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* TRIANGLE CAPITAL, INC, IN SUPPORT OF RESPONDENTS

Jeff Kottkamp
Florida Bar No. 771295
Jeff Kottkamp, P.A.
3311 Dartmoor Drive
Tallahassee, FL. 323212
(239) 297-9741
JeffKottkamp@gmail.com

Counsel for Triangle Capital, Inc.

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

STATEMENT OF INTEREST IN THE CASE

Triangle Capital, Inc. is a Florida Corporation which has been registered to do business in Florida for at least five consecutive years. On or about February 15, 2019 Triangle Capital, Inc. submitted a Request for Registration to the Florida Department of Health, Office of Medical Marijuana Use specifically requesting that they be registered to operate a Medical Marijuana Treatment Center.

In their Request for Registration Triangle specifically noted they:

a. Will meet any safety standard required for security, inventory and control including the use of video surveillance, alarms and physical barrier to control access to their facilities;

b. Will comply with any record keeping requirements for inventory control, tracking and chain of custody, and will use software that can be audited by an independent third party;

c. Will comply with testing requirements for medical marijuana including internal testing and maintaining batch samples for auditing and/or testing by an independent third party;

d. Will maintain records necessary to meet any standard for labeling of products including lists of ingredients and THC content, as well as any necessary product safety warnings;

e. Will make its facilities, processes and records available for inspection by the appropriate government entity;

f. Will consider the safety of its products and the well-being of patients to be a paramount concern;

g. Will satisfy and exceed any safety requirement established by the State of Florida;

h. Will satisfy any zoning requirements of the jurisdictions in which it will operate facilities;

i. Will hire and maintain a professional staff including a Medical Director that advances their core principle of patient safety.

j. Triangle principles have an eleven-year track record in the medical marijuana business in other states (holding 9 licenses in Colorado as "Green Medicine LLC" and 3 vertical licenses in Arizona doing business as "Territory Dispensaries") and the financial ability to successfully operate a Medical Marijuana Treatment Center in Florida. In addition, they are prepared to immediately tender a check for $60,830 to the State of Florida as a registration fee.

After the Office of Medical Marijuana Use failed to respond, or even acknowledge, Triangle's Request for Registration, Triangle Capital, Inc. filed a Motion to Intervene in the underlying action filed in Circuit Court by Respondent Florigrown, LLC against Petitioners. The Court granted the motion and thereafter Triangle Capital, Inc. filed a Complaint which closely mirrors the Complaint filed by Florigrown, LLC.

Like many of the Intervenors in the action, Triangle Capital, Inc. has invested significant financial resources toward their effort to enter the medical marijuana industry in Florida in reliance on the passage and wording of the medical marijuana constitutional amendment. Triangle Capital, Inc. has a direct interest in the outcome of this matter and knows from experience in other states that creating competition in the medical marijuana market in Florida will benefit patients by expanding the assortment of medical marijuana products and increase the available supply of medical marijuana products, which will in turn lower prices.

Summary of Argument

The Court has asked a very important question. Is the statute regulating medical marijuana in Florida (more specifically F.S. 381.986) a "Special Law" that grants a privilege to a private corporation? Put another way---is the current law regulating medical marijuana an example of giving an advantage, special privilege or special treatment to a select few private corporations.

The idea of using Florida law to grant special privilege to a private corporation is so contrary to the values of the citizens of Florida that such actions are prohibited in Article III Section 11 (a)(12) of the Florida Constitution. Thus, it is a fundamental value of the citizens of Florida that the Legislature abstain from granting favors to private companies or otherwise practicing what has come to be known as "crony capitalism".

Unfortunately, to date every medical marijuana treatment center license that has been awarded by the Florida Department of Health has been a grant of a special privilege to a select few private corporation in direct contravention of the Florida's Constitution.

ARGUMENT

How it all started

To fully understand the extent to which the Legislature violated the Constitution when they enacted Florida Statute 381.986(8), you must go back to the 2014 Legislative Session. During that Session, a bill was introduced in the Florida House of Representatives (HB 843)[1] and in the Florida Senate (SB 1030)[2] that authorized the "compassionate use" of low-THC medical marijuana. The legislation was allegedly filed in response to claims that certain types of low-THC medical marijuana provided relief to some children with seizure disorders.

House Bill 843 was filed on February 6, 2014. It was originally a two-page bill that redefined the term "cannabis" in Florida law. The bill was heard in three House committees. In the last committee stop on April 21, 2014 a 13-page strike-all amendment[3] was adopted by the House Judiciary Committee that dramatically changed the bill. Among other things, the amendment directed to the Department of Health to authorize the establishment of a medical marijuana dispensing

[1] https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=51982&SessionId=75
[2] https://www.flsenate.gov/Session/Bill/2014/1030
[3] https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0843c2.docx&DocumentType=Bill&BillNumber=0843&Session=2014

organization in four regions of the state. The amended bill was sent to the House floor for consideration.

Senate Bill 1030 was filed on February 12, 2014. It was a six-page bill that allowed for the use of low-THC medical marijuana. The bill directed the Department of Health to authorize between one and four dispensing organizations statewide to ensure reasonable accessibility and availability of low-THC medical marijuana for patients. The bill was approved by three Senate committees and then sent to the Senate floor where it passed on 4/28/14.

The Senate bill was received in Messages by the Florida House. The Senate bill was then substituted and considered in lieu of the House bill. The night before the Legislative Session ended, on May 1, 2014 at 7:57 p.m., the House filed a 15-page strike-all amendment to the Senate bill. This is a highly unusual approach. Both the House and Senate have rules to prevent late-filed amendments that circumvent the legislative process. It was at this point that the Legislature originally considered granting a special privilege to private corporations.

The strike-all amendment directed the Department of Health to establish five dispensing organizations in Florida and created a special closed class of authorized

dispensing organizations by limiting applicants to registered nurseries that had operated continuously in Florida for 30 years, who were registered with the Department of Agriculture and Consumer Services to cultivate 400,000 or more plants, and who were operated by a nurseryman as defined in Florida law.

This was the first time the Legislature considered the concept of narrowing the class of potential applicants for a license to a privileged class of Florida nurseries who had operated continuously for 30 or more years who were registered to cultivate 400,000 or more plants. The idea was never considered in one committee in the House or Senate. No public testimony or evidence was ever presented to the Legislature to establish a nexus between the creation of such a narrowly tailored special class and the Legislature's stated goal of ensuring reasonable accessibility and availability of low-THC medical marijuana for patients.

Later, on the night of May 1, 2014, the strike-all amendment was adopted by the House, the amended bill was passed and sent back to the Senate in Messages. The next day---the last day of the 2014 Legislative Session---the Senate took up the bill in returning Messages. The Senate concurred in the House strike-all amendment and the bill was passed. On June 16, 2014 Governor Rick Scott signed the bill known as the "Compassionate Medical Cannabis Act" into law.

The effect of severely restricting who could apply to be a dispensing organization to a special closed class of Florida nurseries who had operated for 30 continuous years, and who were registered to cultivate 400,000+ plants, was immediate. Any out-of-state company that actually had experience with growing, processing and dispensing medical marijuana was immediately shut out of the process. Since growing marijuana in Florida was illegal at the time---it could not be said that *any* in-state company or organization had successfully grown and sold marijuana crops in our state---let alone nurseries that typically grow trees, shrubs and flowers. In addition, many Florida nurseries that were shut out of the application process by the criteria believed the restrictions were "arbitrary and unfair".[4]

After the low-THC bill became law the Department of Health began the process of accepting applications for the five dispensing licenses permitted by the law. A total of 24 different companies applied for a low-THC medical marijuana dispensing license on July 8, 2015[5]. Two of the applicants were disqualified leaving 22 applicants for consideration. Ultimately, the five available licenses were awarded to George Hackney, Inc. d/b/a Hackney Nursery (now known as

[4] https://www.news-press.com/story/news/2014/05/19/growing-medical-pot-picnic/9310269/
[5] https://knowthefactsmmj.com/wp-content/uploads/_documents/dispensing-organization-applicants.pdf

Trulieve), Alpha Foliage, Inc. (now known as Surterra Wellness), Costa Nursery (now known as Curaleaf), Knox Nursery (now known as Fluent), and Chestnut Tree Farm (now known as Liberty Health Sciences). The applicants that did not receive a license challenged the decision of the Department of Health in series of administrative Complaints and civil actions. Over the course of the next several years the Department of Health settled most of the challenges by giving away licenses.

Today—22 licenses have been awarded---the exact number of qualified applicants for low-THC licenses. Six years after the initial low-THC bill was passed, one Constitutional amendment, and one implementing statute later—the only companies to be awarded a license to sell any form of medical marijuana by the Florida Department of Health are the companies who fell in to the special class created by the Legislature in 2014 and who applied to sell low-THC medical marijuana.

The Legislature expands to full-blown medical marijuana

During the 2015, the Florida Legislature passed legislation to authorize dispensing organizations to dispense full-blown medical marijuana in addition to low-THC medical marijuana. Sale of medical marijuana was limited to qualified patients diagnosed with a terminal condition. The legislation essentially

"grandfathered" the licenses of all companies that have previously been awarded a low-THC dispensing license from the Department of Health. None of the low-THC license holders were required to submit new applications to demonstrate their ability to cultivate, process and dispense medical marijuana containing THC.

The legislation also authorized three additional licenses to dispense medical marijuana after 250,000 active qualified patients registered to use medical marijuana. The legislation left intact the requirement that a dispensing organization operate as a nursery in Florida for 30 continuous years and be registered with the Florida Department of Agriculture and Consumer Services to cultivate 400,000 or more plants.

The Voters Respond

Apparently unhappy with the medical marijuana scheme established by the Legislature, 71% of the voters in Florida passed a Constitutional Amendment on November 8, 2016 which established a new regulatory system for medical marijuana. The Amendment became Article X Section 29 of the Florida Constitution.

As has been argued extensively in this appeal—the Constitutional Amendment appears to establish a very different regulatory system for medical marijuana in

Florida. The Amendment directed the Department of Health to begin registering new medical marijuana treatment centers within 9 months of the effective date of the Amendment. Because the Amendment did not contain a specific effective date, pursuant to Article XI Section 5.e. of the Florida Constitution, the Amendment became effective on January 3, 2017. Thus, the Department was constitutionally directed to register new medical marijuana treatment centers by October 3, 2017. Now nearly three years later the Department has failed to comply.

The Legislature Ignores the Voters

The Constitutional amendment passed by the voters of Florida provided the Legislature with some very specific parameters. The Amendment calls for a registration process for medical marijuana treatment centers—as opposed to an application process. The difference is worth noting. A registration process allows someone to obtain a license if they meet certain minimum standards. An application process requires companies to compete against each other---with the State picking winners and losers.

The Amendment also makes it clear that a company that registers with the Department of Health can choose to grow, process OR sell medical marijuana. This is a big change since it shifts Florida's medical marijuana regulatory system

from a vertically integrated only system to a hybrid system that affords the registered license holder the option of operating a vertical or horizontal business.

Following the passage of the Amendment the Florida Legislature took aim at passing legislation to implement the Constitutional Amendment. They failed to pass legislation during the 2017 Regular Session---but did pass legislation during a Special Session later that year.

The bill the Legislature passed, SB 8A, essentially ignored the will of the voters of Florida. The 78-page bill, which was ultimately passed and became law, amends F.S. 381.986 and again grandfathered any previously issued license to a company to grow, process, transport and dispense low-THC medical marijuana. In other words—the special privilege awarded to a select group of 30-year nurseries licensed to cultivate 400,000 or more plants was protected. The legislation also gave the Department of Health the authority to issue "variances" related to any representations made by the low-THC license holders in their initial applications. Thus, the low-THC license applicants not only had their license grandfathered---they were given the opportunity to apply for variances from any MMTC regulations that would apply to new MMTCs. This represents another special privilege to a select group of private corporations.

The legislation directed the Department to issue 10 additional licenses. The new statute specifically provided for an award of a license to low-THC license applicants from 2015 who had a legal challenge pending and previously came within one point winning a license.

Moreover, the Department was directed to license four new medical marijuana treatment centers (MMTCs) within six months after the registration of 100,000 active qualified patients in the medical marijuana use registry. In addition, the legislation directed to Department to issue four new medical marijuana licenses each time an additional 100,000 qualified patients are added to the registry. None of this was done---effectively giving the companies that already obtained their MMTC license as a special privilege an even greater head start in the medical marijuana market on future MMTCs.

The 2017 legislation did away with the 30-year nursery/400,000 plant requirements for new license holder—but continued to protect the special privilege given to 30-year nurseries in the original low-THC legislation. The 2017 legislation did establish criteria for an application process to obtain a new medical marijuana treatment center license. Although the legislation was approved by

former Governor Rick Scott on June 23, 2017---as of this date the Department of Health has failed to accept and process a single application for a new company to obtain a medical marijuana treatment center license using the new criteria established by the Legislature. The only current license holders all relate back to the applicants for low-THC licenses in 2015.

Shortly after taking office current Governor Ron DeSantis expressed dismay with the failure of the Department to issue new licenses. At a press conference in Winter Park on January 17, 2019 Governor DeSantis said "We need to have the peoples' will represented in good law that is doing what they intended. I look at how some of this was created, where they (lawmakers) created a cartel, essentially."

Initially, the Governor was also very critical of the vertical integration licensing scheme currently in place. He has since moderated his position and he doesn't know if "vertical is unconstitutional". The Governor has also said that the initial 30-year requirement for a low-THC license "really restricted the ability of folks to be able to participate" in the medical marijuana industry in Florida.[6]

[6] https://www.orlandoweekly.com/Blogs/archives/2019/01/30/ron-desantis-walks-back-opposition-to-floridas-medical-marijuana-system

The Department did award additional licenses to members of the privileged class of 30-year nurseries with 400,000 plants that previously applied for a low-THC license, who came within 1 point of having the highest score for a region, and had pending legal action to challenge the decision of the Department. A total of 8 licenses were awarded on or about April 19, 2019 which resolved a number of pending legal actions against the Department.

F.S 381.986 (8)(a) is Unconstitutional Special Law

This Court has previously addressed the issue of whether a statute is an unconstitutional special law on numerous occasions. For example, in Lawnwood Medical Center, Inc. v. Seeger, 990 So.2d 503, 517–18 (Fla. 2008), this Court held that a special law affecting two private hospitals in St. Lucie County, which were both owned by the same private corporation, provided an unconstitutional privilege because it granted the corporation "almost absolute power in running the affairs of the hospital, essentially without meaningful regard for the recommendations or actions of the medical staff." This Court specifically considered whether the "privilege" was "economic favoritism over other entities similarly situated" or whether " ‘privilege’ encompasses more than a financial benefit." Id. at 510. This Court "conclude[d] that a broad reading of the term ‘privilege’ as used in article

III, section 11(a)(12),—one not limiting the term to any particular type of benefit or advantage—is required." Id. at 512.

In determining the plain meaning of the constitutional text "grant of privilege to a private corporation," this Court in Lawnwood considered dictionary definitions of "privilege" from the time when the text was adopted, noting that "[t]he definitions have not substantially changed from those that existed at the time of the 1968 constitutional revision." Id. at 511 n.10 ; see Myers v. Hawkins, 362 So.2d 926, 930 (Fla. 1978) The Court in Lawnwood explained that "definitions from other state supreme courts construing similar provisions in their constitutions parallel the dictionary definitions as well as the common sense understanding of a 'privilege' as connoting a special benefit, advantage, or right enjoyed by a person or corporation." Id. at 512. In other words, in common parlance, a privilege is having something that others do not have. Venice HMA, LLC v. Sarasota Cnty., 228 So.3d 76 (Fla. 2017)

When it comes to a license to operate a MMTC in Florida—a special privilege was made available to a select class of private corporations---nurseries that have operated continuously in Florida for 30 or more years and who are registered to cultivate 400,000 or more plants. The select class of private corporations with a

MMTC license that originally applied for a low-THC license certainly have something that others do not have. They are the *only* companies to receive a MMTC license in Florida.

Where Do We Go From Here?

The amended provisions of F.S. 381.986 (8) (a) that again perpetuates the privilege of providing a medical marijuana treatment center license to a 30-year nursery with 400,000 plants who applied for a low-THC license appears to contain a severability clause that states "If this subparagraph or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end, the provisions of this subparagraph are severable."

Interestingly, at least one current license holder previously challenged the constitutionality of an unrelated provision in F.S. 381.986 taking the position that the Legislature knew the provision was "suspect" and therefore provided a severance clause in order to preserve the remainder of the statute. *See* George Hackney, Inc. d/b/a Trulieve v. Florida Department of Health, Second Judicial Circuit (Case No. 2018 CA 000698).

If the Court determines that the severability clause is, for whatever reason, flawed there is still a way to address the unconstitutional provisions of the statute without throwing out the entire statute. In Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828 (Fla.1962), this Court established a four-prong test for analyzing whether an unconstitutional portion of a statute is severable from the remaining portions.

When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken. Cramp, 137 So.2d at 830. Severability is an option if the legislature's "clear purpose in enacting the statute" remains after severing the unconstitutional portion. Richardson v. Richardson, 766 So.2d 1036, 1041 (Fla.2000), Homestead Hosp., Inc. v. Miami-Dade County, 829 So.2d 259 (Fla. App. 2002). The severability test established in the Cramp case appears to apply here.

It is worth noting that the statutory provision requiring vertical integration of a medical marijuana treatment center is in a different subparagraph of the statute than the special law provision. Therefore, it appears the Court may separate and consider the "special law" issue independent of other issues raised in this appeal, including the constitutionality of the vertical integration requirements in the statute.

This is important for two reasons. First, although the decision of this Court could have significant impact on countless companies that hope to enter the medical marijuana market in Florida in the future---there are specific and identifiable parties (including the Respondent Florigrown and numerous Intervenors) who have already been expressly denied an opportunity to enter the market and have therefore pursued this action.

Second, it would be enormously destructive to the medical marijuana industry in Florida to essentially "blow up" the current regulatory scheme by voiding the MMTC licenses that have already been issued by the Department of Health. A more practical approach may be to acknowledge the legal shortcomings of the current regulatory framework in the past but look forward with the goal of opening

the medical marijuana market in Florida in a way that is consistent with the Florida Constitution.

Unfortunately, the Court does not have the option of simply finding the current version of the statute regulating MMTC licenses an unconstitutional special law and reverting back to the prior law since the prior statute was also an unconstitutional special law. In the absence of a law to guide the way forward the Court is left with the task of fashioning an equitable remedy to resolve this matter.

Because the Department of Health has completely ignored deadlines for accepting applications and awarding additional licenses set out in both the Constitution and statute—the Court is left with no alternative but to establish deadlines for the Department. To avoid disruption in the market that would have an adverse impact on patient access to affordable medical marijuana the Court could keep the current MMTC licenses intact and direct the Department of Health to accept applications for registration from Florigrown and the Intervenors in this matter within a reasonable period of time---perhaps 90 days. If Florigrown, and any of the Intervenors, meet the criteria established in F.S. 381.986 (8) (b) the Department should be directed to issue a vertically integrated license within 180 days. Thereafter, perhaps within 24 months the Department could begin accepting

applications for registration and award licenses for either a vertically integrated MMTC or a horizontally integrated MMTC based on the choice of the registrant.

Alternatively, the Court could relinquish jurisdiction to the Trial Court for the purpose of holding a Hearing to determine a reasonable timeline for the Department to accept applications and register Florigrown and any Intervenors that meet the statutory criteria for a MMTC.

Conclusion

The statute regulating medical marijuana in Florida is a special law which provides a special privilege to a select group of identifiable private corporations in violation of Article III of the Florida Constitution. Accordingly, Triangle Capital, Inc. respectfully request that this Court find in favor of the Petitioners.

Respectfully submitted this 10th day of September 2020.

/s/ Jeff Kottkamp
Jeff Kottkamp, P.A.
Florida Bar No. 771295
3311 Dartmoor Drive
Tallahassee, FL. 32312
JeffKottkamp@gmail.com
Counsel for Triangle Capital, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September 2020 a true and correct copy of the foregoing has been electronically uploaded to the Florida Courts E-Filing Portal and was furnished by e-mail to all parties listed below:

Katherine E. Giddings
Akerman LLP
106 E. College Avenue
Suite 1200
Tallahassee, FL. 32301
Katherine.gidding@akerman.com

Jonathan S. Robbins
Akerman LLP
Las Olas Centre, Suite 1600
350 East Las Olas Blvd.
Ft. Lauderdale, FL. 33301
Jonathan.robbins@akerman.com

Ari Gerstin
Akerman LLP
Three Brickell City Centre
98 SE Seventh St. Suite 1100
Miami, FL. 33131
Ari.gerstin@akerman.com

Counsel for Respondents

Louise Wilhite-St. Laurent
Florida Department of Health
4052 Bald Cypress Way Bin A-02
Tallahassee, FL. 32399-1708
Louise.stlaurent@flhealth.gov

Counsel for Petitioner

Jason B. Gonzalez
Amber Stoner Nunnally
Daniel Nordby
Rachel Procaccini
Shutts & Bowen, LLP
215 S. Monroe Street
Suite 804
Tallahassee, FL. 32301
jasongonzalez@shutts.com
anunnally@shutts.com
dnordby@shutts.com
rprocaccini@shutts.com

Counsel for Petitioner

Joe Jacquot
Colleen Ernst
Executive Office of Governor
The Capitol, PL-5
400 S. Monroe Street
Tallahassee, FL. 32399
joe.jacquot@eog.myflorida.com
colleen.ernst@eog.myflorida.com

Counsel for Petitioner

Mohammad O. Jazil
Joseph A. Brown
Brooke E. Lewis
Michael R. Beato
Hopping Green & Sams, P.A.
119 S. Monroe Street, Suite 300
Tallahassee, FL. 32301
mjazil@hgslaw.com
josephb@hgslaw.com
brookel@hgslaw.com
michaelb@hgtslaw.com

Counsel for Florida House of Representatives

James A. McKee
Foley & Lardner LLP
106 E. College Ave., Suite 900
Tallahassee, FL. 32301
jmckee@foley.com

Counsel for Perkins Nursery, Inc., San Felasco Nurseries, Inc. d/b/a Harvest, Mount Dora Farms, LLC, and Better-Gro Companies, LLC d/b/a Columbia Care Florida

Douglas William Bell
General Counsel
Florida House of Representatives
418 The Capitol
402 S. Monroe Street
Tallahassee, FL. 32399-1300
daniel.bell@myfloridahouse.gov

Counsel for Florida House of Representatives

John M. Lockwood
Thomas J. Morton
Devon Nunneley
The Lockwood Firm
106 E. College Ave., Suite 810
Tallahassee, FL 32301
john@lockwoodlawfirm.com
tj@lockwoodlawfirm.com
devon@lockwoodlawfirm.com

Counsel for DFMMJ Investments LLC, d/b/a Liberty Health Sciences and Acreage Florida, Inc.

William D. Hall, III
Daniel R. Russell
Dean Mead & Dunbar
215 S. Monroe St. Suite 130
Tallahassee, FL. 32301
whall@deanmead.com
drussell@deanmead.com

Counsel for Dewar Nurseries, Inc.

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).

/s/ Jeff Kottkamp
Jeff Kottkamp