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Case No. 1D22-0375

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

Samuel E. Velez Ortiz

Appellant,

v.

DEPARTMENT OF CORRECTIONS

Appellee.

Appeal from Final Order rendered by
the Florida Department of Corrections
Case No. DF-2021-003

APPELLANT'S REPLY BRIEF

Michael C. Minardi, Esquire Florida Bar No. 568619 MICHAEL MINARDI, PA. 2534 W, Curtis St. Tampa, FL 33614 Phone | 813.995.8227 Email | Michael@MinardiLaw.com *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*	LAURENCE M. KRUTCHIK, ESQ. Florida Bar No. 0069449 LMK LEGAL 7450 SW 172nd Street Palmetto Bay, Florida 33157 Email: LMK@LMKLEGAL.COM Telephone: (305) 537-6866 *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*

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ARGUMENT REPLY TO ANSWER BRIEF

I. The Department's Allegations are Inconsistent with their justification for disallowing Medical Marijuana.

The Department's position is that they are allowed to discriminate against medical marijuana patients because of safety concerns of people being under the influence and unable to complete there job dues. First and foremost, as the Department points out in their brief there were three employees that received positive tests as a result of a random urinalysis, two decide to comply with their request to stop using medical marijuana, Mr. Velez, a military veteran with PTSD did not want to have to go back to taking harmful prescription medications and chose to challenge the rules. The Departments acknowledges all of the tests were random and not because of evidence of impairment or being unable to perform their duties. Mr. Velez Ortiz had his medical card, since May 2018, approximately three years prior to the positive test on May 18, 2021. (R.26, R.5-6). Despite his medical marijuana use for over three years there were no complaints about Mr. Velez Ortiz being unable to perform his job duties or suspicion of being under the influence at work. The positive test result could not determine whether Mr. Velez Ortiz was under the influence at the time of the test. (R.750).

The Department's argument regarding potential danger in the workplace is misplaced as they permit employees to use much more dangerous addictive drugs, like Opiates, Percocet, Codeine, Adderall, Ambien, test positive and then provide a prescription to justify their legal use. *See Smith v. Dept. of Corrections*, 40 FPER ¶ 77 (2003). Opiates are one of the most addictive and deadly drugs known to man, the manufacturers have paid billions to settle lawsuits against state and local governments because of their highly addictive and deadly nature. A positive test would not be able to distinguish whether someone was using legally prescribed opiates vs heroin, or codeine vs. cocaine. This policy against medical marijuana is clearly discriminatory and the random urinalysis does nothing to prove someone is under the influence or impaired on the job. (R.26, 750).

The Department's cited studies from the early 1990's before medical marijuana statutes existed. Multiple recent studies have suggested that there is no correlation between marijuana use and job safety risk from medical marijuana use. *See Macdonald S, Hall W, Roman P, Stockwell T, Coghlan M, Nesvaag S,* Testing for Cannabis in the work-place: a review of the evidence. Addiction. 2010 Mar; 105(3): 408-16. Doi:10.1111/j.1360-0443.2009.02808.x PMID: 20402984. The study concluded that

“[u]rinalysis testing is not recommended as a diagnostic tool to identify employees who represent a job safety risk from cannabis use. Blood testing for active tetrahydrocannabinol (THC) can be considered by employers who wish to identify employees whose performance may be impaired by their cannabis use.” *See also Jeremy b. Berneth, H. Jack Walker,* Altered States or Much to Do About Nothing? A Study of When Cannabis is Used in Relation to the Impact it has on Performance, Group & Organization Management, May 17, 2020, V. 45. Issue 4, (finding after-work cannabis use was not related (positively or negatively) to any form of performance); *Wade R. Biasutti, Kurt S. H. Leffers & Russell C. Callaghan* (2020) Systematic Review of Cannabis Use and Risk of Occupational Injury, Substance Use & Misuse, 55:11, 1733-1745, DOI: 10.1080/10826084.2020.1759643 (finding “[t]he current body of evidence does not provide sufficient evidence to support the position that cananbis users are at increased rate of occupational injury”); *D Mark Anderson, Daniel Rees, Erdal Tekin*, Medical Marijuana laws and workplace fatalities in the United States. Int J Drug Policy. 2018 Oct;60:33-39. doi: 10.1016/j.drugpo.2018.07.008. Epub 2018 Aug 6. PMID: 30092547(finding medical marijuana was associated with a 19.5% reduction in the expected number of workplace fatalities among workers

25-44 and results provide evidence that legalizing medical marijuana improved workplace safety for workers aged 25-44). There are dozens of more recent studies since medical marijuana policies have changed that contradict the studies listed in the Department and Amicus briefs that off-site use results in employees not being able to do their jobs effectively and safely. These studies indicate higher labor participation rates, lower rates of absenteeism, declines in workers' compensation filings, and higher wages for medical marijuana users. *See https://norml.org/marijuana/fact-sheets/marijuana-legalization-and-impact-on-the-workplace*.

The studies and information provided by the Department and Amicus Briefs about the potential danger of an employee using cannabis off work hours are outdated, unfounded and not a basis for them to discriminate between legal medical cannabis use and legal opiate or other prescription drug use. The Department's should be required to treat medical marijuana like all other "prescription" medications pursuant to the Drug Free Workplace Act. Like opiates, alcohol or other legal narcotics, employers are tasked with determining whether someone is under the influence on the job on a regular basis. The definition of prescription or non-prescription under the Florida Drug Free Workplace Act, includes any medication authorized by federal or state law and therefore the Department's argument the

substance has to be legal under all laws fails. § 112.0455(5)(i), Fla. Stat. The Appellant's reading of the statute does not gut the ability of employers to create a drug free workplace, it just requires constitutionally permitted medical marijuana be given the same accommodation as other "prescription or non-prescription" drugs as defined under the Florida Workplace Act.

II. The Department's Own Policies permit for the legal use of Medical Marijuana.

The Order finds that the Department complied with all the requirements necessary to dismiss Mr. Velez Ortiz pursuant to the Drug Free Workplace Act and Florida Statutes. Appellant's position is that they did not comply with the Drug Free Workplace statute because "The Department does not allow the use of medical marijuana by its employees or on its premises" (R.78). The "statement" does not differentiate between legal and illegal use for medical marijuana and is one line of the Department of Corrections Drug-Free Workplace Statement and not part of the random testing rule § 208.045 which provides for the ability to provide justification for a positive test.

Appellant argued in the Closing Statement and Exceptions to the Hearing Officer's Report that the current policy provided for exceptions for legal medical marijuana. (R.738, 753-58). The Department's own policies

were inconsistent, specifically the blanket one line in the “statement” and policies in § 208.045. Appellant called into question why they were separate sections of the policies enacted under the testing and justification section. It was argued that sections (4), (5) (6), after the marijuana results in a positive test, provide additional mechanisms for the employe to provide proof of legal legitimate use, vs illegal use of medical marijuana. Mr. Velez Ortiz provided an additional letter from his Doctor of his legitimate and responsible use of medical marijuana. (R.26). The statement is also inconsistent with the policies reliance on § 112.0455(5)(i), Fla. Stat. as medical marijuana should be considered a “prescription or non-prescription” under Florida Law as it is “a medication that is authorized pursuant to federal or state law.”

III. Article X. s. 29 and Florida Statutes Requires Accommodation by Employers for Off-Site Medical Marijuana Use.

As argued in the initial brief, the principles of statutory construction apply here. First, the court must give plain meaning to all the words contained in the law, second, different sections must be read together, *in para materia*, to provide consistency and meaning within a statute, and lastly the canon of “*expressio unius est exclusion alterius*”, when one or more things of a class are expressly mentioned others of the same class are

excluded." *See Larimore v. State*, 2 So. 3d 101 (Fla. 2008) (holding court must look at actual language of the statute, give every clause meaning and harmony to all parts); *Liberty Mut. Ins. Co. v. Pan Am Diagnostic Servs.*, 347 So. 3d 7 (4th DCA 2022) (holding doctrine of *in pari materia* requires statutes relating to the same subject be construed to harmonize the statute); *Jordan v. State*, 801 So. 2d 1032 (5th DCA 2001) (holding that the express inclusion of items in a statute means that those not listed are excluded).

The public policy provision in Art. X. s. 29(a)(1) of the Florida Constitution was to provide broad protections for patients, it reads "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 Flroida law." The section provides broad overall protections for patients then carves out certain limitations in s. 29(c), including the section at issue here, 29(c)(6), which states "Nothing 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 of marijuana in any public place." The Department argues it does not provide for protections from termination of employment because it is not a "sanction" to be fired. The Department then defines sanction as, "'[t]he detriment, loss of reward, or other coercive intervention, annexed to a violation of a law as a means of

enforcing the law.' . . . 'A penalty or coercive measure that results from failure to comply with a law, rule or order.' . . . "measures designed to coerce or encourage obedience to the law". Ans. Brief. 27. The definition presented by the Department of a sanction, includes a "penalty" "detriment" or "coercive measure to get someone to comply with a rule". This is exactly what occurred to Mr. Velez, he was coerced to stop using a doctor recommended medication or be penalized by being terminated from employment. The termination of employment is about as much of a penalty a person can receive. Would it have been a sanction if the department had only suspended him for thirty days versus termination, both are sanctions, just different levels and types of sanctions an employer can impose under the department's definition.

The Department next argues that they are not required to accommodate a medical marijuana users off-site use because they are still allowed to create drug free workplace policies. Both can coexist under Appellants reading of the relevant provisions, just like someone can use opiates as a medication and still be in compliance. The Amendment and statute both contain consistent provisions Art. X. s. 29(c)(6) and § 381.986(15)(b) Fla. Stat. state that employers do not have to "accommodate" "on-site" use, of medical marijuana patients. There is no purpose for the use

of the words “accommodate” or “on-site” if it did not impose restrictions or requirements by employers on a patient’s medical use. The language clearly intentionally implicates only one restriction, “on-site” use. Principles of construction require that “the inclusion of one thing “on-site” is the exclusion of the other “off-site”, thereby excluding the employers ability to restrict an employee’s off-site use. There is no other reading of the Amendment or statute that would make the words “accommodate” and “on-site” have meaning. *Larimore v. State*, 2 So. 3d 101 (Fla. 2008).

Article X. s. 29 of the Florida Constitution does not provide the separate section added by the legislature regarding employers’ ability to continue drug free workplace programs. The Amendment only provides that employers are not required to accommodate on-site use. The principles of statutory construction require the court read the language in a way for all provisions of the amendment and statute to have meaning and not be inconsistent with each other. This requires reading of § 381.986(15)(a), consistent with the plain language of Article X. s. 29(a)(1), (c)(6) and § 381.986(15)(b),

Reading the two sections together provides clarification that employers could continue to have drug free workplace policies to prevent impaired employees at work, possession, or use at work, but were otherwise required to accommodate off-site use. This provides protections consistent with the

drug free workplace act to all employers that their employees are not under the influence at work. but otherwise requires medical marijuana be treated like other prescription medications. There is no other reading that give meaning to the words “on-site” as used in the amendment and statute. The language in *Barbuto v. Advantage Sales & Mktg., LLC,* 477 Mass. 456 (Sup. Jud. Ct. of Ma. July 17, 2017), is consistent with the language here and used the same principles of statutory construction in requiring an employer to make reasonable accommodations for off-site medical marijuana use. The fact that § 381.986(15)(a) provides that companies can still establish and enforce drug free workplace policies is to allow employers to insure people are not under the influence while working. Any other reading of Art. X. s. 29(c)(6) and § 381.986(15)(b) Fla. Stat. renders the words superfluous and having no meaning. This Court should reverse the ruling of the Department and hold that employers are required to accommodate off-site use of medical marijuana under Florida law. *See also Wild v. Carriage Funeral Holdings, Inc*., 458 N.J. Super 416, 205 A.3d 1144 (App. Div. 2019) (rejecting argument of employer that Compassionate Use Act expressly immunizes employers from violating N.J. Disability act because the statute says nothing about it “shall be construed to accommodate the medical use of marijuana in any workplace’ does not mean the N.J. Disability Act may not impose an

obligation to accommodate such a user because the statute only relates to use “in any workplace”.) The Department in this case is asking for the court to immunize employers from the requirements of the Florida Civil Rights Act in not discriminating against individuals with a disability for the use of their legal doctor recommended medication.

The Department also references *Fla. Dept. of Health v. People United for Med. Marijuana*, 250 So. 3d 825 (Fla. 1st DCA 2018), but the issue before that court was whether to vacate an automatic state and specifically stated, they did “not intent to preclude full review of the issues on appeal by the merits panel”. The opinion of the lower court in *People United for Medical Marijuana et. al*., v. *Fla. Dept. of Health* et. al., Case No. 2017-CA-1394 1, 9 (Fla. 2d Jud. Cir. 2018) ruled consistent with the arguments stated herein in interpreting Art. X. s. 29(c)(6). Judge Gievers, in applying the rule of *expressio unius est exclusion alterius*, ruled that the statutory restriction against smokable marijuana was unconstitutional because the Amendment states “[n]othing in this section shall require any accommodation of . . . or of smoking medical marijuana in any public place.” The ruling found because Art. X. s. 29(c)(6), prohibits smoking marijuana in public the ability to smoke medical marijuana in private was implied. The same analysis applies here, because the amendment says

that employers are not required to accommodate on-site use they are required to accommodate off-site use.

IV. A Dismissal is a Sanction under Florida law.

The Department next argues that dismissal is not a sanction "under Flroida law" to trigger the protections of Article X, section 29(a)(1). These arguments were not made before the hearing officer and raised for the first time on appeal. The Department's Drug Free Workplace act is enacted pursuant to the authority provided in § 112.0455 Fla. Stat. and subject to the requirements under the Act. It requires employers to promulgate standards to assure fair and accurate testing for drugs in the workplace. The Order of the Department relies on § 112.0455 Fla. Stat., and Fla. Stat. 381.986(15)(a) throughout as its authority for why they can still maintain a Drug Free Workplace Act. They cannot now say their policies and procedures are not promulgated under Florida law. The issue in *State v. Luxenburg* is not akin to this matter as the judge created an illegal sentence that was not authorized by Florida law. 13 So. 3d 137, 138 (Fla. 2d DCA 2009). The protections provided to patients under Article X. s. 29(a)(1), (c)(6), are under Florida law, the drug free workplace is enacted under Florida law and the sanctions in this case were for him specifically being a legal medical marijuana patient

under Florida law. The amendments use of "under Florida law" is also to clarify it did not apply to Federal law. The Department's policies and procedures also incorporate the Florida Civil Rights Act which prevents discrimination based on a disability and requires reasonable accommodations for those that can still perform the functions of their job duties. (R.108-09).

V. Federal Law Does Not Prevent State's Rights to Have Medical Marijuana Laws and Employee Protections.

The Department argues the cases cited in the Initial Brief do not apply because they are not arguing preemption. The Department and Amicus Briefs, however, all argue that they do not have to consider legal medical marijuana use because it is not legal to use under Federal law. The Answer briefs also argue employees are not permitted to have or possess firearms because of federal restrictions. Federal law is clear that as long as individuals and entities are complying with state law they are not subject to Federal prosecution or restrictions.

Medical Marijuana is legal in 39 states for medical use and legal for all Adults 21 plus in 21 states. The federal government has passed Omnibus Budget Amendments since 2014 preventing the Department of Justice from spending any funds to interfere with people acting in compliance with state

medical marijuana laws. *See United States v. McIntosh*, 833 F. 3d 1163 (U.S. 9th Cir. Ct. of App. 2016). Recently President Biden pardoned all people convicted under Federal Law for marijuana possession, encouraged all governors to do the same, asked the attorney general to review how marijuana is classified and stated "it makes no sense" for cannabis to be a schedule I substance. Michael D. Shear & Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, The New York Times, Oct. 6, 2022. Supreme Court Justice Clarence Thomas stated in *Standing Akimbo*, that "the patchwork of half in-, half out regime that simultaneously tolerates and forbids local use of marijuana. This Contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary." *Standing Akimbo, LLC. v. United States*, 141 S. Ct. 2236 (*Concurring op.* 2021). He further stated that the time for medical marijuana to be a Schedule I Substance is untenable. 141 S. Ct. 2236n4. In *Sisley v. U.S. Drug Enforcement Agency*, No. 20-71433 (9th Cir. Ct. App. Aug. 30, 2021), Judge Watford in the concurring opinion states that "the Drug Enforcement Administration may well be obliged to initiate a reclassification proceeding for marijuana given the strength of petitioners' arguments that the agency has misinterpreted the

controlling statute by concluding that marijuana "has no currently accepted medical use in treatment in the United States."

The court in In *Noffsinger v. SSC Niantic Operating Co., LLC,* 338 F. Supp 78 (U.S. Dist. Ct. Ct. 2018) specifically found that the Federal Drug Free Workplace act (FDWA) does not prevent states from adopting their own medical marijuana policies. It further held, as the Florida Statute does, that employers are not required to do drug testing under the FDWA or that an employers is required to do so to get federal funding. The arguments by the Department and Amicus Brief's are similar to those by the employer that were rejected in *Noffsinger*, that federal law prevents and allows the employer to apply federal law to whether "medical marijuana" is a legal substance in the state. (Fl. Police Chief Ans. Br. pg. 10-13, D.O.C. Ans. Br. 20-22). *Roe v. Teletech Cust. Care Mgmt. Co. LLC,* 171 Wn. 2d 736 (Wash. 2011) is distinguishable, the law only provided protections from criminal prosecution, not criminal, civil liability and sanctions as Florida does, and deals with the question of whether the act creates a separate cause of action). The cause of action in Florida is provided by the Florida Civil Rights Act that prevents employers from discrimination for disability including the use of medications for treatment.

Noffsinger, applies the principle of *expressio unius est exclusio alterius* in interpreting Connecticut's statute, similar to Florida's amendment, stating "'[n]othing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours. . . or restrict an employer's ability to discipline an employee for being under the influence during work hours.' *Ibid*. By negative implication, this language makes clear that PUMA protects a qualifying patient a qualifying patient for the use of medical marijuana outside working hours and in the absence of any influence during work hours." The state in Arizona v. *Maestas* argued that they had to prevent medical marijuana use to ensure their ability to get federal funding, the court disagreed stating "the [s]tate has not shown that a university would lose (or has lost) federal funding." Like here, there is no indication that the Department of Corrections, the Sheriff's Union or Police Chief would lose federal funding for allowing an employee to be a medical marijuana patient. *State v. Maestas*, No. CR-17-0193-PR (Sup. Ct. Ari. 2018); *see also Panaggio v. C.N.A. Ins. Co.*, No. 2019-0685 (N.H. Compensation App. Bd. 2021) (holding federal CSA does not prevent an employer from being required to reimburse an employee for medical marijuana).

CONCLUSION

The Court should reverse the Department's Order, find that the Department polices are inconsistent and provide for the ability of the employee to provide justification for their legal use, and/ or find Article X. section 29(c)(6) and § 381.986(15)(b), Fla. Stat. require employers to accommodate off-site use of medical marijuana based on the arguments contained herein and in the initial brief. Mr. Velez Ortiz should be reinstated with all back pay, seniority and benefits he would have as if he was never disciplined for this matter.

Respectfully submitted this **17th** day of **January 2023.**

/s/ Michael C. Minardi, Esq. Michael C. Minardi, Esquire Florida Bar No. 568619 MICHAEL MINARDI, PA. 2534 W, Curtis St. Tampa, FL 33614 Phone | 813.995.8227 Email | Michael@MinardiLaw.com *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*	/s/ Laurence M. Krutchik, Esq. LAURENCE M. KRUTCHIK, ESQ. Florida Bar No. 0069449 LMK LEGAL 7450 SW 172nd Street Palmetto Bay, Florida 33157 Email: LMK@LMKLEGAL.COM Telephone: (305) 537-6866 *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed this 17th day of January 2023, via the Florida Courts e-filing

portal to the Florida First District Court of Appeal which provides electronic service to Maria S. Dinkins, Assistant General Counsel, Florida Department of Corrections at Maria.Dinkins@FDC.myFlorida.com, Jason Walter Holman, Jason.Holman@fdsc.myflroida.com, and Mark S. Urban mark.urban@fdc.myflorida.com, 501 S. Calhoun St. Tallahassee, FL 32399-6548, J. David Marsey, at dmarsey@rumberger.com; Rumberger, kirk, & Caldwell,101 North Monroe St., Suite 120, Post Office Box 10507, Tallahassee, FL 32302-2507 for Fl. Police Chiefs Association and R.W. Evans, revans@anblaw.com, Alle, Norton & Blue, P.A., 906 North Monroe St. Suite 100, Tallahassee, FL 32303, for the Florida Sheriff's Association.

/s/ Michael C. Minardi, Esq. Michael C. Minardi, Esquire Florida Bar No. 568619 MICHAEL MINARDI, PA. 2534 W, Curtis St. Tampa, FL 33614 Phone | 813.995.8227 Email | Michael@MinardiLaw.com *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*	/s/ Laurence M. Krutchik, Esq. LAURENCE M. KRUTCHIK, ESQ. Florida Bar No. 0069449 LMK LEGAL 7450 SW 172nd Street Palmetto Bay, Florida 33157 Email: LMK@LMKLEGAL.COM Telephone: (305) 537-6866 *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure Rule 9.045 and Rule 9.210(a)(2)(B), counsel for Appellant hereby certifies this brief complies with all applicable font and word count limit requirements as the brief is written in 14-point Arial font and does not exceed 4,000 words, on this 17th day of January 2023.

/s/ Michael C. Minardi, Esq. Michael C. Minardi, Esquire Florida Bar No. 568619 MICHAEL MINARDI, PA. 2534 W, Curtis St. Tampa, FL 33614 Phone | 813.995.8227 Email | Michael@MinardiLaw.com *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*	/s/ Laurence M. Krutchik, Esq. LAURENCE M. KRUTCHIK, ESQ. Florida Bar No. 0069449 LMK LEGAL 7450 SW 172nd Street Palmetto Bay, Florida 33157 Email: LMK@LMKLEGAL.COM Telephone: (305) 537-6866 *Counsel for Appellant,* *SAMUEL E. VELEZ ORTIZ*