ORDINANCE NO. 2018-012

ORDINANCE OF THE MAYOR AND THE CITY COUNCIL BANNING THE OPERATION OF MEDICAL MARIJUANA TREATMENT CENTER AND DISPENSING FACILITIES; REPEALING ALL ORDINANCES IN CONFLICT HEREWITH; PROVIDING PENALTIES FOR VIOLATION HEREOF; PROVIDING FOR A SEVERABILITY CLAUSE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council recognizes that in 2014 the Florida Legislature enacted § 381.986, Florida Statutes, the Compassionate Medical Cannabis Act of 2014 ("CMCA") to allow a physician to authorize the use of low-THC and medical cannabis, also known as marijuana, for terminal conditions; and

WHEREAS, in 2015 § 499.0295, Florida Statutes, was also enacted allowing the use of cannabis under the CMCA for qualifying patients with terminal conditions; and

WHEREAS, the City Council recognizes that Amendment 2: the Use of Marijuana for Debilitating Medical Conditions, was placed on the ballot, and the Florida Electorate overwhelmingly voted in favor of the amendment to the Florida Constitution, allowing for the production, possession or use of marijuana of any mixture for medical use; and

WHEREAS, Amendment 2 went into effect on January 3, 2017, and was added to the Florida Constitution under Article X § 29 as "Medical marijuana production, possession and use", which provides that the use of medical marijuana shall not subject the physician who with reasonable care recommends its use, nor the person who uses it under the recommendation from the physician to criminal prosecution nor civil liability, and provided for the Department of Health in six months was to issue regulations for the implementation and enforcement thereof; and

WHEREAS, on June 23, 2017, the Governor signed Senate Bill 8A, amending Florida Statute §381.986 by adding subparagraph (11)(b)1, empowering local governments to ban medical marijuana dispensing facilities; and

WHEREAS, the Florida Constitution, Article X § 29(c)(5), states that: "Nothing in this section requires the violation of federal law or purports to give immunity under federal law."; and

WHEREAS, simple possession (*any amount*) of marijuana constitutes a misdemeanor

under federal law, punishable by up to one year imprisonment and a minimum $1,000 fine plus costs. 21 U.S.C. § 844(a); and

WHEREAS, the manufacture, distribution, or possession with the intent to distribute *any amount* of marijuana constitutes a felony, carrying a maximum sentence of five years imprisonment, and a maximum fine of $250,000 for individuals, and $1 million for entities. 21 U.S.C. § 841(b)(1)(D); and

WHEREAS, marijuana is a Schedule I drug under federal law, meaning the federal government has determined that marijuana (1) has high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) has a lack of accepted safety for use under medical supervision. 21 U.S.C. §812(b)(1)(A-C); and

WHEREAS, the Controlled Substances Act, "CSA", preempts state law that positively conflicts with it. 21 U.S.C § 903:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together; and

WHEREAS, the Department of Justice Drug Enforcement Administration (DEA) *that is responsible for scheduling or rescheduling scheduled drugs,* recently published on August 12, 2016 its "Denial of Petition to Initiate Proceedings to Reschedule Marijuana" because it determined that: 1) marijuana has a high potential for abuse, 2) marijuana has no currently accepted medical use in treatment in the United States, and 3) marijuana lacks accepted safety for use even under medical supervision. 81 Fed. Reg. 53767; and

WHEREAS, "the CSA does not contemplate that state legislatures' determinations about the use of a controlled substance can be used to bypass the CSA's rescheduling process." *Krumm v. Holder*, 2009 WL 1563381, at *9-10 (D.N.M. May 27, 2009); and

WHEREAS, on April 18, 2017 John Kelly, the Homeland Security Chief, said:

> "Let me be clear about marijuana. It is a potentially dangerous

gateway drug that frequently leads to the use of harder drugs." "Its use and possession is against federal law and until that law is changed by the United States Congress, we at DHS along with the rest of the federal government are sworn to uphold all the laws that are on the books." New York Daily News (April 18, 2017). ; and

WHEREAS, 21 U.S.C. §856(a) titled: "Maintaining drug-involved premises" provides: "Except as authorized by this subchapter, it shall be unlawful to-- (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. §856(a); and

WHEREAS, there is a clear and direct conflict between the CSA and Florida's newly adopted Amendment 2 and the Florida statutes that allow for the possession or use, cultivation of, and housing a location for marijuana, or for the manufacture and distribution of marijuana, and generating profits therefrom, and, the federal law, and the state law, cannot consistently stand together; and

WHEREAS, the City Council recognizes, as did the Amendment 2 ballot initiative and under Article X § 29 of the Florida Constitution, that the production, possession or use of marijuana under federal law is illegal; and

WHEREAS, the conflict between the federal law and state law regarding medical marijuana has been challenged in other jurisdictions under several clauses of the U.S. Constitution, and the courts have consistently held that the CSA is constitutional, and that the CSA supersedes conflicting state law. See *Gonzales v. Raich,* 125 S. Ct. 2195 (2005), *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), *Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142 (N.D. Cal. 2011), *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012); and

WHEREAS, "The Supremacy clause[1] gives Congress the power to preempt state law. *Arizona v. U.S.,* 132 S. Ct. 2492, 2501 (2012), and the CSA unambiguously provides that federal law shall prevail in the event of a positive conflict between federal and state law, and that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Gonzales v. Raich,* 125 S.Ct. 2195 at 2212 (2005); and

WHEREAS, a "state law [cannot] "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art. VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law." *United States v. McIntosh,* 833 F.3d 1163, 1179, fn. 5., (9th Cir. Aug. 16, 2016); and

WHEREAS, the Supreme Court has held that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the *intrastate* manufacture and possession of marijuana for medical purposes that were voted in by the people of California was well within the Congress's reach under the Commerce Clause[2]. *Gonzales v. Raich*, 125 S.Ct. 2195 (2005); and

WHEREAS, Congress explicitly states in the CSA that "federal control of the *intrastate* incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. §801(6); and

WHEREAS, challenges under the Fifth[3], the Ninth[4], or the Tenth Amendment[5] to the U.S. Constitution attempting to construe a right to use and possess medical marijuana have been

---

[1] The U.S. Constitution provides that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.C. Const. Art. VI, cl. 2

[2] The U.S. Constitution vests to Congress the legislative power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S.C. Const. Art. 1 §8, cl. 3

[3] The U.S. Constitution provides that "No person shall be deprived of life, liberty, or property, without due process of law;" U.S.C. Const. Amend. V- Due Process

[4] The U.S. Constitution provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S.C. Const. Amend. IX

[5] The U.S. Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.C. Const. Amend. X

soundly rejected. See *Gonzales v. Riach,* 125 S. Ct. 2195 (2005), *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), *Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142 (N.D. Cal. 2011), *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012); and

WHEREAS, a federal court has rejected arguments arising under the doctrines of judicial and equitable estoppel in reliance on the "Ogden Memo" [6] because the plain language within the memorandum stated that: "no State can authorize violations of federal law." *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012); and

WHEREAS, in *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006) the court rejected the immunity granted to a city-authorized medical marijuana cooperative as this "contradicts the purpose of the CSA," and held: "*In conclusion, we reject the premise that an ordinance* such as the one Oakland enacted can shield a defendant from prosecution for violation of federal drug laws." (Emphasis original); and

WHEREAS, on January 4, 2018, Attorney General Jeff Sessions, rescinded the Ogden Memo, Cole Memo, and any other DOJ memorandum previously issued providing for cover from prosecution for marijuana growers, distributors, users — instead — restating that the cultivation, distribution, and possession of marijuana remains illegal under 21 U.S.C §§ 801 et., seq., of the United States Code that carries significant penalties under §§ 841, 844, including prosecution for money laundering 18 U.S.C §§ 1956-57, and § 5318; and

WHEREAS, Federal Reserve Bank approval allows financial institutions to tap into the Reserve's banking system. See *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City, 861 F.3d 1052 (10th Cir. 2017).* The Federal Reserve Bank denied an application for a

[6] The "Ogden Memo" is a Memorandum for U.S. Attorneys, issued in 2009 by Deputy Attorney General David W. Ogden, stating that federal resources should not be expended on medical marijuana users that are in clear and unambiguous compliance with state law. In 2011, Deputy Attorney General James M. Cole "Cole Memo" issued a similar memorandum reiterating the same guidance, and warning those who were considering or who had already enacted legislation authorizing large-scale industrial marijuana cultivation centers that "The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law... State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA."

"master account" by the credit union for banking services for marijuana-related businesses in Colorado—on the grounds that the CSA would be violated; and

WHEREAS, there exists the probable prospective for adverse impacts from secondary effects, such as increased crime, trespassing, corruption, and other significant problems, connected to marijuana, a cash only business; and

WHEREAS, because of the Sessions memo, reliance on the Cole memo by the Treasury Department that created a legal space for banks and credit unions to offer accounts to marijuana dispensaries, grow operations, distributors and manufacturers, is questionable; and

WHEREAS, the United States Bankruptcy Courts have found that bankruptcy plans cannot be allowed for marijuana based businesses because marijuana is "an enterprise illegal under [f]ederal law"...[7], and "under no circumstances can the [c]ourt place itself in the position of condoning the [d]ebtor's criminal activity by allowing it to utilize the shelter of the [b]ankruptcy [c]ourt while continuing its unlawful practice of leasing space to those who are engaged in the business of cultivating a Schedule I controlled substance;" [8] and

WHEREAS, the City Council does not desire to enact any legislation that permits the operation of a business that under federal law is illegal with the potential for criminal prosecution by Federal authorities; and

WHEREAS, Florida Statute § 381.986(11)(b)1., provides that a "municipality may, by ordinance, ban medical marijuana treatment center dispensing facilities from being located within [its] boundaries . . . ."; and

WHEREAS, the Planning and Zoning Board at its meeting of November 15, 2017 recommended approval of this ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND THE CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, THAT:

Section 1: The foregoing facts and recitations contained in the preamble to this ordinance are hereby adopted and incorporated by reference as if fully set forth herein.

Section 2: **Ban. Medical Marijuana Treatment Centers**. Medical marijuana

[7] *Arm Ventures, LLC, 564 B.R. 77, 85 (Bankr. S.D. Fla. 2017).*
[8] *In re Rent-Rite Super Kegs W. Ltd., 484 B.R. 799, 809 (Bankr. D. Colo. 2012).*

treatment centers, as provided by Florida law, are prohibited from being located within the boundaries of the City of Hialeah, Florida. No application for a development order, as defined in the City of Hialeah Land Development Code, § I-4(a), building permit, zoning permit, subdivision approval, rezoning, certificate of use, special exception, special or conditional use permit, variance nor business tax receipt for medical marijuana treatment centers, shall be processed, until and unless, the cultivation, possession, dissemination, distribution, sales, and use of marijuana under federal law are made lawful.

Section 3. **Ban. Medical Marijuana Dispensing Facilities.** Medical marijuana dispensing facilities, as provided by Florida law, are prohibited from being located within the boundaries of the City of Hialeah, Florida. No application for a development order as defined in the City of Hialeah Land Development Code, § I-4(a), building permit, zoning permit, subdivision approval, rezoning, certificate of use, special exception, special or conditional use permit, variance nor business tax receipt for medical marijuana dispensing facilities, shall be processed, until and unless, the cultivation, possession, dissemination, distribution, sales, and use of marijuana under federal law are made lawful.

Section 4. **Severability Clause.**

If any phrase, clause, sentence, paragraph or section of this Subdivision shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect.

Section 5. **Repeal of Ordinances in Conflict.**

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 6. Penalties.

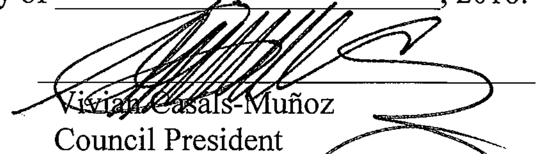
Every person violating any provision of the Code or any ordinance, rule or regulation adopted or issued in pursuance thereof shall be assessed a civil penalty not to exceed $500.00 within the discretion of the court or administrative tribunal having jurisdiction. Each act of violation and each day upon which any such violation shall occur shall constitute a separate offense. In addition to the penalty prescribed above, the city may pursue other remedies such as abatement of nuisance, injunctive relief, administrative adjudication and revocation of licenses or permits.

Section 7. Effective Date.

This Ordinance shall become effective when passed by the City Council and signed by the Mayor or at the next regularly scheduled City Council meeting, if the Mayor's signature is withheld or if the City Council overrides the Mayor's veto.

PASSED and ADOPTED this 13 day of February, 2018.

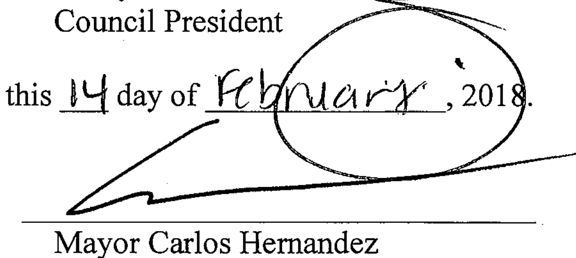
[illegible]REGOING ORDINANCE
[illegible] THE CI[illegible] [illegible]EAH WAS
[illegible] [illegible]ANCE
[illegible] [illegible] OF
[illegible] 166.041
[illegible] TO FINAL READING.

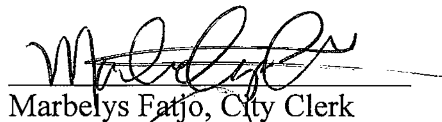


Vivian Casals-Muñoz
Council President

Attest:

Approved on this 14 day of February, 2018.

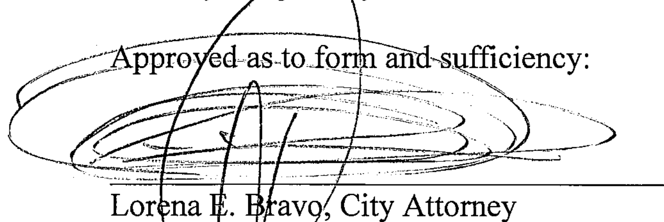




Marbelys Fatjo, City Clerk

Mayor Carlos Hernandez

Approved as to form and sufficiency:



Lorena E. Bravo, City Attorney

S:\DJ\ORDINANCES\SB 8A Marijuana ORDINANCE NO v2.docx

Ordinance was adopted by a 7-0 vote with Councilmembers, Caragol, Zogby, Casáls-Munoz, Cue-Fuente, Garcia-Martinez, Lozano and Hernandez voting "Yes"