SC19-1464

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

Respondents.

BRIEF OF *AMICUS CURIAE* LINER SOURCE, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Constitutional Provisions

Statutes

Other Sources

STATEMENT OF INTEREST IN THE CASE

Liner Source, Inc. ("LSI") is a Florida Corporation which has been registered to do business in Florida for more than thirty (30) consecutive years. LSI has been in business and operating as a second family generation wholesale liner and container nursery in Lake County, Florida since 1983. On or about October 2, 2017 LSI went to the designated Florida Department of Health, Office of Medical Marijuana's ("DOH") address, as published on their website and business cards, to hand deliver its "application"/registration and application fee on the statutorily defined due date of October 3, 2017. At that time, the DOH representative advised that the Office of Medical Marijuana was not located at the address and advised that she would not accept the "application"/registration. Instead, the representative directed LSI to drop the highly confidential "application"/registration and application fee in an unattended and unsecure dropbox. LSI attempted to contact the DOH's Office of Medical Marijuana directly via telephone to determine how to securely deliver the "application"/registration to no avail.

On October 8, 2018, LSI submitted a second Request for Registration to the DOH, Office of Medical Marijuana Use, specifically requesting that it be registered to operate as a Medical Marijuana Treatment Center ("MMTC") pursuant to Article V Section 29(b)(5) of the Florida Constitution. Within its Request for Registration LSI specifically noted that it would meet or exceed requirements mandated for

MMTCs and provide any information and/or documentation necessary to demonstrate same. Five months later, the DOH responded to LSI's Request for Registration and stated that it was not accepting applications for MMTCs.

LSI's 2017 and 2018 applications/registrations are currently the subject of litigation. *See Liner Source, Inc. v. Florida Department of Health, et al.,* Case No.: 2018-CA-001932 (Fla. 2nd Cir. Ct.) (Currently pending).

LSI also moved to intervene in the underlying action filed in Circuit Court by Respondents, Florigrown, LLC and Voice of Freedom, Inc. d/b/a Florigrown (Respondents shall be referred to collectively herein as "Florigrown"), against Petitioners. The lower Court granted its motion and LSI filed a Complaint which mirrors many of the arguments advanced by Florigrown in its Complaint.

LSI also moved to intervene in various administrative and Circuit Court cases filed by prospective MMTC applicants, specifically those applicants that were seeking to obtain a MMTC license under Section 381.986(8)(a)2.a. Within those cases, LSI objected to the licensure of the prospective MMTC applicants via Section 381.986(8)(a)2.a. contesting their qualifications and arguing that they should be comparatively reviewed with similarly situated applicants by submitting new applications.

LSI has expended, and continues to expend, significant time and financial resources in pursuing its registration and right to lawfully operate as a MMTC. As a consequence, it has a direct interest in the outcome of this matter.

On May 7, 2020, this Court directed the parties to provide supplemental briefing regarding the Florigrown's 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.

LSI files this Amicus Brief in support of Florigrown to assist the Court in addressing the issue of whether Section 381.986(8)(a)2a. is a special law granting a privilege to private corporations.

ARGUMENT

The power of the Legislature is limited by the Florida Constitution, which prohibits the Legislature from passing certain special laws. *Lawnwood Med. Ctr., Inc.* 990 So. 2d 503, 509 (Fla. 2008). Article III, Section 11(a)(12) states that "there shall be no special law or general law of local application pertaining to … private incorporation or grant of privilege to a private corporation." *Id.* A special law is defined as "one relating to, or 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." *State ex rel. Landis v. Harris*, 163 So. 237, 240 (Fla. 1934) (internal citations omitted). In *Lawnwood,*

supra, this Court examined the word "privilege" and held that the term "encompasses more than a financial benefit and includes a 'right', 'benefit', or 'advantage' granted to a private corporation." *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 512. Whether a statute is a special law revolves on its applicability to other entities or persons who may come within the regulated class. *City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002). In order for a statute to constitute a valid general law the statutory classification must bear a reasonable relationship to the purpose of the statute. *License Acquisitions, LLC v. Debary Real Estate Holdings, LLC*, 155 So. 3d 1137, 1142 (Fla. 2014). Statutes that contain arbitrary classifications schemes are not valid as general laws. *Id*. "Whether a law is special or general law depends in part on ***whether the class it creates is open."*** *Ocala Breeders' Sales Co., Inc. v. Florida Gaming Centers, Inc.*, 731 So. 2d 21 (Fla. lst DCA 1999) (emphasis added).

Closed Class

The key question in determining whether a law is an unconstitutional special law is whether the class is "closed". In regards to Section 381.986(8)(a)2a., the class is so definitively closed that the statute could have just named the applicants listed on the DOH's website as the 2015 dispensing

organization applicants.[1] The class is fixed and precludes any additional entity from satisfying the statutory requirements and joining the class described in Section 381.986(8)(a)2a. Specifically, Section 381.986(8)(a)2a. provides:

> 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.

Section 381.986(8)(a)2a. is so specific that it creates a class of private corporations that is limited and closed. The only entities that can satisfy the criteria set forth in the statute are those that applied to become a dispensing organization under the former Section 381.986 in 2015. This class has been closed since Section 381.986(8)(a)2a. was enacted in 2017. No entity can join the class as the statutory provision contains a threshold requirement that an eligible entity be one that was

[1] Of the 24 entities listed by the DOH (https://knowthefactsmmj.com/wp-content/uploads/_documents/dispensing-organization-applicants.pdf) all but 2 of the 24 entities were issued a MMTC license with only 6 of the licenses being issued pursuant to the original 2014/2015 DO application process. Many of the entities listed immediately sold their license, with some licenses sold for more than $50 million dollars to out of state entities.

reviewed, evaluated, and scored by the DOH and which was denied a dispensing organization license by the DOH in 2014. This fixed date makes it impossible for any "new" entity to join the class. The ***only*** entities that have been issued a license are those entities that applied for a Dispensing Organization ("DO") license during the 2014/2015 DO application process. No licenses have been issued to "new" entities. In fact, numerous entities, including LSI, have sent the DOH applications and/or requests for licensure/registration proffering that the respective entity could meet all the criteria laid out in Section 381.986 to become a MMTC. In response to LSI's request for licensure/registration the DOH issued a letter stating that the "Office of Medical Marijuana Use is not accepting applications for Medical Marijuana Treatment Center registration." Despite this, the DOH continued to issue licenses to the DO applicants further demonstrating that the class was closed and no other entity was able to join the class. The fact that additional MMTC licenses have or will become available based on the patient population does not change the fact that Section 381.986(8)(a)2a. creates a class within the Statute. Even though these additional licenses are or will become available they are not accessible to the "new" applicants as evidenced by LSI and other entities' attempts to apply for such licenses and the DOH's subsequent denial(s).

Privilege to Private Corporations

Section 381.986(8)(a)2 is not only an unconstitutional special law enacted under the guise of a general law because the class it creates is closed, but it is also unconstitutional because it is a special law which grants a privilege to a private corporation. Granting such a privilege to private corporation is prohibited under Article III, Section 11(a)(12) of the Florida Constitution. Section 381.986(8)(a)2a. allows private corporations to become licensed as MMTCs without having to go through the extensive application process that applies to all "other" entities seeking licensure under Section 381.986. The entities that satisfy the requirements under Section 381.986(8)(a)2a. are allowed to be licensed and begin operation before the application process is even opened to other entities. This gives them a competitive advantage over more qualified entities who have not been able to go through the application process through no fault of their own. Furthermore, many of these entities are being granted licenses more than four (4) years after they applied to become a DO[2]. These licenses are being awarded to entities that were ranked the

[2] Eight entities were licensed in conjunction with a Joint Settlement Agreement in April 2019. The only qualification that these entities met under Section 381.986(8)(a)2.a. was that they had applied for a DO license in 2015. The entities did not, and were not, required to submit updated information demonstrating that they were qualified to operate a MMTC despite the fact that all eight entities received the lowest rankings in their regions in 2015. *See* https://s27415.pcdn.co/wp-content/uploads/_documents/november-2015-aggregated-score-card.pdf. More than

lowest in the 2014/2015 application process without any further evaluation of their qualifications to open and operate a MMTC. The advantage of not having to complete the application process prior to being awarded a license, along with the fact that the DO entities are being licensed while no other entity is even allowed to apply, are clear privileges provided to these private corporations.

No Rational Relationship

The DOH has not and cannot show that Section 381.986(8)(a)2a. is rationally related to a legitimate government interest. The controlling factor is whether the statute has the potential to apply to other facilities in the future. Since the class contained in Section 381.986(8)(a)2a. is closed, the statute is arbitrary as a matter of law and is therefore unconstitutional. *R.J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1084 (Fla. 1st DCA 2011).

Regardless of whether the class is closed, Section 381.986(8)(a)2a. is not rationally related to any important state function or the Amendment's goals. The DOH argues that the state holds responsibility for the wellbeing of its citizenry and alleges that Section 381.986(8)(a)2a. is rationally related to ensuring the supply of safe medicine for qualifying patients. In fact, this provision acts contrary to its responsibility. As discussed, the provision allows the DOH to issue licenses to

a year later, none of these eight entities have opened a single dispensing location and some licensed in 2019 have sold their respective license.

entities before there is an evaluation of their current qualifications to operate a MMTC or the reasons why these entities were initially denied a DO license. Some of the entities that have been licensed do not even operate a dispensary. This fact, in conjunction with the DOH's failure to license those outside of the class, is restricting the market and thus restricting the availability of medical marijuana to Florida patients. Further, Section 381.986(8)(a)2a. cannot be not rationally related to protecting the wellbeing of its citizenry because it does not contain any guidelines related to the production or distribution of medical marijuana. The provision merely delineates a closed class of entities entitled to seek a MMTC license. Therefore, it is clear that this provision does not bear a rational relationship to a legitimate government interest or ensure the supply of safe medical marijuana to patients.

CONCLUSION

The provision set forth in section 381.986(8)(a)2a., constitutes an impermissible special law which violates Article III, Section 11(a)(12) of the Florida Constitution. Section 381.986(8)(a)2a. creates a class that is closed and the benefit to that class cannot be transferred to any other individuals or entities in the future. The class of entities who applied for a DO license in 2014 is a closed class and it is not possible for "new members" to meet the criteria set forth in the statute. Section 381.986(8)(a)2a. grants special rights, benefits, and advantages to certain private entities, and the DOH has not and cannot produce any evidence or

justification to suggest that this provision bears a rational relationship to ensuring the supply of safe medical marijuana to qualifying patients.

Respectfully submitted this 26th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this Brief is the Times New Roman 14-point font and that the Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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I HEREBY CERTIFY that on this 26th day of June 2020 a true and correct copy of the foregoing has been electronically uploaded to the Supreme Court of Florida's e-Portal and was furnished by E-Mail to all parties listed below.

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