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Public Comment on Rule No. 64-4.01:
Medical Marijuana for Debilitating Medical Conditions

MPP Strongly Opposes These Unconstitutional Rules

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Florida Department of Health:

Amendment 2, adopted by the voters in November 2016, sets forth a structure for an effective medical marijuana program, including definitions of key terms, and it requires the Department of Health to issue implementing regulations. These regulations purport to fulfill the Department's constitutional obligation, but instead, they simply expand the existing, extremely limited CBD program and disregard both the plain language of the constitution and the spirit of the amendment, adopted with an overwhelming 71% of the vote.

It is basic, black letter law that the constitution trumps any inconsistent statute. MPP urges the Health Department to discard this flawed rule and begin instead with the explicit terms of the fundamental law of Florida — its constitution. The Florida Supreme Court has said and has repeated the mantra that, "...Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." *Traylor v. State,* 596 So.2d 957, (Fla. 1992). The Court continued saying that "the doctrine of primacy … is a vital and living concept whose antecedents extend back to the earliest days of Florida history." *Id* at 983.

The Department's proposed rules require physicians to "order" medical marijuana for their patients and to submit information, including dosage information, to a state registry. The First Amendment protects a physician's free speech entitlement to recommend patients use medical marijuana, but physicians would be put in jeopardy of losing their Drug Enforcement Agency ("DEA") registration and of violating federal laws because the action of "ordering" is sufficiently similar to that of "prescribing" such that it would show a specific, prohibited intent that the patient obtains medical marijuana as outlined in *Conant v. Walters*, 309 F.3d 629, Court of Appeals (9th Cir. 2002). Specifically, the Court in *Conant* found that doctors could recommend cannabis, but not with the specific intent that the recommendation be used to obtain marijuana. The California Medical Association has issued a list of dos and don'ts to physicians in light of the decision and advised against conduct indicating a specific intent — such as specifying dosage or the mode of administration. The risk may be too heavy a burden to bear for some physicians, and would therefore restrict the number of prescribing physicians across the state.

Amendment 2 clearly expands circumstances in which physicians might recommend medical marijuana to include "other debilitating medical conditions of a similar kind of class language for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient." However, the Department lists only ten medical conditions in which doctors would be allowed to recommend medical marijuana and further limits the unspecified

conditions to those "determined by the Florida Board of Medicine." This flagrantly differs from the text of the Amendment, which provides that the patient's doctor — not the agency — may determine what constitutes a substantially similar condition.

The Department's proposed rule would maintain the unacceptably low number of licensed vendors across the state, violating the intent of Amendment 2. Seemingly in the business of promoting oligopolies, the Department intends for only seven vendors to serve the estimated 450,000 people will now eligible to purchase and use medical marijuana.[1] Amendment 2 clearly establishes a process for licensing medical marijuana treatment centers ("MMTC") and instructs the Department to begin issuing registrations for MMTCs within nine months of the implementation of Amendment 2. Not only should the Department register multiple MMTCs, but the Department should also consider introducing horizontal integration regarding medical marijuana production, transportation, and sales, as to ensure supply can meet demand and to safeguard access to reasonably priced medical marijuana.

The proposed rules define a qualified ordering physician as a doctor who has treated the patient for three months and has completed the additional educational requirements. However, these unnecessarily restrictive requirements for patients to see physicians for authorization of medical marijuana use is unduly prohibitive to patients because mandating multiple visits and multiple payments is medically and economically burdensome. Amendment 2 requires only "a physical examination and a full assessment of the medical history of the patient." Because of the restrictions placed on doctors and the liability placed on qualified ordering physicians under the proposed regulations, access to recommending physicians will be limited. Specifically in the case of terminally ill patients seeking assistance, the proposed waiting period is not practical due to the obvious and immediate need for relief.

MPP strongly opposes the Department's proposed rules and recommends the Department draft rules that reflect the intent of Amendment 2, specifically to:

- Allow physician recommendation and remove any instruction to "order" or to require physicians to specify a type or quantity of medical marijuana;
- Expand conditions for treatment to include any "debilitating medical condition[s] of the same kind or class as or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient";
- Open the market to comply with Amendment 2's mandate of licensing MMTCs within nine months to provide low-cost medical marijuana; and
- Abolish any limitation qualifying the doctor-patient relationship, and allow physicians to recommend medical marijuana to patients after "a physical examination and a full assessment of the medical history of the patient."

[1] The Florida Office of Economic and Demographic Research estimates medical marijuana patients will number about 450,000 annually, but the figure could rise should the number of qualifying conditions increase. *See* http://edr.state.fl.us/Content/constitutional-amendments/2016Ballot/MedMTransmittalLetters.pdf