SC19-1464

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF HEALTH, OFFICE OF MEDICAL MARIJUANA USE, et al.

Petitioners,

v.

FLORIGROWN, LLC
a Florida Limited Liability Company, and
VOICE OF FREEDOM, INC. D/B/A FLORIGROWN

Respondents,

PETITIONERS' INITIAL BRIEF

On Discretionary Review from a Decision of
the First District Court of Appeal

Joe Jacquot (FBN 189715)
Colleen Ernst (FBN 112903)
Executive Office of the Governor
The Capitol, PL-5
400 South Monroe Street
Tallahassee, Florida 32399
(850) 717-9310
Joe.Jacquot@eog.myflorida.com
Colleen.Ernst@eog.myflorida.com

Louise Wilhite-St. Laurent (FBN 91244)
Florida Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1708
(850) 245-4956
Louise.StLaurent@flhealth.gov

Jason Gonzalez (FBN 146854)
Daniel Nordby (FBN 14588)
Amber Stoner Nunnally (FBN 109281)
Rachel Procaccini (FBN 1019275)
Shutts & Bowen LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
(850) 241-1717
JasonGonzalez@shutts.com
DNordby@shutts.com
ANunnally@shutts.com
RProcaccini@shutts.com

Counsel for Petitioners

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INTRODUCTION

This case arises out of a trial court's entry of a temporary injunction enjoining the implementation of section 381.986, Florida Statutes (2017), and ordering the Florida Department of Health (Department) to grant a medical marijuana treatment center (MMTC) license to a newly formed company with no revenue, significant assets, or relevant industry experience. The company—the Respondent in these proceedings—is run by a web video producer and owned by Joe Redner, neither of whom are botanists, pharmacists, physicians or have any professional experience or credentials in the medical field. This company unilaterally chose not to wait for the Department to begin accepting MMTC applications and instead purported to "register" itself as an MMTC by delivering a letter to the Department two weeks after the effective date of the constitutional amendment establishing limited state law immunity for medical marijuana in Florida. This stunt, which makes a mockery of all legal and regulatory procedures related to article X, section 29 of the Florida Constitution, has resulted in the case now before this Court.

In 2016, voters passed an amendment to the Florida Constitution (Amendment) to address the "Use of Marijuana for Debilitating Medical Conditions." The text of this new constitutional provision was clear about its purpose: to provide limited immunity under Florida law for authorized medical use

of marijuana for certain debilitating conditions. Equally clear was that medical use of marijuana would not be unrestricted. Rather, the Amendment provides a framework under which qualifying patients, physicians, caregivers, MMTCs, and the marijuana itself would be subject to regulation and oversight.

As this Court recognized when reviewing the Amendment for placement on the ballot, nothing in the Amendment alters the legislature's power to make policy decisions related to the regulatory oversight of medical marijuana in Florida.[1] In fact, the Amendment itself invites legislative action by reaffirming the longstanding principle that the legislature has plenary authority to enact laws consistent with the constitution. In June 2017, the legislature did just that when it created a broad regulatory scheme to implement the Amendment, including regulations for the licensing and structure of MMTCs. These regulations are codified in section 381.986, Florida Statutes (2017).[2]

Despite clear authority for the action taken by the legislature, the trial court determined that certain provisions of section 381.986(8) are in conflict with the

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[1] *See In re Adv. Op. to Att'y Gen. re Use of Marijuana for Debilitating Medical Conditions*, 181 So. 3d 471, 477 (Fla. 2015) ("If the proposed amendment passes, the Department of Health would perform regulatory oversight, which would not substantially alter its function or have a substantial impact on legislative functions or powers.").

[2] All citations to the Florida Statutes are to the 2017 version, unless otherwise indicated.

constitution and ordered the Department to commence registering MMTCs, including Respondent Florigrown, LLC (Florigrown), "in accordance with the plain language of" the Amendment. The trial court's order granting temporary injunctive relief immediately injected confusion and uncertainty into the MMTC registration process—the antithesis of preserving the status quo. In a split decision, the First District Court of Appeal added to that confusion by affirming the temporary injunction with purported "modifications." On the Department's motion, the First District subsequently certified to this Court a question of great public importance: whether Florigrown had demonstrated a substantial likelihood of success on the merits of its constitutional challenges to section 381.986(8) to justify the entry of a temporary injunction.

Because the order granting the temporary injunction is both substantively and facially flawed, this Court should answer the certified question in the negative, quash the First District's decision, and remand with directions that the case be further remanded to the circuit court for an order denying Florigrown's motion for a temporary injunction.

STATEMENT OF THE CASE AND FACTS

A. Florida's Medical Marijuana Amendment

On November 8, 2016, Florida's electorate approved Amendment 2, a citizens' initiative that amended the Florida Constitution to create article X, section 29, titled "Medical marijuana production, possession and use." Before the Amendment's passage, the use of low-THC and medical cannabis was addressed exclusively in section 381.986, Florida Statutes (2016). The Amendment expanded the class of persons eligible for medical use of marijuana in Florida and directed the Department of Health to issue reasonable regulations for its implementation and enforcement. Art. X, § 29(d), Fla. Const. The regulations mandated by the Amendment are intended to "ensure the availability and safe use of medical marijuana by qualifying patients." *Id.* The Amendment went into effect on January 3, 2017.

The crux of the Amendment is that it provides a limited immunity under state law. Specifically, the Amendment provides that "[t]he medical use of marijuana by a qualifying patient or caregiver in compliance with th[e Amendment] is not subject to criminal or civil liability or sanctions under Florida law." Art. X, § 29(a)(1), Fla. Const. Likewise, actions taken by a registered MMTC that are done "in compliance" with the Amendment and the Department's regulations are not subject to state criminal or civil liability. *Id.* § 29(a)(3).

In furtherance of this purpose, the Amendment outlines certain duties of the Department regarding the registration of MMTCs. Specifically, the Amendment provides that the Department shall promulgate "[p]rocedures for the issuance, renewal, suspension and revocation of registration [of MMTCs], and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." Art. X, § 29(d)(1)c., Fla. Const. An MMTC is defined in the Amendment as "an entity that acquires, cultivates, possesses, processes . . . transfers, sells, distributes, dispenses, or administers marijuana . . . and is registered by the Department." *Id.* § 29(b)(5). Finally, the Amendment expressly clarifies that nothing limits the legislature from enacting laws "consistent" with the Amendment. *Id.* § 29(e).

B. Florigrown Challenges the Legislature's Authority to Implement the Amendment

On January 17, 2017, just two weeks after the effective date of the Amendment, the Department received a letter from counsel for Florigrown, which purported to "register" Florigrown as an MMTC under the Amendment. (App. 184-86, 536-37). The letter stated that Florigrown would meet the requirements of the Department's MMTC regulations, referring to regulations that had not yet been promulgated. (App. 183, 538-41). The Department promptly denied Florigrown's premature registration request. (App. 189, 197, 544, 546). Florigrown then filed a

Petition for Evidentiary Hearing with the Department in February 2017, which the Department dismissed the same month. (App. 192-98, 206-07).

During a special session in June 2017, the Legislature enacted Senate Bill 8A, which set forth a detailed statutory framework for the registration of MMTCs. *See* ch. 2017-232, Laws of Fla. First, the Legislature directed the Department to convert the existing licenses of low-THC and medical cannabis dispensing organizations into MMTC licenses.[3] § 381.986(8)(a)1., Fla. Stat. Notably, to obtain a converted license, a dispensing organization would still have to satisfy all criteria set forth in the statute. *Id.* The Legislature also provided for ten additional MMTC licenses for applicants that meet certain criteria. § 381.986(8)(a)2.-3. Additionally, the Legislature made the policy determination that "[a] licensed medical marijuana treatment center shall cultivate, process, transport, and dispense marijuana for medical use." § 381.986(8)(e). The Department is required to adopt rules to establish a procedure for issuing MMTC licenses under the statute. § 381.986(8)(b).

[3] In 2014, the Florida legislature passed the "Compassionate Medical Cannabis Act," which provided state law immunity to a limited class of individuals—generally, patients with cancer or epilepsy—to possess and use low-THC marijuana based on a physician's recommendation. *See* ch. 2014-157, Laws of Fla. The act was amended in 2016 to include full-potency marijuana, termed "medical cannabis," for use by qualified terminally ill patients only. *See* ch. 2016-123, Laws of Fla.

Florigrown filed suit in December 2017, challenging the constitutionality of the above-cited provisions of section 381.986.[4] According to Florigrown, the limit on the number of MMTC licenses in subsection (8)(a) and the requirement in subsection (8)(e) that licensed MMTCs use a vertically integrated supply chain violate the Amendment.

C. Florigrown Requests a Temporary Injunction

Florigrown sought temporary injunctive relief on the grounds that it allegedly has a constitutional right under the Amendment to be registered as an MMTC and that the Department's ongoing efforts to license MMTCs pursuant to section 381.986 will allegedly cause Florigrown irreparable harm. (App. 248-78).

At an evidentiary hearing, Adam Elend, Florigrown's president and CEO, testified that Florigrown was established in 2016 prior to the passage of the Amendment. (App. 532-33, 1206). At that time, Florigrown had no employees or source of revenue. (App. 1206-08). According to Mr. Elend, Florigrown is qualified to operate as an MMTC based on his own assessment of the requirements in the Amendment and the former standards used to license low-THC and medical

[4] Florigrown initially filed a 148-page, 18-count complaint, which it later amended after the trial court determined it was "not a short and plain statement of the ultimate facts . . . in violation of Rule 1.110, Florida Rules of Civil Procedure." (App. 5-142, 451-52). In an amended complaint, Florigrown sought declaratory, injunctive, and mandamus relief. (App. 153-54). The trial court granted the Department's motion to dismiss the claim for mandamus relief. (App. 511-12).

cannabis dispensing organizations under a previous version of section 381.986. (App. 538-42). Mr. Elend, who is not a lawyer, also opined about the constitutionality of section 381.986 and why he believes it is inconsistent with the Amendment. (App. 550-54). Mr. Elend offered no testimony about how Florigrown is irreparably harmed by the statute. Instead, Mr. Elend testified it may be difficult for Florigrown to receive a license under section 381.986, but that it is "certainly possible" that Florigrown could do so. (App. 1231-32).

Florigrown also submitted deposition testimony of Kayvan Khalatbari, a medical marijuana consultant from Colorado, in support of its request for a temporary injunction. (App. 1261-64). Mr. Khalatbari described himself as a "huge advocate against vertical integration" and an opponent of "limited-license structures" based on his experience in Colorado. (App. 1283-87). Mr. Khalatbari offered generalized opinions about his policy concerns, but he provided no specific evidence as to how section 381.986 was unconstitutional, any irreparable harm to Florigrown, or how the public interest would be served by the requested injunction.

The Department called Courtney Coppola, the then-Deputy Director of the Office Medical Marijuana Use. (App. 636). Ms. Coppola described the Department's ongoing rulemaking to implement the Amendment and section 381.986. (App. 642-46). At the time of the evidentiary hearing in July 2018, there were 13 licensed MMTCs and the Department was engaged in rulemaking for

additional MTMCs.[5] (App. 595, 644-45). Ms. Coppola testified that Florigrown will be given a fair opportunity to compete for an MMTC license under the procedure outlined in the Department's promulgated rules. (App. 645-46).

D. The Trial Court Grants a Temporary Injunction

The trial court initially denied Florigrown's request for a temporary injunction without prejudice after finding that it had not established irreparable harm or that an injunction would serve the public interest. (App. 475-82). However, the trial court determined that Florigrown had a substantial likelihood of success on the merits and no adequate remedy at law. (App. 481).

As to the substantial likelihood of success on the merits, the trial court determined that certain provisions in section 381.986(8) are inconsistent with the Amendment because they "(a) modif[y] the definition of MMTC from the plain text of the Amendment, (b) limit[] the number of licenses available by placing caps on the number of MMTCs to be ultimately licensed, and (c) require[] the mandatory issuance of 'licenses' to a closed class of private entities that were unsuccessful applicants for a 'Dispensing Organization' license." (App. 478-80). As to whether Florigrown has an adequate remedy at law, the trial court found

[5] The Department is authorized to license four additional MMTCs "[w]ithin 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry." § 381.986(8)(a)4., Fla. Stat. The medical marijuana use registry hit the 100,000 mark in July 2018. (App. 645).

"there is no adequate remedy at law for the harm Florigrown will suffer if it continues to be denied the opportunity to obtain MMTC registration." (App. 481).

The trial court was clear it was denying the motion, though, because Florigrown would have an opportunity in the future to compete for an MMTC license and thus it would not suffer irreparable harm. (App. 481). The trial court also explicitly determined that issuing a temporary injunction "would substantially alter the status quo by halting the Department's existing process and procedures for the issuance of MMTC licenses as well as the rulemaking currently underway to initiate the application process." *Id.* The trial court then set a "case management conference" for two months later to reconsider its findings on irreparable harm and the public interest. *Id.*

Thereafter, Florigrown renewed its motion for a temporary injunction, arguing that it should be granted its requested relief because "the Department has continued to neglect and ignore the constitutional duties imposed on it by [the Amendment]." (App. 483-86). The trial court held a "case management conference" on Florigrown's renewed motion. (App. 1348). At the hearing, Florigrown reiterated its prior arguments as to why temporary injunctive relief was allegedly warranted in this case. (App. 1348-58). Notably, however, Florigrown did not present any evidence to meet its burden to establish irreparable harm, which the trial court had determined just two months earlier did not exist.

On October 5, 2018, the trial court granted Florigrown's motion and entered a temporary injunction:

> (1) immediately enjoining the Department of Health from registering or licensing any MMTCs pursuant to the unconstitutional legislative scheme set forth in Section 381.986, Florida Statutes, (2) requiring the Department ***by 5:00 PM Friday, October 19, 2018*** to commence registering MMTCs in accordance with the plain language of the Medical Marijuana Amendment, and (3) requiring the Department to register Florigrown as an MMTC by ***5:00 PM Friday, October 19, 2018***, unless the Department can clearly demonstrate to this court that such registration would result in unsafe use of medical marijuana by qualifying patients.

(App. 501) (emphasis in original). In support, the trial court cited its earlier determination that Florigrown has a substantial likelihood of success on the merits and no adequate remedy at law. (App. 498). As to the issue of public interest, the trial court found only that "[t]he public interest was clearly stated with the passage of the Constitution's Medical Marijuana Amendment by over 70% of Florida voters." (App. 499). There are no findings regarding irreparable harm in the trial court's order. And the order is silent as to Florigrown's obligation to post an injunction bond.

E. The First District Court of Appeal's Decision

The Department appealed to the First District Court of Appeal the trial court's order granting the temporary injunction. In a 2–1 decision, the First District upheld the injunction after concluding that Florigrown has a substantial likelihood

of success on the merits of its claims that the provisions of section 381.986(8) requiring MMTCs to be vertically integrated and placing caps on the number of MMTC licenses violate the Amendment. *Fla. Dep't of Health v. Florigrown* (*Florigrown I*), 44 Fla. L. Weekly D1744, 2019 WL 2943329, at *2-3 (Fla. 1st DCA July 9, 2019).

The three-judge panel determined that section 381.986(8) "directly conflicts" with the Amendment because the statutory requirement for MMTCs to "cultivate, process, transport, and dispense marijuana for medical use" amounts to a "more restricted definition" of MMTC than in the Amendment. *Id.* at *3 (citing § 381.986(8)(e)); *see also id.* at *6 (Wetherell, J., concurring in part and dissenting in part) (agreeing that "the statute likely contravenes the constitutional definition of MMTC"). Only two judges agreed, however, that their ruling on vertical integration "renders the statutory cap on the number of facilities in section 381.986(8)(a) unreasonable." *Id.* (citing *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 887 (Fla. 1996), for the proposition that "[t]he state may not regulate an industry governed by a constitutional amendment in such a manner that would severely restrict or diminish the industry"). The court did not address the legislature's authority to establish caps on MMTC licenses.

As to the remaining requirements for a temporary injunction, the majority concluded that "[t]he irreparable harm and inadequate remedy at law prongs are

established by the fact that [Florigrown] is being unconstitutionally prevented from participating in the process for obtaining a license to operate as an MMTC." *Id.* at *4. On the issue of the public interest, the majority ruled that it is in the public interest for the Department to implement the Amendment without applying the "unconstitutional" provisions of section 381.986(8), but that it is also in the public interest to allow the Department "a reasonable period of time to exercise its duties under the constitutional amendment." *Id.* at *4-5 ("[T]he public interest would not be served by requiring the Department to register MMTCs pursuant to a preliminary injunction without applying other regulations to uphold the safety of the public."). Judge Wetherell disagreed in part, reasoning that Florigrown had "failed to establish that the portion of the injunction affirmed by the majority is in the public interest." *Id.* at *5 (Wetherell, J., concurring in part and dissenting in part).

The First District denied the Department's Motion for Rehearing En Banc,[6] but certified the following question as one of great public importance:

> WHETHER THE PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS THAT THE STATUTORY REQUIREMENTS OF VERTICAL INTEGRATION AND CAPS ON THE NUMBER OF MEDICAL MARIJUANA TREATMENT CENTER LICENSES AS SET FORTH IN SECTION 381.986(8), FLORIDA STATUTES, ARE IN DIRECT

[6] The Motion for Rehearing En Banc was denied by a 4–4 vote, with five judges recused.

> CONFLICT WITH ARTICLE X, SECTION 29, OF THE FLORIDA CONSTITUTION?

Fla. Dep't of Health v. Florigrown (*Florigrown II*), 44 Fla. L. Weekly D2182, 2019 WL 4019919, at *1 (Fla. 1st DCA Aug. 27, 2019).

On October 16, 2019, this Court entered an order accepting jurisdiction. *Fla. Dep't of Health v. Florigrown*, 2019 WL 5208142 (Fla. Oct. 16, 2019).

SUMMARY OF THE ARGUMENT

This case is about the constitutionality of the policy choices made by the legislature to implement a citizens' initiative amendment granting limited state law immunity for medical marijuana in Florida, and whether Florigrown has a substantial likelihood of succeeding on its challenges to those choices.

In Florida, plenary lawmaking authority is vested exclusively in the legislature. That means the legislature, subject to the governor's veto power, may enact any law it chooses so long as it is not expressly prohibited by the state or federal constitution. In the context of the regulation of medical marijuana, the legislature can adopt laws related to any aspect of medical marijuana that are not specifically addressed in the constitution and are consistent with the constitution.

In 2017, the legislature did just that when it amended existing law regarding medical marijuana in section 381.986, Florida Statutes, to place a limit on the number of available licenses for MMTCs and require all licensed MMTCs to use a vertically integrated supply chain (*i.e.*, to cultivate, process, transport, and dispense medical marijuana). The legislature was well within constitutional bounds to make those policy decisions when implementing an entirely new medical marijuana program in the state. Nothing in the text of the Amendment expressly foreclosed the legislature from designing the ultimate structure or parameters for licensing MMTCs. Nor are the statutory provisions challenged by Florigrown in any way

inconsistent with the Amendment. Indeed, the Amendment itself contemplates legislative action.

The First District overlooked the legislature's broad lawmaking authority when reviewing Florigrown's constitutional challenges to vertical integration and the caps on MMTC licenses. The First District also failed to recognize other substantive and technical defects in the trial court's order granting Florigrown temporary injunctive relief. In short, the First District's decision cannot stand.

This Court should answer the certified question in the negative—No, Florigrown does not have a substantial likelihood of success on its constitutional challenges to section 381.986(8), Florida Statutes (2017). This Court should also quash the First District's decision and remand with the directions that the case be further remanded to the circuit court for an order denying Florigrown's motion for a temporary injunction.

STANDARD OF REVIEW

"The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo by this Court." *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). Likewise, legal conclusions made by a lower court when reviewing an order granting a temporary injunction are reviewed de novo. *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 471 (Fla. 1st DCA 2018).

A temporary injunction is an extraordinary remedy that should be granted sparingly. *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 485 (Fla. 2001); *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 752 (Fla. 1st DCA 1994). Before a lower court may enjoin a duly-enacted law or compel a state agency to act, the party seeking a temporary injunction must establish 1) a substantial likelihood of success on the merits, 2) irreparable harm absent an injunction is likely, 3) an adequate remedy at law is unavailable, and 4) the balance of public interest favors the injunction. *Provident Mgmt. Corp.*, 796 So. 2d at 481 n.9; *City of Jacksonville*, 634 So. 2d at 752; *see also St. Johns Mgmt. Co. v. Albaneze*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009) (party seeking a temporary injunction bears the burden of providing competent, substantial evidence on each element).

The merits of Florigrown's claims that section 381.986(8), Florida Statutes (2017), is unconstitutional under the Amendment are subject to the rigorous scrutiny required for facial challenges. *See Davis v. Gilchrist Cty. Sheriff's Office*, 280 So. 3d 524, 532 (Fla. 1st DCA 2019) (recognizing a party's "high burden" in succeeding on a facial challenge). To prevail on its claim that the laws at issue here are facially unconstitutional, Florigrown must show "that no set of circumstances exists in which the statute can be constitutionally valid." *Fraternal Order of Police v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018). Adding to Florigrown's heavy burden is the presumption of constitutionality afforded to all statutes. *See Jackson v. State*, 191 So. 3d 423, 426 (Fla. 2016) ("Statutes are presumed constitutional, and the challenging party has the burden to establish the statute's invalidity beyond a reasonable doubt.").

ARGUMENT

I. FLORIGROWN DOES NOT HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

The First District certified the following question as one of great public importance:

> WHETHER THE PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS THAT THE STATUTORY REQUIREMENTS OF VERTICAL INTEGRATION AND CAPS ON THE NUMBER OF MEDICAL MARIJUANA TREATMENT CENTER LICENSES AS SET FORTH IN SECTION 381.986(8), FLORIDA STATUTES, ARE IN DIRECT

> CONFLICT WITH ARTICLE X, SECTION 29, OF THE FLORIDA CONSTITUTION?

Florigrown II, 2019 WL 4019919, at *1. The answer to the certified question is no; Florigrown did not, and cannot, establish a substantial likelihood of success on its constitutional challenges to section 381.986(8).

In reviewing the order granting temporary injunctive relief, the First District determined that Florigrown had established a substantial likelihood of success on certain aspects of its constitutional claims. First, the First District held that the requirement in section 381.986(8)(e) that MMTCs be vertically integrated "directly conflicts" with the Amendment by creating a "more restricted" definition of MMTC. *Florigrown I*, 2019 WL 2943329, at *3. The First District then held that "[its] ruling that the vertically integrated system conflicts with the constitutional amendment thus renders the statutory cap on the number of facilities in section 381.986(8)(a) unreasonable." *Id.* But nothing in the Amendment, or any other part of the Florida Constitution, expressly prohibits the legislature from requiring vertical integration and caps on the number of MMTC licenses. Therefore, Florigrown's constitutional challenges to section 381.986(8) have no merit.

Because Florigrown failed to meet its burden to establish a substantial likelihood of success on the merits of its claims, this Court should answer the certified question in the negative, quash the First District's decision, and remand

with directions that the case be further remanded to the circuit court for an order denying Florigrown's motion for a temporary injunction.

A. The Florida Constitution grants the legislature plenary lawmaking authority.

In our state constitutional system, plenary lawmaking authority has been vested exclusively in the legislature by the people of Florida. Art. III, § 1, Fla. Const. ("The legislative power of the state shall be vested in a legislature of the State of Florida."). This means "the Legislature may exercise any lawmaking power that is not forbidden by the organic law of the land." *Stone v. State*, 71 So. 634, 635 (Fla. 1916). In other words, the vesting of lawmaking power in the legislature is in full, and it includes all inherent policymaking powers on all matters, not otherwise precluded by the constitution, without the need for any enumeration of specific powers. *See State v. Bd. of Pub. Instruction for Dade Cty.*, 170 So. 602, 606 (Fla. 1936) ("The power of the Legislature is inherent, though it may be limited by the Constitution.").

Unlike the United States Constitution, which grants limited and express powers to the federal government where no power previously existed, the Florida Constitution acts as a limitation on the powers of the legislature. *See Peters v. Meeks*, 163 So. 2d 753, 755 (Fla. 1964); *see also Stone*, 71 So. at 635 (noting that the Florida Constitution "does not grant particular legislative powers, but contains

specific limitations of the general lawmaking power of the legislature"). This distinction means that while the federal government must look to the United States Constitution for authority to act, our state government may act unless the text of the federal or Florida Constitution expressly prohibits it from doing so.

More simply stated, the Florida Legislature, subject to the Governor's constitutional veto power, may enact ***any*** law it chooses, so long as no provision of the Florida Constitution or the United States Constitution ***expressly*** prohibits it. In the context of regulation of medical marijuana, the scope of the legislature's plenary authority may be divided into three categories. First, the legislature may adopt laws related to any aspect of medical marijuana not specifically addressed in article X, section 29 of the Florida Constitution. Second, the legislature may adopt laws related to any aspect of medical marijuana that is specifically addressed in article X, section 29, so long as the laws are consistent with that section, which would include any law that furthers the Amendment's express provisions contemplating regulations to ensure the "availability and safe use" of medical marijuana. Third, any existing marijuana statute or regulation not expressly abrogated by article X, section 29 remains unaffected.

Against this backdrop, it is clear the legislature has plenary authority to enact laws related to the medical use of marijuana in Florida, including regulating the way in which the product may be produced and distributed. *See* art. III, § 1,

Fla. Const. This authority existed long before the enactment of the Amendment and was exercised in 2014 when the legislature created a program for the use of low-THC cannabis for a limited class of patients with serious conditions such as epilepsy or cancer. *See* ch. 2014-157, Laws of Fla. (creating the "Compassionate Medical Cannabis Act"). As part of that program, the legislature authorized "dispensing organizations"—the precursor to MMTCs—"to cultivate, process, and dispense low-THC cannabis." § 381.986(1)(a), Fla. Stat. (2014). The legislature also directed the Department to oversee the approval and establishment of five regional dispensing organizations "to ensure reasonable statewide accessibility and availability" of low-THC cannabis for qualified patients. § 381.986(5)(b), Fla. Stat. (2014). In 2016, the legislature again exercised its policymaking authority to allow terminally ill qualified patients to use full-potency marijuana (*i.e.*, "medical cannabis") as ordered by an authorized physician. *See* ch. 2016-123, Laws of Fla.

The Amendment, adopted at the 2016 general election, expanded the class of qualified patients eligible for the medical use of marijuana. It also created a general framework under which every aspect of medical use of marijuana in Florida—the patients, their caregivers and physicians, MMTCs, and the marijuana itself—is subject to regulation and oversight by the state. It is clear from the text that the Amendment contemplates a highly regulated medical marijuana industry in Florida. *See* art. X, § 29(c)-(d), Fla. Const. (outlining limitations of the

Amendment and duties of the Department to "issue reasonable regulations necessary for the implementation and enforcement of this section"); *see also id.* § 29(e) ("Nothing in this section shall limit the legislature from enacting laws consistent with this section."). "The purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients." *Id.* § 29(d).

The Amendment identifies certain types of regulations the Department must promulgate and requires the Department to promulgate any additional "reasonable regulations necessary for the implementation and enforcement of" the Amendment. *See id.* § 29(d)(1). But the Amendment has only one regulatory directive related to MMTCs: The Department must establish "[p]rocedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." *Id.* § 29(d)(1)c. The Amendment is silent as to the number of MMTCs that may be registered or licensed by the Department or whether MMTCs should be "horizontally" or "vertically" integrated. Most importantly, nothing in the Amendment expressly prohibits the legislature from making policy decisions on these two points. *See generally Bd. of Pub. Instruction of Dade Cty.*, 170 So. at 606 (explaining that the legislature "looks to the Constitution for limitations on its power, and if not found to exist, its discretion reasonably exercised is the sole brake on the enactment of legislation").

To fill the regulatory void left by the Amendment, the legislature amended the existing law regarding medical marijuana in section 381.986 to require the Department to convert the licenses of low-THC and medical cannabis dispensing organizations into MMTC licenses so long as the organization would satisfy all criteria set forth in the statute. § 381.986(8)(a)1., Fla. Stat. The legislature also provided for ten additional MMTC licenses for applicants that meet certain criteria. § 381.986(8)(a)2.-3. Anticipating future growth, the legislature provided for additional MMTC licenses as the medical marijuana use registry expanded. § 381.986(8)(a)4. Finally, the legislature made a policy choice to create a vertically integrated supply chain by requiring all licensed MMTCs to "cultivate, process, transport, and dispense marijuana for medical use." § 381.986(8)(e).

Within the constitutional framework described above, this Court's analysis and response to the First District's certified question should be faithful to the extensive lawmaking authority retained by the people acting through their elected representatives in the legislature.

B. The statutory cap on the number of MMTC licenses the Department may issue does not violate the Amendment.

In seeking a temporary injunction, Florigrown asserted the statutory limit on the number of MMTC licenses in section 381.986(8)(a) violates the Amendment.

The First District concluded that Florigrown has a substantial likelihood of success on this constitutional challenge. *Florigrown I*, 2019 WL 2943329, at *3.

The legislature was well within constitutional bounds to determine as a matter of policy that a system of controlled growth of the number of MMTC license, tied to the increase of active qualified patients, properly implemented the Amendment. Maintaining measured growth of the number of MMTC licenses ensures adequate state oversight of a burgeoning industry. The legislature had to create a regulatory structure that, among other health and safety priorities, would ensure that medical marijuana that is legal in Florida would not be diverted to other states where it remains illegal, that it would not be diverted to minors, and that this state-authorized activity would not be used as a pretext by MMTCs for other illegal activities.[7] Steady expansion, commensurate with need, also fulfills the Amendment's purpose of giving patients access to the safe use of medical marijuana.

When examining the challenge to the statutory caps, the First District did not grapple with this analysis. Instead, it concluded that Florigrown has a substantial likelihood of success on the merits only because the court found unconstitutional

[7] *See* Memorandum from Deputy Attorney General James M. Cole, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

the requirement for vertical integration. *Florigrown I*, 2019 WL 2943329, at *3 (explaining this conclusion was a "direct result" of its determination that vertical integration is unconstitutional because that ruling "renders the statutory cap on the number of facilities in section 381.986(8)(a) unreasonable"). This flawed reasoning is unmoored from any language of the Amendment.

Neither Florigrown nor the First District identified ***any*** language in the Amendment prohibiting the legislature from establishing the limits on the number of MMTC licenses set forth in section 381.986(8). As discussed in detail above, the legislature is vested with full authority to enact laws on any topic not addressed in the Amendment or expressly forbidden by its text. The Amendment itself recognizes this by providing that the legislature may, without limitation, "enact[] laws consistent with this section." Art. X, § 29(e), Fla. Const. It is entirely insufficient for Florigrown or the First District to claim section 381.986(8)(a) violates the Amendment without identifying any specific language requiring unlimited MMTCs or forbidding the legislature from acting in this area.

Moreover, the First District incorrectly referred to the statutory cap as a limitation on "facilities." *Florigrown I*, 2019 WL 2943329, at *3. But Florigrown has not challenged any cap on the number of *facilities*; rather, the statutory cap at issue here is on the number of MMTC *licenses*, which are not the same as brick-and-mortar "facilities" from which medical marijuana is dispensed. To illustrate,

22 entities presently hold MMTC licenses, and there are 205 approved dispensing locations throughout the state. *See* Fla. Dep't of Health, Office of Medical Marijuana Use, *Weekly Update* at 2 (Nov. 29, 2019), *available at* https://knowthefactsmmj.com/about/weekly-updates/.

Finally, the First District's reasoning that the constitutionality of caps on MMTC licenses is based on the constitutionality of a vertically integrated supply chain further ignores the broad authority the legislature has to regulate the medical marijuana industry. Even if vertical integration were foreclosed by the Amendment (although it is not), nothing in the text of the Amendment would prevent the legislature from deciding as a matter of policy that caps on licenses are needed in a horizontally integrated system. For example, if an MMTC may register to perform only a single function, as Florigrown contends, the legislature would be well within its plenary lawmaking authority to determine that only a finite number of licenses may be issued to MMTCs performing specific functions (*e.g.*, a set number of licenses for MMTCs that *cultivate* medical marijuana or a set number of licenses for MMTCs that *dispense* medical marijuana). Limiting the number of MMTC licenses—regardless of the type of supply chain used in the industry—is an efficient and useful regulatory tool necessary to implement an entirely new medical marijuana program in this state that the Amendment does not prohibit the legislature from adopting. The First District's analysis provides no basis for

disregarding the will of the people as carried out through their elected representatives in the legislature.

C. The statutory requirement for vertical integration of MMTCs does not violate the Amendment.

Florigrown has also asserted that the statutory requirement for vertical integration of MMTCs violates the Amendment. The First District affirmed the trial court's determination that Florigrown has a substantial likelihood of success on the merits of its claim, reasoning that the Amendment requires an "unstacked" or "horizontal" integration system in which MMTCs can engage in one or more activities in the supply chain, rather than all. *Florigrown I*, 2019 WL 2943329, at *3 (citing definition of MMTC in art. X, § 29(b)(5), Fla. Const.). The text of the Amendment simply does not require nor support this conclusion.

By its plain terms, the Amendment provides immunity from state liability for entities the state determines are sufficiently regulated to provide qualified patients safe access to medical marijuana. The Amendment thus limits the state-law immunity for MMTCs to those entities that fulfill two necessary conditions: (1) the entity "acquires, cultivates, possesses, processes . . . transfers, sells, distributes, dispenses, or administers marijuana" and (2) the entity "is registered by the Department." Art. X, § 29(b)(5), Fla. Const. Only upon satisfaction of *both* conditions can an entity be an MMTC.

Properly understood, the first element sets out a limit for the potential reach of entities granted state law immunity. The first element lists the full range of activities a qualified entity may be authorized by the Department to perform, but it in no way limits how the supply chain of medical marijuana may be structured. The second element, by contrast, serves a limiting function. It restricts the class of actual MMTCs to the subset within the broader group that are "registered by the Department." With this language, the Amendment not only preserves, but reaffirms the legislature's authority to regulate the medical marijuana industry in the state.

The second element in article X, section 29(b)(5) invites action by the legislature. The legislature, in enacting section 381.986(8)(e), exercised its plenary authority to set forth criteria for registration by the Department through a vertically integrated licensing system. This action filled the space for regulation created by the second element. The legislature's action, however, in no way altered the Amendment's definition of the broad range of entities that *could* potentially qualify for immunity under the first element, if authorized by the Department.

Defining criteria for registration is fully consistent with the text and purpose of the Amendment. Indeed, the Amendment expressly contemplates and requires the formation of a regulatory system to oversee the medical marijuana program authorized by the Amendment. Moreover, such action makes sense when considered against the longstanding background principle that the legislature

retains plenary power to enact laws consistent with the constitution. When the legislature determined that a limited number of MMTC licenses would go to those entities that perform a minimum of four core activities—cultivate, process, transport, and dispense medical marijuana—the legislature exercised its policymaking judgment as to how best to balance the competing concerns of public safety and ready access to medical marijuana for qualifying patients.

Notably, the Amendment does not expressly foreclose the legislature from designing the ultimate structure or parameters for the licensing of MMTCs or nullify the law related to medical marijuana in place at the time the Amendment was enacted. And tellingly, the First District failed to identify any language in the Amendment that would restrict the legislature from requiring vertical integration of MMTCs. Florigrown has similarly provided none. The analyses by both the First District and Florigrown are fatally flawed in that they altogether ignore the "registered by the Department" element of the MMTC definition in the Amendment.

The First District's reliance on its decision in *Notami Hospital of Florida, Inc. v. Bowen*, 927 So. 2d 139 (Fla. 1st DCA 2006), is also misplaced. The First District cited *Notami* for the proposition that "[a] statute enacted by the legislature may not restrict a right granted under the constitution and, to the extent that a statute conflicts with express or implied mandates of the constitution, the statute

must fall." *Florigrown I*, 2019 WL 2943329, at *2 (citing *Notami*, 927 So. 2d at 142).

First, *Notami* construed an amendment entitled "Patients' right to know about adverse medical incidents" that expressly created a constitutional right for patients to access health care providers' records relating to any adverse medical incident. 927 So. 2d at 143 (construing art. X, § 25, Fla. Const.). By contrast, the Amendment at issue here does not create a constitutional right for any Florida citizen or business entity. Rather, by its plain terms, the Amendment's legal effect is to provide immunity from "criminal or civil liability or sanctions under Florida law" for qualifying patients, approved caregivers, authorized physicians, and licensed MMTCs. Art. X, § 29(a)(1)-(3), Fla. Const.

Second, the First District omitted an important word in its citation to *Notami*. Specifically, *Notami* explained that a statute is invalid when it "conflicts with express or ***clearly*** implied mandates of the Constitution." 927 So. 2d at 142 (emphasis added). This language in *Notami* is taken from this Court's decision in *Holley v. Adams*, 238 So. 2d 401 (Fla. 1970), which states that when "an act violates expressly or ***clearly*** implied mandates of the Constitution, the act must fall." *Id.* at 405 (emphasis added). In omitting the word "clearly," the First District imports an incorrect legal standard into its analysis. A "clearly" implied mandate in the constitutional sense is not just any fathomable mandate that may be read into

the provisions of the constitution. Rather, it is one that must plainly and necessarily flow directly from the language of the text being construed. The principle referred to in *Notami* is not an invitation for courts to choose between multiple plausible readings of the constitution.

Here, the "mandate" in the Amendment for horizontal integration the First District finds as a source of conflict for section 381.986(8)(e) is neither express nor clearly implied by its text. Therefore, the Amendment does not prohibit the legislature from exercising its plenary authority to require vertical integration of MMTCs.

* * *

For the all the reasons stated above, Florigrown does not have a substantial likelihood of success on the merits of its constitutional challenges to section 381.986(8), Florida Statutes (2017). Accordingly, this Court should answer the certified question in the negative and quash the First District's decision affirming the order granting a temporary injunction.

II. FLORIGROWN FAILED TO SATISFY THE REMAINING THREE CRITERIA TO SUPPORT THE TEMPORARY INJUNCTION.

The order granting temporary injunctive relief is substantively flawed for three additional reasons: Florigrown failed to demonstrate irreparable harm, the lack of an adequate remedy at law, and that the public interest favors the entry of a

temporary injunction. *See SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012) (explaining that a petitioner has the burden to provide competent, substantial evidence for each of the four elements for a temporary injunction before it may be issued). By affirming the injunction order, the First District departed from an abundance of well-settled case law concerning the stringent four-part standard for temporary injunctions. *See generally Bayfront HMA Med. Ctr., LLC*, 236 So. 3d at 472 ("If the party seeking the temporary injunction fails to prove one of the requirements, the motion for injunction must be denied." (citing *Genchi v. Lower Fla. Keys Hosp. Dist.*, 45 So. 3d 915, 919 (Fla. 3d DCA 2010)). The First District's opinion should therefore be quashed.

A. Florigrown has an adequate legal remedy and will not suffer irreparable harm absent a temporary injunction.

Without legal justification, the First District concluded that Florigrown established irreparable harm and the lack of an adequate legal remedy "by the fact that [Florigrown] is being unconstitutionally prevented from participating in the process for obtaining a license to operate as an MMTC." *Florigrown I*, 2019 WL 2943329, at *4. The First District further reasoned that "a continuing constitutional violation, in and of itself, constitutes irreparable harm" and that the "implementation of an unconstitutional statute for which no adequate remedy at law exists leads to irreparable harm." *Id.* But the authority relied on by the First

District does not support applying such a novel and expansive "presumption" that these two prongs of the injunction standard were met, thus eliminating Florigrown's well-established burden to satisfy each and every element of the four-part standard for the grant of injunctive relief.

For example, the First District relied on this Court's decision in *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017), to support its conclusion that Florigrown is entitled to a presumption of irreparable harm to obtain a temporary injunction. *Florigrown I*, 2019 WL 2943329, at *4. In that case, the trial court applied a presumption of irreparable harm in the context of a law requiring a 24-hour waiting period before a woman may get an abortion. The majority in *Gainesville Woman Care* upheld the trial court's ruling, explaining that a presumption of irreparable harm has been recognized by some federal courts and state district courts "when certain ***fundamental rights***" have been violated. *Gainesville Woman Care*, 210 So. 3d at 1263 (emphasis added). Regardless of the validity of the majority's decision in *Gainesville Woman Care*, it is clear the presumption relied on there is wholly inapplicable in this case. Florigrown does not have a constitutional right, let alone one recognized as fundamental, to be registered as an MMTC. The Amendment does not expressly create any rights related to medical marijuana. Instead, its legal effect is to provide a limited state

law immunity for qualifying patients, caregivers, physicians, and licensed MMTCs. *See* art. X, § 29(a)(1)-(3), Fla. Const.

The First District also erroneously reasoned that "[t]he amendment itself recognizes there is no adequate remedy at law where, as here, a state agency or actor refuses to abide by its express duties mandated under the constitution." *Florigrown I*, 2019 WL 2943329, at *4 (citing art. X, § 29(d)(3), Fla. Const.). Nothing in the text of the Amendment supports this conclusion. The provision of the Amendment cited by the First District does not address the four-prong test to obtain a temporary injunction. Instead, article X, section 29(d)(3) provides standing for "any Florida citizen" to bring suit "to compel compliance with the Department's constitutional duties." Whether a party has standing to sue is a very different inquiry than whether a party can establish the lack of an adequate legal remedy for the purpose of obtaining a temporary injunction.

B. The public interest does not support a temporary injunction.

The final step in obtaining a temporary injunction requires the moving party to demonstrate that the entry of a temporary injunction will serve the public interest. *Provident Mgmt. Corp.*, 796 So. 2d at 485 n.9.

Here, the trial court determined "[t]he public interest was clearly stated with the passage of [the Amendment] by over 70% of Florida voters" and therefore an injunction was warranted because the Department has "failed" to comply with the

Amendment's requirements. (App. 499-500). The First District approved this misplaced reasoning, explaining that "it is in the public interest to require the Department to register[] or license MMTCs without applying the unconstitutional statutory provisions which [Florigrown] has challenged." *Florigrown I*, 2019 WL 2943329, at *4. Thus, the First District affirmed the part of the injunction that "precludes [the Department] from enforcing the unconstitutional provisions [of section 381.986(8)]." *Id.* at *5.

The First District's decision misses the mark for two reasons. First, affirming the temporary injunction, in whole or in part, amounts to a radical alteration of the status quo of the medical marijuana industry in Florida. In effect, both the trial court and the First District have rewritten existing law, requiring an immediate change to the entire structure of the medical marijuana marketplace. There is no evidence in the record to support a determination that the public interest is served by mandating such changes through temporary injunctive relief. Instead, the changes imposed by the temporary injunction will inject "confusion and uncertainty" into a "fledgling industry," which is not in the public interest.[8] *Id.* at *7 (Wetherell, J., concurring in part and dissenting in part).

[8] As noted by Judge Thomas in *Florigrown II*, the temporary injunction also "invalidates the comprehensive regulation of a controlled substance," which "endangers public safety and the physical and mental health of adults and children who will now likely have greater access to unregulated marijuana use and abuse."

Second, the public has a significant interest in ensuring that democratically enacted legislation, such as the statute at issue here, is enforced. In other words, preventing the Department from implementing section 381.986(8), which represents the will of voters via their elected representatives, does a "***disservice*** to the public." *Manatee Cty. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012) (emphasis added); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Focusing on the popularity of the Amendment during the 2016 election ignores that the Amendment itself "contemplated a highly-regulated medical marijuana industry, not unlimited availability and unrestricted access to medical marijuana." *Florigrown I*, 2019 WL 2943329, at *7 (Wetherell, J., concurring in part and dissenting in part). As Judge Wetherell aptly explained in dissent, "the public interest would be best served by leaving the carefully-crafted statutory scheme enacted by the Legislature in place until the final disposition of this case." *Id.*

* * *

2019 WL 4019919, at *6 (Thomas, J., dissenting from denial of rehearing en banc).

Because the order granting a temporary injunction is substantively flawed for each of the reasons cited above, this Court should quash the First District's decision affirming the order.

III. THE ORDER GRANTING A TEMPORARY INJUNCTION ATTEMPTS TO RADICALLY ALTER THE STATUS QUO.

This Court determined long ago that the purpose of a temporary injunction is to preserve the status quo while a party seeks permanent injunctive relief. *See Sullivan v. Moreno*, 19 Fla. 200, 215 (Fla. 1882); *see also Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. 2d DCA 2014) ("The primary purpose of a temporary injunction is to preserve the status quo while the merits of the underlying dispute are litigated."); *Grant v. Robert Half Int'l, Inc*., 597 So. 2d 801, 801-02 (Fla. 3d DCA 1992) ("The purpose of a temporary injunction is not to resolve a dispute on the merits, but rather to preserve the status quo until the final hearing when full relief may be granted."). The status quo is "the last, actual, peaceable, noncontested condition which preceded the pending controversy." *Lieberman v. Marshall*, 236 So. 2d 120, 125-26 (Fla. 1970) (quoting *Bowling v. Nat'l Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931)).

The indisputable status quo just prior to commencement of this controversy, and continuing to the present, is that Florigrown is ***not*** a licensed MMTC and the Department is faithfully following the text of the Florida Constitution and statutes

as written. Here, the temporary injunction entered by the trial court attempts to radically alter the status quo by "requiring the Department to register Florigrown as an MMTC by ***5:00 PM Friday, October 19, 2018***," "immediately enjoining the Department of Health from registering or licensing any MMTCs pursuant to [section 381.986]," and "requiring the Department ***by 5:00 PM Friday, October 19, 2018*** to commence registering MMTCs" in a manner the trial court deemed to be in accordance with the Amendment and contrary to the existing statute. (App. 501) (emphasis in original). The injunction order compelling the Department to provide the ultimate relief requested by Florigrown—an MMTC license—misused temporary relief to effectively resolve the entire case on the merits rather than to preserve the status quo pending a final decision on the constitutionality of section 381.986. *See Florigrown I*, 2019 WL 2943329, at *6 (Wetherell, J., concurring in part and dissenting in part) ("The portion of the injunction affirmed by the majority will effectively mandate an immediate change in the entire structure of the medical marijuana industry in Florida.").

For this reason alone, the First District's opinion affirming the temporary injunction may be quashed.

IV. THE ORDER GRANTING THE TEMPORARY INJUNCTION IS FACIALLY INVALID.

The order in this case is facially defective because it fails to articulate sufficient factual findings for at least two of the four temporary injunction criteria and it fails to require a bond.

Because a temporary injunction is an extraordinary remedy, strict compliance with Florida Rule of Civil Procedure 1.610 is required. *Salazar v. Hometeam Pest Defense, Inc.*, 230 So. 3d 619, 621 (Fla. 2d DCA 2017); *Yardley v. Albu*, 826 So. 2d 467, 470 (Fla. 5th DCA 2002). Rule 1.610 states that "[e]very injunction shall specify the reasons for entry . . . ." Fla. R. Civ. P. 1.610(c). Pursuant to this mandate, "[c]lear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction." *Bayfront HMA Med. Ctr., LLC*, 236 So. 3d at 472 (quoting *City of Jacksonville*, 634 So. 2d at 754). When a temporary injunction order does not set forth factual findings for each of the four criteria, the order must be reversed. *E.g., Milin v. Nw. Fla. Land, L.C.*, 870 So. 2d 135, 137 (Fla. 1st DCA 2003).

A. The injunction order does not include any findings of fact to support the conclusions regarding irreparable harm and lack of an adequate remedy at law.

It is well-settled that the necessary findings in an injunction order "must do more than parrot each tine of the four-prong test." *Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (quoting *Santos v. Tampa Med. Supply*, 857 So. 2d 315, 316 (Fla. 2d DCA 2003)). The order "must contain more than conclusory legal aphorisms. . . . ***Facts must be found***." *City of Jacksonville*, 634 So. 2d at 753-54 (emphasis added). Here, facts were not found. This lack of fact-finding on its face invalidates the injunction order and required reversal by the First District.

The trial court made no real findings of fact on two of the injunction criteria—irreparable harm and lack of an adequate legal remedy. Far from offering specific findings, the trial court merely stated that "the court now finds irreparable harm if this temporary injunction is not issued," (App. 499), without detailing the nature or extent of the purported harm. In addition, the trial court offered no factual findings to support its determination of the lack of an adequate legal remedy and stated simply that it had already determined that Florigrown satisfied that element in its earlier August 2018 order. (App. 498). But that earlier order is equally devoid of any factual findings detailing why Florigrown lacks an adequate remedy at law. Instead, the August 2018 order stated "there is no adequate remedy at law for the

harm Florigrown will suffer if it continues to be denied the opportunity to obtain MMTC registration." (App. 481).

Despite the obvious lack of factual findings in the injunction order, the First District concluded that "the trial court made sufficient findings supported by the record to establish that [Florigrown] will suffer irreparable harm without injunctive relief and that [Florigrown] has no adequate remedy at law." *Florigrown I*, 2019 WL 2943329, at *3. This conclusion is based on the novel and expansive premise that "[t]he irreparable harm and inadequate remedy at law prongs are established by the fact that appellee is being unconstitutionally prevented from participating in the process for obtaining a license to operate as an MMTC." *Id.* As discussed above in Part III.A., there is no legal support to justify the application of such a presumption in this case.

B. The injunction order is not conditioned on the posting of a bond.

Finally, the injunction order is not conditioned on the posting of a bond, despite rule 1.610's unequivocal requirement that, absent exceptions inapplicable here, "[n]o temporary injunction shall be entered unless a bond is given."[9] Fla. R.

[9] Two months after the entry of the injunction order and six weeks after the filing of the notice of appeal to the First District, Florigrown requested the trial court modify or "correct" the order by including the requirement that Florigrown post a bond. *See* Docket, *Florigrown, LLC v. Fla. Dep't of Health*, Case No. 2017-CA-2549 (Fla. 2d Cir. Ct.) (reflecting Florigrown's Motion to Correct or Supplement Order Granting Motion for Temporary Injunction to Address Issue of Bond filed

Civ. P. 1.610(b), *see also Pinder v. Pinder*, 817 So. 2d 1104, 1105 (Fla. 2d DCA 2002) ("Under the compulsory language of the rule, the trial court has no discretion to dispense with the requirement of a bond."). The First District's opinion failed to address this clear legal defect in the injunction order.

* * *

Because of the facial defects outlined above, the injunction order cannot stand. The First District erred in affirming the injunction order in spite of these *per se* reversible defects.

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on December 6, 2018). The Department opposed Florigrown's motion because the trial court was without jurisdiction to modify the injunction order while it was on appeal at the First District. *See, e.g.*, *Fla. Dry Cleaning & Laundry Bd. v. Everglades Laundry*, 190 So. 33, 33-34 (Fla. 1939) (holding that circuit court "lost jurisdiction" of an order granting temporary injunction by entry of a notice of appeal and therefore was "without power" to amend the order); *Sharp v. Bussey*, 176 So. 763, 776-77 (Fla. 1937) (explaining that modifications to temporary injunction orders may only be made "when such orders are not pending on appeal"). The Department also wanted to avoid any potential delay in the progress of this case which may have resulted from relinquishing jurisdiction to the trial court.

CONCLUSION

For each of the reasons set forth above, the Court should answer the certified question in the negative, quash the First District's decision, and remand with the directions that the case be further remanded to the circuit court for an order denying Florigrown's motion for a temporary injunction.

Respectfully submitted,

/s/ Joe Jacquot
JOE JACQUOT (FBN 189715)
COLLEEN ERNEST (FBN 112903)
EXECUTIVE OFFICE OF THE GOVERNOR
The Capitol, PL-5
400 South Monroe Street
Tallahassee, Florida 32399
(850) 717-9310
Joe.Jacquot@eog.myflorida.com
Colleen.Ernst@eog.myflorida.com

LOUISE WILHITE-ST. LAURENT (FBN 91244)
FLORIDA DEPARTMENT OF HEALTH
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1708
(850) 245-4956
Louise.St.Laurent@flhealth.gov

JASON GONZALEZ (FBN 146854)
DANIEL NORDBY (FBN 14588)
AMBER STONER NUNNALLY (FBN 109281)
RACHEL PROCACCINI (FBN 1019275)
SHUTTS & BOWEN LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
(850) 241-1717

JasonGonzalez@shutts.com
DNordby@shutts.com
ANunnally@shutts.com
RProcaccini@shutts.com

Counsel for Petitioners

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 5th day of December, 2019, through the Florida Courts E-Filing Portal to:

Katherine E. Giddings
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
katherine.giddings@akerman.com

Counsel for Respondents

Jonathan S. Robbins
Akerman LLP
Las Olas Centre II, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
jonathan.robbins@akerman.com

Counsel for Respondents

Ari H. Gerstin
Akerman LLP
Three Brickell City Centre
98 S.E. Seventh Street, Suite 1100
Miami, Florida 33131
ari.gerstin@akerman.com

Counsel for Respondents

Mohammad O. Jazil
Joseph A. Brown
Brooke E. Lewis
Michael R. Beato
Hopping Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
mjazil@hgslaw.com
josephb@hgslaw.com
brooke1@hgslaw.com
michaelb@hgslaw.com

Counsel for Florida House of Representatives

/s/ Joe Jacquot
ATTORNEY