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**SC19-1464**

# IN THE SUPREME COURT OF FLORIDA

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**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*,

## SUPPLEMENTAL BRIEF OF THE PETITIONERS

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

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves constitutional challenges to three components of Florida's regulatory system for medical marijuana treatment centers ("MMTCs") outlined in section 381.986(8), Florida Statutes (2017) (the "MMTC Licensure Statute"). The First District decision under review affirmed in part and reversed in part the trial court's temporary injunction concluding that Respondents Florigrown, LLC, and Voice of Freedom, Inc. d/b/a/ Florigrown (collectively, "Florigrown") had demonstrated a substantial likelihood of success on their constitutional challenges to: 1) a statutory "cap" on the number of MMTC licenses that may be issued by the Florida Department of Health; and 2) a statutory requirement for "vertical integration" of MMTCs. The parties addressed these matters at length in their principal briefs and at oral argument.

This supplemental brief addresses a third constitutional challenge by Florigrown that was not discussed by the First District and was not a basis for its decision affirming the trial court's order of injunctive relief: whether Florigrown demonstrated a substantial likelihood of success on the merits of its claim that section 381.986 is a prohibited special law granting a privilege to a private corporation. As set forth below, Florigrown does not have a substantial likelihood of success on the merits of this "special law" challenge. For this reason—and the grounds argued in the Department's principal briefing and at oral argument—the

trial court's order granting a temporary injunction should be reversed.

## 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). Legal conclusions made by a lower court when reviewing an order granting a temporary injunction are also reviewed de novo. *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 471 (Fla. 1st DCA 2018). Finally, whether a statute is a special law or a general law is subject to de novo review. *Fla. Dep't of Bus. & Prof. Reg. v. Gulfstream Park Racing Ass'n*, Inc., 967 So. 2d 802, 806 (Fla. 2007).

Florigrown's claim before the trial court that the MMTC Licensure Statute is an unconstitutional special law is subject to the rigorous scrutiny required for facial challenges. *See Davis v. Gilchrist Cnty. 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, Florigrown must show that no set of circumstances exists under which the statute would be valid. *Venice HMA, LLC v. Sarasota Cnty.*, 228 So. 3d 76, 79 (Fla. 2017). 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."); *R.J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1084, 1089 (Fla. 1st DCA 2011) ("All reasonable doubts as to the validity of the statute are to be resolved in favor of constitutionality."). Only if Florigrown satisfied these burdens would injunctive relief have been proper.

## ARGUMENT

### I. FLORIGROWN DOES NOT HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS "SPECIAL LAW" CHALLENGE TO THE MMTC LICENSURE STATUTE.

This Court asked the parties to address whether Florigrown has a substantial likelihood of success on the merits of its challenge to sections 381.986(8)(a)1., (a)2.a., and (a)3., Florida Statutes (2017), as a special law granting a "privilege to a private corporation." Art. III, § 11(a)(12), Fla. Const. For three reasons, the answer is no. First, to the extent the statute describes different qualifications for different categories of MMTC applicants, the MMTC Licensure Statute remains a constitutional general law because it operates uniformly based upon proper differences inherent in or peculiar to each class. Second, the MMTC Licensure Statute ultimately establishes a comprehensive and unified statutory system for the statewide licensure and regulation of MMTCs, with a rolling expansion of the number of available MMTC licenses commensurate with patient growth and need. Third, the MMTC Licensure Statute has statewide effect and is rationally related to

important state functions. For these reasons, section 381.986 is a general law, and the trial court erred by finding Florigrown demonstrated a substantial likelihood of success on the merits of its special law challenge.

**A. The legal standard for "special law" challenges.**

Florida's Constitution prohibits certain special laws. Art. III, § 11, Fla. Const. As relevant here, such prohibited "special laws" include those that pertain to "private incorporation or [a] grant of privilege to a private corporation." Art. III, § 11(a)(12), Fla. Const. A plaintiff, to establish that a statute violates the constitutional, must demonstrate that the statute provides a benefit to a private corporation that others do not or cannot receive. *Venice HMA*, 228 So. 3d at 82.

A law is not a special law merely because it applies classifications to its subjects or relates to certain classes differently from others. Valid general laws may relate to "subjects, persons, or things as a class . . . if the classification is based upon proper differences which are inherent in or peculiar to the class." *Schrader v. Fla. Keys Aqueduct Auth.*, 840 So. 2d 1050, 1055 (Fla. 2003) (citing *Dep't of Legal Affairs v. Sanford–Orlando Kennel Club, Inc.*, 434 So. 2d 879, 881 (Fla. 1983)). A law becomes a "special law" only if the classifications contained therein are "not permissible or the classification adopted is illegal." *Gulfstream Park*, 967 So. 2d at 807 (quoting *State ex rel. Landis v. Harris*, 163 So. 237, 240 (Fla. 1934)). Thus, a law remains a general, and proper, law where it operates

"uniformly within permissible classifications" or "universally throughout the state." *Id.* (quoting *Landis*, 163 So. at 240).

### B. The MMTC Licensure Statute is a constitutional general law.

Despite these well-established legal standards, the trial court concluded that Florigrown had a substantial likelihood of success on the merits of its "special law" challenge. The trial court's conclusion was error.

#### *i. The MMTC Licensure Statute is a constitutional general law because it operates uniformly within permissible classifications.*

Prior to the ballot initiative underlying the MMTC Licensure Statute, medical marijuana was available to Floridians only through seven dispensing organizations ("DOs") licensed by the Department of Health. The Department licensed these DOs in accordance with procedures outlined in the Compassionate Medical Cannabis Act of 2014, Chapter 2016-123, Laws of Florida, and as the result of litigation. Each originally-licensed DO was selected in one of five regions of the state, and each had to demonstrate technical skill, financial integrity, and the ability to comply with measures designed to avoid diversion and unlawful access to marijuana, a Schedule I substance under federal law. *See* § 381.986(1)-(7), Fla. Stat. (2014); *see also* 21 U.S.C. § 812. Many potential purveyors sought licensure through the DO process ("2015 Applicants"), and the Department became familiar with the 2015 Applicants' ability to comply with licensing requirements through their DO application submissions and the litigation that ensued after the licensure

awards.

When the Legislature created the MMTC Licensure Statute, it did so against the backdrop of the existing medical marijuana licensure landscape. The Medical Marijuana Amendment required the Department to begin registering MMTCs within just nine months of the Amendment's effective date. To ensure availability of medical marijuana quickly while also complying with the Amendment's textual command to ensure "safe use," the Legislature, in section 381.986(8)(a)1., grandfathered in DOs already regulated by the Department and, through section 381.986(8)(a)2.a., other entities who (1) had previously been evaluated by the Department, (2) were within one point of the DO license criteria or pursued arguments in court to that effect, (3) otherwise satisfied the statutory criteria for MMTC licensure, and (4) provided documentation to the Department regarding their "existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center."

To the extent this grandfathering scheme created classifications, such classifications do not render the MMTC Licensure Statute unconstitutional.[1] The

[1] Section 381.986(8)(a)3. did not create any distinct classification with a separate track for licensure. Instead, it defines a ***preference*** for certain entities qualified under the other provisions of the MMTC Licensure Statute. For this reason, section 381.986(8)(a)3. is not a "special law."

MMTC Licensure Statute's nod to the existing landscape reflected proper differences inherent in or peculiar to the affected groups. The scheme was not "arbitrary" but bore a "reasonable relation to the subject matter" of the statute, reflecting proper distinctions and differences. *See Sanford–Orlando Kennel Club*, 434 So. 2d at 881.

Specifically, the grandfather provisions are reasonably and rationally related to the purpose of section 381.986: creating a comprehensive and unified structure for MMTC licensure that would further Amendment's textually stated goal of "safe use" of medical marijuana while also achieving "availability" by the constitutionally mandated deadline. *See* Ch. 2017-232, § 1, Laws of Fla. ("It is the intent of the Legislature to implement s. 29, Article X of the State Constitution by creating a unified regulatory structure."); § 381.986(8)(a), Fla. Stat. ("The department shall license [MMTCs] to ensure reasonable statewide accessibility and availability as necessary for qualified patients."). The distinct framework for obtaining an MMTC license furthered the constitutional purposes of expanding the medical marijuana market in Florida in a regulated, safe, and expeditious manner.

At the time of the MMTC Licensure Statute's passage, entities who had already been evaluated or were already regulated by the Department were not similarly situated to new entities that had not been previously evaluated or regulated by the Department with respect to medical marijuana. The entities

discussed in section 381.986(8)(a)1. and (a)2.a. were known to the Department and were either ready to satisfy the needs of the medical marijuana-qualified patients by conversion of the already operational DO license to an MMTC license, or ready to begin the process of cultivation upon approval of their application by the Department. The unique position held by these entities justified distinct treatment.

The First District Court of Appeal's decision in *R.J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1084 (Fla. 1st DCA 2011), is instructive on this point. There, the First District considered a special law challenge to a statutory bond provision that applied only to the plaintiffs in the *Engle* progeny cases and the five tobacco companies that signed a settlement agreement under which the signatory tobacco companies were required to pay substantial sums of money to the state. *Id*. at 1090. The First District recognized the statute's narrow application but rejected the argument that the statute was an unconstitutional special law. *Id*. The court upheld the statute because the statutory bond limitation was reasonably related to the state's interest in the revenue stream under the agreement. *Id*. In reaching this conclusion, the First District relied on this Court's precedent holding that "a law does not have to be universal in application to be a general law if it materially affects the people of the state." *Id.* (quoting *St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla., Inc.*, 421 So. 2d 1067, 1069 (Fla. 1982)). The court thus upheld the statute, emphasizing the court's obligation to "give deference to the

classifications in the statute unless [the court] can say that the Legislature *could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made*." *Id*. (emphasis added).

Here, even more clearly than in *Hall*, public considerations justified the classifications and distinctions properly made by the Legislature. The Amendment outlined specific and competing public considerations the state had to honor: safe use and reasonable availability of medical marijuana on a tight timetable. The resulting provisions in the MMTC Licensure Statute were reasonably and rationally related to these purposes. And the standards operated uniformly within the groupings created. Every entity brought under the law by sections 381.986(8)(a)1. and 2.a. was equally affected. The statute allowed grandfathered entities to receive a license only if they satisfied a set of clear criteria that applied uniformly to each eligible business. For existing DOs, the entities had to be licensed and otherwise meet the requirements of section 381.986(8). § 381.986(8)(a)1., Fla. Stat. Entities affected by section 381.986(8)(a)2.a. could receive a license only if they (1) had previously been evaluated by the Department, (2) were within one point of the DO license criteria or pursued arguments in court to that effect, (3) otherwise satisfied the statutory criteria for MMTC licensure, and (4) provided documentation to the Department regarding their "existing

infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center." The uniformity of these requirements on the affected classes rendered the law a constitutional general law. *See State v. Leavins*, 599 So. 2d 1326, 1336 (Fla. 1st DCA 1992) ("A general law operates uniformly, not because it operates upon every person in the state, but because every person brought under the law is affected by it in a uniform fashion.").

Because the different qualifications for different categories of MMTC applicants operated uniformly based upon proper differences peculiar to the specified classes, Florigrown does not have a substantial likelihood of success on the merits of its "special law" challenge. This Court, like the First District in *Hall*, should defer to the Legislature's "broad discretion to establish statutory classification schemes in general laws." 67 So. 3d at 1090.

*ii. The MMTC Licensure Statute is a constitutional general law because the class of regulated entities remains open.*

Moreover, the statute did not create a closed universe of licensed MMTCs. The MMTC Licensure Statute, viewed properly as a comprehensive and unified whole, does not provide a benefit to private corporations that others—like Florigrown—do not or cannot also receive. The entirety of subsection (8)(a) establishes an open class of regulated entities (MMTCs) and a single, comprehensive, and unified structure for license issuance.

Although the first three subparts of section 381.986(8)(a) contain multiple subparagraphs listing *qualifications* for certain entities to receive licensure, the final subdivision makes clear that the statute establishes a single "bucket" of MMTC licenses that automatically increases as active qualified patients are added to the medical marijuana use registry. The MMTC Licensure Statute charts a path by which any applicants, including those totally unknown to the Department and who had never applied to be a DO, could join the ranks of marijuana purveyors in the state:

> Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers that meet the requirements of this section. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry that meet the requirements of this section.

§ 381.986(8)(a)4., Fla. Stat.

This rolling expansion of the number of available MMTC licenses demonstrates that the regulated class of authorized MMTCs is open. The MMTC Licensure Statute thus constitutes a valid general law.

The trial court erred as a matter of law when it found dispositive the fact that the only MMTCs licensed by the Department at the time of the preliminary injunction hearing in July 2018 had been issued licenses under the statutory qualifications applicable to the 2015 DO applicants. *See* (R. 1936-37); *but see* (R.

1938) (finding that Florigrown had not suffered irreparable harm because it would have "the ability to apply and compete for *one of the remaining available licenses*, and thus still has the opportunity to obtain licensure") (emphasis added). *Cf.* (R. 1955-56) (finding irreparable harm and granting injunctive relief two months after the order denying temporary injunction without addressing Florigrown's ability to apply for and compete for one of the remaining available MMTC licenses). The trial court's myopic focus disregarded the implications of section 381.986(8)(a)4. and the rolling expansion scheme envisioned by and provided by the statute. Simply stated, the trial court fell into the trap rejected in *City of Coral Gables v. Crandon*, 25 So. 2d 1 (Fla. 1946). There, this Court held that a statute relating to the creation of a water management district in any county having a population greater than 260,000 was not a special law, despite the fact the statute captured only Dade County at the time. *Id.* at 2–3. This Court reasoned that the statute was "potentially applicable to other counties in the state," as census data indicated other Florida counties were rapidly approaching the limit set by the statute. *Id.* at 2. *Cf. Dep't of Bus. Reg. v. Classic Mile, Inc.*, 541 So. 2d 1155, 1158 n. 4 (Fla. 1989) (concluding that a law was a special law where "a statutory classification scheme [was] fixed so as to preclude additional parties from satisfying the requirements for inclusion within the statutory classification at some future point in time"). In much the same way, the MMTC Licensure Statute created an open class of regulated

entities (MMTCs) and a single, comprehensive, and unified structure for the issuance of licenses.

For the similar reasons, Florigrown was tilting at windmills when it suggested to the trial court that the MMTC Licensure Statute was an invalid "special law" because Florigrown and others could not apply for MMTC licensure under the specific statutory subdivisions that carved out a path for those involved in the "earlier low-THC program." (AB at 41). This argument, like the trial court's myopic analysis, improperly focused the special law inquiry on whether Florigrown could seek an MMTC license under certain discrete provisions of the MMTC Licensure Statute listing *qualifications* for certain entities to receive licensure. But the proper focus in the special law inquiry is not on that question. Rather, it is on whether the framework for licensure remains open to new entities, including Florigrown. *See Ocala Breeders' Sales Co., Inc. v. Fla. Gaming Ctrs., Inc.*, 731 So. 2d 21, 25 (Fla. 1st DCA 1999) ("Whether a law is special or general depends in part on whether the class it creates is open. If it is possible in the future for others to meet the criteria set forth in the statute, then it is a general law and not a special law."). That fact alone is determinative.

The MMTC Licensure Statute provides for the competitive award of MMTC licenses to any qualified applicants, not just those grandfathered in through section 396.861(8)(a)1. and 2. Seven MMTC licenses are currently available to be

awarded by the Department to potential future applicants like Florigrown, regardless of whether they sought licensure as a DO. And the number of available MMTC licenses continues to increase automatically by operation of law. The rolling expansion of additional MMTC licenses represents a paradigmatic "open class."

Because it is possible for others to meet the statutory criteria for the award of an MMTC license, Florigrown does not have a substantial likelihood of success on the merits of its "special law" challenge to the MMTC Licensure Statute.

*iii. The MMTC Licensure Statute is a constitutional general law because it has statewide impact and is reasonably and rationally related to important state functions.*

Finally, Florigrown did not demonstrate a likelihood of success on the merits of its claim that section 381.986(8)(a) is a special law because the MMTC Licensure Statute has a statewide impact and is reasonably and rationally related to important state functions.

Without question, the licensing scheme set forth in section 381.986(8) has statewide implications. Under the MMTC Licensure Statute, the Department has awarded MMTC licenses across Florida. MMTCs are active throughout the state, as Florida's 22 licensed MMTCs collectively operate more than 240 brick-and-mortar dispensing facilities in 33 of Florida's counties, from Pensacola to Miami. In addition, many licensed MMTCs deliver medical marijuana to qualifying

patients. The MMTC Licensure Statute has a statewide footprint rather than a geographically narrow one, and it therefore is consistent with a general law. *See Schrader*, 840 So. 2d at 1056-57 (concluding that a law applicable only in one county was a general law, not a special law, because it served an important and necessary purpose and had statewide impact).

The MMTC Licensure Statute is also reasonably and rationally related to important state functions. The state holds responsibility for the wellbeing of its citizenry. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . . ."); *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905). The Amendment reaffirmed this notion and imposed a specific obligation on the state, through the Department of Health, to ensure the "availability and safe use" of medical marijuana by qualifying patients, Art. X, § 29(d), Fla. Const. The MMTC Licensure Statute is consistent with these objectives because its scheme for expeditious initial licensure and gradual but steady expansion is reasonably and rationally related to the Amendment's goals. Specifically, the MMTC Licensure Statute allows the Department to effectively exercise regulatory oversight of licensed MMTCs to ensure, by inspection, adequate safety and anti-diversion efforts that would be practically impossible under the free-for-all registry system advocated by Florigrown.

This Court's precedent reveals that such a connection to state functions is critical to the court's analysis when a challenger argues that a statute is an impermissible special law. In several cases, this Court has upheld as legally valid legislation that facially appeared to affect only a limited area of the state but which had a primary purpose of serving an important and necessary state function and an actual impact far exceeding the limited geographic area identified by its terms. *See, e.g.*, *Classic Mile, Inc.*, 541 So. 2d at 1159 (collecting cases finding statutes that, on their faces, appeared to affect only limited geographic areas were general laws, rather than special laws, where the statutes served an important and necessary purpose and had statewide impact). In such instances, this Court upheld the laws as general laws so long as they were not a guise for some illicit, geographically narrow purpose, but rather consistent with and part of a larger statute's scheme of statewide importance and impact. *See, e.g.*, *Schrader*, 840 So. 2d at 1056.

This same analysis applies in the commercial context. This Court has approved as a general law a statute that benefitted a single pari-mutuel racing facility where the state "ha[d] a legitimate pecuniary interest in racing because of the substantial revenue it receives from pari-mutuel betting" and the classification in the statute was directly related to that interest. *Sanford–Orlando Kennel Club*, 434 So. 2d at 881-82. In upholding the statute as a permissible general law, this Court explained that the state's interest in pari-mutuel racing was "substantial" due

to its enhancement of the tourism and the tax revenues generated by the industry. *Id.* at 883.

In much the same way, the state's interest in regulating the expanding field of entities providing medical marijuana to qualified patients was and is substantial. The Legislature was dutybound to ensure the licensure scheme enabled patients ready and safe access within just nine months of the Amendment's effective date. The Legislature crafted a system that furthered the Amendment's goals and honored the State's traditional role as "the authority to provide for the public health [and] safety." *Barnes*, 501 U.S. at 569. The scheme in section 381.986(8)(a) strikes a difficult but intentional balance. It is not a guise for some illicit, commercially narrow purpose, but rather consistent with and part of a scheme of statewide importance and impact. *Cf. Schrader*, 840 So. 2d at 1056.

Because the MMTC Licensure Statute has a statewide impact and is reasonably and rationally related to important state functions, Florigrown does not have a substantial likelihood of success on the merits of its special law challenge.

## CONCLUSION

Florigrown does not have a substantial likelihood of success on the merits of its facial constitutional challenge to the MMTC Licensure Statute, including its claim that section 381.986(8) is a special law granting a privilege to a private corporation. 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,

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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 27th day of May, 2020, through the Florida Courts E-Filing Portal to:

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