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.

Case No. SC19-1464
DCA Case No. 1D18-4471
L.T. Case No. 2017-CA-2549

BRIEF OF *AMICUS CURIAE* LOUIS DEL FAVERO ORCHIDS, INC. IN PARTIAL SUPPORT OF PETITIONERS

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I. Introduction

On May 7, 2020, the Court directed the parties to provide supplemental briefing on "whether Florigrown, LLC, and Voice of Freedom, Inc., d/b/a Florigrown (collectively, Florigrown) have a substantial likelihood of success on the merits of their challenge to section 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." Order Directing Supplemental Briefing (May 7, 2020).

Louis Del Favero Orchids, Inc. files this Amicus Brief to assist the court in addressing the following narrow issue:

> Whether Section 381.986(8)(a)3, Florida Statutes is a special law granting a privilege to a private corporation.

II. Legislative Background

In 2017, the legislature substantially amended section 381.986, Florida Statutes, through Senate Bill No. 8-A, described as "an act relating to the medical use of marijuana." *See* ch. 2017-232, Laws of Fla. This Act went into effect on June 23, 2017. *See id.*

The 2017 law required the Department to license Medical Marijuana Treatment Centers ("MMTCs"). *See id.* After directing the Department to license those Dispensing Organizations described by Section 381.986(8)(a)1, the statute went on to direct the Department to license ten applicants under the parameters of Section 381.986(8)(a)2. *See* § 381.986(8)(a)2. Those parameters were as follows:

> a. As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which had one or more administrative or judicial challenges pending as of January 1, 2017, or had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014; which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.
>
> b. As soon as practicable, but no later than October 3, 2017, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011) and is a member of the Black Farmers and Agriculturalists Association-Florida Chapter. An applicant licensed under this sub-subparagraph is exempt from the requirements of subparagraphs (b)1. and 2.
>
> c. As soon as practicable, but no later than October 3, 2017, the department shall license applicants that meet the requirements of this section in sufficient numbers to result in 10 total licenses issued under this subparagraph, while accounting for the number of licenses issued under sub-subparagraphs a. and b.

§ 381.986(8)(a)2., Fla. Stat. (2017) (emphasis added).

The law at issue in this brief, Section 381.986(8)(a)3, Florida Statutes ("Citrus Preference"), provides as follows:

> For up to two of the licenses issued under subparagraph 2., the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana.

§ 381.986(8)(a)3. The Citrus Preference, therefore, creates a preference for applicants who own a citrus processing facility and are applying for licenses pursuant to (8)(a)2. *See id.*

III. Section 381.986(8)(a)3 Creates An Open Classification And Is Therefore Not An Unconstitutional Special Law

The Citrus Preference is not an unconstitutional special law because it creates an open classification, as demonstrated by Del Favero's joining the classification by acquiring a citrus processing facility subsequent to the enactment of the Citrus Preference. *See* Del Favero's Motion For Leave Of Court to File Amicus Curiae Brief.

a. Constitutional Prohibition of "Special" Laws

The Florida Constitution provides that "[n]o special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law." Art. III, § 10, Fla. Const. The legislature did not provide notice of its intention to seek enactment of section 381.986(8)(a)3, Florida Statutes as a special law. *See* Ch. 2017-232, Laws of Fla. (2017). Even if the legislature publishes such notice of a special law, the Florida Constitution further provides that "[t]here shall be no special law or general law of local application pertaining to . . . private incorporation or grant of privilege to a private corporation." Art III, § 11(a)(12).

To determine whether Section 381.986(8)(a)3 is a special law granting a privilege to a private corporation, the Court first considers whether section 381.986(8)(a)3 is an unconstitutional special law in the guise of a general law. If the law is not an unconstitutional special law, there is no need to consider whether it grants a privilege to a private corporation. *See R.J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1084, 1090 (Fla. 1st DCA 2011) ("If the statute is a special law, then it is subject to the limitations in article III, section 11; if, however, the statute is a general law, then article III, section 11 is not applicable.").

The Constitution defines "special law" as "a special or local law." Art. X, § 12(g), Fla. Const. As the First District Court of Appeal has observed, "[t]his definition incorporates two related but slightly different concepts." *State, Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc.*, 912 So. 2d 616, 621 (Fla. 1st DCA 2005).

"A special law is one designed to operate upon particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal." *License Acquisitions, LLC v. Debary Real Estate Holdings, LLC*, 155 So. 3d 1137, 1142 (Fla. 2014). Stated another way, a law is an unconstitutional special law when it employs "a statutory scheme incapable of generic application to members of a class, and fixed so as to preclude additional parties from satisfying the requirements for inclusion within the

statutory classification at some future point in time." *Fla. Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc.*, 967 So. 2d 802, 807 (Fla. 2007) (quoting *Dep't of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1158 n.4 (Fla. 1989)).

In contrast, a general law is one "that operates universally throughout the state, uniformly upon subjects as they may exist throughout the state, or uniformly within a permissible classification." *License Acquisitions*, 155 So. 3d at 1142 (quoting *Classic Mile*, 541 So. 2d at 1157); *see also Gulfstream Park*, 912 So. 2d at 621 ("[A] general law operates universally throughout the state or uniformly within a permissible classification.").

b. Determining Whether a Law is an Unconstitutional Special Law

In *License Acquisitions*, the Florida Supreme Court explained the analysis for determining whether a law is an impermissible special law as follows:

> A statutory classification scheme must bear a reasonable relationship to the purpose of the statute in order for the statute to constitute a valid general law. *Id.* at 1157 (citing *West Flagler Kennel Club, Inc. v. Fla. State Racing Comm'n*, 153 So. 2d 5 (Fla. 1963)). Statutes that employ arbitrary classification schemes are not valid as general laws. *Id.* A statute is invalid if " 'the descriptive technique is employed merely for identification rather than classification.' " *Id.* at 1159 (quoting *West Flagler*, 153 So. 2d at 8). **Ultimately, the criterion that determines if a reasonable relationship exists between the classification adopted and the purpose of the statute is whether the classification is potentially open to additional parties**. *Id.* at 1158–59 (quoting *Dep't of Legal Affairs v. Sanford–Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983)); *see also Ocala Breeders' Sales Co., Inc. v. Fla. Gaming Ctrs., Inc.*, 731 So. 2d 21, 25 (Fla. 1st DCA

> 1999) ("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.").

License Acquisitions, 155 So. 3d at 1143 (emphasis added). If the classification in the statute is not potentially open to additional parties, then the law is "an unconstitutional special law enacted in the guise of a general law." *St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Grp., Inc.*, 967 So. 2d 794, 802 (Fla. 2007).

In *License Acquisitions*, the Florida Supreme Court addressed the validity of a statute that contained a classification that, when enacted, applied to only two entities. 155 So. 3d at 1143. Applying the same analysis from *St. Vincent's*, the court framed the issue as whether there was "a reasonable possibility" that the classification was "open to additional parties." *Id.* at 1144. Because the court concluded that the classification was "open to additional parties," the statute was a permissible general law. *Id.* at 1148.

St. Vincent's and *License Acquisitions* make clear that the dispositive inquiry in a case challenging a law as an unconstitutional special law in the guise of a general law is whether the classification within the challenged statute "is potentially open to additional parties." 155 So. 3d at 1143.

c. The Citrus Preference is Not a Special Law

Unlike the licenses available pursuant to Section 381.986(8)(a)2.a., the Citrus Preference is not limited to a closed group of applicants who applied for a medical marijuana license at some time in the past. Nor is the Citrus Preference limited only

to applicants who owned or acquired a citrus facility prior to the enactment of the Citrus Preference. Unlike Section 381.986(8)(a)2.a, the Citrus Preference does not use a "descriptive technique . . . employed merely for identification rather than classification." *License Acquisitions*, 155 So. 3d at 1143 (quoting *Classic Mile*, 541 So. 2d at 1159.

Rather, the only requirement to qualify for the Citrus Preference is that an applicant "own one or more facilities . . ." at the time of application. *Id.* The classification created by the Citrus Preference is open to applicants, such as Del Favero, who did not own a citrus facility at the time the Citrus Preference was enacted, but who acquired such facility subsequently, thereby joining the classification after it was created. The classification is therefore open to additional parties and is not an unconstitutional special law.

IV. Conclusion

Because the Citrus Preference creates a classification that is "open to additional parties," as demonstrated by Del Favero's joining the classification subsequent to its enactment, the Citrus Preference is not an unconstitutional special law.

Respectfully submitted,

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