* § 29(d). These regulations were "to ensure the availability and safe use of medical marijuana by qualifying patients." *Id.* Moreover, the Amendment contained a standalone provision addressing "Legislation," making clear that "[n]othing in this section shall limit the legislature from enacting laws consistent with this section." *Id.* § 29(e). The Amendment's only reference to smoking medical marijuana appears in its "Limitations" section, which provides that "[n]othing in this section shall require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place." *Id.* § 29(c).

During its June 2017 special session, the Legislature enacted Senate Bill 8A, which set forth a statutory framework for medical use of marijuana in accordance with the Amendment. R. 1531. The statute includes a definition of "medical use" which excludes the smoking form of medical marijuana:

> "Medical use" means the acquisition, possession, use, delivery, 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.
>
> . . .

§ 381.986(1)(j), Fla. Stat.

On June 16, 2017, exactly one week after passage of Senate Bill 8A, the Department of Health provided notice of its adoption of Regulation 1-1.01, which adopted the Legislature's definition of "medical use" from section 381.986. *See* Fla. Dep't of Health, Office of Med. Marijuana Use, Notice of Adoption, Reg. 1-1.01(1)(e) (eff. July 3, 2017) ("'Medical use' shall have the same definition as medical use in s. 381.986(1)(j), F.S. (2017).").[1]

The Legislature's Concern Over the Negative Effects of Smoking Marijuana and the Expert Testimony Confirming Those Negative Effects

[1] *available at* https://www.flrules.org/Gateway/View_notice.asp?id=19142385; *see also* Fla. Admin. Register, Vol. 43, No. 117 at 2698–99 (June 16, 2017), *available at* https://www.flrules.org/faw/fawdocuments/fawvolumefolders2017/43117/43117doc.pdf

Notably, during discussion over the exclusion of smokable marijuana from medical use, legislators highlighted concerns about smoking as a form of medical treatment. Specifically, such concerns centered on the negative health effects of smoking ("[T]he act of inhaling smoke into your lungs is inherently an unhealthy act."[2]; "We're talking about [] medicine. And if we're going to be serious about treating this as we do serious medicines for people that are truly sick, I would suggest that smoking should not be in the different ways that people take it."[3]), and the nature of smoking as a crude delivery method ("You cannot dose smoke in any way, shape, or form. . . . [S]moking marijuana doesn't really affect you in a way medically that we need it to by having a dose-specific mechanism of delivery. Plus, it has the negative side effects."[4]).

Regarding the health effects of smoking marijuana, Appellants introduced below both the affidavit and deposition testimony of Dr. Marilyn Huestis, an

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[2] Fla. S., recording of proceedings (June 8, 2017) (Sen. Rob Bradley, bill sponsor, discussing and answering questions on SB 8A) at 51:20, *available at* http://www.flsenate.gov/media/VideoPlayer?EventID=2443575804_2017061079

[3] Fla. S. Comm. on Health Policy, recording of proceedings (Mar. 22, 2017) (bill sponsor comments at legislative workshop on key concerns in implementing Amendment 2) at 1:40:48, *available at* http://www.flsenate.gov/media/VideoPlayer?EventID=2443575804_2017031323

[4] Fla. H.R., recording of proceedings (May 2, 2017) (Rep. Ralph Massullo, M.D., discussing the smoking exclusion in House companion bill) at 1:25:10, *available at* http://thefloridachannel.org/videos/5217-house-session-part-1/

expert in toxicology with a specialization in cannabinoids and cannabis. R. 2066–67. Dr. Huestis's work focuses specifically on "the effects of drugs on the body and how the body processes drugs." R. 2067. She is "considered the world's expert on cannabis pharmacokinetics," and has conducted numerous studies examining the different routes of cannabis administration, including smoked cannabis, vaporized cannabis, and oral cannabis. R. 2076–77.

Dr. Huestis's affidavit and deposition testimony confirmed the Legislature's concerns over the negative health effects of smoking marijuana. Specifically, Dr. Huestis testified that cannabis smoke contains many carcinogens and particulates. R. 424–32, 2108–09. In the results of one study, smoking cannabis resulted in a greater respiratory burden of carbon monoxide and tar than smoking a similar quantity of tobacco. R. 425–26. Smoking marijuana on a long-term basis can adversely impact the user's health, including respiratory functions and effects on the cardiovascular system. R. 424–32, 2080–81, 2105–07. Smoked marijuana also is a medical concern for those exposed to second hand smoke, especially children. R. 431–32, 2111. Moreover, the smokable form of marijuana is a crude delivery system, "which does not allow for accurate or consistent dosing measures." R. 427, 432. Finally, no other legally prescribed medicine is administered by smoking. R. 432, 2081–82.

Alternate Forms of Inhaled Medical Marijuana Are Available in Florida

Although marijuana "in a form for smoking" is excluded from the statutory definition of "medical use," other alternate forms of inhaled medical marijuana are available in Florida. Specifically, there are presently "three (3) categories of medical marijuana products and/or delivery devices that involve the inhalation of medical marijuana: (1) nasal spray applications; (2) vaporization of ground flower; and (3) vaporization of oil." R. 1622. Notably, Florida allows the vaping or vaporization of marijuana flower as a medical use, so long as the flower is in a sealed, tamper-proof receptacle. *See* § 381.986 (1)(j)2., Fla. Stat.; *see also* R. 1622. In that delivery system, the vaporization process heats the marijuana, but at a lower temperature than the incineration process for smoking. R. 429–30, 2085–86. Vaporization provides rapid THC absorption and THC concentrations that are similar to smoking marijuana, while reducing harmful constituents that are present in the smoking form of marijuana and removing the harm of second hand exposure to others. R. 429–30, 2085–86, 2110–12, 2118–19, 2142.

Various Plaintiffs Challenge the Legislature's Definition of "Medical Use"

Soon after the Legislature enacted Senate Bill 8A, People United for Medical Marijuana, Inc. (PUMM, Inc.) facially challenged the constitutionality of the exclusion of smokable marijuana from the statutory definition of medical use. R. 13–38. The Complaint subsequently was amended three times, each time adding

and removing various plaintiffs and defendants. R. 45–46, 222–24, 308–12, 322–24. Under the operative Third Amended Complaint, plaintiffs consisted of two individuals—Catherine Jordan and Diana Dodson—and two organizational plaintiffs—People United for Medical Marijuana (the unincorporated entity) and Florida for Care, Inc. (a non-profit corporation). R. 322–24.

Appellee Catherine Jordan is a resident of Florida and has been diagnosed with Amyotropic Lateral Sclerosis. R. 1532. She is registered as a "qualifying patient" for purposes of the Amendment, R. 418, which means she has a valid physician certification from a Florida physician stating that "in the physician's professional opinion, the patient suffers from a debilitating medical condition, [and] that the medical use of marijuana would likely outweigh the potential health risks for the patient." Art. X, § 29(b)(9)–(10), Fla. Const. Ms. Jordan testified she prefers the smokable form of marijuana because it best relieves her symptoms, as opposed to other available forms of medical marijuana. R. 2552–53. She presently has access to smokable marijuana because she "grow[s] it in [her] yard." R. 2554. She joined as a plaintiff in the case because she wants the smokable form to be legally available. R. 2555–56.

Appellee Diana Dodson has been diagnosed with HIV/AIDS. R. 2499. She is not a qualifying patient for medical marijuana purposes in the State of Florida. R. 418, 1533, 2502. Ms. Dodson explained that she has not applied to become a

qualified patient because it is "cost prohibitive for [her] at this point." R. 2502. When asked when she would apply, she responded "I don't know." R. 2503. She has used smokable medical marijuana in California and testified that "[s]moked cannabis works best for me." R. 2500–01.

Appellee People United for Medical Marijuana (PUMM) is an unincorporated entity. R. 1533. At the request of Appellees below, PUMM)the unincorporated entity) substituted in for PUMM, Inc. (the incorporated entity) as a plaintiff at the filing of the Third Amended Complaint. R. 308–11. By affidavit, PUMM asserted below that "[a]s of July 6, 2017 approximately 29,439 individuals had joined PUMM as members, contributed to PUMM, elected to receive emails from PUMM, or have volunteered PUMM." R. 600. The affidavit, therefore, merely identifies an aggregate number of several categories of individuals (e.g., members, donors, volunteers) rather than the actual number of PUMM's members.

Appellee Florida for Care, Inc. (FFC), is a Florida non-profit corporation. R. 1533. By affidavit, it asserted below that "[a]s of December 2017, [it] had approximately 41,580 members," R. 541, yet the affidavit reflects that number represents "41,580 individuals who had either joined as members, contributed to Florida for Care, Inc., or volunteered for Florida for Care," R. 604. The affidavit, therefore, merely identifies an aggregate number of several categories of

individuals (e.g., members, donors, volunteers) rather than the actual number of FFC's members.

Regarding its membership, PUMM asserted that "some" of its members have debilitating medical conditions and "some" have become qualified patients. R. 546. "Other" members have indicated an intent to seek to become qualified patients in the future, and they have "expressed that they would seek smokeable [sic] medical marijuana from their physicians if it were not prohibited by Florida law." *Id.* In a similar vein, FFC asserted "some" of its members are qualified patients, and "some" will apply "in the future." R. 547.

Throughout the proceedings, Appellants challenged the standing of specific plaintiffs. R. 86–93, 287–88, 2836–40. By the time of the summary judgment hearing and bench trial, Appellants maintained challenges to the standing of Ms. Dodson and both organizational plaintiffs. R. 385–91, 1536, 1589–98, 1640–45.

Specifically, Appellants challenged Ms. Dodson's standing to seek declaratory relief because she failed to establish any actual or imminent legal injury. R. 386–87. It is undisputed that Dodson is not a "qualifying patient" for medical use of marijuana, as defined in Article X, section 29(b)(10). R. 1533. She does not possess a physician certification or valid qualifying patient identification card for medical use of marijuana, R. 1533, both of which are required for purposes of the Amendment, *see* Art. X, § 29(b)(3), (9), (10), Fla. Const.

As for the organizational plaintiffs, Appellants challenged PUMM's standing because it is an unincorporated association that cannot sue or be sued in its name. R. 1642. Further, Appellants argued that both PUMM and FFC lacked standing because neither had identified or established any actual or imminent legal injury flowing from the challenged law to their specific organizations. R. 390. To the extent PUMM and FFC claimed associational standing, Appellants argued that the organizations' reliance on speculative assertions and factual assumptions were insufficient to establish associational standing. R. 390–91.

The Circuit Court's Order and Final Judgment

Seven months after filing suit, Appellees moved to expedite the proceedings, and the trial court granted the request. R. 247–50, 271. To that end, the trial court set the case for a bench trial, and "[t]o avoid any needless delay," the court directed that "the summary judgment motions and non-jury trial will be held the same day, so the appellate court will have a full record." R. 272. At the proceeding, the Court heard argument on the cross-motions for summary judgment and took them "under advisement." R. 2486. The trial court then proceeded to hold a bench trial.

Following that consolidated proceeding, the trial court issued its Order and Final Judgment declaring facially invalid the Legislature's prohibition on smoking medical marijuana because, in the trial judge's view, "it conflicts with the Florida Constitution and prohibits a use of medical marijuana that is permitted by the

amendment: smoking in private." R. 1769. Specifically, the trial court understood the Amendment to implicitly create a "protected right" to smoke medical marijuana, R. 1775, and concluded that this implicit right is "without restriction except that there is no right to smoke in public places," R. 1771. Accordingly, the trial court declared the statutory exclusion of smoking as an authorized form of medical use of marijuana "invalid and unenforceable." R. 1787.

In reaching its conclusion, the trial court disregarded Dr. Huestis's expert testimony as "irrelevant" because "Floridians have already given the rights of qualifying patients Constitutional protection." R. 1781. Additionally, the trial court noted that "[i]f the case were to be decided solely on factual evidence, Ms. Jordan's compelling testimony as to how she gets relief" from smoking marijuana "is more credible that the toxicology opinions of Dr. Huestis." R. 1781.

The trial court also rejected Appellants' challenge to the standing of three of the plaintiffs. R. 1782–86. In the trial court's view, Ms. Dodson has standing because "she has a desire to pursue her right to smoke medical marijuana" and she has a "debilitating medical condition." R. 1784. Additionally, the trial court determined "any Florida citizen" would have standing to pursue declaratory relief. R. 1783. As for PUMM and FFC, the trial court determined that the organizations had associational standing under the *Florida Home Builders Association* three-prong test. R. 1785–86.

The Trial Court's Lifting of the Automatic Stay and Preliminary Proceedings in This Court

Appellants promptly filed a notice of appeal and invoked the automatic stay under Florida Rule of Appellate Procedure 9.310(b)(2). R. 1789. Appellees moved to vacate the automatic stay, R. 1815–21, a request that Appellants opposed, R. 2357–66. The trial court granted Appellees' motion. R. 2440–43.

To avoid further disruption and uncertainty throughout the State in the enforcement of Florida's Medical Marijuana Amendment, Appellants moved for this Court to reverse the trial court's order vacating the automatic stay. *See* Motion for Review of Order Vacating Automatic Stay, Case No. 1D18-2206 (June 6, 2018). This Court promptly reimposed the automatic stay, Order (June 6, 2018), and ultimately quashed the trial court's order, Order (June 18, 2018). In a subsequently-issued written opinion, the motions panel explained that "after [its] review of the wording of the Medical Marijuana Amendment and the statute prohibiting the use of medical marijuana in a smokable form, we conclude that Appellees have not sufficiently demonstrated a likelihood of success on the merits as required to justify vacating the stay." *Fla. Dep't of Health v. People United for Med. Marijuana*, Case No. 1D18-2206, 2018 WL 3233113 at *2 (Fla. 1st DCA July 3, 2018). Of course, the panel explained that its decision would not "preclude full review of the issues on appeal by the merits panel." *Id.* at 3 n.*.

SUMMARY OF THE ARGUMENT

This Court should reverse the Final Order and Judgment because the trial court misconstrued the plain language of the Medical Marijuana Amendment, disregarded relevant expert testimony detailing the negative health effects of smoking marijuana, and misapplied other relevant legal principles regarding constitutional interpretation and standing.

First, the trial court held that the definition of "medical use" in section 381.986, Florida Statutes, is facially invalid because it conflicts with Article X, section 29, in that it prohibits a "protected right" to smoke medical marijuana in private. The plain language of the Medical Marijuana Amendment, however, refutes that conclusion. Nowhere does the text of Article X, section 29, require that smoking be permitted under the Amendment. The Legislature's exclusion of smoking as a permissible form of medical use, therefore, cannot be said to conflict with the Amendment.

Second, the text of the Amendment explicitly authorizes the Legislature to, with broad discretion, enact laws implementing the Amendment: "Nothing in [the Amendment] shall limit the legislature from enacting laws consistent with this section." Art. X, § 29(e), Fla. Const. In other words, the Amendment recognized the State's broad authority to set parameters governing the permissible medical use of marijuana. To that end, the Legislature enacted a statutory framework that

advances the purposes of the Amendment and is based on reasonable considerations and conclusions about the public's health, safety, and welfare. The Legislature permissibly relied on health considerations relating to smoking and constructed legislation to effectuate the Amendment in a way that best serves the citizens of Florida.

Third, the trial court improperly disregarded Dr. Huestis's expert testimony, which confirmed the Legislature's health-related concerns about the smoking of marijuana. Dr. Huestis's testimony was relevant and credible, and the trial court's determinations to the contrary should be reversed.

Finally, the trial court's determination that Appellee Dodson, and the two Appellee Organizations have standing is incorrect as a matter of law and should be reversed. It is undisputed that Ms. Dodson is not a "qualifying patient" for purposes of the Amendment. At a minimum, to have standing to challenge the Legislature's statutory definition of "medical use," a plaintiff should have completed the prerequisite step of becoming a qualified patient. As for PUMM, it is an unincorporated association and cannot sue or be sued in its own name. And neither PUMM nor FFC have satisfied the standard for associational standing or identified any actual or imminent legal injury flowing from the challenged law to their specific organizations.

ARGUMENT

I. IN EXCLUDING MARIJUANA "IN A FORM FOR SMOKING" FROM THE STATUTORY DEFINITION OF MEDICAL USE, THE LEGISLATURE EXERCISED ITS AUTHORITY TO REGULATE PUBLIC HEALTH, SAFETY, AND WELFARE IN A MANNER CONSISTENT WITH ARTICLE X, SECTION 29.

This Court reviews de novo decisions determining a statute's constitutionality. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). The challenged statute—like all statutes—is "clothed with a presumption of constitutionality," *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008), and this Court must indulge all reasonable presumptions in favor of its constitutionality, *see State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *Smithers v. N. St. Lucie River Drainage Dist.*, 73 So. 2d 235, 237 (Fla. 1954). This Court, therefore, must uphold the statute unless the challenger can demonstrate its constitutional invalidity "beyond reasonable doubt." *Crist*, 978 So. 2d at 139 (quoting *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004)) (internal quotation marks omitted). Additionally, when facially challenging a duly enacted statute, plaintiffs bear a heavy burden. "[A] determination that a statute is facially unconstitutional means that *no set of circumstances exists* under which the statute would be valid." *Fla. Dep't of Revenue*, 918 So. 2d at 256 (emphasis added)).

A. Under the Amendment's Plain Language, the Legislature Has Discretion to Define "Medical Use."

Section 381.986 defines "medical use" to be "the acquisition, possession, use, delivery, transfer, or administration of marijuana authorized by a physician certification." § 381.986(j), Fla. Stat. Expressly excluded from the definition is the "[p]ossession, use, or administration of marijuana in a form for smoking." *Id.* § 381.986(j)2. The trial court determined this legislative definition to be facially "invalid and unenforceable" because the smoking exclusion "restricts the rights that are protected in the Constitution,"—namely, 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." R. 1786–87.

Contrary to the trial court's conclusion, however, the Amendment does not establish any "right" to use medical marijuana at all. Rather, by its plain terms, its legal effect is to provide an immunity from "criminal or civil liability or sanctions under Florida law,"[5] for "qualifying patient[s] or caregivers," for "medical use of marijuana" that is "in compliance" with the Amendment, Art. X, § 29(a)(1), Fla.

[5] Of course, federal law independently still prohibits the manufacture, distribution, or possession of marijuana. *See* Art. X, § 29(c)(5), Fla. Const. ("Nothing in this section requires the violation of federal law or purports to give immunity under federal law."); *see also* 21 U.S.C. §§ 812(c)(10), 841(a)(1), 844(a).

Const. Compliance with the Amendment includes compliance with all valid regulations and laws that are reasonably calculated to ensure the safe use of medical marijuana. *See id.* § 29(b)(6), (d), (e). In short, Florida voters did not enact an "anything goes" Amendment. Indeed, the Amendment itself expressly contemplates that the State can—and must—regulate the use of medical marijuana based on health and safety concerns. *Cf. Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 976 (Colo. App. 2011) ("To interpret the medical marijuana amendment as claimant suggests—as a blanket 'right to use marijuana as long as it is recommended by a physician and registered with the state'—would require us to disregard the amendment's express limitations protecting only against criminal prosecution and allowing employers not to accommodate the use of marijuana in the workplace, as well as the General Assembly's interpretation of the amendment. We decline to do so.").

"Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986). When the language of a constitutional amendment is clear and precise, the text must be enforced as written, and extrinsic interpretive tools "are not allowed to defeat the plain language." *Brinkmann v. Francois*, 184 So. 3d 504, 510 (Fla. 2016) (quoting *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992)).

Notably, the Amendment indicates an overriding concern that the medical use of marijuana be implemented with a focus on health and safety. Specifically, the Department "shall issue reasonable regulations necessary for the implementation and enforcement of this section. The purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients." Art. X, § 29(d). Further, the Amendment expressly states that the Legislature may, without limitation, "enact[] laws consistent with this section." *Id.* § 29(e).

In the same way, "medical use" is defined broadly in the Amendment, allowing for legislative discretion. Any claim that medical use of marijuana *must* include smoking is foreclosed by the text of the Amendment, which nowhere mandates smoking marijuana as "medical use." Rather, "medical use" is defined in the Amendment with no mention of smoking whatsoever:

> "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.

Id. § 29(b)(6).

This definition expressly provides that the Department of Health will promulgate rules governing "medical use," which inherently contemplates potential legislative action and direction. *See also id.* § 29(e) ("Nothing in [the Amendment] shall limit the legislature from enacting laws consistent with this

section."). The definition also states in plain terms that "medical use" is use that is "not in conflict with" the regulatory guidelines the State sets. *Id.* § 29(b)(6). And where the definition addresses "administration of an amount of marijuana," as part of medical use, it does so without specifying—and certainly without mandating—any particular method of administration. *See id.* Moreover, the purpose of the State's role in implementing the Amendment through regulation "is to ensure the availability and safe use of medical marijuana by qualifying patients." *Id.* § 29(d).

Accordingly, the Amendment's plain language acknowledges the State may enact a range of statutory and regulatory frameworks implementing production, distribution, and use of medical marijuana. In its broad discretion, the Legislature did just that, and it did so in a manner consistent with the Amendment.

B. The Amendment's "Limitations" Provision Does Not Create a Right to Smoke Medical Marijuana

The trial court determined in its Order and Final Judgment that, under the canon of construction "*expressio unius est exclusio alterius*," R. 1775,[6] "the ability to smoke medical marijuana was implied" in the "Limitations" section of Article X, section 29, and the Legislature therefore was barred from interfering with this "protected right," *see* R. 1774–75.

[6] In its Order, the trial court stated "the [Appellants] ignore the doctrine of '*expressio unius est exclusion alterius*.' R. 1779. But Appellants did address this canon below and explained why it did not apply. *See* R. 1609.

However, the Florida Supreme Court has cautioned against use of this canon with respect to constitutional provisions because it is a tool of *statutory* construction. Accordingly, it should be "sparingly used in construing the constitution" and only "'applied with great caution.'" *Taylor v. Dorsey*, 19 So. 2d 876, 881 (Fla. 1944) (quoting *State v. Bryan*, 39 So. 929, 956 (Fla. 1905)). To that end, the Florida Supreme Court has applied it only in rare circumstances where "the Constitution expressly provides the manner of doing a thing" such that "it impliedly forbids its being done in a substantially different manner." *Bush v. Holmes*, 919 So. 2d 392, 408 (Fla. 2006) (quoting *Weinberger v. Bd. of Pub. Instruction*, 112 So. 253, 256 (Fla. 1927)). Here, the canon is inapplicable because 1) there is no ambiguity in the language to resolve, and 2) the provision at issue does not place any express limitation upon the Legislature from which an implied limitation could be drawn.

Specifically, subsection 29(c)(6), which addresses specific limitations on the reach of the Amendment,[7] provides in pertinent part: "Nothing in this section shall require any accommodation . . . of smoking in any public place." Art. X,

[7] "Nothing in this section allows . . . . Nothing in this section shall affect . . . . Nothing in this section authorizes . . . . Nothing in this section shall permit . . . . Nothing in this section requires . . . . Nothing in this section shall require . . . . Nothing in this section shall require . . . . Nothing in this section shall affect or repeal . . . ." Art. X, § 29(c)(1)–(8), Fla. Const.

§ 29(c)(6), Fla. Const. On its face, that provision only means that the Amendment does not require the accommodation (by anyone) of the smoking of medical marijuana in a public place. It does not follow that smoking must be allowed in private places.

To illustrate, the same subsection provides that the Amendment shall not "require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment." *Id.* That provision clarifying that the Amendment *does not require* accommodation of on-site use in some settings does not mean that the Amendment *does require* accommodation of on-site use in all other facilities and settings. Similarly, the limitation the trial court relied on simply clarifies that, however it is implemented, nothing in the Amendment mandates that public places in Florida accommodate marijuana smoking. It does nothing more.

Had the framers or voters intended to require the smoking of medical marijuana by adopting the Amendment, they could have done so. There was ample opportunity for smoking to be specifically provided for or required in the Amendment. But Appellees have not and cannot point to language in the Amendment that requires the Legislature to define "medical use" to include smoking. And such a substantial "right"—to a heretofore illegal act—cannot

reasonably be created through unstated implication and flawed deductive reasoning.

The Legislature chose not to permit smoking as part of medical marijuana use at all, for several reasons set forth below. *See infra* at I.D. This act of discretion was within the Legislature's general authority to protect the health, welfare, and safety of Florida's citizens and within the range of options permissible under the constitutional language.

C. The Amendment's Incorporation of the 2014 Statutory Definition of Marijuana Does Not Create a Right to Smoke Medical Marijuana.

The trial court also reasoned that the 2017 legislative definition of "medical use" was "inconsistent with the marijuana definition incorporated in and part of" the Amendment. R. 1779. Specifically, the Amendment defines "marijuana" to "ha[ve] the meaning given cannabis in Section 893.02(3), Florida Statutes (2014), and, in addition, 'Low-THC cannabis' as defined in Section 381.986(1)(b), Florida Statutes (2014), shall also be included in the meaning of the term 'marijuana.'" Art. X, § 29(b)(4), Fla. Const. Section 893.02(3), Florida Statutes (2014), defines cannabis as:

> 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 or its seeds or resin. The term does not include "low-THC cannabis," as defined in s. 381.986, if manufactured, possessed, sold, purchased, delivered, distributed, or dispensed, in conformance with s. 381.986.

§ 893.02(3), Fla. Stat. (2014). Section 381.986(1)(b), Florida Statutes (2014), defines "Low-THC cannabis" as:

> 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 part 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."

§ 381.986(1)(b), Fla. Stat. (2014).

Below, Appellees argued that, because the definition of cannabis in section 893.02 refers inclusively to "all parts of the plant, it unambiguously includes the cannabis flower in smokeable [sic] form." R. 534. And because the Amendment incorporates that definition, then Appellees reason that the Legislature cannot exclude the smoking of medical marijuana under the Amendment. But that logic is flawed.

The definition of "marijuana" in subsection (b)(4) of the Amendment, would be relevant if this case were about a legislative restriction on what constitutes "marijuana" for purposes of the Amendment. There is a distinct difference, however, between what constitutes the physical substance of marijuana and what constitutes a permissible method of medical use of that substance. This case concerns the Legislature's ability to set parameters governing the latter. For example, under section 381.986, Florida Statutes, a qualified patient could not use the marijuana

flower in a form for smoking but could use the marijuana flower so long as it is in a sealed, tamper-proof receptacle for vaping. § 381.986(1)(j)2., Fla. Stat. The substance of marijuana (the flower) would be the same in either scenario; the distinction would be in how that substance is consumed (either smoked or vaporized).

In any event, as detailed above, *supra* at I.A, no matter how inclusive a definition of marijuana, the use of marijuana for medical purposes under the Amendment is not unrestricted—by the Amendment's own express terms, it is subject to regulation by the State.

D. The Legislature Considered Important Health and Safety Factors and Reasonably Concluded That Smoking Is Inconsistent with Medical Treatment.

The Amendment's text outlined a framework designed to culminate in "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. Notably, the Legislature considered evidence of the health hazards of smoking and concluded that smoking marijuana constitutes a harmful delivery method. Time and again during debate, elected members of Florida's Legislature emphasized that the Amendment is exclusively about *medicine*, and that smoking is antithetical to good medicine. In considering these health-related factors, the Legislature reasonably determined that the harms caused by smoking—

including harms to patients and those exposed to secondhand smoke—were ample reason to exclude smoking from the statutory definition of "medical use." The Legislature therefore acted under its general authority to regulate public health, safety, and welfare when it drew a reasonable line between the smoking of medical marijuana, and other delivery methods. Moreover, the placement of that line is supported by scientific evidence.

A statute's presumption of constitutionality is particularly strong when a State is operating within its general power to protect the health and safety of its citizens. As the Florida Supreme Court has explained, "[e]very presumption is to be indulged in favor of the validity of a statute and each cause should be considered in light of the principle that the State is the primary judge, and may by statute or other appropriate means, regulate any enterprise, trade, occupation or profession if necessary to protect the public health, safety, welfare or morals." *Golden v. McCarty*, 337 So. 2d 388, 389 (Fla. 1976). When it comes to statutes relating to public health, welfare, and safety, the State operates with broad authority. *Newman v. Carson*, 280 So. 2d 426, 428 (Fla. 1973) ("A great deal of discretion is vested in the Legislature to determine public interest and measures for its protection."). "[A] Court will not, and may not, substitute its judgment for that of the Legislature insofar as the wisdom or policy of the act is concerned." *Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1978).

To that end, the Legislature's exercise of its general authority to regulate health, welfare, and safety is evaluated by "whether the means utilized bear a rational or reasonable relationship to a legitimate state objective." *Belk-James, Inc. v. Nuzum*, 358 So. 2d 174, 175 (Fla. 1978). The Legislature's protecting public health and safety is, of course, a legitimate state objective. *State v. Yu*, 400 So. 2d 762, 764 (Fla. 1981). A law "bearing a substantial relationship to the health, safety, morals, or general welfare of the community" is inherently "a valid exercise of police power." *Orange Cty. v. Costco Wholesale Corp.*, 823 So. 2d 732, 739 (Fla. 2002). Section 381.986 is just such a law—squarely in the realm of public health, safety, and welfare—and "[e]very presumption is to be indulged in favor of the validity of [the] statute." *Golden*, 337 So. 2d at 389.

As the Amendment's full text makes clear, the purpose of the Amendment was to address the production, possession, and use of medical marijuana. The Legislature considered evidence of the health hazards of smoking and concluded that smoking marijuana is a harmful delivery method. To illustrate, during the legislative process, legislators emphasized that the Amendment is exclusively about *medicine*, and that smoking is antithetical to good medicine:

- "[T]he concern about smoking is those involved in the medical community at this point in time, and the ones that I speak to . . .

the act of inhaling smoke into your lungs is inherently an unhealthy act."[8]

- "In my discussions with the medical community, the idea of inhaling smoke is by its nature not a healthy act. . . . We are not talking about recreational marijuana . . . We're talking about the medicine. And if we're going to be serious about treating this as we do serious medicines for people that are truly sick, I would suggest that smoking should not be in the different ways that people take it."[9]

- "Smoking has ill effects. And even though marijuana has not been shown to cause cancer in the individuals who smoke it, there have been other statistically proven effects of restrictive airway diseases and other sorts of pulmonary diseases that you get from smoking *anything*. Not to mention you cannot dose smoke in any way, shape, or form. . . . [S]moking marijuana doesn't really affect you in a way medically that we need it to by having a dose-specific mechanism of delivery. Plus, it has the negative side effects."[10]

Specifically, the Legislature considered scientific research that smoking is carcinogenic, causes lung damage, exacerbates asthma and bronchitis, and propagates dangerous second-hand smoke. *See, e.g.*, Fla. S., recording of

[8] Fla. S., recording of proceedings (June 8, 2017) (Sen. Rob Bradley, bill sponsor, discussing and answering questions on SB 8A) at 51:20, *available at* http://www.flsenate.gov/media/VideoPlayer?EventID=2443575804_2017061079

[9] Fla. S. Comm. on Health Policy, recording of proceedings (Mar. 22, 2017) (bill sponsor comments at legislative workshop on key concerns in implementing Amendment 2) at 1:40:48, *available at* http://www.flsenate.gov/media/VideoPlayer?EventID=2443575804_2017031323

[10] Fla. H.R., recording of proceedings (May 2, 2017) (Rep. Ralph Massullo, M.D., discussing the smoking exclusion in House companion bill) at 1:25:10, *available at* http://thefloridachannel.org/videos/5217-house-session-part-1/

proceedings (June 9, 2017) (in debate on SB 8A, Senator Keith Perry discussing several studies his staff found demonstrating the negative health repercussions of smoking marijuana) at 18:40–20:50[11]; *see also* Fla. H.R., HB 5A (2017), Final Bill Analysis 3 (June 30, 2017)[12] (summarizing health concerns over smoking as a medical marijuana delivery method and citing studies). For example, the Senate discussed studies from numerous scientific journals, including:

- 2016 article in the RESPIRATORY CARE JOURNAL reporting a risk of lung cancer from the inhalation of smoking marijuana

- 2015 EUROPEAN RESPIRATORY JOURNAL article reviewing the results of more than a dozen studies demonstrating an association between marijuana smoking and chronic bronchitis, and a follow-on 2016 article in the same publication reinforcing these findings and suggesting that quitting smoking marijuana reversed these symptoms

- 2014 review published in CURRENT OPINION IN PULMONARY MEDICINE reporting results from a Swedish study finding individuals that smoked marijuana more than 50 times had two-fold increase in developing lung cancer

- 2008 comprehensive-review article in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION examining multiple research studies which found statistically significant associations between increased lung cancer risk and premalignant changes in the lungs of marijuana smokers

[11] *available at* http://www.flsenate.gov/media/VideoPlayer?EventID=2443575804_2017061092

[12] *available at* http://www.flsenate.gov/Session/Bill/2017A/5A/Analyses/h0005Az.HHS.PDF

- 2007 article published in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION finding that long-term marijuana smoking increased symptoms of obstructive lung disease

- 2001 article published in the JOURNAL OF CANNABIS THERAPEUTICS reporting that marijuana smoking increased risks of pulmonary infections and respiratory cancers, especially in patients with compromised immune systems

See Fla. S., recording of proceedings (June 9, 2017) at 18:40–20:50. Likewise, the House companion bill sponsor walked the House members "through a number of scientific studies that have been published in the New England Journal of Medicine, which is the gold standard among medical research . . . that have shown from many different medical aspects, whether it's lung disease, whether it's the potential for cancer—and . . . the College of Periodontists have released a study that shows smoking marijuana significantly increases gum disease. So, the act of smoking—bringing those toxins into your body—[is] harmful." Fla. H.R., recording of proceedings (June 8, 2017) (Rep. Ray Rodrigues during Q & A on the House implementing bill for Amendment 2) at 1:29:10.[13] Moreover, Dr. Huestis's expert testimony, which the trial court improperly disregarded as irrelevant, confirms the Legislature's health-related concerns. *See infra* at 36–37.

In considering these several significant health-related factors, the Legislature reasonably determined that the harms caused by smoking provided an

[13] *available at* http://thefloridachannel.org/videos/6817-house-session/

overwhelming basis to exclude smoking from the definition of "medical use." They therefore drew a reasonable line between the smoking of medical marijuana, and other inhaled delivery methods. For example, there are presently "three (3) categories of medical marijuana products and/or delivery devices that involve the inhalation of medical marijuana: (1) nasal spray applications; (2) vaporization of ground flower; and (3) vaporization of oil." R. 1622.

That the Legislature considered extensive evidence on the health hazards of smoking reinforces that the smoking exclusion in section 381.986 is a permissible exercise of the State's general power to regulate health and safety.[14] Furthermore, the medical use of marijuana has not been approved by the FDA and has not undergone clinical trials with vetted protocols and quality standards.[15] As such, the Legislature's considerations in light of available scholarly research, lack of FDA

[14] In addition to the health hazards of smoking, reasonable law enforcement concerns supported the exclusion of smoking. Specifically, from a law enforcement perspective, excluding the smokable form of marijuana from authorized medical use would aid in distinguishing between medical use of marijuana, and non-medical use of marijuana. *See* Fla. H.R., recording of proceedings (May 2, 2017) (Rep. Ray Rodrigues during Q & A on HB 1397, the predecessor to HB 5A which included the same anti-smoking policy) at 34:06, *available at* https://thefloridachannel.org/videos/5217-house-session-part-1/

[15] *Cf. Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 476 (2013) (detailing FDA approval process).

approval, and reasonable law enforcement concerns provides an adequate basis to cautiously pass legislation regarding the use of medical marijuana.[16]

E. Because the Legislature's Definition of Medical Use Is Consistent with the Plain Text of the Amendment, Appellees' Reliance on Other Materials Is Misplaced.

Because the Legislature acted "consistent with" the plain language of the Amendment, that ends the inquiry. However, even if this Court were to look to the Amendment's ballot title and summary, neither would suggest that the Amendment requires the smoking of marijuana for "medical use." The ballot title was "Use of Marijuana for Debilitating Medical Conditions"—not "*Unrestricted* Use of Marijuana for Debilitating Medical Conditions," and not "*Smoking* of Marijuana for Debilitating Medical Conditions." *In re Advisory Op. to the Att'y Gen. re Use of Med. Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471, 476 (Fla. 2015). The ballot summary likewise lacked any reference to smoking:

> Allows medical use of marijuana for individuals with debilitating medical conditions as determined by a licensed Florida physician. Allows caregivers to assist patients' medical use of marijuana. The Department of Health shall register and regulate centers that produce and distribute marijuana for medical purposes and shall issue identification cards to patients and caregivers. Applies only to Florida

[16] Other states have come to the same conclusion and excluded smoking from the use of medical marijuana. *See, e.g.*, MINN. STAT. ANN. § 152.22, Subd. 6(a)(4) (2018); N.Y. PUB. HEALTH LAW § 3360(1) (2018); OHIO REV. CODE ANN. § 3796.06(B)(1) (2018); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.304(b)(1) (2018); W. VA. CODE ANN. § 16A-3-3(b)(1) (2018).

> law. Does not immunize violations of federal law or any non-medical use, possession or production of marijuana.

Id. And, of course, the ballot summary is what the voters see. § 101.161(1), Fla. Stat. (2018) Because neither the ballot title nor the ballot summary addressed smoking as a medical use of marijuana, neither can be relied upon enshrining a right to smoke medical marijuana in the State's constitution. *See Graham v. Haridopolos*, 108 So. 3d 597, 605 (Fla. 2013) (declining to adopt an interpretation of a constitutional amendment when "[n]owhere in the ballot title or ballot summary does it indicate" such an intent).[17]

With the plain language of the Amendment, ballot title, and ballot summary against them, Appellees attempted below to rely on an undated, unauthenticated, self-serving document to provide conclusive proof of "[t]he intent of drafters and voters." R. 331. Appellees failed, however, to establish how voters would have come to know about the intent statement and therefore how it could have formed the basis of voter intent. Although Appellees argued that the "intent statement . . . was published and distributed to provide voters with the meaning of the provisions on which they would vote," *id.*, they failed to establish that any meaningful

[17] Appellee PUMM was the ballot sponsor of Amendment 2 and therefore had every opportunity to include a smoking requirement in the ballot title, summary, or text. *See generally In re Advisory Op. to the Att'y Gen.*, 181 So. 3d 471. But when presenting the Amendment to the Florida Supreme Court, PUMM never suggested that smoking would or must be included in the use of medical marijuana. *See id.*

number of voters were aware of and had access to the intent statement. Put simply, there is no way to authenticate how many voters reviewed this document before casting their ballot. Considering this, there is no basis for concluding that the statement is a reliable source of voter intent.

Regardless, even if it were appropriate to consider the intent statement (which it should not), the intent statement itself does not suggest that the Amendment requires smoking as an authorized form of medical use. The statement does not even say what Appellees say it says. Instead, the statement, in discussing what is now Article X, section 29(c)(6) of the Florida Constitution, 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." R. 331, 342. Nowhere, though, does the intent statement say that "proper use of medical marijuana in a private place" must include smoking at all. On this point, Appellees' bare assertion that "[t]he statement unambiguously says that smoking medical marijuana in a private place in compliance with the provisions of the amendment is legal," R. 331–32, is unsupported and incorrect.

Equally unpersuasive is Appellees' attempt to rely on the intent statement's explanation that the Amendment "defines medical marijuana differently and the scope and standards for this amendment are intended to provide broader access to

qualifying patients than provided for in the existing statutes." R. 332 (emphasis added). An understanding that the proposed constitutional amendment went beyond then-existing statutes does not undermine the validity of subsequently enacted statutes reasonably crafted to effectuate the Amendment, nor does it reflect an intent to mandate the availability of smokable marijuana.

* * *

The Legislature—acting under its long-standing authority to regulate public health, safety, and welfare—crafted section 381.986 in a way that is not only faithful to the text of the Amendment but also capably serves the purposes of the Amendment. Accordingly, this Court should reverse the trial court's Order and Final Judgment and remand with instructions to enter judgment in favor of Appellants.

II. DR. HUESTIS'S EXPERT TESTIMONY IS RELEVANT AND CREDIBLE, AND THE TRIAL COURT ERRED IN DISREGARDING IT.

A trial court's ruling as to the relevancy of evidence is reviewed under the abuse of discretion standard, *Taylor v. State*, 640 So. 2d 1127, 1133 (Fla. 1994), and credibility determinations are sustained only if supported by competent substantial evidence, Philip J. Padovano, *Florida Appellate Practice* § 19.6 n.12 (2017 ed.) ("The credibility of witnesses is a decision of fact and is therefore reviewed by the competent substantial evidence test.").

First, the trial court abused its discretion when it disregarded Dr. Huestis's expert testimony as irrelevant. R. 1781–82. "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. Stated differently, to be relevant, the evidence "must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action." Charles W. Ehrhardt, *Florida Evidence* § 401.1 (2016). Here, the trial court explained it was disregarding the testimony as irrelevant because "Floridians have already given the rights of qualifying patients Constitutional protection in [the Amendment]." R. 1781. Throughout the proceedings, however, Appellees asserted that smoking marijuana does not pose any respiratory health hazards and is a "medically effective and efficient way to deliver Tetrahydrocannibinol (THC) and other cannabinoids to the bloodstream." R. 16–17, 48, 225, 326. Appellants denied those assertions and retained Dr. Huestis as an expert to refute those contentions and provide context to the science behind various marijuana delivery methods. Additionally, Appellants argued that the challenged law was enacted under the Legislature's traditional authority to regulate public health, safety, and welfare.

Accordingly, Appellants presented both affidavit and deposition testimony from Dr. Huestis which confirmed the reasonableness of the Legislature's exclusion of smoking from section 381.986. Dr. Huestis's testimony detailed the health hazards of smoking marijuana. Specifically, Dr. Huestis testified that

cannabis smoke contains many carcinogens and particulates. R. 424–32, 2108–09. In the results of one study, smoking cannabis resulted in a greater respiratory burden of carbon monoxide and tar than smoking a similar quantity of tobacco. R. 425–26. Smoking marijuana on a long-term basis can adversely impact the user's health, including respiratory functions and effects on the cardiovascular system. R. 424–32, 2080–81, 2105–07. Smoked marijuana also is a medical concern for those exposed to second hand smoke, especially children. R. 431–32, 2111. Moreover, the smokable form of marijuana is a crude delivery system, "which does not allow for accurate or consistent dosing measures." R. 427, 432. Finally, no other legally prescribed medicine is administered by smoking. R. 432, 2081–82.

Dr. Huestis's testimony also addressed the vaporization of marijuana, which is allowed under section 381.986, so long as it is in a sealed, tamper-proof receptacle. In that delivery system, the vaporization process heats the marijuana, but at a lower temperature than the incineration process for smoking. R. 429–30, 2085–86. Vaporization provides rapid THC absorption and THC concentrations that are similar to smoking marijuana, while reducing harmful constituents that are present in the smoking form of marijuana and removing the harm of second hand exposure to others. R. 429–30, 2085–86, 2110–12, 2118–19, 2142. Because Appellees challenged a legislative prohibition on the smoking of medical marijuana, Dr. Huestis's testimony was entirely relevant.

Second, trial court further erred when it reasoned that "[i]f the case were to be decided solely on factual evidence, Ms. Jordan's compelling testimony as to how she gets relief" from smoking marijuana "is more credible that the toxicology opinions of Dr. Huestis." R. 1781. That determination is not supported by competent substantial evidence and, in any event, it has no place in this facial challenge.

In the usual course of proceedings, where a trial court has an opportunity to observe the witnesses, their demeanor, and candor (or lack thereof), any resulting credibility determinations typically will not be disturbed on appeal. *See Tonnelier Const. Group, Inc. v. Shema*, 48 So. 3d 163, 166 (Fla. 1st DCA 2010) (citing *Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204, 205 (Fla. 5th DCA 1998)). An exception exists, however, where the trier of fact makes a credibility determination for a witness based solely upon a deposition transcript. *Redondo v. Jessup*, 426 So. 2d 1146, 1147 (Fla. 3d DCA 1983). In those circumstances, the appellate court, may revisit that witness's credibility because it is in the same position as the trial court in terms of assessing credibility—through review of the deposition transcript. *Id.* ("Whitley's testimony was also presented at the evidentiary hearing, but only by way of deposition. Since the trial court had no opportunity to observe Whitley's demeanor, we are not required, as appellee suggests, to accept the trial court's determination of Whitley's credibility."). A trial court's credibility determination

may therefore be reversed if there is a lack of competent substantial evidence. *See Smiley*, 128 So. 2d at 896.

Here, although the individual Appellees testified that they believe that smoking marijuana best relieves adverse symptoms of their respective medical conditions, at issue in this case is whether the Legislature's enactment of the smoking exclusion was facially unconstitutional, not whether that form of delivery is subjectively preferable for any particular Appellee. In any event, there is no competent substantial evidence supporting the trial court's determination of credibility as to Dr. Huestis.

Because Dr. Huestis's expert testimony was both relevant and credible, the trial court's conclusion to the contrary should be reversed.

III. APPELLEE DODSON AND THE APPELLEE ORGANIZATIONS LACK STANDING TO CHALLENGE THE STATUTORY EXCLUSION OF SMOKING.

To establish standing, "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) (emphasis supplied). The long-established rule in Florida is that "a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy." *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980). Here, Ms. Dodson and the two Appellee Organizations lack standing to

challenge section 381.986, Florida Statutes, and the trial court's finding to the contrary should be reversed.

A. Ms. Dodson Lacks Standing Because She Is Not a "Qualifying Patient" for Purposes of the Amendment.

The trial court held that Ms. Dodson had standing because " 'any Florida citizen' ha[s] standing pursuant to Section 29(d)(4) and chapter 86 to pursue declaratory relief." R. 1783. This conclusion misreads the plain language of the Amendment and improperly conflates the concept of standing with the principle of justiciability in a declaratory judgment action.

Specifically, the trial court held essentially that, under the Amendment, "any Florida citizen" would have standing to sue in this case. But that is not what the Amendment provides. Subsection 29(d)(3) of the Amendment does address standing, but only in the context of the Department of Health not performing certain actions within a specified timeframe:

> *If the Department does not issue regulations, or if the Department does not begin issuing identification cards and registering MMTCs within the time limits set in this section*, any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department's constitutional duties.

Art. X, § 29(d)(3), Fla. Const. (emphasis added). The trial court incorrectly read this language to confer standing on Ms. Dodson (and any other Florida citizen) to challenge the prohibition on smoking marijuana in section 381.986.

Further confusing the standing inquiry, the trial court held that Chapter 86, Florida Statutes, somehow conferred standing upon Ms. Dodson. But that chapter sets forth the statutory framework governing declaratory judgment actions. It does not displace Florida's well-settled standing principles requiring that a plaintiff have, at a minimum, "a legally cognizable interest which would be affected by the outcome of the litigation." *Nedeau v. Gallagher*, 851 So. 2d 214, 215 (Fla. 1st DCA 2003). To predicate standing, such an interest must not be conjectural or speculative. *Id.*; *see also State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) ("There are three requirements that constitute the "irreducible constitutional minimum" for standing. First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of." Third, a plaintiff must show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." (citations omitted)).

Here, because Ms. Dodson failed to establish any actual or imminent legal injury flowing from the Legislature's exclusion of marijuana in a form for smoking from the statutory definition of "medical use," she lacks standing. Specifically, it is undisputed that Dodson is not a "qualifying patient" for medical use of marijuana, as defined in Article X, section 29(b)(10), nor does she possess a physician certification or valid qualifying patient identification card for medical use of

marijuana, R. 418, both of which are required for purposes of the Amendment. *See* Art. X, § 29(b)(3), (6), (10), Fla. Const.; *see also* R. 329 ("The prerequisite for medical use under the Constitution requires a person become a 'qualifying patient' by obtaining a 'physician certification' by a licensed Florida physician that finds that the patient has a 'debilitating medical condition.'").

At trial, Ms. Dodson confirmed that she had not applied to become a qualified patient R. 2502. When asked when she would take steps to apply, she responded "I don't know." R. 2503. In the absence of any evidence establishing that Dodson has taken the necessary steps to become a "qualifying patient" with a "physician certification" recommending the medical use of marijuana, Dodson lacks standing to challenge the Legislature's statutory definition of "medical use."

Even if Appellee Dodson intends to see a doctor to become a qualifying patient at some indefinite time in the future, that is too speculative to establish standing. Ms. Dodson's assertion of standing assumes that she will take the necessary steps to become a qualifying patient; that the doctor she sees will determine that "that the medical use of marijuana would likely outweigh the potential health risks for [Dodson]," Art. X, § 29(b)(9); and that the doctor will recommend that she smoke marijuana rather than recommending an alternative method, such as vaporization. This hypothetical and speculative chain is insufficient to demonstrate any immediate threat of legal injury sufficient to

establish standing for declaratory relief. *See State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002) ("While one may seek a declaration of his or her rights without an allegation of actual injury, an 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."). At a minimum, to have standing to challenge the Legislature's statutory definition of "medical use," a plaintiff should have completed the prerequisite steps necessary to become a qualifying patient. Without Ms. Dodson taking the necessary steps to become a qualifying patient and demonstrating that her physician would recommend smokable medical marijuana but for the challenged law, there is no way to establish that her physician would recommend that she smoke marijuana as opposed to any of the other available delivery methods.

B. Both PUMM and FFC Lack Standing.

The trial court held that PUMM and FFC have standing to challenge section 381.986, Florida Statutes, because the entities satisfied the three-prong test set forth in *Florida Home Builders Association v. Department of Labor & Employment Security*, 412 So. 2d 351 (Fla. 1982). As detailed below, the trial court's conclusion was incorrect and should be reversed.

First, PUMM is an unincorporated association, R. 1533, and lacks standing to be a party. In Florida, an unincorporated association cannot sue or be sued in its own name. *See Larkig v. Buranosky*, 973 So. 2d 1286, 1287 (Fla. 4th DCA 2008) ("Florida does not have an enabling statute that allows unincorporated associations to be sued in their own names."); *Johnston v. Meredith*, 840 So. 2d 315, 315 (Fla. 3d DCA 2003) ("It is undisputed that [the organizations] are voluntary, unincorporated associations. . . . [S]uch an association must sue or be sued in the names of the individuals composing it rather than its firm name.").

Second, both organizations lack standing because neither has identified or established any actual or imminent legal injury flowing from the challenged law to their specific organizations. A party "who is not adversely affected by the statute . . . has no standing to argue that the statute is invalid." *Sancho v. Smith*, 830 So. 2d 856, 864 (Fla. 1st DCA 2002). "Without a showing of an actual denial of [a constitutional right] in a specific factual context, [a plaintiff] lack[s] standing to assert this claim." *McCarty v. Myers*, 125 So. 3d 333, 337 (Fla. 1st DCA 2013). Here, the Appellee Organizations have failed to demonstrate any adverse effect or denial of a right caused by section 381.986, Florida Statutes.

Nor have they demonstrated associational standing, which requires, at a minimum, that the association 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 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 establish it is "suffering immediate or threatened injury of the kind comprising a justiciable issue had an individual member of the association . . . brought the action").

PUMM and FFC argued below that they have standing to seek a declaration on the validity of section 381.986, Florida Statutes, due to "their advocacy and history of supporting the rights of Floridians to obtain medical marijuana" and because the entities "are membership organizations that have members who are directly impacted by the [challenged law.]" R. 546, 558. Further, the organizations argued that they satisfy the three-prong test for associational standing set forth in *Florida Home Builders Association*. R. 558–59. Under that standard, an association must establish: (1) a substantial number of the association's members are substantially affected by the challenged rule; (2) the subject matter of the rule is within the association's general scope of interest and activity; and (3) the relief requested is the type appropriate for an association to receive on behalf of its members. 412 So. 2d at 353–54.[18]

[18] Both this Court and the Second District have applied this test outside the context of administrative proceedings, in declaratory actions challenging the validity of city and county ordinances. *See Fla. Home Builders Ass'n v. City of Tallahassee*, 15 So. 3d 612 (Fla. 1st DCA 2009) (applying the test in a constitutional challenge to a municipal ordinance); *Hillsborough Cty. v. Fla. Rest.*

Both PUMM and FFC fail this test because they have failed to establish that a substantial number of members are substantially affected by the challenged law. Rather, both organizations relied on speculative assertions and factual assumptions that are insufficient to establish standing. Specifically, neither organization has established a definite number of members or shown how a substantial number of its purported members would have been substantially affected such that they would have standing in their own right as a plaintiff. For example, PUMM asserted that it "has over 29,000 members," R. 539, yet the affidavit upon which that statement relies does not support that conclusion. Rather, the affidavit asserts that "[a]s of July 6, 2017 approximately 29,439 individuals had joined PUMM as members, contributed to PUMM, elected to receive emails from PUMM, or have volunteered PUMM." R. 600. The affidavit, therefore, merely identifies an aggregate number of several categories of individuals (e.g., members, donors, volunteers) rather than the actual number of PUMM's members.

Similarly, Florida for Care, Inc. asserted that "[a]s of December 2017, [it] had approximately 41,580 members," R. 541, yet the underlying affidavit reflects that number represents "41,580 individuals who had either joined as members,

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Ass'n, Inc., 603 So. 2d 587, 589 (Fla. 2d DCA 1992) ("Further, we find that the three-prong test for association standing in the context of administrative proceedings . . . is equally applicable to the case before us.").

contributed to Florida for Care, Inc., or volunteered for Florida for Care." R. 604. The affidavit, therefore, merely identifies an aggregate number of several categories of individuals (e.g., members, donors, volunteers) rather than the actual number of FFC's members.

Beyond the problematic membership totals provided by PUMM and FFC, the statements and generalizations about "some" of the organizations' members are not supported by any competent evidence. Moreover, such generalized and unsupported statements are insufficient to satisfy the *Florida Home Builders* test for associational standing. Specifically, PUMM asserted that "some" of its members have debilitating medical conditions and "some" have become qualified patients. R. 546. "Other" members have indicated an intent to seek to become qualified patients in the future, and they have "expressed that they would seek smokeable [sic] medical marijuana from their physicians if it were not prohibited by Florida law." *Id.* In similarly vague terms, FFC asserts "some" of its members are qualified patients, and "some" will apply "in the future." R. 547.

In light of these vague and generalized assertions, PUMM and FFC failed to demonstrate any particularized legal injury to the respective organizations or to any substantial number of purported members. At best, PUMM and FFC provided speculation and general assertions about "some" members, but that is insufficient to establish standing. Even if "some" members plan to become qualifying patients,

there is nothing establishing that they will in fact receive physician certifications recommending the use of medical marijuana. And for the group of "some" members who are already qualified patients and desire to "seek smokeable [sic] marijuana," there is nothing establishing that their physicians would recommend such a treatment, given the health risks inherent to smoking. *See generally supra* at 27–31, 36–37. Indeed, there is nothing establishing that this hypothetical group of "some" members would not benefit from other, available forms of medical marijuana, such as vaporization, which provides rapid THC absorption and THC concentrations similar to smoking. *See supra* at 37.

It is well-settled that standing must be demonstrated through facts, not speculation. *McCall v. Scott*, 199 So. 3d 359, 366 (Fla. 1st DCA 2016), *review denied*, No. SC16-1668, 2017 WL 192043 (Fla. Jan. 18, 2017) ("The cloudy crystal ball the trial court would be required to gaze into in order to identify a particularized harm to Appellants underscores the speculative nature of their arguments for standing."). And this applies equally in the context of associational standing—"speculative possibilities, based on factual assumptions pertaining to events that only might occur at some uncertain time in the future, do not create the necessary standing for declaratory or injunctive relief." *Fla. Home Builders Ass'n v. City of Tallahassee*, 15 So. 3d 612, 613 (Fla. 1st DCA 2009).

For example, this Court has rejected a claim of associational standing where home builder organizations asserted not only that their membership included "the great majority" of qualified builders and developers, but also that those builders "would be reasonably likely to build or develop projects that could be subject to the [challenged] ordinance." *Id.* Because these assertions were speculative and indefinite, the court held that the organizations had failed to show that a substantial number of members were sufficiently affected by the challenged law. *Id.* Here, the record is similarly devoid of any non-speculative facts establishing PUMM or FFC's standing on the basis of harm to a substantial number of their members.

* * *

Because the trial court erred as a matter of law in rejecting Appellants' challenges to the standing of Ms. Dodson, PUMM, and FFC, this Court should reverse the court's judgment and remand with instructions to dismiss the three plaintiffs that lack standing.

CONCLUSION

This Court should reverse the trial court's Order and Final Judgment and remand with instructions to enter final judgment in favor of Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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