FLORIDA SUPREME COURT

Case No.

JOSEPH REDNER, an individual,

Petitioner,

v.

FLORIDA DEPARTMENT OF HEALTH,

Respondent.

PETITION TO INVOKE
"ALL WRITS" JURISDICTION

Respectfully Submitted,

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I.

PRELIMINARY STATEMENT

This action involves a Florida citizen's access to valuable medical treatment deemed of Constitutional importance by over 71% of Florida Voters. The emergency articulated in this action arises from the First District's reinstatement of the automatic stay in favor of the Respondent, the Florida Department of Health (the "Department"), an automatic stay that operates to deprive the Petitioner of access to critical medication. The reinstatement of the automatic stay took place after the trial court ruled in favor of the Petitioner, Joseph Redner ("Redner"), a medical marijuana patient, finding both that he was correct in asserting that Amendment 2, designated as article X, section 29 of the Florida Constitution, allowed him to "possess a growing plant" for self-administration of his medication and finding access to this valuable and necessary medical treatment one factor to vacate the automatic stay.

Because the district court's ultimate ruling will address the scope of a Constitutional Amendment, this Court will have jurisdiction to review that decision, but it will not be able to grant full relief absent issuance of an emergency writ now, because of the immediate need for the medication at issue. It is respectfully asserted that emergency relief is clearly warranted and urgently needed.

All relevant materials from the record being developed in the circuit and district courts are submitted in an appendix ("App."). References to the Appendix attachment will be made by citing the Bates stamp page number(s) applicable to any reference, App. at pp. _____.

II.

BASIS FOR INVOKING THIS COURT'S JURISDICTION

This Court is authorized, pursuant to article V, section 3(b)(7), Florida Constitution, to issue "all writs necessary to the complete exercise of its jurisdiction." Accord Fla. R. App. P. 9.030(a)(3). This authority not only protects jurisdiction that has already been properly invoked, but also "protect [s] jurisdiction that likely will be invoked in the future." *Roberts v. Brown*, 43 So. 3d 673, 677 (Fla. 2010); see also *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982) (noting that because "jurisdiction of the issue of apportionment will vest in this Court with certainty in this year we have the jurisdiction conferred by article V, section 3(b)(7), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction" of the Court) (citing *Couse v. Canal Auth.*, 209 So. 2d 865 (Fla. 1968)).

It is not only likely, but guaranteed that the either Petitioner or Respondent will invoke this Court's discretionary jurisdiction as soon as the First District issues its opinion assessing the merits of the trial court's Order on Non-Jury Trial

and Final Judgment issued April 11, 2018. The First District will expressly "construe a provision of the state constitution," which will provide this Court with jurisdiction under both under Rule 9.030(a)(2)(ii) and article V, section (3)(b)(3).

The First District has, however, not yet issued a decision that expresses precisely how it construed the plain language of article X, section 29, however, the First District has commented, "After this panel's preliminary review of the full wording of the ***constitutional amendment*** we determine that Appellee did not sufficiently demonstrate a likelihood of success on the merits as required to justify the vacating the automatic governmental stay…" (App. at p. 799, emphasis added). As shown below, the "full wording" of Amendment 2 totally supports Redner, and, because this matter deals not only with constitutional issues, but emergency medical issues as well, "justice delayed" is "medication delayed," and the Petitioner's health being unduly threatened. This combination of factors is respectfully submitted as an appropriate basis to invoke this Court's "all writ" jurisdiction.

The primary remedy the Petitioner seeks is an Order vacating the automatic stay for a valid personal need, as well as a valid public purpose, *i.e.*, the ability to administer medication to himself through the route of administration deemed optimal by his physician. This action impacts not only Redner, but all medical marijuana patients similarly situated to him, whom suffer from similar "debilitating

conditions" and need access to valuable medicine recommended by their physician. Under these circumstances, this Court can and should exercise its all writs jurisdiction now to preserve the issue for its discretionary review. See *State ex rel. Chiles v. Public Emps. Relations Comm'n,* 630 So. 2d 1093, 1095 (Fla. 1994) (indicating that the all writs provision is used to guard against threats to the potential exercise of the Court's jurisdiction).

Because it has been described as "a form of ancillary power," the all writs jurisdiction of this Court may be "used to obtain a stay or injunction to preserve the *status quo* of a proceeding" that is or will be pending in this Court. Philip J. Padovano, Florida Appellate Practice § 3:18 at 92 (2013 ed.). "The most common occasion for the invocation of the power to issue 'all writs' in Florida is the perceived necessity to preserve the *status quo* pending the review of some issue by the court from which the writ is sought." Robert T. Mann, The Scope of the All Writs Power, 10 Fla. St. U. L. Rev. 197, 200 (1982); see also *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968) (exercising all writs jurisdiction to halt destruction of election records even though court was uncertain it had jurisdiction because destruction would render issue moot); *Monroe Educ. Ass'n v. Clerk, Dist. Ct. of Appeal, Third Dist.*, 299 So. 2d 1, 3 (Fla. 1974) (noting that all writs jurisdiction is important because "certain cases present extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved

that require expedition"). The *status quo* prior to the First District's reinstatement of the automatic stay allowed for Redner to administer medication as recommended by his physician.

In this action, it is respectfully submitted that the constitutional dimensions and medical issues described herein "present extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved," sufficient to invoke this Court's "all writs" jurisdiction.

III.

FACTS ON WHICH PETITIONER RELIES

On November 8, 2016, Florida voters approved Amendment 2 (the "Amendment") by over 71%. When the Amendment became effective on January 3, 2017, as article X, section 29 of the Florida Constitution, it made marijuana legal for medical purposes and defined several "debilitating medical conditions" for which a qualified physician may determine that the medical use of marijuana would likely outweigh the potential health risks for a patient. The Amendment also established a constitutional immunity for three different and distinct groups: qualifying patients and their caregivers, doctors, ***and*** Medical Marijuana Treatment Centers.

Based on the First District's decision to quash the trial court's order vacating the automatic stay and the gratuitous comment regarding "review of the full

wording of the ***constitutional amendment***," plainly criticizing the trial court's analysis of which party had a "substantial likelihood of success," Redner's request for this Court's exercise of its "all writs" jurisdiction will be thorough and extensive. Once this Court has a clear understanding of the "full wording" of Amendment 2, article X, section 29 of the Florida Constitution, the merit of Redner's position will be evident.

The pertinent provisions of article X, section 29 of the Florida Constitution provide as follows:

> SECTION 29. Medical marijuana production, possession and use.—
>
> (a) PUBLIC POLICY.
>
> (1) The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law.
> (2) A physician shall not be subject to criminal or civil liability or sanctions under Florida law solely for issuing a physician certification with reasonable care to a person diagnosed with a debilitating medical condition in compliance with this section.
> (3) Actions and conduct by a Medical Marijuana Treatment Center registered with the Department, or its agents or employees, and in compliance with this section and Department regulations, shall not be subject to criminal or civil liability or sanctions under Florida law.
>
> (b) DEFINITIONS. For purposes of this section, the following words and terms shall have the following meanings:
>
> …
> (4) "Marijuana" has the meaning given cannabis in Section 893.02(3), Florida Statutes (2014), and, in addition, "Low-THC cannabis" as

defined in Section 381.986(1)(b), Florida Statutes (2014), shall also be included in the meaning of the term "marijuana."

(5) "Medical Marijuana Treatment Center" (MMTC) means an entity that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department.

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

…

(10) "Qualifying patient" means a person who has been diagnosed to have a debilitating medical condition, who has a physician certification and a valid qualifying patient identification card. If the Department does not begin issuing identification cards within nine (9) months after the effective date of this section, then a valid physician certification will serve as a patient identification card in order to allow a person to become a "qualifying patient" until the Department begins issuing identification cards.

In article X, section 29(b)(4), "***marijuana" …has the meaning given to cannabis in Section 893.02(3), Florida Statutes (2014)***, and, in addition, "Low-THC cannabis" as defined in Section 381.986(1)(b), Florida Statutes (2014), shall also be included in the meaning of the term "marijuana." (emphasis added).

In Section 893.02(3), Florida Statutes (2014), "cannabis" is defined as follows:

"Cannabis" means ***all parts of any plant of the genus Cannabis, whether growing or not;*** the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt,

> derivative, mixture, or preparation of the plant or its seeds or resin. The term does not include "marijuana," as defined in s. 381.986, if manufactured, possessed, sold, purchased, delivered, distributed, or dispensed, in conformance with s. 381.986. (emphasis added).

In Section 381.986(1)(b), Florida Statutes (2014), "marijuana" is defined as follows:

> "Marijuana" means all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin, including low-THC cannabis, which are dispensed from a medical marijuana treatment center for medical use by a qualified patient.

This means that there are many different forms of marijuana, but all are considered "marijuana" under the definition and, for every medical use, subject to immunity. At every opportunity before the trial court, Redner asserted that the trial court need look no further than "the plain language of these components of Article X, section 29," to grant the relief he sought in this action.

On June 20, 2017, Petitioner Redner filed the operative complaint in this action against the Florida Department of Health (the "Department") (App. at pp. 4-13). In Count I of the Complaint, Redner, "a registered holder of a medical marijuana use card," a vegan, and a Stage-IV lung cancer patient, sought a declaratory judgment stating that he was entitled to the benefit of the "plain language" of article X, section 29 of the Florida Constitution (the "Amendment" or "Amendment 2"), to "possess" a "plant, growing or not," and "the seeds thereof," for his own personal

medicinal therapy, as recommended by his Doctor. In Count II of the Complaint, Redner sought an injunction against the Department to "prohibit Defendant from barring Plaintiff's right to grow his own cannabis plant(s) for personal use," as made lawful by Amendment 2, a constitutional right embraced by over 71% of Florida Voters.

On July 21, 2017, Redner filed a Motion for Temporary Injunction. On July 28, 2017, the Department filed a Motion for Change of Venue and Transfer of Court File (the "Motion to Transfer") seeking transfer of this action from the Thirteenth Judicial Circuit (Hillsborough County) to the Second Judicial Circuit (Leon County). The operative argument in the Motion to Transfer was based on the "home venue privilege" doctrine. On July 31, 2017, the Department filed a Motion to Dismiss the Complaint based on Redner's alleged failure to "exhaust his administrative remedies" prior to seeking relief in the Circuit Court. On October 5, 2017, Redner filed an Emergency Supplemental Motion for Entry of Temporary Injunction against the Department, with affidavits and/or declarations from Mr. Redner's Doctor, Barry Gordon, M.D., Amanda Derby, Esq., Redner's Counsel, and Mr. Redner.

On November 8, 2017, the Hillsborough County Circuit Court Judge entered an Order Granting the Department's Motion for Change of Venue and Transfer of

Court File (the "Transfer Order"). In accordance with the Transfer Order, the case was transferred to the Second Judicial Circuit Court on November 20, 2017.

On December 8, 2017, the Department filed an Amended Motion to Dismiss the operative Complaint and a Response in Opposition to Plaintiff's Emergency Supplemental Motion for Entry of Temporary Injunction, and, on December 18, 2017, Redner filed his Response in Opposition to the Motion to Dismiss and a Reply to the Department's Response in Opposition to the Motion for Temporary Injunction.

On December 11th and 12th 2017, the depositions of Alexander Sandorf (App. at pp. 14-58), Dr. Barry Gordon (App. at pp. 59-141), Dr. Dustin Sulak (App. at pp. 142-184), and Joseph Redner (App. at pp. 185-203) were conducted and ultimately filed. On December 18, 2017, the parties filed a Joint Pretrial Hearing Statement in preparation for the December 20, 2017, hearing on the on Motion to Dismiss and on the Motion for Temporary Injunction, discussed more fully below.

The evidence and testimony presented to the trial court on December 20, 2017, incorporated both the depositions referenced above and also included additional testimony from Dr. Barry Gordon, Alexander Sandorf, Dr. Dustin Sulak, and Joseph Redner. The transcript of this hearing is included at App. at pp. 204-325. Also entered into evidence were the PowerPoint presentations submitted by

Redner ("Plaintiff's Right to Grow His Own Medical Cannabis Under article X, section 29 of the Florida Constitution," App. at pp. 326-339) and Dr. Dustin Sulak ("Expert Witness Testimony," App. at pp. 340-364). On January 24, 2018, the trial court issued an Order denying the Motion to Dismiss and denying the Emergency Motion for Temporary Injunction. (App. at pp. 371-387). This Order summarizes the evidence and testimony described above. The Department filed its Answer and Affirmative Defenses on February 7, 2018 (App. at pp. 388-393).

The trial court then set the matter for a non-jury trial. In anticipation of the trial, in lieu of courtroom testimony, the parties conducted the depositions of Courtney Coppola, the Deputy Director of the Office of Medical Marijuana Use (App. at pp. 394-499), Dr. Barry Gordon (App. at pp. 500-532), , and Joseph Redner (App. at 533-540) The transcript of the March 21, 2018, trial is found at App. pp. 541-597. Introduced into evidence at this trial was an additional PowerPoint presentation ("Plaintiff's Argument Supporting Injunctive and Declaratory Relief Pursuant to article X, section 29 of the Florida Constitution." (App. at 598-625).

Following the bench trial, the trial court entered its Order on Non-Jury Trial and Final Judgment on April 11, 2018. (App. at pp. 658-679). The trial court ruled that Mr. Redner "has a constitutional right to possess growing marijuana plants for the purpose of using them as a medical treatment for his qualifying debilitating

condition, consistent with Dr. Gordon's recommendation as to emulsifying [juicing] the biomass of the marijuana plants to obtain the recommended eight ounces per day." (App. at p. 674). The trial court further ruled that "Article X, Section 29(d) provides the Department with no authority by which it may limit routes of administration for a qualifying patient to administer medical marijuana, and the Department has no authority to modify the rights of qualifying patients that Floridians have chosen to place in the Florida Constitution." (App. at p. 676).

On April 11, 2018, the Department filed it Notice of Appeal, thus triggering the automatic stay of the Final Judgment authorized by Florida Rule of Appellate Procedure 9.310(b)(2). Redner filed his Motion to Vacate Automatic Stay on April 12, 2018, (App. at pp. 680-692), which the Department filed an opposition to on April 16, 2018. (App. at pp. 693-697). The transcript of the hearing on the Motion to Vacate the Automatic Stay is found at App. at pp, 704-736. The trial court granted the Motion to Vacate Automatic Stay on April 17, 2018. (App. at pp. 698-703). The hearing transcript is at App. pp. 704-736.

On April 17, 2018, the Department filed its Motion for Review of Order Vacating Automatic Stay and Request for Expedited Treatment. (App. at pp. 737-749). On April 19, 2018, Redner filed his Response to Show Cause Why Appellant, the Florida Department of Health's Motion for Review of Order vacating Automatic Stay Should Not Be Granted. (App. at pp. 750-798). On May

1, 2018, the First District issued its order quashing the trial court's April 17, 2018, order vacating the automatic stay, reinstating same, and stating that the stay "shall remain in effect pending the outcome of this appeal." (App. at p. 799).

IV.

THE NATURE OF THE RELIEF SOUGHT

For the reasons set forth below, Mr. Redner would respectfully submit that the facts and applicable law established in this case justify, overwhelmingly, the exercise of this Court's "all writs" jurisdiction and the issuance of an order that the automatic stay be vacated, thus allowing Redner access to the medicine recommended by his Doctor, for which he has established a medical necessity.

V.

ARGUMENT

A. THE LEGAL POINTS AND AUTHORITIES SUPPORTING EXERCISE OF THIS COURT'S "ALL WRITS" JURISDICITION

To support the relief requested, Redner will show that the First District's comment regarding "review of the full wording of the ***constitutional amendment*** " actually supports Redner's position, particularly based on this Court's prior evaluations of constitutional amendments that incorporate definitions from statutes. Redner will show that the plain language of Amendment 2 fully establishes the merit of the trial court's conclusions that it was Redner who showed a "substantial

likelihood of success," and not the contrary, in this hugely important constitutional and "patient's rights" matter.

Success in this action rests on a single constitutional question: *does the plain language of the constitution mean what it says, or does it mean what a State agency decides it says*? The inescapable language of article X, section 29, and the vast case law supporting the trial court's ruling all indicate that "any other provision" of state law would be inferior to and legally incapable of changing the plain language of article X, section 29. Article X, section 29(a)(1) provides that: "the medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liabilities or sanctions under Florida law."

The operative terms in that provision, *medical use*, and *marijuana* are specifically defined within the text of amendment.[1] The term *medical use* is defined in article X, section 29(b)(6) as "the acquisition, **possession**, use, delivery, transfer, or administration of an amount of marijuana not in conflict with Department rules, or of related supplies by a qualifying patient or caregiver for use by the caregiver's designated qualifying patient for the treatment of a debilitating medical condition."

Article X, section 29(b)(4) defines "Marijuana" as "the meaning given cannabis in Section 893.02(3), Florida Statutes (2014)" which, by cross-reference

[1] It has been stipulated in the record that plaintiff Joseph Redner is a qualifying patient as defined in the Amendment.

to 893.02(3) means "**all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof;** the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." [emphasis added].

When the definitions of "medical use" and marijuana" are incorporated into the plain text of the Amendment by cross-reference, it is clear and unambiguous that article X, section 29(a)(1) immunizes Redner from civil or criminal liabilities or sanctions for the "***possession***" and "***use***" of "***all parts*** of any plant of the genus Cannabis, ***whether growing or not; the seeds thereof…"*** [2]

The trial court agreed with Redner that the language in section 893.02(3) defining "marijuana" as "all parts of any plant . . . whether growing or not," means that Redner, as a "qualifying patient," can possess a "plant, growing or not." The trial court concluded:

> Plaintiff Redner also contends that he is entitled to possess, grow and use his own medical marijuana plant for emulsification, as the raw plant needed for emulsification is not available from the "Medical Marijuana Treatment Centers" [MMTCs] the Department of Health has approved for distribution of medical marijuana. The Department of Health denies that even the individual qualifying patients [such as Plaintiff Redner] to whom the Amendment applies have the right to possess or use the raw, growing plant, although the Amendment, with

[2] The definition that the Amendment sources from criminal statutes 893.02(3) has its origins in the federal Controlled Substances Act (CSA). The definition is relied upon for both state and federal criminal prosecutions, where there is a compelling state interest in ensuring that the most accurate language is used to describe what is meant by "marijuana."

> its incorporated definition from Section 893.02(3), Florida Statutes (2014), provides otherwise.
>
> Based upon the clear language of the Amendment, and the lack of any credible evidence as to why the Amendment should not be given that effect, the Court finds for the reasons set forth below, under Florida law, Plaintiff Redner is entitled to possess, grow and use marijuana for juicing, **solely** for the purpose of his emulsifying the biomass he needs for the juicing protocol recommended by his physician. The Court also finds, for the reasons set forth below, that the Florida Department of Health has been, and continues to be, non-compliant with the Florida Constitutional requirements. (App. at pp. 659-660).

A qualifying patient is immunized for the possession of marijuana in all its forms contemplated in the definition. Contrary to the Department's claims, the right to possess a growing plant is indeed enshrined in the constitution. While the Constitutional Amendment allows for the creation of rule-making authority, and the Department is mandated to establish an "amount" a patient may possess, nothing can limit the ***type*** of medical marijuana to be used, and ***nothing*** in any grant of authority provides the Legislature or the Department the power to deviate from or contradict the will of the people as clearly embraced by the Amendment:

> "Thus, where there is a choice, a constitutional provision must always be construed to be self-executing, for such construction avoids the occasion by which the people's will may be frustrated." *Gray v. Bryant*, 125 So.2d 846 (Fla. 1960).

In looking specifically at the Amendment, and emphasizing the pertinent language of the "Duties of the Department," nothing purports to limit the rights provided to qualified patients:

(d) DUTIES OF THE DEPARTMENT. The Department shall issue reasonable regulations necessary for the implementation and enforcement of this section. **The purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients.** It is the duty of the Department to promulgate regulations in a timely fashion.

(1) Implementing Regulations. In order to allow the Department sufficient time after passage of this section, the following regulations **shall** be promulgated no later than six (6) months after the effective date of this section:

a. Procedures for **the issuance and annual renewal of qualifying patient identification** cards to people with physician certifications and standards for renewal of such identification cards. Before issuing an identification card to a minor, the Department must receive written consent from the minor's parent or legal guardian, in addition to the physician certification.

b. Procedures establishing **qualifications and standards for caregivers**, including conducting appropriate background checks, and procedures for the issuance and annual renewal of caregiver identification cards.

c. **Procedures 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.

d. A regulation that defines **the amount of marijuana** that could reasonably be presumed to be an adequate supply for qualifying patients' medical use, based on the best available evidence. This presumption as to quantity may be overcome with evidence of a particular qualifying patient's appropriate medical use.

Indeed, if Amendment 2 was to set forth any provision prohibiting a "qualified patient" from possessing a growing plant for medical purposes, such a

restriction would have been set forth in the "limitations" contained in the Amendment. No such limitation is set forth:

> (c) LIMITATIONS.
>
> (1) Nothing in this section allows for a violation of any law other than for conduct in compliance with the provisions of this section.
>
> (2) Nothing in this section shall affect or repeal laws relating to non-medical use, possession, production, or sale of marijuana.
>
> (3) Nothing in this section authorizes the use of medical marijuana by anyone other than a qualifying patient.
>
> (4) Nothing in this section shall permit the operation of any vehicle, aircraft, train or boat while under the influence of marijuana.
>
> (5) Nothing in this section requires the violation of federal law or purports to give immunity under federal law.
>
> (6) 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 medical marijuana in any public place.
>
> (7) Nothing in this section shall require any health insurance provider or any government agency or authority to reimburse any person for expenses related to the medical use of marijuana.
>
> (8) Nothing in this section shall affect or repeal laws relating to negligence or professional malpractice on the part of a qualified patient, caregiver, physician, MMTC, or its agents or employees.

Absolutely nothing in the "duties" set forth for the Department, nor any aspect of the "limitations" imposed by Amendment 2, requires or authorizes the Legislature to prohibit a qualified patient from possessing a growing plant, period.

In fact, the Legislature is only authorized to enact laws that are ***consistent*** with the Amendment:

> (e) LEGISLATION. Nothing in this section shall limit the Legislature from enacting laws consistent with this section.

If the Department was authorized to deny qualifying patients one form of marijuana, they would arguably have the authority to deny them ***all*** forms of marijuana and the right to medical use of marijuana for qualifying patients would cease to exist which would be totally contrary to the will of Florida voters. As the trial court recognized, the law on this issue could not be more settled.

> **"A constitutional provision that is clear and explicit cannot be given a meaning by the legislature which conflicts with the terms of such provision.**
>
> "If such were not a recognized limitation upon the general rule with respect to legislative determinations the legislature would have the means within its grasp to fritter away or set at naught every single limitation upon the exercise of governmental power which has been inserted in the Constitution for the protection of the citizen **by the simple device of declaring legislatively that such a limitation did not in fact exist, or that the language prescribing the limitation meant something other than that which was clearly stated**." [emphasis added]. *State v Florida State Improv. Com.* 47 So 2d 627 (Fla, 1950)

Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language. *Lawnwood Medical Center v. Seeger*, 990 So.2d 503 (Fla. 2008); *Zingale v. Powell*, 885 So.2d

277 (Fla. 2004); *Coastal Florida Police Benevolent Ass'n, Inc. v. Williams*, 838 So.2d 543 (Fla. 2003). This explicit language is found in the statement of public policy articulated in the Amendment:

> (a) PUBLIC POLICY.
>
> (1) The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law.

If constitutional language is clear, unambiguous and addresses the matter at issue, it must be enforced as written, and the courts do not turn to rules of constitutional construction. *Ford v. Browning*, 918 So.2d 250 (Fla. 2005).

The record will show that the entire basis of the argument asserted by the Department is that:

> "Based on the plain language of the definition of 'Medical use' a qualifying patient is not entitled to cultivate (i.e., grow) or process marijuana because the words 'cultivate' and 'process' are not included in Article X, section 29(b)(6)." (App. at p. 742).

The Department has continuously asserted the argument that "a qualifying patient is not entitled to cultivate or process marijuana," however, neither those words, nor anything approximating the concept, appear anywhere in the Amendment. Based on this, the First District's oblique comment that, the panel's "***preliminary*** review of the ***full*** wording of the constitutional amendment"

(whatever that means) indicates Redner "did not sufficiently demonstrate a likelihood of success," this comment is ***not*** based on the plain language of the Amendment, but an artificial interpretation not allowed for constitutional provisions. There is nothing in the "full wording" of the amendment that contradicts the plain language of article X, section 29(a)(1) which gives a qualifying patient immunity for the possession of a growing plant. The terms "medical use" and "marijuana" are clearly defined in the Amendment. The trial court found:

> Because Article X, section 29 as adopted by Florida's voters is ***clear and unambiguous***, and because it is not the role of the Court to rewrite the Constitution, the Court must find that Florida's Medical Marijuana Amendment permits Plaintiff Redner to possess growing marijuana plants in order to cultivate and process such plants for the **sole** purpose of administering the emulsified medical marijuana biomass to himself for the medical treatment to which he is entitled, and which Dr. Gordon has appropriately recommended. (App. at pp. 674-675).

Ambiguity is an **absolute prerequisite** to judicial construction of the Constitution. *Florida League of Cities v. Smith*, 607 So.2d 397 (Fla. 1992). It is a general rule that the courts must construe constitutional provisions as they find them. In other words, the courts have the obligation to support, protect, and defend the constitution of the state, and to give effect to the controlling law as it is written, and, where constitutional provisions are plain in meaning, no "construction" using other sources is necessary or allowable. If the words used in a constitution are plain

and clear, there is generally no necessity to resort to extrinsic means of interpretation. *State ex rel. West v. Gray*, 74 So.2d 114 (Fla. 1954). In fact, if the natural signification of the words used in the order and grammatical arrangement in which they have been placed conveys a definite meaning and involves no absurdity or contradiction between the parts of the same instrument, no construction is allowable. *City of Jacksonville v. Continental Can Co.*, 113 Fla 168, 151 So. 488 (Fla. 1933). A constitutional provision that is clear and explicit cannot be given a meaning by the Legislature that conflicts with the terms of such provision.

The Amendment grants three distinct immunities: that of the patient for medical use of marijuana, the physician for issuing a physician certification, and for actions and conduct by the Medical Marijuana Treatment Center. Mr. Redner's medical use involves the possession and administration of marijuana. Growing plants are the type of marijuana that Mr. Redner, in consultation with his physician, desires to possess and administer to himself by way of juicing. Article X, section 29(a)(1) provides Mr. Redner immunity for the possession and administration of those growing plants irrespective of the rights or immunities granted to Medical Marijuana Treatment Centers.

The trial court appropriately rejected the Department's strained effort to ignore the impact of the incorporation of the definition of "marijuana" in

Amendment 2, which unequivocally provides immunity to a qualified patient and allows that patient to possess a "growing plant." Probing more deeply the arguments accepted by the trial court, the major disconnect in the Department's argument is that the Constitutional Amendment, a clear and unambiguous document, provides rights and immunities to a "qualified patient," and, ***also*** provides rights and immunities to MMTC's that can easily be reconciled with the rights given a qualified patient.

The definitions in article X, section 29(b)(5), provide the list of services that a MMTC can provide, all of which can be read in harmony with the rights provided to a qualified patient. In the absence of a showing to the contrary, all laws, and certainly Constitutional Amendments, are presumed to be consistent with each other. See *Capella v. City of Gainesville*, 377 So.2d 658 (Fla. 1979).

The clear language embraced by the trial court establishes that, while the MMTC is "an entity that acquires, cultivates, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department," Amendment 2 ***does not prohibit***, in any way, a qualified patient from possessing a "growing plant" for personal medical use. As identified by the trial court:

> Nothing in the Amendment authorizes the Department of Health [or any other part of Florida's government] to ignore the rights of qualifying patients to access the medical marijuana treatment to which they are entitled under the Florida Constitution, or to exclude any method by which qualifying patients may take their medicine. (App. at p. 670).

The MMTC has a specific immunity for selling marijuana products to qualifying patients, while the definition of medical use for patients allows no commercial exploitation. Similarly, medical use is subject to restrictions as to the amount a qualifying patient may possess, while the Amendment subjects the MMTC to no such restriction. The plain language of article X, section 29 clearly allows for patients to possess growing plants, but also recognizes that commercial marijuana producers can supply patients with marijuana in whatever form they require.

The most important aspect of the argument asserted by Redner is based on this Court's decision in *Benjamin v. Tandem Healthcare, Inc.*, 998 So.2d 566 (Fla. 2008). In that case, the daughter of former nursing home resident, who brought a negligence action as the personal representative of the resident's estate against the nursing home arising out of the resident's death from the alleged failure to serve her food in compliance with her treatment plan, challenged the district court's determination that she had no right to discovery of reports or records of any adverse medical incident involving the resident, under the state constitutional provision which gave patients a right of access to records in the course of business

of a "health care facility" or "provider" relating to any adverse medical incident as set forth in article X, section 25.

In the *Benjamin* decision, this Court stated that the polestar of constitutional construction is voter intent; this Court is obligated to give effect to the language of a constitutional amendment according to its meaning and what the people must have understood it to mean when they approved it. The Court also held that, when interpreting a constitutional provision, this Court must give effect to ***every*** provision and ***every*** part thereof. The most pertinent aspect of the decision was this Court's comments on what impact the "incorporation" of other statutory language has on interpretation:

> Our review of this question of constitutional construction is *de novo. Zingale v. Powell,* 885 So.2d 277, 280 (Fla.2004). We begin by observing that the polestar of constitutional construction is voter intent. *City of St. Petersburg v. Briley, Wild & Assocs., Inc.,* 239 So.2d 817, 822 (Fla.1970). "We are obligated to give effect to [the] language [of a Constitutional amendment] according to its meaning and what the people must have understood it to mean when they approved it." *Id.* Further, when interpreting a constitutional provision we must give effect to every provision and every part thereof. *Dep't of Envtl. Prot. v. Millender,* 666 So.2d 882, 886 (Fla.1996) ("[E]ach subsection, sentence, and clause must be read in light of the others to form a congruous whole so as not to render any language superfluous."). "Ambiguity is an absolute prerequisite to judicial construction" and "when constitutional language is precise, its exact letter must be enforced...." *Fla. League of Cities v. Smith,* 607 So.2d 397, 400 (Fla.1992). These foundational principles guide our analysis.[3]
>
> In interpreting a constitutional amendment, we begin with the

> amendment's plain language. *Ervin v. Collins,* 85 So.2d 852, 855 (Fla.1956) ("We are called on to construe the terms of the Constitution, an instrument from the people, and we are to effectuate their purpose from the words employed in the document."); *see also Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n,* 489 So.2d 1118, 1119 (Fla.1986) ("Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language."). As pointed out by both the First and Fourth District Courts of Appeal, article X, section 25, defines "health care facility" and "health care provider" as having "the meaning given in general law related to a *patient's rights and responsibilities.*" Art. X, § 25, Fla. Const. (emphasis added). Section 381.06 is titled "Florida *Patient's* Bill of *Rights and Responsibilities.*" § 381.026, Fla. Stat. (2004) (emphasis added). The Fourth District held that "[a] plain reading of the amendment reflects its reference to section 381.026 by its name." *Tandem Healthcare,* 969 So.2d at 522. We agree.
>
> Again, as noted by the district courts, when Amendment 7 was enacted no other statute in Florida used the phrase "patient's rights and responsibilities" in its title. No other statute used that phrase in its text either. Section 381.026, however, both used the phrase "patient's rights and responsibilities" in its title and also contained definitions of the terms that article X was defining when it used the phrase "patient's rights and responsibilities." *Id*. 998 So.2d, 570-571.

In the instant action, the incorporation of the definition of "marijuana" in Section 893.02(3) is clearly stated, thus, there is no need to determine what statutory language was sought to be incorporated into the constitutional amendment by looking at the "statement of purpose," any outside source, or the comparison of operative language, like the methods used by this Court in the *Benjamin* case to incorporate Section 381.026 into article X, section 25, and

conclude that the Amendment was drafted with the Florida Patient's Bill of Rights and Responsibilities, Section 381.026, "directly in mind."

Article X, section 29 hits the nail squarely on the head by stating, in article X, section 29(b)(4), "***marijuana" …has the meaning given to cannabis in Section 893.02(3), Florida Statutes (2014)***, and, in addition, "Low-THC cannabis" as defined in Section 381.986(1)(b), Florida Statutes (2014), shall also be included in the meaning of the term "marijuana." (emphasis added).

In Section 893.02(3), Florida Statutes (2014), "cannabis" is defined as follows:

> "Cannabis" means ***all parts of any plant of the genus Cannabis, whether growing or not;*** the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. The term does not include "marijuana," as defined in s. 381.986, if manufactured, possessed, sold, purchased, delivered, distributed, or dispensed, in conformance with s. 381.986. (emphasis added).

Most importantly, the above assertions are overwhelmingly supported by this Court's Advisory Opinion to the Attorney General Re: Use of Marijuana for Debilitating Medical Conditions, issued by this Court in Case No. SC15-1796/No. SC15-2002 (App. at pp. 642-656). In this Opinion, this Court concluded that the ballot title and summary complied with section 01.161(1), Florida Statutes (2015). This Court also concluded that the Amendment and the ballot summary satisfied the single subject rule, that being the inclusion of "a provision in our state

constitution permitting the medical use of marijuana," and fairly informed voters of the purpose of the proposed amendment. This Court stated:

> We conclude that the ballot title and summary comply with the statutory word limitations. Additionally, the ballot title and summary fairly inform voters of the purpose of the proposed amendment- the state authorization of medical marijuana for patients with debilitating medical conditions. The language is clear and does not mislead voters regarding the actual content of the proposed amendment. Accordingly, we conclude that the ballot title and summary comply with the clarity requirements of section 101.161. (App. at p. 653).

There is no restriction described for "home grow," simply the acknowledgement that Amendment 2 had one clear purpose, "the state authorization of medical marijuana for patients with debilitating medical conditions."

Based on the forgoing, it is respectfully submitted that it is ***Redner*** that has shown a "substantial likelihood of success on the merits," and, as set forth in the following section, that he and similarly situated patients have the constitutional right to administer their medication in accordance with their physician's recommendations.

B. THE EMERGENCY NATURE OF THE MEDICAL ISSUES IN THIS ACTION FURTHER SUPPORT EXERCISE OF THIS COURT'S "ALL WRITS" JURISDICTION

This issue was presented clearly to the trial court, where it was stipulated that: 1) Plaintiff Joseph Redner is a "Qualifying Patient" as defined in Article X

Section 29(b)(10) of the Florida Constitution, in that he has been diagnosed as a cancer patient, a condition which qualifies as a "Debilitating Medical Condition" as defined in Article X Section 29 (b)(1), Florida Constitution; 2) Plaintiff Joseph Redner possesses a valid "Physician Certification" and Qualifying Patient "Identification Card" as provided in Article X Section 29(b), Florida Constitution, and 3) Plaintiff's physician would recommend that plaintiff grow and "juice" his own marijuana, and consume a quantity of the juice daily as part of his treatment if Florida law permits plaintiff to grow and juice his own marijuana.

The trial court had the benefit of Redner's witnesses' testimony, all proving that a live cannabis juicing regimen would be optimal for Redner in seeking to prevent a recurrence of Stage-IV lung cancer, a "Debilitating Medical Condition" as defined in Article X Section 29 (b)(1), Florida Constitution. It was argued that "Redner will suffer irreparable harm if he continues to be prevented from being allowed to benefit from a medication which is clearly articulated as his constitutional right to use and possess under Article X, section 29."

It was further argued to the trial court that, under the "automatic stay" restrictions, during the time the Department's appeal will consume before any decision would be rendered, Redner would be deprived of a medical necessity deemed optimal to prevent a recurrence of his Stage-IV lung cancer. It was submitted that, "This harm will be irreparable, since the timing of medically

necessary treatment is *per se* critical, and the deprivation thereof is *per se* irreparable injury, and there is clearly no adequate legal remedy "after the fact" for such medically critical issues."

In ruling on this issue, the trial court properly concluded:

> The evidence previously adduced during the December 2017 evidentiary hearing on the plaintiff's injunction request and during the March 21, 2018 non-jury trial demonstrates that the plaintiff has been denied access to medical treatment to which he has been entitled since Floridians adopted the Medical Marijuana Amendment in November 2016. [The Amendment is placed in Article X, section 29 of the Florida Constitution].
>
> Denying the motion to vacate the stay would result in further preclusion of, and interference with, plaintiff Redner's constitutionally protected access to medical marijuana treatment, causing further potentially irreparable harm if the medical treatment recommended as optimum for him to keep his lung cancer from recurring. The unambiguous language of the Amendment indicating the plaintiff's rights as a qualifying patient to possession and use of marijuana in various forms, including the growing plant form referenced in the statutory definition incorporated in the Amendment from Section 893.02(3), 2014 Florida Statutes evinces a strong likelihood of Plaintiff's success on the merits. (App. at pp. 698-699).

The trial court accepted this argument in determining that the stay should be vacated because of the extensive evidentiary support for this assertion. The record is replete with the medical benefits of using marijuana to treat debilitating conditions (See Depositions of Dr. Barry Gordon, App. at pp. 59-141; Deposition of Dr. Dustin Sulak, App. at pp. 142-184; Sulak PowerPoint, App. At pp. 340-364). Specifically, the deposition testimony of Dr. Gordon is as follows:

> "Q: And as far as Mr. Redner's condition, did you, as his certified cannabis clinician come to any conclusions about what would be the optimal route of administration for medicinal cannabis for Mr. Redner:
>
> "A: Well, I think for someone as motivated as Mr. Redner, and surely as knowledgeable and as willing to undertake a juicing regimen, as Mr. Redner, the ability to juice what many feel, quite frankly, is a vegetable, cannabis sativa, would be a remarkable benefit to him to the extent of his ability to achieve the cannabinoid ratios and levels that he feels- as many physicians, as well, feel could best treat and continue to suppress cancer." See App. at p. 84.

Even more profound evidence is found in the Deposition of Dr. Sulak:

> "Q: Okay, as far as-a patient that had cancer, would you find there is any efficacy in preventing a relapse?
>
> "A: So there's – there's a scientific basis for preventing relapse using the raw cannabinoids. In particular, we know the most about THC-A. A recent article came out that proved THC-A stimulates not only- it stimulates a different receptor, not the cannabinoid receptors I mentioned earlier, but something called PPAR Gamma. And this is a nuclear receptor that controls transcription of certain genes and long before we know that THC-A stimulated this receptor, there's a whole body of scientific evidence that this receptor controls the cell cycle and can have anti-cancer effects and cancer preventative effects." See App. at pp. 162-163.

Finally, in utilizing the certification process provide by the Department to facilitate how a physician would register what his recommendation was to a qualifying patient, Dr. Gordon, on February 9, 2018, submitted a recommendation which stated: "Juicing raw cannabis has been found to be an optimal route of administration in the effort to prevent cancer" Exhibit1, Gordon Deposition, March 8, 2018.

The Department put forth zero evidence and not one witness to discuss the medical issues in this action. Redner presented more than sufficient evidence of "compelling circumstances" as discussed *Dep't of Envtl. Prot. v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998). Cancer is one thing, fishing nets another. The trial court recognized this in its Order Vacating the Automatic Stay:

> There is no evidence the Department will suffer any harm from the vacating of the automatic stay of the judgement at issue here. The only "harm" the Department will suffer is that it will not get to keep blocking the plaintiff's access to medical treatment deemed by the plaintiff's physician Dr. Gordon and expert Dr. Sulak as being the optimum method for Mr. Redner to keep his former stage 4 lung cancer in remission." See App. at p. 700.

No evidence has been presented whatsoever to demonstrate any disruption to the currently operating medical marijuana program that will occur in the absence of a stay. Quite to the contrary, the record shows that Dr. Gordon submitted a physician certification for growing plants through the Department's Compassionate Use Registry (the Registry), as all recommendations are submitted. The record shows that this certification became active on the Registry, upon which MMTCs rely to sell and distribute marijuana.

Leaving aside the amorphous, speculative, and arguably non-existent nature of any harm to the Department, it is respectfully submitted that, using the same authority referenced in the First District's order quashing the vacation of the

automatic stay, *Mitchell v. State*, 911 So.2d 1211 (Fla. 1995), in applying the balancing tests mentioned in *Mitchell*, the trial court did not abuse its discretion in vacating the automatic stay. As it stands now, the reinstatement of the automatic stay remaining in force during this appeal will cause Redner to suffer definite, irreparable, and irremediable harm, both to his health interests, but also to the important Constitutional interests already recognized by the trial court. In this action, the trial court has observed that Redner is suffering irreparable harm by not having access to the route of administration for the medical use of marijuana recommended by his Doctor, and what could be more of a compelling reason than a medical need coupled with a Constitutional right.

VI.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court has an overwhelmingly appropriate basis to exercise its "all writs" jurisdiction and can and should exercise its all writs jurisdiction ***now*** to preserve the issues in this action for its discretionary review. Since the all writs jurisdiction of this Court may be "used to obtain a stay or injunction to preserve the *status quo* of a proceeding" that is or will be pending in this Court, the perceived necessity to preserve the *status quo* of allowing valuable medical treatment is asserted in good faith as a case which "presents extraordinary circumstances involving great public interest

where emergencies and seasonable considerations are involved that require expedition." Again, it is respectfully submitted that the Constitutional dimensions and medical issues described herein "present extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved," sufficient to invoke this Court's "all writs" jurisdiction.

Based on the foregoing, Mr. Redner would respectfully submit that the facts and applicable law established in this case justify, overwhelmingly, the exercise of this Court's "all writs" jurisdiction and the issuance of an order that the automatic stay be vacated, thus allowing Redner access to the medicine recommended by his Doctor, for which he has established a medical necessity, and whatever further relief this Court deems just and reasonable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 15, 2018, a true and correct copy of the above and foregoing has been furnished in accordance with Florida Rule of Judicial Administration 2.516 to Michael J. Williams, Esquire at michael.williams@flhealth.gov, to Amber Stoner, Esquire at amberstoner@shutts.com, to Jason Brent Gonzalez, Esquire at jasongonzalez@shutts.com, and to Amanda L. Derby-Carter, Esquire at Amanda.l.derby@gmail.com.

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