NO. 98, Sept. Term, 2016

IN THE
Court of Appeals of Maryland

JANE & JOHN DOE, ET AL.,

Appellants,

– v. –

ALTERNATIVE MEDICINE MARYLAND, LLC,

Appellee.

On a Writ of Certiorari to the Court of Special Appeals of Maryland
(The Honorable Barry G. Williams)

BRIEF OF APPELLEE & APPENDIX

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STATEMENT OF THE CASE

Pursuant to Md. Rule 8-504(a)(2), Alternative Medicine Maryland, LLC (AMM) disagrees with Appellants' Statement of the Case, and therefore states the following concise procedural history.

On August 15, 2016, the Natalie M. Laprade Maryland Medical Cannabis Commission (hereinafter "the Commission") awarded medical cannabis grower applicants preliminary, also known as "Stage 1," pre-approvals to grow medical cannabis. Having been denied a Stage 1 pre-approval, AMM immediately began investigating the facts and circumstances of the Commission's application review process. On October 31, 2016, AMM filed suit in the Circuit Court for Baltimore City, alleging the Commission conducted its medical cannabis grower licensing scheme in an arbitrary, capricious, unconstitutional and illegal manner.

In the Complaint, AMM requests a declaratory judgment and an injunction preventing the Commission from acting toward granting final, or "Stage 2" licenses until the Commission takes corrective action.

On December 12, 2016, the Commission filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment. E. 85.[1] On December 30, 2016,

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[1] In its Motion to Dismiss, the Commission argued neither laches nor administrative mandamus. Apx. 2-4. At the hearing on the Commission's

four growers who received Stage 1 pre-approvals,[2] patients seeking to use medical cannabis in Maryland, and a trade association representing growers and patients (hereinafter "Doe & Grower Appellants") filed a Motion to Intervene. E. 115. On January 25, 2017, another pre-approved grower, Holistic Industries, LLC (hereinafter "Holistic"), filed a Motion to Intervene. E. 220.

On February 21, 2017, the Circuit Court held a hearing on (1) the Commission's Motion to Dismiss; and (2) the Doe & Grower Appellants' Motion to Intervene.[3] The court denied both motions from the bench, E. 296–313, and issued separate written orders on February 21, 2017. E. 33, 112, 199–203. The court also denied Holistic's motion from the bench and in a separate Order on February 23, 2017. E. 36. The Doe & Grower Appellants and Holistic filed timely Notices of Appeal to the Court of Special Appeals. E. 268, 272, 277.

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motion to dismiss, the Commission argued both laches and lack of ripeness, but not administrative mandamus.

2 Curio Cultivation, LLC, ForwardGro, LLC, Doctor's Orders, LLC, and SunMed Growers, LLC. Subsequently, ForwardGro, LLC received a grower license, retained new counsel, E. 1004, and filed a separate brief in this Court.

3 The transcript of the argument from the motion to dismiss portion of the hearing was excluded from the Record Extract, making Docket No. 54/0 incomplete. That omission has been cured by the inclusion of the missing transcript pages in the Appendix to Appellee's Brief. Record Extract page 302 is misleading, as in between the time listed "Off the record" the Court was on the record hearing the arguments regarding the Commission's Motion to dismiss. See Apx. at 16-46.

Neither contemporaneously petitioned this Court for *Certiorari*, nor did Doe & Grower Appellants or Holistic ask for an expedited briefing and argument schedule in the Court of Special Appeals.

Discovery ensued. AMM propounded 25 requests for production of documents and took five depositions.[4] During discovery, AMM learned that the Commission might imminently issue a Stage 2 grower license. Therefore, on May 15, 2017, AMM filed a Motion for an Emergency Temporary Restraining Order (TRO), Request for Order to Show Cause Why a Preliminary Injunction Should not be Granted, and Request for Immediate Emergency Hearing. E. 409.

On May 17, 2017, the Commission issued a Stage 2 grower license to ForwardGro. E. 1070. On May 25, 2017, the Circuit Court held a hearing, granted the TRO from the bench, E. 1053–55, and issued a written Order. E. 667. The TRO permitted anyone affected by the TRO to move to dissolve or modify it, as long as two days' notice was provided to AMM. E. 667. The Court

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4 On May 8, 2017, the Commission filed a Notice of Appeal to the Court of Special Appeals from the Circuit Court's denial of a Motion for Protective Order, E. 367, and a Motion to Stay Circuit Court Proceedings Pending Further Review, E. 369. The Circuit Court denied the Motion to Stay. E. 408. AMM has moved to strike the Notice of Appeal because the Circuit Court's denial of the Commission's Motion for protective Order is not an appealable final order, and the order does not fall within one of the exceptions to the "final order" rule.

also set a hearing on AMM's request for a Preliminary Injunction for June 2, 2017. E. 1056.

On May 30–31, 2017, the Doe & Grower Appellants,[5] ForwardGro, Temescal Wellness, and Holistic filed a flurry of motions in the Circuit Court. They sought to:

> Renew their intervention motions, E. 678 (Doe & Grower Appellants), 989 (Holistic);
>
> Dissolve or modify the TRO, and oppose AMM's preliminary injunction, E. 695 (Doe & Grower Appellants), 952 (Holistic), 1070 (ForwardGro), 1103 (Temescal);
>
> Stay all Circuit Court proceedings pending appeal, E. 678, 695 (Doe & Grower Appellants), 975 (Holistic);
>
> Continue the upcoming hearing on AMM's request for a preliminary injunction, E. 686 (Doe & Grower Appellants), 957 (Holistic);
>
> Consolidate this case with the GTI[6] case, E. 678 (Doe & Grower Appellants), 952 (Holistic); and
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> Shorten the time to respond to all of the foregoing. E. 678 (Doe & Grower Appellants), 985 (Holistic).

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5 Two additional pre-approved growers, Green Leaf Medical, LLC, Kind Therapeutics, USA, LLC, and a second trade association, Maryland Wholesale Medical Cannabis Trade Association, joined the Doe & Grower Appellants.

6 *GTI Maryland, LLC v. Natalie M. Laprade Maryland Medical Cannabis Commission*, Case No. 24-C-16-005134.

The Circuit Court denied all of those motions on May 31, 2017. E. 29. All proposed intervenors filed Notices of Appeal to the Court of Special Appeals on June 1, 2017.

In preparation for the preliminary injunction hearing on June 1, 2017, AMM filed a bench memorandum that stated, among other things, that AMM could be ready for a trial on the merits as soon as the State could be ready. Apx. 49

On June 2, 2017, this Court stayed the Circuit Court case. On June 9, 2017, this Court granted the Writ of *Certiorari*. E. 1016.

QUESTIONS PRESENTED

I. Did the Circuit Court properly deny Appellants' Motions to Intervene?[7]

STATEMENT OF FACTS

Pursuant to Md. Rule 8-504(a)(4), AMM states the following facts "necessary to correct or amplify the statement in the Appellant[s'] brief."

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7 AMM only raises one "question presented" because no other issue is properly before this Court. Out of an abundance of caution, and without waiving the argument that no other issue is properly before this Court, AMM will address Appellants' sprawling issues in its argument, despite the fact that those issues were never briefed nor argued below, much less decided below.

AMM applied for a license to grow medical cannabis. E. 45. The Commission was charged with creating a licensing process in which to license medical cannabis growers. Md. Code Ann., Health Gen. § 13–3306(a)(2)(iii). The Commission was permitted to issue no more than 15 licenses to grow medical cannabis. *Id.* § 13-3306(a)(2). The "Commission shall actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." *Id.* § 13–3306(a)(9)(i)(1). Additionally, and distinctly, the "Commission shall...Encourage applicants who qualify as a minority business enterprise, as defined in § 14-301 of the State Finance and Procurement Article." § 13–3306(a)(9)(i)(2).

On March 24, 2015, the Office of the Attorney General wrote a letter to Delegate Christopher West, opining about constitutional issues related to the Commission's diversity mandate. E. 624. The letter did not state that the diversity mandate was "unconstitutional and severed." Doe & Grower Appellants. Br. 19. Moreover, the Appellants' incorrectly paraphrase the letter, plainly evident from reading the letter E. 624. It is also false that AMM does not challenge the letter. AMM challenged the letter in its Complaint. E. 60. The letter was addressed to a delegate in the Maryland House of Delegates, not the Commission or anyone within the Commission and there is no evidence that it was provided as legal advice to the Commission. Additionally, whether

or not the letter was even followed is a major issue in dispute at this time. Finally, the Attorney General's office has since disavowed the letter. E. 100.

The Commission then failed to mention racial or ethnic diversity in its grower licensing regulations. COMAR Title 10, Subtitle 62, Chapter .08. The Commission later vacillated between arguing that "broad publicity" of the licensing process satisfied the mandate (E. 1036, 1047) and that the Commission, despite having issued all 15 pre-approvals, was still going to comply. Apx. 46. A lack of diversity among those pre-approved to grow medical cannabis has been widely reported. E. 97, 491, 498.[8]

AMM filed a Maryland Public Information Act (MPIA) request to the Commission that was never answered with responsive documents or a denial. E. 45 ¶5, 109 ¶¶21–22. AMM was thus forced to conduct its own investigation. After filing suit, AMM requested information about its application, score, and

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8 Appellants assertions that there is diversity among pre-approved growers, Doe & Grower Appellants' Br. 47, is misleading and not supported by the record. Appellants suggest that the Commission's website can be judicially noticed. AMM challenges this assertion and the data itself. Moreover, the website provides no methodology for the way in which the data was obtained, the website contains a statement that the data is "preliminary", and the Commission acknowledges only a fraction of pre-approved growers responded. All information underlying the data and Commission methodology has been specifically denied to AMM in discovery.

rank in discovery. The Commission again refused to provide the information, and an ongoing discovery dispute exists. E. 106-109.

Appellants' assertion that AMM has hidden its ranking is false. AMM is completely unaware of its RESI[9] ranking, or if such a ranking even exists. AMM has sought this information in discovery. The Commission has not produced it. E. 106. AMM's application ranking, and the reasons for the ranking, if AMM's application was, in fact, even ranked, are unknown to AMM.[10]

ARGUMENT

Appellants' Brief is a scathing op-ed of the medical cannabis licensing procedure, and to a lesser extent, of AMM. Little of the brief is relevant to this appeal, and none of the arguments have merit.

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9 The Commission outsourced the grading/ranking of applications to the Regional Economic Studies Institute (RESI).

10 An appeal from the denial of a Motion to Intervene is not the time or the place to assert AMM's ranking "on information and belief." Doe & Grower Appellants' Br. 20.

I. Certain arguments raised by Appellants are not properly before this Court.

Appellants' Emergency Bypass Petition for Writ of Certiorari presented only intervention as a question for this Court to review[11]. This Court's Writ of *Certiorari* did not specifically identify which issues before the Circuit Court and the Court of Special Appeals were to be briefed and argued. This Court should only consider whether the trial court properly denied intervention under Md. Rule 2-214.[12]

The Maryland Rules state that an appellate court will ordinarily not decide any other issue unless it "plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Appellants asserted laches and administrative mandamus in a proposed pleading attached to their Motion to Intervene. The Motion to Intervene was denied, and therefore the proposed pleading was never accepted or ruled on by the Circuit Court. Thus, the issues would not "have been cognizable by the Court of Special Appeals." Md. Rule 8-131(b)(2). This Court has previously stated, an issue that "was not

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11 A stay of the case is now moot.

12 As stated *supra*, AMM will address Appellants' other arguments without waiving the argument that only the issue of intervention is properly before this Court.

decided by the trial court . . . is not properly before us for review." *Yockey vs. Kahl*, 338 Md. 64, 74 (1995).

II. The Appellants are not permitted to intervene as a matter-of-right under Rule 2-214(a)(2). They do not have direct, significant, legally protectable interests that would be impaired or impeded by the outcome of this case, and they are adequately represented by the Commission.

Because the trial court denied the Motions to Intervene on grounds other than untimeliness, this Court reviews the denial de novo. *Md.-Nat'l Capital Park & Planning Comm'n v. Town of Washington Grove*, 408 Md. 37, 65–66 (2009). Rule 2-214 provides:

> Upon timely motion, a person shall be entitled to intervene in an action: . . . (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties.

The elements of intervention under Rule 2-214(a)(2) are conjunctive for the Appellants. Failure to meet any of the elements warrants denying intervention. *Duckworth v. Deane*, 383 Md. 524, 539 (2006).

A. The Appellants' interests are not sufficient.

To warrant intervention, the interest asserted must be a "direct, significant, legally protectable interest," for which intervention is "essential to protect." *Montgomery County v. Bradford*, 345 Md. 175, 194 (1997) (citing *Hartford Insurance Co. v. Birdsong*, 69 Md. App. 615, 626, 628 (1987)); *see*

Donaldson v. United States, 400 U.S. 517, 531 (1971) (stating that intervenor under Fed. R. Civ. P. 24 must have a "significantly protectable interest"). Thus, the Appellants incorrectly assert that the bar for intervention is merely whether their economic interest "could" or "may" be impacted by AMM's case. Doe & Grower Appellants' Br. 23, 32.

This Court stated, "It is not enough for a person seeking intervention to base its motion on concern that some future action in the proceedings may affect its interests adversely. Seeking intervention on such a basis is 'merely speculative and affords no present basis upon which to become a party to the proceedings.'" *Washington Grove*, 408 Md. at 75 (quoting *Citizens Coordinating Committee on Friendship Heights, Inc. v. TKU Associates*, 276 Md. 705, 712 (1976)).

In *Duckworth v. Deane*, 393 Md. 524, 530 (2006), gay and lesbian couples who were denied marriage licenses sought a declaratory judgment that Maryland's prohibition against same-sex marriage violated the Maryland Constitution. The Clerks of the Court who denied the licenses were represented by the Attorney General. Three groups or individuals sought to intervene in the action.

One Clerk of the Court sought to intervene with private counsel. *Id.* at 531. This clerk doubted that the Attorney General would effectively represent

his interests, and attempted to advance arguments that the Attorney General had not raised. *Id.* Several members of the Maryland legislature also sought to intervene because they doubted that the Attorney General would zealously defend the prohibition, which they supported, and raised arguments that they believed the Attorney General would not raise. *Id.* at 532. The legislators argued that they had a right to intervene under the Declaratory Judgment Act, Cts. & Jud. Proc. § 3-405, and Rule 2-214(a)(1), (2). *Id.* at 535.

This Court granted *certiorari* before argument in the Court of Special Appeals, and affirmed the Circuit Court's denial of all of the intervention motions under the intervention-of-right provision of Rule 2-214 and the Declaratory Judgment Act, Cts. & Jud. Proc. § 3-405. First, this Court held that the intervening Clerk of Court had no right to intervene with private counsel. The interests that the clerk claimed related only to the performance of his official duties. His right to intervene, if it existed, would be represented by the Attorney General, who was required by statute to represent state officers and units. *Id.* at 537–38.

Second, this Court held that the legislators and the individual arguing for religious liberty should not be permitted to intervene under the third or fourth elements of Rule 2-214(a)(2). *Id.* at 539. Though the General Assembly had an interest greater than the public's in legislating, no individual legislator

had a "greater legal interest" than an ordinary citizen in a challenge to a statute's constitutionality. *Id.* at 540–41. This Court also held that, even if the intervenors established a sufficient "interest," they were adequately represented by the State.

In *Montgomery County v. Bradford*, 345 Md. 175, 177–78 (1997), several groups of plaintiffs sued the State Board of Education, seeking a declaratory judgment stating that the conditions in the Baltimore City school system violated current and future students' right to an adequate education guaranteed by the Maryland Constitution. The plaintiffs attributed various economic, social, and educational deficiencies in the school system to the State. Their Complaint did not seek to divert money from other school systems. Instead, they sought a declaration that the State violated its duty to ensure an adequate system of education in Baltimore City, and a court order requiring the State to:

> [W]ork with the plaintiffs and Baltimore City to improve the City's public schools so that they provide an adequate education in conformance with contemporary educational standards; and . . . to take all steps necessary to implement an educational improvement plan which would result in providing an adequate education to the public school children in Baltimore City.

Id. at 179–80.

Montgomery County moved to intervene. *Id.* at 181. The county argued that the remedy sought could cause "vast" resources to be diverted from other

counties to Baltimore City, which already received a disproportionately high percent of available funds. Additionally, the county alleged that it would have to devote more of its local tax revenue to the school system. The county asserted that it had a right to participate in correcting the failures of the Baltimore City school system in a way that did not impair Montgomery County's school system. *Id.*

This Court held that the county was not permitted to intervene. *Id.* at 198. This Court explained that the "transaction" at issue was the plaintiffs' claim that Baltimore City schools were constitutionally inadequate. *Id.* This Court rejected as remote and speculative the county's claims that (1) if the plaintiffs were successful, the State would divert funds from Montgomery County to Baltimore City, and as a result (2) Montgomery County would need to increase taxes to locally fund its school system. *Id.* Neither event "**would follow automatically from a judgment for the Plaintiffs.**" *Id.* (Emphasis added.)

In *Hartford Insurance Co.*, *supra*, an insurer was not permitted to intervene in a suit against an at-fault driver. 69 Md. App. at 626–28. The insurer argued that injured drivers would obtain a default judgment against the at-fault driver and attempt to enforce it against the insurer. However, the insurer denied that it covered the at-fault driver. Thus, the insurer's concern

that a judgment would be enforced against it was inconsistent with their denial of coverage. *Id. at 627.* Moreover, the Court of Special Appeals explained that the insurer's interest was contingent on (1) a judgment against the at-fault driver; and (2) an attempt to collect that judgment against the insurer. Thus, the court stated: "[w]hile there may be some substance to the appellants' fears concerning those events, we believe that at the point intervention was sought those fears were merely speculative." *Id.* at 628.

On the other hand, in *Washington Grove*, this Court held that a state agency responsible for "park and planning" functions in Montgomery and Prince George's Counties was permitted to intervene in a town's condemnation action because the agency contended that the property being condemned was owned by the agency and that the town had no jurisdiction over the property. 408 Md. at 445. In that case, a developer applied to the Montgomery County Planning Board for approval to develop a subdivision. One of the conditions of the Board's pre-approval was that the developer dedicate an undeveloped 12–acre parcel to the "park and planning" agency to retain the area's natural appeal.

Before final approval, however, the town sought to condemn the parcel through eminent domain. The agency was named as a third-party defendant in the condemnation action, and participated substantially in the proceeding.

At an early stage of the proceeding, the developer conditionally conveyed the parcel to the agency, on the condition that the agency approve the subdivision development. The agency also argued that the town lacked statutory authority to condemn land without the agency's permission.

After the trial court granted partial summary judgment to the town in the condemnation action, the agency moved to intervene as a party-defendant, as opposed to a third-party defendant, for the remainder of the litigation. The town argued that the agency's interest was not sufficient to warrant intervention because the dedication was conditional on the agency's final approval of the subdivision. If the subdivision was not approved, the land reverted immediately from the agency back to the developer. Additionally, the town argued that the dedication from the developer to the agency was merely an easement for public use. According to the town, the developer retained its fee simple interest in the parcel, and as a result, the agency would not be bound by a judgment in the condemnation action.

This Court concluded that the agency's interest in the condemnation action warranted intervention. Though issues remained unresolved about whether the conditional nature of the dedication conveyed the interest to the agency, and about the extent of the interest dedicated, there was a sufficient factual basis upon which to conclude that the agency is or may be bound by the

judgment in the condemnation action. *Id.* at 87. *See also Chapman v. Kamara*, 356 Md. 426, 445 (1999) (holding a defendant in a federal tort case may intervene in a motion to vacate a state court judgment, arising from the same incident, that would have preclusive effect in the federal case); *Board of Trustees of the Employees' Retirement System v. Mayor & City Council of Baltimore*, 317 Md. 72, 88–89 (1989) (holding pension beneficiaries were permitted to intervene in suit challenging city ordinances requiring that pension systems divest holdings in South Africa because outcome would be res judicata against beneficiaries in subsequent suit).

This Court also concluded the agency's interests were not adequately represented by the developer. *Washington Grove*, 408 Md. at 103. Under this Court's interest-analysis paradigm, the agency's interests were similar, but not identical, to those of the developer. The developer feared that the condemnation action would frustrate its subdivision plans. The developer only "indirectly" supported the agency's position. *Id.* The agency had its "own grounds, at times in conflict with the [developer]'s," for opposing the condemnation, and only the agency was incentivized to assert the claims it raised in the Circuit Court. *Id.* at 104.

1. The Growers' economic interests do not warrant intervention.

a. The Growers' investment in the licensing process is not a legally protectable interest in this case.

The Growers lament, at length, the money and time they have spent seeking Stage 2 approval, and allegedly stand to lose if an injunction is granted. Money already spent is no longer legally protectable. The Growers have invested that money in the licensing process regardless of the outcome of AMM's suit. The Growers basically complain about the cost of attempting to enter a new highly regulated market for medicine. The Growers must be accountable for understanding and bearing these costs. Delays in approving or licensing medicine, and judicial review of agency action, are routine features of regulated markets for medicine. The Growers, with no proven track record, entering into a new regulated market for medicine, where caution should be expected, are not entitled to a license merely after obtaining preliminary approval and are certainly not entitled to a risk-free investment.

The licensing process must similarly not be insulated from judicial review. This Court should not be lured into sympathizing with the Growers over the amount of money it takes to enter into these markets, including the cost of delays and judicial review. These costs should have been expected, and the Growers should be financially able to absorb them if they want to maintain

medical cannabis operations in Maryland. This Court has frequently addressed intervention and has a substantial jurisprudential backdrop against which to decide this case. This Court should not endorse cries for sympathy from new market entrants.

The Growers have demonstrated, at most, what AMM has been saying all along—that the Commission's licensing process is seriously flawed. The Commission decided to (1) simultaneously issue all fifteen pre-approvals permitted by the enabling legislation; and (2) require all of the awardees to be operational within one year. The Commission did not create a mechanism for challenging its decisions. The Commission gave no guidance to awardees about the effect of a challenge to the awards. Nonetheless, the Growers must bear the risk of their investment, and the Commission's flawed process does not create a greater right to intervention for the Growers.

b. None of the growers have a direct, substantial, legally protectable interest in preventing the injunction AMM requests. The relief AMM seeks does not impair or impede any particular Growers' interests.

None of the consequences bemoaned by the Growers "follow automatically from a judgment for [AMM]." See *Bradford*, 345 Md. at 198. The Growers have overstated and aggregated the consequences they will incur if AMM obtains the relief it seeks. In its Complaint, AMM seeks (1) a declaratory

judgment that the Commission failed to follow the law; and (2) an injunction and order requiring the Commission to take corrective action. AMM's Complaint resembles the request for declaratory relief in *Bradford*, 345 Md. at 179–80, in that it also requests (1) a declaration that the State violated the law; and (2) an injunction and order for the State to take corrective action, without prescribing that resources be diverted from any specific grower.

If AMM prevails, the Circuit Court will have to fashion an equitable remedy. Depending on information obtained in discovery, it may order specific corrective action. It may simply retain jurisdiction over the case to monitor the Commission's steps to comply with the diversity mandate. There's no factual basis for the Growers' fear that, if AMM prevails, any particular grower will necessarily be deprived of its license.

In *Bradford*, Montgomery County had a stronger interest in the outcome because all school systems received a share of finite resources, and it was logical that money diverted to Baltimore City would take money away from Montgomery County. The Growers are unable to make even this tenuous connection, which this Court in *Bradford* concluded was too speculative. An injunction alone merely delays licensure. The Growers' belief that an injunction will cause all of them to lose their license and suffer significant

economic harm is based on "a leap of faith, not . . . principles of law." *Bradford*, 345 Md. at 183.

c. The Growers' concern about the Commission's ability to rescind pre-approvals is speculation and hyperbole.

The Growers also overstate the impact of the requirement in COMAR 10.62.08.06(E) that they be operational within one year of receiving Stage 1 pre-approval. COMAR did not "compel" awardees to "spend millions." Doe & Grower Appellants' Br. 29. Pre-approved grower awardees did so in their quest for profit, with a corresponding risk of loss. Moreover, COMAR 10.62.08.06(E) provides that the Commission "may" rescind a Stage 1 pre-approval if a Grower is not operational within one year of the pre-approval.

Thus, the Commission must decide whether to treat the Growers as noncompliant if, because of the injunction, they are not operational by August 15, 2017. The Growers bear the burden of proving that rescission of their pre-approvals will automatically occur if an injunction is granted, and there is no evidence in the record indicating that the Commission will enforce the one-year time limit regardless of the outcome in this case and another challenge to the licensing process, *GTI Maryland, LLC v. Natalie M. Laprade Maryland Medical Cannabis Commission*, Case No. 24-C-16-005134.

Regardless of the Commission's decision, it is clear that the Growers' concerns are even more attenuated from the outcome of this case than the interests in *Bradford*, *Duckworth*, and *Hartford Insurance*. For the Growers' interests to be directly impacted, the Circuit Court would have to order specific corrective action directed at one or more of the Growers. Additionally, if the Growers are not operational within one year of being pre-approved, the Commission would have to decide to rescind pre-approvals in spite of ongoing litigation.

2. The Doe patients have a contingent and remote claim to receive medical cannabis.

The Doe patients are incorrect in asserting that access to medical cannabis is a "civil right." Doe & Grower Appellants' Br. 3. That the Doe patients are not entitled to intervene is clear from the Court of Appeals' explanation in *Washington Grove* that:

> It is not enough for a person seeking intervention to base its motion on concern that some future action in the proceedings may affect its interests adversely. Seeking intervention on such a basis is "merely speculative and affords no present basis upon which to become a party to the proceedings."

408 Md. at 75 (quoting *Citizens Coordinating Committee on Friendship Heights, Inc. v. TKU Associates*, 276 Md. 705, 712 (1976)); *accord Environmental Integrity Project v. Mirant Ash Mgmt., LLC*, 197 Md. App. 179, 188 (quoting *Duckworth v. Deane*, 393 Md. 524, 540 (2006) (stating that

"indirect, remote, and speculative" concerns are insufficient to warrant intervention).

3. The Coalitions have only a generalized interest in medical cannabis.

The Coalition Appellants have not demonstrated that this case may cause them any "special damage" different from that of the public. *Environmental Integrity*, 197 Md. App. at 188. *Environmental Integrity* is directly on point. In that case, organizations claimed interests in ensuring that pollution laws were enforced, and that the Potomac River was not over-polluted. However, the Court of Special Appeals concluded that their interests were not distinct from the public's interests in protecting the environment. *Id.* at 189.

4. ForwardGro.

Though AMM concedes that ForwardGro's interest is different in kind, the analysis is virtually identical. There is no indication that ForwardGro's license is likely to be impaired, the Circuit Court specifically refused to impair the license at the TRO hearing, and just as in *Bradford*, *Duckworth*, and *Hartford Insurance,* the potential harm to ForwardGro is contingent and remote. As discussed *supra*, a merely theoretical taking is not sufficient interest to be a party to this litigation.

ForwardGro argues that, if the Circuit Court issues a preliminary injunction, the Circuit Court cannot suspend or revoke ForwardGro's license. ForwardGro Br. 13. This issue is also not properly before this Court, as the only ruling the trial court made on this issue went in favor of ForwardGro. E. 1021. If the Court wishes to provide guidance to the Circuit Court on remand, Md. Rule 8-131(a), AMM takes no position at this time on whether ForwardGro's license can or should be suspended or revoked by the Circuit Court.

B. All Appellants are adequately represented by the Commission.

This Court decided adequacy of representation by "compar[ing] the interest asserted by the intervention applicant with that of each existing party." *Washington Grove*, 408 Md. at 102. This Court developed an "interest-analysis" test in which, in relevant part:

> [(1)] [I]f the proposed intervenor's interest is similar, but not identical, to that of an existing party, "a discriminating judgment is required on the circumstances of the particular case, but [the proposed intervenor] ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee"; [or]
>
> [(2)] if the interest of an existing party and the proposed intervenor are identical, or if an existing party is charged by law with representing the proposed intervenor's interest, "a compelling showing should be required to demonstrate why this representation is not adequate."

Id. at 102–03 (quoting *Md. Radiological Scty., Inv. v. Health Serv. Cost Review Comm'n*, 285 Md. 383, 390–91 (1979)). Appellants bear the burden of demonstrating inadequate representation. *Id.*

In *Maryland Radiological Society*, physicians and a hospital challenged an administrative agency determination that the phrase "total costs of the hospital" included radiologists' fees. Radiologists and a radiological professional association moved to intervene. This Court concluded that the proposed intervenors' interests were adequately represented. *Id.* The intervenors and the physicians sought to give the phrase the same meaning. Additionally, the intervenors did not seek any independent relief. *Id.* Thus, the intervenors' interest was identical to one or more existing parties, and there was no "compelling showing" warranting intervention. To the contrary, there was "every indication of a compatibility of objective." *Id.* at 392. This Court concluded:

> [W]e think that when the applicant seeking intervention makes no claim of his own but merely asserts a position that is precisely the same, and holds like consequences for him, as that championed by one who is already a party, then he can gain admittance on the ground that his interests are inadequately represented only if he can show collusion, nonfeasance, or bad faith on the part of those existing parties with whom his interest coincides.

Id. at 391.

In *Environmental Integrity, supra*, individuals and organizations sought to intervene in the Maryland Department of the Environment's enforcement action against a polluter. The intervenors argued that their interests were distinct from, and narrower than, the State's. The State agreed that its interests were "not necessarily the same" as the intervenors'. 197 Md. App. at 191.

The Court of Special Appeals held that, under *Maryland Radiological Society*, the intervenors were required to demonstrate a "compelling showing" that the State's representation was inadequate, even though the State and the intervenors requested different forms of relief. 197 Md. App. at 192. The State was responsible for enforcing water pollution laws generally. Thus, the State's broad policy goals and statutory responsibilities created a presumption that the State's representation was adequate. *Id.* The Court of Special Appeals did not indicate that the State had any special responsibility to protect the individual and organizational intervenors more than the general public.

The Court of Special Appeals reiterated that, under *Maryland Radiological Society*, existing parties' interests and proposed intervenors' interests may not be precisely the same, yet the "compelling showing" requirement applies as long as there is "every indication of a compatibility of

objective, and of efforts to obtain that goal." 197 Md. App. at 192 (quoting *Md. Radiological Society*, 285 Md. at 392).

The Court of Special Appeals concluded: "Ultimately, however, appellants' and MDE's goals of ensuring the water quality of the Wicomico and Potomac Rivers, safeguarding the viability of the surrounding wildlife habitats, and generally protecting the environment are largely similar and are not adverse." *Id.*

1. Appellants cannot demonstrate a compelling reason to intervene.

Under *Maryland Radiological Society* and *Environmental Integrity*, the "compelling showing" requirement applies in this case. The Appellants want the exact same relief as the Commission—to defeat AMM's suit and continue the licensing process. They also assert the same grounds—that the Commission has defenses to the suit, and nonetheless, on the merits, it complied with the diversity mandate. The defenses here are on all fours with the "compatibility of objective" in *Maryland Radiological Society*, 285 Md. at 392, in which intervenors argued for the same interpretation of a phrase for which existing parties argued, and *Environmental Integrity*, 197 Md. App. at 192, where even though the intervenors sought different forms of relief, their ultimate objective was the same as the State's.

Appellants cannot demonstrate inadequate representation by merely describing the obvious point that they are different types of organizations than the Commission. It is not enough to say that the Commission is an agency that does not represent all market participants. In the abstract, there are multiple different interests held by the Growers and the Commission. That fact is not dispositive.

In *Environmental Integrity*, the Court of Special Appeals rejected the very same argument now asserted by the Growers that the Commission's broad policy goals make it ill-suited to represent the Growers. The Court held the opposite. The State's broad authority to enforce the pollution laws and uphold its policies created a presumption that the State adequately represented those who wanted the laws enforced. 197 Md. App. at 192.

The Growers' arguments are illogical in light of *Environmental Integrity* and *Maryland Radiological Society*. The only distinguishing fact between *Environmental Integrity* and this case is that in *Environmental Integrity*, the State brought suit, whereas here, the State is defending the suit. That's a distinction without a difference. The "compatibility of objective," *Md. Radiological Society*, 285 Md. at 392, and the presumption that the State adequately represents the Growers, because the State is responsible for safe,

legal implementation of medical cannabis, is even stronger here because the Growers and the State are seeking the exact same result.

2. Even if the "discriminating judgment" standard applies, the Commission adequately represents the Appellants.

The Commission and the Appellants not only happen to have the same interests, but the Commission is best suited to represent the Appellants' interests. The Appellants suggest that the Growers are especially situated to demonstrate the prejudice that may result from an injunction. However, the Commission directly regulates the Growers. It has access to their audited financial statements, and any other information relevant to the costs of complying with the licensing requirements.

Before this Court granted *certiorari*, the Circuit Court scheduled a hearing on AMM's request for a preliminary injunction. AMM was prepared, and AMM assumes the Commission was prepared. In this posture, Appellants delay the orderly administration of justice. "Indeed, remanding this case for the sole purpose of including [intervenors] would result in unnecessarily protracted litigation, delay the administration of justice, and result in further costs." *John B. Parsons Home, LLC v. John B. Parsons Found.*, 217 Md. App. 39, 65 (2014).

C. If the Circuit Court crafts a remedy directly impacting one of the Appellants, that party may intervene to appeal the decision on the merits.

The Appellants seek to intervene when AMM seeks (1) a declaration that the Commission failed to follow the diversity mandate in Health Gen. § 13-3306; and (2) a preliminary injunction prohibiting the Commission from issuing further licenses until it takes corrective action. The Growers make a giant logical leap in claiming that they are all at risk of losing their licenses and their investments. An injunction and corrective action cannot have the same effect on all Growers.

AMM believes that the Appellants do not oppose the diversity mandate. The Appellants likely support the mandate. Nonetheless, Appellants do not want the Commission's failure to follow the law to have any impact on their businesses.

The better course of action is for this Court to deny intervention and wait until the trial court creates a remedy in response to the Commission's failure to follow the diversity mandate. In the event that one or more Growers is "directly" effected by the remedy, *Duckworth*, 383 Md. at 539, and the Commission does not appeal, then the effected Grower may intervene post-judgment to appeal the remedy. *Duckworth*, 383 Md. at 542 (citing *Coalition for Open Doors v. Annapolis Lodge No. 622*, 333 Md. 359, 366–71 (1994)) (recommending post-judgment intervention on appeal).

D. The Declaratory Judgment Act does not provide any greater right to intervention than the Appellants would have under Md. Rule 2-214(a)(2).

The Declaratory Judgment Act, Md. Cts. & Jud. Proc. § 3-405(a)(1), provides: "If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be made a party." Section 3-405(a)(1) is identical in effect to Rule 2-211(a) governing necessary joinder of parties. *Serv. Transp., Inc. v. Hurricane Exp., Inc.*, 185 Md. App. 25, 37–38 (2009) ("]T]here is no difference in a necessary parties analysis whether the Declaratory Judgment Act or Md. Rule 2-211 is invoked.").

Like Rule 2-214(a)(2), section 3-405 and Rule 2-211(a) don't require joinder when parties are adequately represented. *Id.* at 40 ("Moreover, even if the Rule 2-211(a)(2) factors were in play, we do not see why any 'claimed interest' of [the nonparty] would not be adequately represented by its president . . . a named defendant."); *Stubbs v. Colandrea*, 154 Md. App. 673, 678–79 (2004) (holding that, under Rule 2-211(a), a child's interests in a paternity suit were adequately presented to the court by a child psychologist).

In *Duckworth*, this Court equated intervention under the Declaratory Judgment Act with intervention under Md. Rule 2-214(a)(2). 393 Md. at 547 ("[F]or the reasons set forth above, the legislators do not have an 'interest which would be affected by the declaration' within the meaning of § 3-405(a)(1) of the Courts and Judicial Proceedings Article."). Moreover, *Bradford, Hartford*

Insurance, and *Duckworth* all involved requests for declaratory judgments. This Court and the Court of Special Appeals consistently analyzed the cases under Rule 2-214(a)(2) and never suggested that section 3-405 creates a greater right to intervention than a party would have under Rule 2-214.

In *John D. Parsons Home, LLC*, the Court of Special Appeals concluded that a corporation was not permitted to intervene as a matter of right under Rule 2-214(a)(2). 217 Md. App. at 66. Additionally, an existing party argued that, because the plaintiffs sought a declaratory judgment, the corporation was required to be joined as an indispensable party. *Id.* at 67. The Court of Special Appeals disagreed, and held that the corporation's interests were adequately represented by its subsidiary, just as it had under the Rule 2-214 analysis. *Id.*

III. The Circuit Court correctly denied permissive intervention because intervention would unduly delay the litigation and prejudice AMM.

This Court reviews the denial of permissive intervention for an abuse of discretion. *Environmental Integrity*, 197 Md. App. at 193. There is an abuse of discretion "'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Id.*

Md. Rule 2-214(b) provides that a party may be permitted to intervene if its claim of defense has a question of law or fact in common with the action. The court "shall consider whether intervention will unduly delay or prejudice

the adjudication of the rights of the original parties." Md. Rule 2-214(b)(3). Additionally, the party opposing intervention does not bear the burden of demonstrating that intervention would cause an undue delay or prejudice. Instead, the parties seeking to intervene bear the burden of persuading this Court that the Circuit Court abused its discretion. *Environmental Integrity*, 197 Md. App. at 194.

In denying permissive intervention, the Circuit Court incorporated all of the reasons it gave for denying intervention-of-right, and added that intervention would unduly delay the resolution of AMM's case. The court explained that the Appellants' claimed desire to expedite the case, in order to begin growing as soon as possible, was inconsistent with their filing of various motions. The court concluded: "The Commission is ready, and willing and able to defend its actions. Allowing intervention at this stage does not assist in that determination." E. 300–01.

The Circuit Court was correct. AMM incorporates all of the arguments from section II. for why intervention should be denied. Additionally, the potential for disruption and undue delay is palpable. Intervention would add time and expense for all parties. AMM and the Commission are ready to litigate the merits of the case. Apx. 49.

Appellants insist that they should be permitted to conduct extensive discovery in the Circuit Court. They have already demanded that AMM provide them discovery, even though they are not a party, and invited themselves to depositions at which they are not permitted to attend. E. 177, 191, 688. In addition to seeking to intervene, Appellants have asked to stay all discovery. E. 334.

If Appellants are permitted to intervene, the sheer number of interests and litigants in this case would stall the efficient administration of justice. This stall comes while the merits are ready to be litigated. It would seem to be in the best interest of the Appellants to let the trial on the merits proceed at once?

Appellants' posture would also unduly prejudice AMM. Appellants intend to seek discovery from AMM. E. 1074. AMM needs nothing from Appellants to litigate on the merits. Appellants have insinuated that they seek AMM's financial documents, application, score, and rank. AMM assumes arguendo that Appellants want to re-litigate standing, an issue that the Circuit Court already decided in its ruling on the Commission's Motion to Dismiss.

IV. Laches is not before this Court. Even if it is, AMM challenged the Commission at the only logical time to do so, after it was denied a Stage 1 pre-approval.

A. This Court should not consider laches.

Appellants raised laches in their proposed pleading attached to their first Motion to Intervene. E. 127. Their Motion to Intervene was denied. Thus,

they were not a party in the Circuit Court, and their proposed pleading was never addressed or ruled on by the Circuit Court. This Court disapproves of the filing of briefs by non-parties, *Surland v. State*, 392 Md. 17, 23–24 n.1 (2006); *Auclair v. Auclair*, 127 Md. App. 1 (1999), and it should similarly disapprove of the filing of briefs arguing issues for which the Appellants are not parties.

Thus, laches was not "raised in or decided by the trial court," Md. Rule 8-131(a). For all issues other than intervention, Appellants were not a party in the Circuit Court and it follows that laches would not have been "cognizable in the Court of Special Appeals." Md. Rule 8-131(b)(2).

B. Laches does not bar AMM's challenge to the Commission's failure to follow the law. The only logical, reasonable time to challenge the Commission's failure was after Stage 1 pre-approvals.

This Court should not be lured by the Appellants' cries of urgency. The General Assembly fixed no time by which the first fifteen grower licenses must be awarded, and the Commission similarly did not bind itself to a deadline for issuing licenses. The General Assembly prioritized "public safety and safe access to medical cannabis," Md. Code Ann. Health Gen. § 13-3306(a)(3), as well as "actively seek[ing] to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." *Id.* § 13-3306(a)(9)(i)(1). The

Commission's flawed licensing scheme, *see supra* II.A.1., creates a sense of urgency for the Growers. Those flaws must not be held against AMM.

1. AMM's claim accrued when the Commission issued Stage 1 pre-approvals.

The single most glaring error in Appellants' laches argument is using the date that the Commission promulgated regulations as the starting point for measuring the time until suit was filed. AMM is not challenging narrowly the issuance of regulations that do not mention racial diversity. AMM is challenging broadly the Commission's failure to comply with the statutory requirement to "actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." Health Gen. § 13-3306(a)(9)(i)(1). *See* E. 53–55 (Complaint alleging failure to implement the diversity mandate after the regulations were promulgated).

After the regulations were promulgated, the Commission was still statutorily required to fulfill the diversity mandate, and express racial preference in the regulations may not have been the only method by which to comply. It would make no sense for AMM to file suit immediately after the regulations were issued, when the Commission could still have taken steps to comply with the diversity mandate. How could AMM have known the Commission would do nothing to comply with their mandate? Was AMM supposed to file suit to remind them of something they were presumed to know?

AMM did not know of the Commission's failures to follow the law until after nothing was done *and nothing could be done to correct the failure.* If the Commission had issued 10 or 12 pre-approvals, holding some back to help meet the diversity mandate, if necessary, AMM would not have had a valid complaint. As an illustration that the regulations are not dispositive, the Commission did not attempt to implement the geographic diversity mandate also listed in § 13-3306(a)(9)(i)(1) until the eleventh hour of the Stage 1 selection process, and in a manner not specified in COMAR. E. 54; *see GTI Maryland, LLC v. Natalie M. Laprade Maryland Medical Cannabis Commission*, Case No. 24-C-16-005134 (Balt. City Cir. Ct.).

The Attorney General's Bill Review advised that the diversity mandate be implemented "consistent with the provisions of the United States Constitution as described in *Richmond v. l.A. Croson Co.*, 48[8] U.S. 469 (1989) and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013)."[13] E. 624. The Attorney General did not suggest, and AMM has never claimed, that express race-based preference in the regulations was the only way to comply

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13 The *Fisher* case cited by the Attorney General is *Fisher I*, which remanded the case to the U.S. Court of Appeals for the Fifth Circuit to apply strict scrutiny. On remand, the Fifth Circuit applied strict scrutiny and found the race-based program constitutional. The Supreme Court affirmed the Fifth Circuit in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2418 (2016) ("*Fisher II*").

with the diversity mandate. Instead, AMM noted Professor Michael Higginbotham as an expert to be called at trial to testify about the actions that the Commission could have taken to comply with the diversity mandate. E. 419–35.

State Ctr., LLC v. Lexington Charles Ltd. P'ship, 438 Md. 451 (2014), is on point here. There, the State conducted a "unique procurement process." *Id.* at 606. First, it issued a Request for Qualifications (RFQ) to redevelop a section of Baltimore City. The RFQ prescribed the procedures under which it would select a Master Developer, who would obtain the exclusive right to negotiate with the State. The State and the Master Developer would work toward executing a final agreement to complete the redevelopment. Taxpayers contended that the Master Developer was chosen illegally.

This Court stated that claims did not accrue when the RFQ was published. Instead, the claims accrued when the State granted the exclusive right to negotiate with the Master Developer. *Id.* at 600–01. The taxpayers also challenged later aspects of the redevelopment, and this Court described the later dates on which each set of claims arose. *Id.* at 602–03. Nonetheless, the clear import of *State Center* is that the earliest the taxpayers' claims arose was when the State selected the Master Developer.

The analogy to this case is clear. The promulgation of regulations, like the RFQ in *State Center*, was a starting point for the licensing process. However, the Commission's actions could not be discerned, and thus AMM's claims did not accrue, until Stage 1 pre-approvals were granted. At that time, AMM "could have filed suit seeking an injunction to preclude the State from expending further resources in the form of [pursuing Stage 2 final licenses with growers] chosen in an ultra vires manner, as well as the intended execution of [Stage 2 licenses]." *Id.* at 601.[14]

At base, Appellants argue that AMM should have filed suit before any Stage 1 pre-approvals were issued. Filing suit when the regulations were issued, but before any licensing decision was made, would have been premature. The Commission argued in its Motion to Dismiss that AMM's claims, even having filed suit after Stage 1 pre-approvals, were not ripe. E. 305:20; Apx. 2-4. Neither the Commission's ripeness argument nor Appellants' laches argument is correct, and in any event, they certainly both cannot be correct at the same time. "[T]here could be no 'delay' until a claim was ripe such that a court could entertain it." *State Ctr., LLC*, 438 Md. at 592.

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14 *State Center* is instructive. However, the Appellants are incorrect that their Stage 1 pre-approval created a "statutory contract of performance" with the State. Doe & Grower Appellants' Br. 31. Additionally, there's no comparison between the 77 days for AMM to file suit and the four and a half years for the plaintiffs in *State Center* to file suit.

AMM had no reason to object because it did not know how and whether the Commission would implement the diversity mandate. The only logical time to file suit was after AMM was denied a Stage 1 pre-approval, and when it became apparent that the Commission took no action at any time to comply with the diversity mandate.[15] Filing suit before Stage 1 pre-approvals were issued would have been nonsensical. The Appellants insinuate that AMM should have filed suit regardless of whether AMM was granted a grower license. They admonish AMM for not challenging its own dispensary license. Doe & Grower Appellants' Br. 4, 13–14, 25. This argument defies all logic and common sense. The Growers expect AMM to file suit even if AMM is granted a license. Just as the growers must do with respect to their pre-approvals, AMM bears its own risk with respect to its dispensary and the possibility of legal challenges regarding the Commission's failures.

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15 The Circuit Court understood the issue in this way: "The Defendants indicate that the Commission was not statutorily required to provide a race-based preference in scoring application for medical cannabis grower licenses. And that is at [sic] an issue here, the Court is not focused on whether or not there was a race-based preference. **Just whether or not the Commission followed the requirements of the statute and regulations, and that the manner in which it did so was potentially unconstitutional, arbitrary, or capricious.** The Defendants do mention the [*City of Richmond v. L.A. Croson Co.*, 488 U.S. 469 (1989)] case, **but the issue here is what, if anything, was done. And if nothing was done, why not.**" E. 309:20–310:6 (emphasis added).

2. There was no unreasonable or unjustifiable delay in filing suit. Pre-approvals were issued in August. AMM filed suit in October.

In cases like this, where AMM has invoked the inherent, original jurisdiction of the Circuit Court, E. 46 ¶12, this Court has used the general three-year statute of limitations as a guide for laches issues. *Washington Suburban Sanitation Comm'n v. C.I. Mitchell & Best Co.*, 303 Md. 544, 562–63 (1985). Under this guide, 77 days from Stage 1 pre-approvals to AMM filing suit is more than reasonable. Laches is not applicable to this Complaint.[16]

Laches is an equitable doctrine. This Court "weigh[s] all the facts. . . . the motivations of the parties matter." *State Cntr., LLC*, 438 Md. at 608. In this case, three days after Stage 1 pre-approvals, AMM filed a Maryland Public Information Act request for its scored application and its application rank. E. 45 ¶5, 109 ¶¶21–22. AMM acted diligently. The Commission never answered the request or followed any of the procedures in the MPIA. The Commission caged itself off from the public and the grower applicants. It never asserted a

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16 Appellants' reliance on *Ross v. State Bd. of Elections*, 387 Md. 649 (2005), Doe & Grower Appellants' Br. 43, is patently incorrect, considering the urgency underlying the election process and the extremely short time frame for filing a suit challenging an election.

reason, and there is no good reason, for refusing to disclose applicant's own scored applications.

Appellants also incorrectly claim laches based on money and resources they spent after AMM filed suit. When deciding a defense based on laches, a court does not consider how long it takes to litigate to a decision. Many of the harms alleged by the Growers must have occurred after AMM filed suit on October 31, 2016. *See Washington Suburban Sanitation Comm'n,* 303 Md. 544 at 563 (explaining that, in the laches analysis, harm that occurs after a suit is filed is irrelevant). Appellants' miscalculation demonstrates that they are essentially complaining about the Commission's flawed process, but they cannot attribute those harms to AMM.

Appellants also argue that AMM failed to exhaust its administrative remedies, which is a red-herring argument because there are no administrative remedies to exhaust. In contrast to the government procurement context cited by Appellants, Doe & Grower Appellants Br. 20 n.16, in a licensing process where no administrative remedies are enumerated in the licensing statute or regulation, the failure to object before the licensing process is complete is not a waiver. Appellants also state that laches depends on whether AMM "objected, . . . [wrote] letters, . . . [or did] a lot of things" short of filing suit. E. 294:25–295:1. That is absurd. There were no administrative

remedies to follow. Laches does not depend on whether AMM hypothetically could have taken various unspecified informal actions.

Regarding prejudice, Appellants repeatedly argue that the one-year limit for awardees to be operational should be held against AMM in the laches analysis. Appellants are incorrect. Imposing a one-year operational requirement, without accommodating the right to seek judicial review of the Commission's actions, was designed by the Commission. There's nothing in the record demonstrating that the Appellants complained to the Commission about the one-year requirement or asked the Commission how it would exercise its discretion, given two lawsuits challenging the licensing process. The one-year requirement cannot be a bar to seek redress in the courts from illegal agency action.[17]

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17 The Circuit Court came to the same conclusion in denying the Commission's Motion to Dismiss, stating that, if the Commission acted arbitrarily, capriciously, or contrary to statute, the "Court can not let it stand simply because of the potential harm to those who have received Stage 1 approval. To the extent there is harm, it would be the default [sic] of the Defendants if it is determined that the process is flawed." E. 307:16–20.

V. Whether this is an action for administrative mandamus is not before this Court. Even if it is, this case is not an action for administrative mandamus. It is a declaratory judgment action invoking the inherent authority of the Circuit Court over the Commission's quasi-legislative function.

A. Like laches, this issue is not before this Court.

The issue of whether the Complaint should have been captioned as an action for administrative mandamus is not before this Court for the same reasons that laches is not before this Court. Administrative mandamus was not asserted in the Appellants' proposed pleading attached to its Motion to Intervene, which was denied. For all issues other than intervention, Appellants are not parties, and the Circuit Court never accepted or ruled on the proposed pleading. Administrative mandamus was also not raised by the Commission in the Circuit Court. The Commission first raised administrative mandamus in its response in opposition to AMM's Motion to Maintain Status Quo in this Court.

B. This case is not an action for administrative mandamus. This action seeks review of a quasi-legislative activity and invokes the inherent jurisdiction of the Circuit Court.

The 30-day limitations period asserted by the Appellants applies only to a "quasi-judicial order or action." Md. Rule 7-401(a). Appellants incorrectly seem to believe that AMM is challenging the denial or grant of a particular license. AMM is challenging a quasi-legislative action.

AMM is challenging the Commission's implementation of statutorily required policy. AMM did not seek a license as relief. Whether an action is quasi-judicial or quasi-legislative essentially depends on whether the action was based on "individual or general grounds." *Bucktail, LLC v. Cnty. Council of Talbot Cnty.*, 352 Md. 530, 545 (1999). "[L]egislative action is predicated on facts that do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." *Bethel World Outreach Church v. Montgomery Cty.*, 184 Md. App. 572, 588 (2009)

AMM has consistently stated that there could have been different ways to implement the diversity mandate. Complying with the diversity mandate could effect current grower applicants, future grower applicants, or other organizations who are encouraged to apply. Complying with the diversity mandate depends on the judgment and policy-making discretion of the Commission that typify quasi-legislative action, not adjudication of individual facts. In fact, policies to implement the diversity mandate could have been implemented without knowledge of or reference to any particular grower applicant. The Commission's inaction was "bound up in broader policy considerations." *Bethel*, 184 Md. App. at 592; *see Talbot County v. Miles Point*, 415 Md. 372, 391 (2010) (holding that the county's refusal to amend its

comprehensive water and sewer plan, though based on individual requests, was quasi-legislative, because the decision turned on how the applicant's request "fit into [the] county's overall wastewater treatment program"); *Adventist Healthcare Midatlantic, Inc. v. Suburban Hospital, Inc.*, 350 Md. 104, 122 (1998) (holding that the development of the comprehensive State Health Plan was a quasi-legislative function, pursuant to which quasi-judicial consideration of applications was conducted); *Lewis v. Gansler*, 204 Md. App. 454, 474 (2012) (holding that an agency suspending a county's ability to grant variances to environmental programs, though directed at the county, was quasi-legislative, because the agency was furthering "programmatic goals").

Stated differently, the Commission's complete failure to act to implement the diversity mandate lacks all of the "indicia of a quasi-judicial process[:] a fact-finding process that entails the holding of a hearing, the receipt of factual and opinion testimony and/or forms of documentary evidence, and a particularized conclusion, based upon delineated statutory standards[.]" *Appleton Reg. Cmty. All. v. Cnty. Comm'rs of Cecil Cnty.*, 404 Md. 92, 100.

Appellants appear to generalize too broadly by asserting that any action in connection with grower licensing is quasi-judicial. To the contrary, Maryland cases disfavor a categorical approach and focus on the "nature of the particular act" being reviewed. *Dugan v. Prince George's County*, 216 Md. App.

650, 659 (2014); *accord Talbot Cnty.*, 415 Md. at 387 ("This determination is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds."); *Bethel*, 184 Md. App. at 596 ("[W]e are not holding that all actions by the Council amending the water and sewer plan, even when the nature of the amendment is not subject to the administrative delegation process, are necessarily legislative. We hold that *the action, in this instance,* was legislative.").

C. This case should not be reviewed solely on the administrative record.

When AMM filed suit, the Commission did not certify an administrative record. Since then, the Commission has asserted deliberative process privilege with respect to nearly all information it possesses, including, but not limited to, AMM's ranking, score, and any documents relating to the Commission's efforts to "actively seek racial [and] ethnic diversity..." Such protection of information is not consistent with the concept of an administrative record from which an aggrieved party could seek judicial review.

CONCLUSION

For the foregoing reasons, Alternative Medicine Maryland, LLC respectfully requests that this Court:

AFFIRM the decision of the Circuit Court denying intervention to all Appellants.

Respectfully submitted,

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Certificate of Word Count and Compliance with Rule 8-112

This brief contains 10,493 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

This brief was prepared with the font, spacing, and type size requirements listed in Md. Rule 8-112. It was prepared with proportionally-spaced Century Schoolbook 13-point font, with double line spacing.

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CITATION AND VERBATIM TEXT OF ALL PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS NOT INCLUDED IN THE APPELLANTS' BRIEFS

Rule 8-131. Scope of Review

(a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) **In the Court of Appeals – Additional limitations.** (1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in a petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition. (2) **No prior appellate decision.** Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) **Action tried without a jury.** When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

(d) **Interlocutory order.** On an appeal from a final judgment, an interlocutory order previously entered previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) **Order denying motion to dismiss.** An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

Rule 8-504. Contents of brief.

(a) **Contents.** A brief shall comply with the requirements of Rule 8-112 and include the following items in the order listed:

(1) A table of content and a table of citations of cases, constitutional provisions, statutes, ordinances, rules, and regulations, with cases alphabetically arranged. When a reported Maryland case is cited, the citation shall include a reference to the official Report.

(2) A brief statement of the case, indicating the nature of the case, the course of the proceedings, and the disposition in the lower court, except that the appellee's brief shall not contain a statement of the case unless the appellee disagrees with the statement in the appellant's brief.

(3) A statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail.

(4) A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

(5) A concise statement of the applicable standard of review for each issue, which may appear in the discussion of the issue or under a separate heading placed before the argument.

(6) Argument in support of the party's position on each issue.

(7) A short conclusion stating the precise relief sought.

(8) The citation and verbatim text of all pertinent constitutional provisions, statutes, ordinances, rules, and regulations except that the appellee's brief shall contain only those not included in the appellant's brief.

(9) If the brief is prepared with proportionally spaced type, the font used and the type size in points shall be stated on the last page.

(b) **Appendix.** Unless the material is included in the record extract pursuant to Rule 8-501, the appellant shall reproduce, as an appendix to the brief, the pertinent part of every ruling, opinion, or jury instruction of each lower court that deals with points raised by the appellant on appeal. If the appellee believes that the part reproduced by the appellant is inadequate, the appellee

shall reproduce, as an appendix to the appellee's brief, any additional part of the instructions or opinion believed necessary by the appellee.

(c) **Effect of noncompliance.** For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed.

NO. 98, Sept. Term, 2016

IN THE
Court of Appeals of Maryland

JANE & JOHN DOE, ET AL.,

Appellants,

– v. –

ALTERNATIVE MEDICINE MARYLAND, LLC,

Appellee.

On a Writ of Certiorari to the Court of Special Appeals of Maryland
(The Honorable Barry G. Williams)

APPENDIX TO APPELLEE'S BRIEF

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TABLE OF CONTENTS TO APPENDIX

Statement of Reasons

Pursuant to Md. Rule 8-501(f), Appellee provides this following statement of reasons for the necessity of the Appendix. The excerpt from the Commission's Memorandum of law in support of their Motion to Dismiss has independent relevance in responding to Appellant's argument regarding laches. The transcript of the arguments on the Commission's motion to dismiss should have been included as part of Docket No. 54/0. The transcript is relevant to the briefs generally and specifically in response to Appellant's arguments regarding laches and likelihood of success on the merits. The transcript would have been included in the Record Extract, but Appellee's counsel was not made aware it was not being included despite numerous inquiries; hence, this is the reason for the first email chain. Finally, the body of the Plaintiff's bench memo in preparation for the Preliminary Injunction hearing has been included in its entirety without exhibits. The memo is relevant to the briefs generally and specifically in response to Appellant's arguments regarding laches and likelihood of success on the merits. Appellants' counsel refused the request include the Memo; hence, this is the reason for the second email chain. All inclusions in the Appellee's Appendix, save the email excerpts, should properly be a part of the record.

AMM alleges that it is a well-capitalized organization with a "comprehensive" business plan. Complaint ¶ 6. It then alleges that the Commission failed to sufficiently specify how much capital was needed by applicants in order to be adequately capitalized and should not have scored adequate capitalization on a scale of 0-5. AMM alleges that the Commission should have been responsible for informing applicants exactly what capital should be required of them, rather than leaving that to applicants to budget and demonstrate in their respective applications. The Complaint neither pleads nor suggests "upon information and belief" that AMM was aggrieved by the Commission's evaluation of adequate capitalization. AMM lacks standing to bring any of its articulated claims for declaratory judgment, so the Complaint should be dismissed.

III. AMM'S CLAIMS REGARDING RACIAL AND ETHNIC DIVERSITY IN LICENSING AND INVESTIGATING ADEQUATE CAPITALIZATION SHOULD BE DISMISSED BECAUSE THEY ARE NOT RIPE.

AMM alleges that the Commission's efforts to actively seek to achieve racial and ethnic diversity in licensing medical cannabis growers is deficient and in contravention of the statutory mandate. This claim is not yet ripe because the Commission's licensing efforts are ongoing and no licenses have yet issued.

"Generally, an action for declaratory relief lacks ripeness if it involves a request that the court 'declare the rights of parties upon a state of facts which has not yet arisen, [or] upon a matter which is future, contingent and uncertain.' " *State Ctr., LLC*, 438 Md. at 591 (*citing Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 690 (1987) (internal quotations and citations omitted)). Here, where the licensing process is continuing, the Commission is still carrying out its obligations under the law. Decisions

of the Commission for award of medical cannabis grower licenses involving both racial diversity and financial investigations remain unresolved and cannot properly present justiciable claims.

AMM alleges that the Commission has "failed" to act to achieve racial and ethnic diversity, but the Commission is still acting to do so. Most recently, the Commission has worked to collect data from applicants in an effort to assess the level of racial and ethnic diversity within the applicant pool for each of the relevant licensing categories. The Commission has also announced plans it is presently pursuing in an effort to consider all available opportunities for achieving racial and ethnic diversity. Exhibit D. The Commission intends to work with a diversity consultant to identify present and future opportunities to create racial and ethnic diversity in medical cannabis licensing. No category of medical cannabis licenses have issued and, upon information and belief, no pre-approved medical cannabis grower applicant will be in a position to convert a pre-approval to a full license for months. The licensing process is ongoing, as are the Commission's efforts to achieve racial and ethnic diversity.

The Complaint also alleges that the Commission accepted unfounded assertions about applicants' capitalization and did not discover that applicants who received Stage I pre-approvals were not adequately capitalized. These allegations disregard the steps embodied within the two-stage licensing process, so they are not yet ripe for review.

The first stage of the Commission's application review was designed to be a blinded-application evaluation process. The second stage was designed to be an unblended investigation into those applicants that were selected for pre-approvals for

medical cannabis grower license. The Commission is now in that second stage and is presently in the process of determining whether the pre-approved applicants for medical cannabis grower license can satisfy the financial requirements and substantiate that they are ready to operate according to the specifications set out in their applications. Under COMAR 10.62.08.07, any pre-approved applicant for medical cannabis grower license has to submit to the Commission audited financial statements or records sufficient to confirm the accuracy of the applicant's statements of capitalization. Under COMAR 10.62.08.05B., the Commission may deny any application that contains a "misstatement, omission, misrepresentation, or untruth." If pre-approved applicants for medical cannabis grower license are found to have misstated their capitalization in their applications, the regulations permit the Commission to deny those applications, even after pre-approval.

IV. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN NECESSARY PARTIES.

The 15 applicants awarded Stage One pre-approvals for medical cannabis grower license may be affected by a declaratory judgment in favor of AMM. If the Court grants the relief requested by AMM and requires the Commission to discontinue the licensing process pending some unspecified "corrective action," then those companies which have already received Stage One pre-approvals for medical cannabis grower license will be irreparably damaged. Pre-approved applicants for medical cannabis grower license are expected to invest significant time and resources toward cooperating with the Commission's moral character investigations and financial due diligence, fitting out their facilities, recruiting and training staff, and securing all necessary permits and approvals

Michael Berman <mberman@rwllaw.com> Jun 9

to Brian, Byron, John, Ira, Joseph, Bezalel, bekman, Robert, bmarcus, Gary, Sydney, Danielle, heather

Per today's order of the Court of Appeals, attached please find our initial draft of the certain appellants' supplemental record extract designations. Please provide all of AMM's counter-designations by COB Monday, as we have to compile the record extract and send it to the printer forthwith. Of course, all of appellants' rights to counter-designate are reserved.

We have received AMM's prior designations.
Unless AMM demonstrates a reason to include AMM's memoranda of law in the extract, we object to appellee's earlier designations of its memoranda of law for inclusion.
Absent a good reason shown to include legal memoranda, we will not include them, unless AMM prepays costs.
Unless the designations of legal memoranda are withdrawn, or cause to include them shown, a cost estimate will follow.
Please let us have your response as soon as possible. Time is of the essence given the briefing and argument schedule.

Thank you.

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ATTORNEYS AT LAW

PLEASE NOTE NEW EMAIL ADDRESS OF **mberman@rwllaw.com**

CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS under Circular 230, we inform you that any U.S. federal tax advice contained in this communication (including attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any matters addressed herein.

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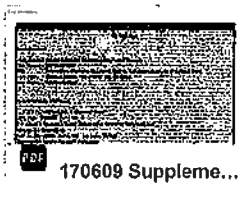

170609 Suppleme...

Byron Warnken <byron@warnkenlaw.com> Jun 12

to Michael, Brian, John, Ira, Joseph, Bezalel, bekman, Robert, bmarcus, Gary, Sydney, Danielle, heath

Mr. Berman:

This is not our counter-designations. I will provide in full before the end of the day. However, I have a few requests.

1.) We would like our opposition to intervention, in its entirety, included in the extract. The rule reads not included "unless it has independent relevance." This has independent relevance. Perhaps you want certain lines of legal argument redacted? Including only the first two pages and signature block is arbitrary. Please advise.

2.) You state that these are the supplemental designations, but there is overlap in the entries you have highlighted (at least 45-47). Please confirm that all previous entries on the list you sent on 3/22/17, including our designations (save my point above to be addressed separately), have been included.

3.) Please send me the transcript of the 2/21 hearing.

Michael Berman <mberman@rwllaw.com> Jun 12

to Byron, Brian, John, Ira, Joseph, Bezalel, bekman, Robert, bmarcus, Gary, Sydney, Danielle, heather

We respectfully disagree that AMM's legal memoranda have any, much less independent, relevance to the appellate issues. It is our view that the Rule prohibits including them in the Record Extract. Please explain the asserted independent relevance of AMM's memoranda of law, or prepayment is required. If a detailed justification showing independent relevance or prepayment is not received, AMM's legal memoranda will not be included in the Record Extract.

Contrary to AMM's suggestion, below, there is nothing arbitrary about following the Rules governing the extract. We intend to include designations made by AMM other than legal memoranda, except under the limited context set forth above, and even then, over objection.

I am confused by your comment that "these are not our counter-designations," in light of your earlier statement that you were sending an "initial draft of the certain appellants' supplemental record extract designations." Of course, we have no problem with you modifying AMM's list of designations by COB today, as you suggested below. However, it would be helpful if all of AMM's counter-designations were made in a single document.

Thank you.

Byron Warnken <byron@warnkenlaw.com> Jun 12

to Michael, Brian, John, Ira, Joseph, Bezalel, bekman, Robert, bmarcus, Gary, Sydney, Danielle, heath

| "Contrary to AMM's suggestion, below, there is nothing arbitrary about following the Rules governing the extract."
I'm sorry, I suppose I wasn't clear. Please explain why you intend to include the first two pages of the opposition in question. Is your contention that there is no legal argument in the first two pages, and everything thereafter until the signature block is legal argument.

Furthermore, you did not address my request for clarification about the two overlapping sets of docket entries you sent. (One sent on 3/22/17 and the other sent on 6/9/17.) Each set highlights entries that the other does not, but, confusingly, both highlight some of the same entries. Please clarify your intent.

Finally, again, please send the transcript you have included in your designation.

Michael Berman <mberman@rwllaw.com> Jun 12

to Byron, Brian, John, Ira, Joseph, Bezalel, bekman, Robert, bmarcus, Gary, Sydney, Danielle, heather

I am sorry, but I don't understand your confusion. I suggest that we need not burden all counsel with these Record Extract emails.

You are correct that the June 9 designation includes Entries 44/0, 45/0, and 47/0 that were also designated on March 22. The intention therefore is to include them in the Record Extract. If my circling the same entries on both docket sheets caused confusion, I apologize. To clarify, we intend to include, one time only, any document that we designated on either date.

You correctly note that "Each set highlights entries that the other does not...." The June 9 designation does in fact include entries that we did not designate on March 22. That is because the latter designation covers papers not filed at the time of the first designation. For example, on June 9 we designated the March 22 notice of appeal that was not docketed until March 24, two days after the March 22 designations were made.

Given time constraints, if you send me a copy of the specific document you are referring to and wish to be included (You wrote: "I'm sorry, I suppose I wasn't clear. Please explain why you intend to include the first two pages of the opposition in question. Is your contention that there is no legal argument in the first two pages, and everything thereafter until the signature block is legal argument."), I will be better able to reply with the pages that we will include in the extract.

Byron Warnken <byron@warnkenlaw.com> Jun 12
to Michael

Please send me the transcript I've referenced

Byron Warnken <byron@warnkenlaw.com> Jun 16

to Michael, Brian, John, Christopher, bcc: me

Mr. Berman:

I request you please provide me with a copy of the transcript of the February 21, 2017 hearing. This is either my fourth or fifth request. My request has been acknowledged at least twice and the last time I was told that the transcript would be forthcoming via a separate email (that I did not receive). I am a party and I have been requesting a transcript that is a significant part of the joint record extract.

I just went out of my way to provide five documents to your paralegal as quickly as I was able.

Finally, please confirm you will send digital copy of your brief and the record extract on Friday, June 23. I make this request because of the unusually tight briefing schedule.

Your cooperation is appreciated.

Michael Berman <mberman@rwllaw.com> Jun 18

to Byron

I think that we confirmed some time ago that all briefs will be served via email and mail by agreement of all parties.
We will try to do the same with the record extract, size of the PDF permitting.
Please let us know the size limitations of your inboxes.
If email does not go through, we will make them available for pick up.
We assume that you will serve everything you file by email on all counsel. If not, please advise.

You were not told that the transcript would be forthcoming.
You were told that a response would be forthcoming.

On May 30, 2017, we wrote to AMM: "It is our understanding that AMM has sent or served subpoenas and communications regarding nature and scope of the June 2 hearing, and we ask that all counsel be provided with copies."
You did not respond.

Previously, on January 9, 2017, we requested copies of discovery that AMM had propounded. You refused.
We renewed the request the following day and you again refused.

Now, however, you demand that we do otherwise.

AMM has taken five depositions, and we do not have transcripts (except for the Robshaw transcript filed in Court).
Nor do we have discovery that was exchanged with the Commission.
We will provide a copy of the requested transcript of the AMM intervention hearing if you would provide the materials we have requested, including the four deposition transcripts, discovery requests, and responses.

It is correct that you provided documents for the extract.
Thank you.
That is much different than the matters set out above.

I trust that this is fully responsive.
If you send me the information we requested long ago, we will immediately comply with your request.
It can be done later this afternoon.

Byron Warnken <byron@warnkenlaw.com> Jun 18
to Michael, Brian, Christopher, John

Mr. Berman:

I will expect the Appellant's brief via email on Friday. For the record extract, dropbox or google drive will work better than email. That said, my limit per email is 50mb so it will likely only take a few emails. I cannot speak for Brian, John, or Chris's emails, but if it comes to me digitally I will provide copies to each of them.

I have an obligation to my client to check the accuracy and completeness of the transcript that you plan to submit as part of a joint record extract, and, per the rules, where possible, we are to agree. You are in possession of the transcript and you are including it in the extract without showing it to me.

I did not owe you documents then (January) so that I may have an entitlement to collaborate with you on a joint record extract now. I have that entitlement now. I have that obligation now.

You were not a party at that time nor was there an independent requirement for me to provide you with the document you requested. You were asking for two documents that were not part of the Court file. You later informed me that the State provided you with the documents you were seeking. You have never asked me for deposition transcripts. With respect to your May 30 request, I have no memory of it, but, again, you were not entitled to anything you now say you asked for. Me providing it to you would be a failure in my representation of my client.

Do you believe that the deposition transcripts are appropriate for inclusion in the joint record extract?

For the final time, please provide the transcript that you plan to include as part of the joint record extract.

Michael Berman <mberman@rwllaw.com> Jun 18

to Byron

If you are obligated to your client to check the transcript, as indicated below, you may purchase a copy from the court reporter.
Just as you assert that you have no obligation to provide the papers we requested from you in January, and which you refused to provide, we have no obligation to provide you at this time with a free copy of a transcript that you can purchase.
Perhaps your misunderstanding comes from your erroneous description of a "joint" record extract.
If you provide the deposition transcripts and documents we requested, we will voluntarily comply with your request for thetranscript.
As to your having no memory of our earlier request, it was sent via email.
Please confirm that briefs will be exchanged via email no later than 5 p.m. on the date that they are filed.
If you so confirm, you may interpret this as confirmation that we will do the same.
We do not use Dropbox or Google Drive for this purpose.
Your other questions are not relevant.
We have fully answered your inquiry.

Byron Warnken <byron@warnkenlaw.com> Jun 18

to Michael, Brian, Christopher, John

I only mean joint insomuch as where possible, we are to agree. Your point is taken and I will not ask for a "free copy" of the transcript again. I know you believe you are simply mirroring my lack of "professional courtesy" as you earlier stated it. I believe I have sufficiently explained why I do not see it that way.

Briefs will be exchanged via email no later than 5pm on date filed. That is confirmed. Please confirm you will send the record extract digitally via email as well.

right to intervention under Rule 2-214(b). The Court has considered whether intervention would unduly delay the adjudication of either claim and it determines that it would. Interestingly enough, the proposed intervenors seemingly have an interest in speeding up the process, because they want to begin growing as soon as possible, and want nothing to stand in the way of the next phase of represent the issue of whether or not the statute as licensing.

While understanding the desire for their speed, filing various motions does add time to these proceedings. The Plaintiffs have filed their claims and as noted above, Defendant were arbitrary, capricious, or potentially unconstitutional. The Commission is ready, and willing and able to defend its actions. Allowing intervenors at this stage does not assist in that determination. Therefore the Motion to Intervene as a matter of right impermissibly is denied.

The Court will now hear the arguments on the Motion to Dismiss filed by the Commission. Thank you, Counsel.

MR. BERMAN: Thank you, Your Honor.

THE COURT: All right. This is the Motion to Dismiss or in the Alternative for Summary Judgment in 24-C-16-5801. Counsel, identify yourselves for the record.

MS. NELSON: Good afternoon. Heather Nelson for the Maryland Medical Cannabis Commission, the Department of Health and Mental Hygiene, and all individually named commissioners. With me here at counsel table is Deborah Donahue and Robert McCray.

THE COURT: Good afternoon, counsel. And for the record.

the issue here is whether or not the actions of the

MR. WARNKEN: Good afternoon, Your Honor. Byron B. Warnken on behalf of Plaintiff, Alternative Medicine Maryland, LLC.

THE COURT: Your motion.

MARYLAND MEDICAL CANNABIS COMMISSION'S MOTION TO DISMISS OR IN THE ALTERNATIVE SUMMARY JUDGMENT

COMMISSION'S ARGUMENT

MS. NELSON: Thank you, Your Honor. A few Dismiss of GTI's second amended complaint. GTI came before the Court to say and allege that the Commission somehow changed the rules, and announced rules for evaluation, but changed them in the process. Here, Alternative Medicine Maryland comes before the Court to say; we knew the rules, we knew the rules when we applied, but we don't like that they were applied to our application. If I may also reserve six minutes for rebuttal?

THE COURT: You want six minutes?

MS. NELSON: Yes, please.

THE COURT: Absolutely.

MS. NELSON: Thank you. Alternative Medicine Maryland, AMM, followed the implementation of the Maryland Medical Cannabis Law through its creation. Represented by very able counsel both in town and in Annapolis, they laid weeks ago this Court convened to hear the Motion to out in their complaint the history of the Medical Cannabis Statute and the history of the evaluation criteria by which every evaluation was reviewed as embodied in the regulations.

On this history they set forth three claims. They claim that race and ethnicity should have been used a scoring criteria, as an evaluation criteria. And that scoring weight should have been given to those applicants who demonstrated some threshold of racial or ethnic diversity in their organizational makeup. They claim that the award of points for Maryland residency was unconstitutional. And they claim that the Commission gave performed insufficient vetting of those applicants who demonstrated adequate capitalization to the Commission.

Alternative Medicine Maryland knew each of those scoring and evaluation criteria when it filed its application to the Commission in November 2015. They

followed the proposed regulations when they were published in the Maryland Register, June 26th of 2015. They submitted comment on proposed regulations when they were published in the Maryland Register and they knew the evaluation criteria when they took effect in September of 2015, months before filing their own application.

The Commission -- I'll try not to retread the insufficient standards for adequate capitalization and ground covered in the filings. But I do think --

THE COURT: It's your time. I'm trying to only say, I read every single that's filed. Everything.

MS. NELSON: Thank you.

THE COURT: So.

MS. NELSON: Here, Alternative Medicine Maryland has failed to establish standing to challenge the evaluation criteria. They have not established that any of these criteria prevented them from being selected for a pre-approval. They claim that the issue of when they brought suit has somehow been complicated by the fact that there are allegations that they filed too late and allegations of that their suit is not yet ripe. And I'd like to take a moment to distinguish the claims and the arguments that apply to those various claims.

When Alternative Medicine Maryland alleges financial adequacy of the pre-approved applicants, those

claims are not yet ripe. The process set forth in the regulations made it very clear that pre-approvals would be issued based on the application materials themselves. And then after that point, after pre-approvals were issued, the Commission would investigate the financial statements submitted as a supplement in Stage II, and would perform due diligence to ensure the accuracy of financial that the Commission has not adequately vetted the statements made in the application process. And so the Commission is presently vetting financial reports submitted by all pre-approved growers.

As for waiting to loan, they did. They had notice that the Commission would not be using race or ethnicity, would be using Maryland residency, and would not be requiring a minimum capital require, cash on hand capitalization requirement.

THE COURT: Are you saying that at that point they should have filed suit?

MS. NELSON: At a minimum they could have submitted comment, public comment, when the regulations were published on June 26th, 2016 in the Maryland Register.

THE COURT: Well, what's the significance of public comment?

MS. NELSON: If they believed that the

regulations did not conform to statutory requirements, then public comment is appropriately made to say we believe that the regulations are required to include the scoring criteria under COMAR 10-62-08-05.

THE COURT: Are you saying that it's the duty of a potential plaintiff or a public citizen to inform the government that a statute is wrong before it's implemented racial and ethnic composition of an organization as a or unconstitutional?

MS. NELSON: I'm not saying that. I'm saying that --

THE COURT: Okay. I'm not asking, I'm trying to figure out what is the benefit under the facts that we have here of issuing comment, because you're saying that they didn't do it in a timely manner. So in relationship to that I'm trying to understand your argument, that would asking for a comment to do, what would that do?

MS. NELSON: Comments are helpful in moving from proposed regulations to final regulations. They are --

THE COURT: It's helpful to who? It's helpful to --

MS. NELSON: To the agency promulgating the regulations. Because comments are --

THE COURT: But isn't it the job of the agency to

get it right in the first place?

MS. NELSON: It is.

THE COURT: Okay.

MS. NELSON: It is. And yet clearly the Commission believes they got it right.

THE COURT: I'm sure they do. And they may have. that it wasn't done timely. And what they should have You don't know. But my point is, you brought up the fact done was filed a comment. I guess my question really -- what I'm trying to figure out is, how would that be relevant to the timing of the filing, how does that affect it?

MS. NELSON: It's notice. That's when they have notice, and opportunity to intervene, and advocate their position in a way that doesn't require a government agency to go back 18 months and a few million dollars in a governmental process that many have participated in in good faith, and have made significant investments in in good faith. And so --

THE COURT: Okay. So you're saying there's case law that says that if a proposed plaintiff or someone who wants to be involved in the process doesn't file a comment and that restrains the Court in some way, shape, or form when it is brought to the Court's attention that there's the potential that a statute is unconstitutional or done

in an arbitrary or capricious manner?

MS. NELSON: No, Your Honor. What I'm saying is, this Plaintiff had opportunity to raise complaints about these evaluation criteria beginning in early 2015 and submitted proposed comments on proposed regulations without addressing any of the complaints that it brings before the Court in the underlying complaint.

You don't know. But my point is, you brought up the fact

THE COURT: Okay. So I guess my question is, if they don't do that, are you saying they're precluded from filing suit?

to consider in the overall analysis. Had they filed suit in July, August, September, October, November, all before applications were due, received, processed, evaluated for an extended period of time --

THE COURT: What is they filed suit and no one listened to them? Would we not be in the same position? And so that gets to my question of why does that matter as far as, again, your issue of timeliness of filing?

MS. NELSON: The parties are extremely prejudiced because of the lateness of the filing.

THE COURT: Isn't that kind of circular? You're saying the parties are prejudiced because of the lateness of the filing, but you're saying that the burden is on the proposed plaintiff in this case, AMM, to tell you that the

statute is wrong? Not you, personally, obviously.

MS. NELSON: The Commission contends that, and I'm not sure that there's a challenge that the statute is wrong, but AMM contends --

THE COURT: Implemented wrong.

MS. NELSON: Correct. That the regulations that the Commission promulgated to effectuate the

MS. NELSON: I think that's an important fact statute failed to include criteria that were required under the statute. And so the Commission contends that the evaluation criteria are proper and were properly implemented. But if a party interested in the process contends that they're not and sees that the evaluation criteria omits what they consider to be a necessary element, and includes what they consider to be an improper process plays out, and we'll only file a suit if we don't like the results.

Every person and company to participate in the process is extremely prejudiced thereby. Beyond the passage of time and the significant investment, there has been an entire licensing process undertaken in evaluation of this. And counsel suggested earlier that the State has made a financial investment in the course of evaluating applications. And that is true. The State has invested taxpayer funds in the evaluation of these applications

according to the criteria as they were put into regulation.

THE COURT: Let me ask you a question. It's a simple one. If it is found that the Commission implemented the statute in an improper way or their regulations were improper, are you arguing that the Court should just let it go anyway because money has been spent? element, and they simply wait on this, wait to see how the

MS. NELSON: No, I'm not suggesting that. What I'm suggesting is, or what I'm arguing is, that AMM's complaint should be dismissed, because they waited to long to bring it.

THE COURT: Okay.

MS. NELSON: They do not have a specified right to assert here. They specifically have -- they specifically have no right to challenge the evaluation of Maryland residency, at a minimum.

THE COURT: Okay.

MS. NELSON: Because they have received all the demonstrating Maryland residency, only now seek to come back and say that that's an impermissible consideration.

THE COURT: And we know they received it because of what they filed in the complaint or what you filed your response as an affidavit and attachment?

MS. NELSON: Their complaint does not include

those allegations. Their complaint alleges only that the mere consideration of Maryland residency, without anything else, is unconstitutional. And so that that alone should require everything to go back and be redone.

THE COURT: Okay.

MS. NELSON: The complaint also alleges that the Commission gave insufficient guidance of adequate points for Maryland residency. And after receiving and capitalization and should somehow have been required to set a minimum threshold for cash reserves for applicants to maintain. And that it was unreasonable, arbitrary and capricious, for the Commission to expect companies, organizations, to determine how much capital they needed to operate.

The Commission was very clear at all points in the process that a company was responsible for demonstrating adequate capitalization. They've published 27 frequently asked questions related to financial information in an effort to make it beyond clear to applicants that it was their responsibility alone to evaluate the adequate capitalization and the showings that they would have to make to prove that they were specifically capitalized to operate in the way that they good reason. Because applicants have chosen very different business models and so were appropriate expected

to put individualized attention into how much they needed to operate and demonstrate that they could do what they intended to do.

The complaint also alleges that the Commission has somehow failed to sufficiently vet pre-approved growers because of rumors that certain pre-approved growers are continuing to look for investors. We intended to operate. And the Commission did so with very respectfully submit that allegations based upon industry rumors are not sufficient to sustain a claim for consideration before this Court. That the insufficiency of the allegations complimented by the clarity of the process laid out in the regulations, and the application, and the frequently asked questions, specifically the fact that the Commission expected everyone to demonstrate adequate capitalization, would determine pre-approval, and then do investigation through the Compliance and Enforcement Division to confirm that the statements made about capitalization were correct and accurate. And that the capitalization was actually there for each of the pre-approved entities to move forward in the way that they represented make it appropriate to dismiss that claim at this time.

There's, in the alternative, if the Court chooses to look at the exhibits, there is no genuine

dispute of fact that the process was always to award pre-approvals based on the application materials themselves Stage I and Stage II. At which time applicants, pre-approved applicants, may likely move forward and may not move forward. If there are misrepresentations found in application materials, if there are other triggering events as laid out under the regulations, pre-approved and to perform all due diligence investigation between applicants may not move forward to final licensure.

The timing of the complaint is particularly important here. Your Honor asked in the prior hearing about when the complaint could have been brought and when things could have moved forward. And I appreciate that Your Honor has asked a bit about it in this argument as well. Alternative Medicine Maryland followed the implementation of the regulations very clearly and participated in the public comment for regulation. And tracked all of that as it was going through the process. Both Alternative Medicine Maryland and other industry participants, including the legislature, were following the regulations finalizing the evaluation criteria.

It puts all interested parties in a position of extreme prejudice to permit this plaintiff to stay silent upon if they -- upon holding a sincere belief that the regulations were not as they should have been, to stay

silent, to submit an application, to await the final results and choose to sue only when they don't like the final outcome. The complaint should be dismissed. The Commission respectfully requests that the complaint be dismissed. In the alternative, the Commission respectfully requests summary judgment on all counts.

MS. NELSON: Thank you.

THE COURT: Thank you, Counsel.

AMM'S ARGUMENT

MR. WARNKEN: Thank you, Your Honor. Your Honor, we have standing to be here. AMM submitted a comprehensive, valid, and timely application to grow medical cannabis in Maryland. The Commission conducted a process that we will show is arbitrary and capricious, unconstitutional, and contrary to their governing statute. The Commission, in their motion, confuses standing with the merits. We don't believe that a favorable decision is likely to redress the harms by the Commission's actions, which we have sufficiently done.

My client invested significant resources in the application process as many others did. My client was and is entitled to a fair process that is not arbitrary, capricious, or contrary to statute. We were harmed by going through the Commission's licensing process. Applicants not awarded one of the 15 pre-approvals are

blocked from participation at this point. The Commission was statutorily only allowed 15 pre-approvals. And all 15 have been awarded.

Your Honor has the authority to make declarations under the Declaratory Judgment Act and also has broad authority to fashion equitable relief. This Court has inherent authority to review and enjoin agency

THE COURT: Thank you, Counsel.

actions, which includes not just action, but lack of action. Your Honor, I can say that my client was concerned prior to the process, prior to the scoring of lawsuit prior to that. We didn't know what the Commission would do. We didn't know that 15 were certainly going to be licensed. That was the assumption we could not know specifics with respect to that, we could only know what the regs were.

Your Honor, at this time it is substantially certain that the Commission has no more power to comply with the statute. The Commission's power at this point, with respect to growers, is confirming what's in the applications. The pre-approved growers have their pre-approvals, Your Honor. And they, themselves, control whether they get their final license. They must merely meet criteria that it is in their power to meet. It is substantially certain, Your Honor, that the Commission

will not comply with the governing statute at this point.

Your Honor, with respect to joinder, you've heard from us with respect to the overlapping arguments. You know, again, I think Your Honor has more or less already found is the Commission adequately represents the interests of the pre-approved growers. And even if there was a chance that anyone else was a proper party, the City obligations. But that does not rise to the duty to file a of Bowie versus MIE Properties, they should not now -- the Court should not now force them to be a defendant. The case so far has garnered significant media attention since it was filed three and a half months ago. And clearly they are aware and relying on the Commission to move this forward.

What is clear about joinder, Your Honor, is granted leave to amend. Your Honor, with respect to failure to state a claim. In their papers, with respect to failure to state a claim, the Commission argues that we have not sufficiently pled facts to warrant the granting of a preliminary injunction. Failure to state a claim is not addressed with respect to declaratory relief, only with respect to injunctive. We have stated a redressable claim for declaratory and injunctive relief.

Your Honor, the entirety of our complaint outlines why we are likely to succeed on the merits in a

full two pages of the complaint. At 19 through 21 lay out the specifics. We address the convenience to the parties, the balancing of the convenience. And we address our irreparable injury. And obviously the public benefits when the law is followed. Your Honor should treat the Commission's motion only as a Motion to Dismiss and not as a Motion for Summary Judgment. We do not believe it's the dismissal is not warranted. At most we should be appropriate at this time for Your Honor to consider summary judgment.

The two affidavits are dispositive of nothing. We are actively working towards refining the dispute as thoroughly outlined in our 2-501(d) affidavit, Your Honor. The Commission was continuing nothing as outlined in the Colonel Rochshaw (phonet) affidavit with the intent, "intent," to hire a diversity consultant. Your Honor, the statute was ignored, plain and simple. Motive and intent are at issue. Why did the Commission do what the Commission did? This, in addition to multiple inferences, Honor.

Even if Your Honor did want to consider summary judgment, the Commission is not entitled to judgment as a matter of law. Your Honor, the law that governs the Commission, the Commission's enabling statute, is Health General 13, the 3300 series. Specifically at issue in

this case, 13-3306(a)(9). The Commission, "shall actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." Your Honor, we have pleaded and will show that the Commission acted contrary to statue and in fact ignored the statute. All statutes, obviously, have significance to the legislature. But this one has particular importance in that there was a make summary judgment inappropriate at this time, Your striking change of expression in the progression of this statute, Your Honor.

First, the provision wasn't there at all. Then "shall seek" was added. Then "shall actively seek." And even after counsel, that the statute must be implemented in accordance with Prosen (phonet), the legislature did not get rid of it. The legislature had that chance, but did not do so. Your Honor, the Commission argues but does not offer affidavit that they wanted to start "race neutral." The statute was race conscious, but they wanted to start race neutral. However, they confuse race neutral with doing nothing. They did not pursue race neutral avenues, Your Honor. They did nothing. If they truly wanted to start race neutral and see what happened, and licenses, 12 licenses, and see at that point.

Broad publication, Your Honor, as they assert in their papers, is not a furtherance in their statutory

directive under the statutory language. Broad publication would have been necessary under any circumstances in a licensing process. Your Honor, and the Commission knew that it hadn't applied it at that point, as evidenced in their affidavit by the intent to hire a diversity consultant after we filed our complaint. More important than after we filed our complaint, it was after the make adjustment from there, they could have issued 10 Commission had any ability to do anything about the fact that the statute was ignored. And again, active seek -- shall actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers. They issued 15 pre-approvals, they may not issue any more.

Your Honor, we believe that if anyone would be entitled to summary judgment at this time as a matter of law, it would be us. But we are not there yet and that is not what we have asked for, Your Honor. We intend to prove our case. The Commission pretends, Your Honor, that their hands were tied. The Commission's arguments seem to vacillate back and forth between we didn't have to comply and we're still going to comply. They did have to comply and they no longer have the chance to. And they state that they weren't specifically told exactly how to implement it, but with respect to the unconstitutional

question with respect to Maryland residency, they weren't capitalization. They then argued broad latitude should be afforded them.

One brief point with respect to adequate capitalization, Your Honor. Adequate capitalization was 3.75 percent of the total score. So you could have had an applicant with 96.25 percent on 100 scale on their told specific things. And they did that without adequate application and have no money. The unconstitutional Maryland residency question was worth nearly as much, Your Honor.

THE COURT: So how is that relevant to anything here, Counsel?

MR. WARNKEN: Your Honor, we plan to show that the way in which arbitrary -- the way in which adequate capitalization was put forth in regs and scored was arbitrary and capricious. An uncapitalized grower, Your Honor, can not meet the mandates of the Commission. And the --

THE COURT: So if it's an uncapitalized grower, that they can't meet the mandates, then they wouldn't meet it. So I don't understand how you believe that it adds something that is relevant in your filing. I don't understand.

MR. WARNKEN: Sure. Your Honor, we're alleging

that no minimum capitalization requirement is in essence arbitrary and capricious in and of itself.

THE COURT: What's your basis in law for that?

MR. WARNKEN: Only that Your Honor has power action under a arbitrary and capricious standard.

THE COURT: So you're saying the fact that the Commission didn't say the exact dollar amount is your under Harvey v. Marshall, 389 Md. 243, to review agency basis for arguing that it's arbitrary and capricious, is that it?

MR. WARNKEN: Only the exact dollar amount being a minimum, Your Honor. As far as the exact dollar amount, no, that's not what we're saying. Of course they are afforded some latitude, but they can not --

THE COURT: Well, if it's five dollars, 10 dollars, a million dollars; if they can't grow, they can't grow. So how is that relevant?

MR. WARNKEN: Well, Your Honor --

THE COURT: More importantly, how is that arbitrary and capricious? They're saying that there needs to be some level of capitalization. That's a level of commonsense in commerce, so.

MR. WARNKEN: Sure, Your Honor. They couldn't grow. Under Your Honor's example of five or 10 dollars, you could have a situation where a grower came forth and

was an excellent growing. You know, got all of the points on horticulture, got all the points on everything else, but didn't have any money. And that's what we're suggesting is arbitrary and capricious, Your Honor. But more importantly, we --

THE COURT: (Inaudible) that's nonsensical.

MR. WARNKEN: Well, Your Honor, at this -- we believe that we should have a chance to show that on the merits is what we're suggesting, Your Honor.

THE COURT: The argument you just made, again, what was written was one thing, what you just made as a nonsensical argument. But we'll see where we are.

MR. WARNKEN: Thank you, Your Honor. In summary, Your Honor, our claim should be entitled to move forward. We have pled a sufficient complaint to move forward. Neither dismissal of the action nor summary judgment is appropriate at this time.

THE COURT: Thank you.

MR. WARNKEN: Thank you, Your Honor.

THE COURT: Go ahead.

COMMISSION'S REBUTTAL ARGUMENT

MS. NELSON: Thank you, Your Honor. It's important to remember that the current statutes provide that the Commission may issue additional licenses in June of 2018. We are barely one year from the date on which

the Commission has statutory authority to extend additional licenses beyond those 15 pre-approvals that have been issued thus far. And so --

THE COURT: So again, the fact that the Commission can authorize other licenses in 2018, how is that relevant to the theoretical failure to do it properly in 2016?

believe that we should have a chance to show that on the

MS. NELSON: Let me clarify if I may.

THE COURT: Okay.

MS. NELSON: Because I don't think they're argument that his client is somehow irreparably damages or forever shut out of the industry and opportunity, that his client saw the evaluation criteria at the outset, that his client had concerns at the beginning. And that his client decided to wait and see how it played out, because they didn't know whether all 15 pre-approvals would be issued or not.

Now, I think that setting aside the choice to wait and see where you believe you have valid legal claims about evaluation criteria that your application is going to be scored against, it is important to remember that this is the initial licensing process. In fact, this is the very first step of an entire industry. With no history in the State to speak of; a brand new industry

unfolding. And the Commission believes and contends that it did so appropriately.

THE COURT: Okay. Well, I would imagine they would contend that.

MS. NELSON: Right.

THE COURT: Otherwise, we probably wouldn't be here. But they contend that they did it properly. There directly related. I offer that in response to Counsel's are others who are contending that they didn't do it properly. And at this stage we're here for a Motion to Dismiss or potential summary judgment, we're not here on the merits. So based on what you just said, do you need to say anything else?

MS. NELSON: If I may make one last point.

THE COURT: You may. I'm asking you, I'm not was right and you know someone else said it wrong, and have the Court say; okay, I'll grant the Motion to Dismiss because the Commission says they did it right.

MS. NELSON: If I may make one last point.

THE COURT: Sure, go ahead.

MS. NELSON: Thank you. Each and every element that Alternative Medicine Maryland complains of was set in regulation prior to the time they submitted their application.

THE COURT: Who wrote up the regulations?

MS. NELSON: The Commission wrote and published them for comment, and put them through all required channels. They don't have authority to implement regulations without going through AELR and going through the proper channels to be effectuated. And being reviewed publically and privately to ensure that the regulations that the government is going to use to exercise their -- I don't understand how you can say that they said it statutory authority are correct.

THE COURT: Okay. So they went through the process.

MS. NELSON: Yes.

THE COURT: I assume they did. They went through the process. The regulations are out there. And are you saying therefore it follows that they are correct and the Court has no role in it?

MS. NELSON: I'm not saying that, Your Honor. I'm saying GTI came before the Court to say the Commission acted arbitrarily and capriciously because they changed knew what the rules were, we were concerned about it, we admit we were concerned about the rules, we decided to go ahead with the process, and we don't like the results. So after everyone in the industry has expended significant time and resources, going forward on the rules that we knew about in the summer of 2015 --

THE COURT: But what is the rules were unconstitutional or arbitrary and capricious? Basically what you're saying is; yep, these are the rules, this is what happened, let us go forward at this stage, dismiss it, and then we'll fix whatever may be wrong later on, because money has been spent. Isn't that exactly what you're arguing?

the rules. Alternative Medicine Maryland is saying; we

MS. NELSON: Your Honor, the Commission respectfully contends that the regulations are appropriate and properly addresses --

THE COURT: I'm aware that you do that. And I'm positive that's what you're arguing. But my point here is wouldn't that argument be better served at a hearing on the merits as opposed to here for the Motion to Dismiss? Because otherwise, what you're saying is, the Commission says that they were correct, right? That's what you're saying?

MS. NELSON: Yes.

THE COURT: Is that what you're saying?

MS. NELSON: Yes.

THE COURT: Okay. Then this Court shouldn't do correct.

MS. NELSON: I think this Court could reasonably find that Alternative Medicine Maryland, in evaluating

their industry opportunity, this valuable opportunity that they wanted to embark upon, if there was a sincere concern about the adequacy of the evaluation criteria such that they were truly concerned about a fair evaluation and evaluation criteria that may have affected the review of their application, that this challenge would have been brought before applications were submitted.
anything at all, because the Commission says they were

THE COURT: And would have been brought to what entity?

MS. NELSON: They could have filed this very same action in October or November of 2015.

THE COURT: Before who? Before this Court?

MS. NELSON: If they were an interested applicant --

THE COURT: Um-hum.

MS. NELSON: -- preparing an application and organizing a company --

THE COURT: Um-hum.

MS. NELSON: They could have filed suit to say --

THE COURT: To say what?

MS. NELSON: That these are the evaluation criteria that this Commission intends to evaluate applications by.

THE COURT: Intends to.

MS. NELSON: Intends to.

MS. NELSON: These are the regulations that have taken effect -- these are the regulations that have to govern the evaluation process. Because now, if the criteria, the evaluation criteria, are in regulation, then the Commission has to apply them to evaluate the applications.

THE COURT: Not done, but intends to.

THE COURT: And so you're saying at that point AMM should have filed suit so that this Court could then determine whether or not the regulations were appropriate, is that what you're saying should have happened?

MS. NELSON: Yes, Your Honor.

THE COURT: And you would have filed a motion saying it wasn't ripe because they hadn't done anything yet?

MS. NELSON: Well, I was not --

THE COURT: Yeah, okay. My fault. I'm sorry, I'm sorry. I shouldn't have done that to you. I apologize. Go ahead.

MS. NELSON: Your Honor, AMM's complaint does not allege that the relief that they're seeking with regard to racial and ethnic diversity is likely to redress the harm that they suffered.

THE COURT: Say that again.

MS. NELSON: They do not allege that the relief that they seek in the complaint, AMM wants the Court to order the Commission to go back and do a disparity study and find an evidentiary basis upon which to give a scoring preference and give a scoring criteria -- if you read it. Trust me, I've read it a few times, more than I wanted to. It does not say that at all. It

THE COURT: That's not what the complaint says, basically alleges that what you did, the Commission did, was not appropriate. And that the Court does have authority to resolve the issue in some way, shape, or form. But it does not specifically state that there should be a racial quota or racial -- it does not say that at all.

MS. NELSON: Thank you, Your Honor.

THE COURT: You're welcome.

MS. NELSON: AMM asks for this complaint to go forward without alleging or establishing that there is any relief that would move them to a position where they would be entitled to a pre-approval. They failed to establish --

THE COURT: But are they required to go to pre-approval or just to have a process that is not, as they are alleging, flawed?

MS. NELSON: Certainly AMM will speak to their

request on their own. But I understand they are speaking of pre-approval in the process.

THE COURT: You think that they're asking for this Court to order that they be one of the 15 that are pre-approved?

MS. NELSON: They're asking this Court to order the Commission to go back and redo the process in a way

THE COURT: That's not what the complaint says, that may likely lead to a different outcome.

THE COURT: Okay, okay.

establish any standing for their challenge to Maryland residency. In their complaint they allege that the whole thing is unconstitutional on its face. And in their opposition to the Motion to Dismiss, they do a bit of shape-shifting and attempt to suggest that they're entitled to assume that the Commission did not apply the regulations as stated because of allegations in a different case. And that they should be permitted to go into extensive discovery to confirm that the Commission evaluated and scored Maryland residency exactly as it did. All the while conceding that AMM met the Maryland residency requirement under the regulations and as explained in the application and the FAQs. And therefore was in no way aggrieved by any consideration of Maryland residency in any way.

The Commission also takes seriously efforts to continue to actively seek to achieve diversity in the industry, has continued to work through the RFP process to continue efforts to actively seek to achieve diversity in the industry.

THE COURT: You say continue efforts. What efforts were made?

MS. NELSON: AMM, at a minimum, has failed to

MS. NELSON: The Commission broadly publicized opportunities prior to the application point and is now working to collect information on who the industry participants are. Evidentiary -- a proper evidentiary basis for anything more requires an understanding of the actual data. And the Commission has worked very promptly present, has published it --

THE COURT: Present in what?

MS. NELSON: Present among those pre-approved applicants who appear likely to be the first industry participants.

THE COURT: So is that what the statute said, to make sure there's diversity among the pre-approved individuals or whether it was done to, again, "actively seek racial diversity overall?" So is it in a pre-approved group or in the applicants overall, which one is it?

MS. NELSON: The statute says; actively seek to achieve racial, ethic and geographic diversity in licensing.

THE COURT: Okay.

MS. NELSON: And as Your Honor noted earlier, the licensing process is not complete. There are Stage I pre-approvals issued and no licenses have been issued. to collect data to understand the amount of diversity And so the licensing process continues, as do the Commission's efforts to seek diversity.

THE COURT: And what do we have to show that, again, in this Motion to Dismiss or for the potential of summary judgment? Not the merits hearing, because we're not there. So you're making statements, which I understand why you're making them. But what's the evidence of that? And if there's evidence of that, it's got to be an affidavit. In which case it wouldn't be the in the Plaintiff's complaint, correct?

MS. NELSON: That's correct. It's not in Plaintiff's complaint.

THE COURT: Okay. Anything else?

MS. NELSON: No, Your Honor.

THE COURT: Okay, thank you. We'll take another five minute recess.

THE CLERK: All rise.

(Off the record - 03:49:18 p.m.)

(Session resumes - 03:54:41 p.m.)

THE COURT: Thank you. Everyone may be seated. Mr. Warnken, in your pleadings you indicated that you agree with the request to dismiss the Department of Health and Mental Hygiene and the individually named commissioners, is that correct?

Motion to Dismiss. Because you will acknowledge it is not

MR. WARNKEN: That's correct, Your Honor, we have no objection.

COURT'S RULING

THE COURT: All right. So that will be granted. This Court is satisfied that concerning the issue of the Motion to Dismiss, that the Court's analysis of the motion be limited to the four corners of the complaint, any exhibits. And as far as dismissal for failure to state a claim is proper only if the alleged facts and permissible inferences so viewed would have proven, none the less failed, to afford relief to the Plaintiff. In the alternative, the Defendant has asked this Court to grant a Motion for Summary Judgment. And that, of course, will be fact and that the parties would be entitled to judgment as a matter of law.

At the outset the Court will not that it has reviewed all relevant case law and all statutes. But for

Michael Berman <mberman@rwllaw.com> Jun 13
to Byron, Vanessa

Thank you.
Under no circumstances will the entirety of the Bench Memo be included in the record extract.
Your statement that we offered "no information" is incorrect. Precise and more-than-adequate information was provided.
We will send our counter-designations later.

From: byron717@gmail.com [mailto:byron717@gmail.com] **On Behalf Of** Byron Warnken
Sent: Tuesday, June 13, 2017 11:17 AM
To: Michael Berman <mberman@rwllaw.com>
Cc: Byron Warnken <byron@warnkenlaw.com>; Vanessa McKinley <VMcKinley@rwllaw.com>; Brian Brown <bbrown@brownbarron.com>; Christopher Casciano <ccasciano@brownbarron.com>

ALTERNATIVE MEDICINE MARYLAND, LLC, Plaintiff, v. NATALIE M. LAPRADE MARYLAND MEDICAL CANNABIS COMMISSION, *et al.*, Defendants.	IN THE CIRCUIT COURT FOR BALTIMORE CITY **Case No.: 24-C-16-005801**

PLAINTIFF'S BENCH MEMORANDUM

Now comes the Plaintiff, Alternative Medicine Maryland, LLC, by undersigned counsel, filing this Bench Memorandum, and in support thereof states that[1]:

I. INTRODUCTION

On May 25, 2017, after hearing arguments from the parties, this Honorable Court issued a Temporary Restraining Order,[2] ordering, in part, as follows:

> that Defendants, the Natalie M, LaPrade Maryland Medical Cannabis Commission, *et al.*, including their agents, servants and/or employees, are hereby RESTRAINED and ENJOINED from authorizing, granting and/or issuing any final licenses to cultivate and grow medical cannabis in Maryland prior to a full adversarial hearing on the propriety of granting Preliminary Injunction.

Temporary Restraining Order **(Ex. 5)**. In addition, the Court set this matter in for a "full adversarial hearing on the on the propriety of granting a Preliminary Injunction" on June 2, 2017.

[1] Plaintiff incorporates all arguments advanced in all its previous filings and at the May 25, 2017 hearing as if specifically stated herein. In particular, in response to Plaintiff's in-depth allegations, Defendant has asserted "broad publicity" was sufficient to satisfy its legislative mandate. However, Plaintiff notes that Defendant has not even been able to prove its own narrative that "broad publicity" succeeded in actively seeking racial and ethnic diversity when licensing medical cannabis growers.

[2] A copy of the transcript from the hearing is attached hereto as **(Ex. 3)**.

(Ex. 5). This Memorandum is filed to assist the Court during the hearing, and to supplement the record with materials not before the Court at the May 25, 2017 hearing.

At the outset, Plaintiff is compelled to address assertions that by filing the instant action, it is somehow deliberately seeking to delay the distribution of medicine to patients who need it. Nothing could be further from the truth. Instead, if there is a delay in implementing the Medical Cannabis Program, it is of the Defendant's own making, resulting from its failure to follow the law. As the Court pointed out at the May 25, 2017 hearing: "Notwithstanding the Defendant's argument concerning getting product to proposed patients in a timely manner[,] [t]his Court, again, is not involved with the timing of getting product to the proposed patients ..., because it is critical that there is a determination that our statutes are implemented in a way that is not discriminatory, or arbitrary, or capricious." Tr. of May 25, 2017 Hearing (Ex. 3 at 38).

However, given the concern of "getting the product to proposed patients," should this Honorable Court grant Plaintiff's request for a Preliminary Injunction, Plaintiff respectfully requests that this Honorable Court issue an expedited Scheduling Order with a short trial date. Plaintiff is ready for trial on the merits at the Court's convenience. Given that Defendant has conducted no discovery of its own, and given that it has failed to produce certain promised documents in response to Plaintiff's discovery requests, Plaintiff acknowledges that Defendant may need some period of time to prepare for trial. Plaintiff will make itself available for trial as soon as the Court and the Defendant are ready.

II. THE STATUTE AT ISSUE

At the risk of rehashing already well-trodden ground, Plaintiff respectfully reminds the Court that the issue at hand concerns the enabling legislation that created the Defendant Natalie M. LaPrade Medical Cannabis Commission (the "Commission"). Code Ann., Health-Gen. § 13-3301,

et seq. Amongst many other things, the enabling legislation created the Commission and tasked the Commission with overseeing Maryland's Medical Cannabis Program.

One of Commission's tasks is to license medical cannabis growers, and in doing so, the legislature required it "[a]ctively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." Md. Code Ann., Health-Gen. § 13-3306(9)(i)(1). Plaintiff is a Maryland LLC that is majority owned by a racially diverse minority and was denied the issuance of a medical cannabis grower's license. Amongst other things, Plaintiff asserts that the Commission failed to follow its legislative mandate because it admittedly failed to "actively seek to achieve racial and ethnic diversity when licensing medical cannabis growers."

Plaintiff directs the Court to the language of the very next section of the enabling legislation, which in stark contrast to the "***actively seek to achieve***" requirement for racial and ethnic diversity, requires the Commission simply to "***encourage***" applicants who qualify as minority business enterprises. Md. Code Ann., Health-Gen. § 13-3306(9)(i)(2). Under basic rules of statutory construction, the legislature intended the Commission to do more with regard to potential "racially and ethnically" diverse applicants than it did with regard to applicants who may qualify as minority business enterprise.

III. DEFENDANT'S FAILURE TO FOLLOW THE LAW

Plaintiff has conducted depositions of five witnesses, all of whom would have personal knowledge of any efforts by Defendant to actively seek to achieve racial and ethnic diversity when licensing medical cannabis growers. None of these witnesses have testified that the Commission complied with the law, nor has Defendant produced any evidence that it did so.[3]

[3] Additionally, in its Complaint, Plaintiff alleged "The Commission failed to request additional advice from the Attorney General about whether and how to conduct the requisite "disparity study" mentioned in the AG's letter. The AG has since (1) publicly admonished the Commission

A. MARY JO MATHER

Plaintiff first deposed Mary Jo Mather. Ms. Mather is the Director of Administration, and former deputy director of the Commission. Ms. Mather testified that the Commission has no separate committee to ensure that there is racial and ethnic diversity among licensees. **(Ex. 6, 125:25-126:3)**. She also testified that she was not aware of any initiative taken by the Department of Transportation to achieve ethnic and racial diversity. **(Ex. 6, 135:15-19)**. According to Ms. Mather, the Department of Transportation handles such matters for all State agencies. Ms. Mather testified that Hillman Communications, a private communications company, was retained to conduct media advertising directly targeted to ethnic and racially diverse groups. **(Ex. 6, 133:4-7)**.[4] Ms. Mather further testified that the Commission purposefully removed any reference to race and ethnicity from the grower's license application. **(Ex. 6, 143:18-148:13)**.

B. HARRY "BUDDY" ROBSHAW

Mr. Robshaw is the Vice-Chairperson of the Commission and was the chairperson of the Grower's selection subcommittee. Mr. Robshaw testified that he was aware that the enabling legislation required the Commission to actively seek racial, ethnic, and geographic diversity in the application and selection process for growers' licenses. **(Ex. 7, 49:4-11)**. However, the only action the Commission took, according to Robshaw, was that the commission "talked about

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for completely failing to take racial and ethnic diversity into consideration based on the advice in the letter; (2) publicly stated that the Commission could have researched whether there was evidence of racial disparity in industries similar to medical cannabis; and (3) noted that other agencies have employed efforts to promote racial and ethnic diversity in other new industries in Maryland, such as wind farming and gaming." **(Ex. 1, Complaint, Paragraph 39)**. In response Defendant admitted "that the Office of the Attorney general issued public comment on the matter and those public comments are self-evident." **(Ex. 2, Answer to Complaint, Paragraph 39)**. A copy of the *Washington Post* article from August 26, 2016 containing the Attorney General's public comments has been attached as **Ex. A to Ex.2**.

[4] As will been seen *infra*, this testimony is false.

outreach to the – particularly to the African-American community by way of information to black colleges, to magazines, and – and other newsprint that reached out to the African-American community . . . [and] to publications that are either initiated or are aligned with cannabis – medical cannabis use in the State of Maryland. And we have hired a – a consultant, a diversity consultant, to help us accomplish that." **(Ex. 7, 49:12-50:6)**. But Defendant has produced no evidence concerning its so-called "outreach" and, notably, the diversity consultant was hired ***after*** the issuance of the pre-approvals at issue in this case.

Like Ms. Mather, Mr. Robshaw testified that there was no specific subcommittee tasked with seeking racial and ethnic diversity in the application and selection process. **(Ex. 7, 60:10-60:14)**.

Mr. Robshaw testified that the Commission provided the executive director, Hannah Byron, a list of suggestions concerning what the Commission could do to actively seek racial and ethnic diversity and that it was Ms. Byron's responsibility to follow up with implementing those suggestions. **(Ex. 7, 60:16-61:4)**. However, he also testified that he did not know what actions Ms. Byron actually took to implement those suggestions that the Commission made. **(Ex. 7, 64:20-65:12)**. Notwithstanding the Commission's suggestions to Ms. Byron, Mr. Robshaw said he never saw any advertisements, notifications, etc., of any kind specifically seeking racial or ethnic diversity in the application solicitation or selection process of growers' licenses. **(Ex. 7, 65:13-66:17)**. Moreover, Ms. Byron did not testify, during her deposition, that any such suggestions were ever implemented, or even offered in the first place.

In fact, Mr. Robshaw, *the chair of the grower selection subcommittee*, testified that he does not know what the Commission did or did not do to seek racial and ethnic diversity in the selection of growers. **(Ex. 7, 68:9-10)**. Mr. Robshaw testified that he attended every Commission

meeting. Yet notwithstanding his attendance at every meeting, he could not recall any discussions whatsoever concerning the active seeking of racial and ethnic diversity in the selection and application process for growers' licenses. He also testified that he did not remember any such discussion at any of the private Commission meetings he attended. **(Ex. 7, 69:1-16)**.

Mr. Robshaw testified that there was discussion between Commission members and the Maryland Department of Transportation ("MDOT") about diversity studies and about outreach. MDOT offered a number of suggestions that were essentially the same as the Commission had offered to Ms. Byron in the original conversation. **(Ex. 7, 70:10-71:9)**. He went on to testify that there was a meeting with MDOT about the "possibility of doing a diversity study" as the Commission became aware that MDOT was the state agency that dealt with those types of studies. Notwithstanding this meeting with the MDOT, at the time of Mr. Robshaw's deposition, no such study had been performed. **(Ex. 7, 72:13-73:19)**. Notably, the MDOT meeting occurred ***after*** the pre-approvals were issued. **(Ex. 7, 76:16-18)**.

Mr. Robshaw testified that Ms. Byron had advised the Commission to stop considering racial and ethnic diversity in the licensing process. **(Ex. 7, 105:13-18)**. Mr. Robshaw testified that during the initial vote, the commissioners were not provided with any information concerning the race or ethnicity of potential applicants. **(Ex. 7, 167:10-14)**. Prior to the vote, no concern was raised at the meeting regarding racial or ethnic diversity of the applicants. **(Ex. 7, 167:15-19)**.

C. SANDRA "SANDY" HILLMAN

Ms. Hillman is the president of Hillman Communications, the "communications specialist" which, according to Ms. Mather, was retained by the Commission to conduct

advertising directly targeted to ethnically and racially diverse groups. But, according to Ms. Hillman—the owner of the company—efforts to actively seek racial and ethnic diversity were "not relevant to anything we would have done" **(Ex. 8, 16:10-17)**, and her company did not conduct any advertising of any kind whatsoever **(Ex. 8, 17:2-4)**.

As characterized by Ms. Hillman, the role of her company was to "put out information to the general public." Also, according to Ms. Hillman, nothing was targeted toward any particular ethnic group or race. **(Ex. 8, 18:2-9)**. With regard to press releases her company may have issued, Ms. Hillman testified that she did not know whether any press releases included the subject of racial diversity. **(Ex. 8 22:13-23:6)**.

In contrast to Ms. Mather's false testimony that Ms. Hillman's company was hired to assist the commission in actively seeking to achieve racial and ethnic diversity, Ms. Hillman testified that she was not even familiar with the phrase "actively seek racial diversity." **(Ex. 8, 45:1-3)**. As the Commission's communications specialist, she testified that she did not know if a press release was ever sent specifically to a newspaper primarily circulated to the African-American community. **(Ex. 8, 48:6-8)**. She further testified that it was not her company's role to publicize information to the African-American community as her responsibility was the "general public." **(Ex. 8, 62:1-5)**.

D. DAVID CURLEY

Mr. Curley is an employee of Hillman Communications and was primarily responsible for handling the Commission's account. Like Ms. Hillman, Mr. Curley testified that, as opposed to actively seeking racial and ethnic diversity, it was the company's role to reach out to the "general population" **(Ex. 9, 14:14-15:1)**, and that there was no targeting of specific subgroups **(Ex. 9, 15:12-17)**. He further testified that he could not recall drafting any web content

specifically directed towards racial or ethnic minorities. **(Ex. 9, 18:16-19)**. He went on to state that the awareness program did not specifically aim to reach racial and ethnic minorities in any fashion. **(Ex. 9, 19:5-9)**. He testified that there were no tailored news releases targeting racial and ethnic minorities **(Ex. 9, 19:20)** and that Hillman Communications prepared no social media engagement concerning this issue. **(Ex. 9, 23:17)**.

With regard to community outreach, Mr. Curley testified that he was not aware of ***any*** specific community outreach initiatives or endeavors specifically targeted to racial and ethnic minorities **(Ex. 9, 32:9-13)** and that "the general public was the priority." **(Ex. 9, 46:6)**.

Finally, and almost unbelievably, Mr. Curley testified that he was not even aware of the law's requirement that the Commission actively seek racial and ethnic diversity when awarding medical cannabis growers' licenses. **(Ex. 9, 54:16-19)**.

E. HANNAH BYRON

Ms. Byron is the current Executive Director of the Commission. While her deposition is replete with testimony identical to that of the other witnesses discussed, *supra*, one statement in her testimony sums up the Commission's violation of the law very succinctly:

> So I just want to make clear because I – as I've been sitting here, you know, a lot of questions about what we did or didn't do for outreach to – to African-Americans, and – ***and keep in mind that we – we were under the impression that we could not give any extra guidance, advice, funding or anything else to a particular group.*** So we wouldn't have done that, you know, based on what our understanding was. So I just want to make sure that you understand that because you kept saying, well, did you do it in this and did you do it in this? ***No, we didn't do it*** in any of those because that would send the appearance out that we were trying to target that – that group when we were told that that's not what we could do.

(Ex. 10, 115:1-15, emphasis added). In other words, by the Commission's Executive Director's own admission, the Commission did ***nothing*** to actively seek to achieve racial and ethnic diversity when licensing medical cannabis growers.

IV. THE FOUR FACTORS FOR INJUNCTIVE RELIEF

A preliminary injunction "is designed to preserve the status quo from future acts so as not to undermine the final disposition of the case on the merits." *Ehrlich v. Perez*, 394 Md. 691, 735 (2006). When considering an application for and entry of a preliminary injunction, the trial court must weigh the following four factors: (a) The likelihood that the plaintiff will succeed on the merits; (b) The "balance of convenience," determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (c) Whether the plaintiff will suffer irreparable injury or harm unless the injunction is granted; and (d) The public interest. *See, e.g., Department of Transportation v. Armacost*, 299 Md. 548 (1984); *Teferi v. Dupont Plaza Assocs.*, 77 Md. App. 566 (1989). The Court of Special Appeals has explained that "[d]espite some suggestions to the contrary, these factors are not like elements to a tort. The four factors are simply that, *factors*, designed to guide trial judges in deciding whether a preliminary injunction should be issued." *DMF Leasing, Inc. v. Budget Rent-A-Car of Maryland, Inc.*, 161 Md. App. 640, 643-44 (2005) (emphasis in original).

As this Honorable Court ruled at the May 25, 2017 hearing, Plaintiff has satisfied all four factors: First, this Court recognized that Plaintiff is likely to succeed on the merits because, "having reviewed all of the documents provided by both sides [the Court] notes that the Commission may not have directly complied with the statute when it came to actively seeking to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." **(Ex. 3 at 37)**. Second, with regard to balance of convenience, this Court weighed the inconvenience of the Commission not being permitted to issue licenses for ten days versus the Plaintiff having been "involved in a potentially flawed process." While the injunction requested here would be in effect for longer than ten days, the fact remains that Plaintiff's involvement in this flawed

process is permanent, while Defendant, once the flaws in the process are corrected, will be permitted to issue medical cannabis grower's licenses. In other words, Defendant's inconvenience can be remedied simply by following the law, while without intervention of this Honorable Court, Plaintiff's inconvenience is permanent. Furthermore, as discussed *supra*, should a Preliminary Injunction be issued, Plaintiff has requested an expedited Scheduling Order and a short trial date. Third, if the licensing process is not halted, Plaintiff would suffer substantial, irreparable harm "because the Plaintiff would be shut out of the cannabis growing industry for a significant period of time without an opportunity to have the Court intervene to review the licensing process." **((Ex. 3 at 37).** Finally, with regard to the fourth factor concerning the public interest, this Court has ruled that the public interest at issue is ensuring the Commission follows the law, not the speed at which medical cannabis is made available to the public. **(Ex. 3 at 38).**

Thus, as this Court has previously noted, Plaintiff has satisfied all four of the *Armacost* factors. Therefore law and equity favors issuance of the requested injunctive relief.

V. FORWARDGRO, LLC

In its Order, this Honorable Court invited ForwardGro, LLC (the only entity issued a final license) to argue at the hearing on the preliminary injunction solely on the issue of whether its license should be suspended pending full resolution of this matter. **(Ex. 3 at 39).** It is Plaintiff's position that the entire licensing process, including but not limited to the issuance of pre-approvals and the final license issued to FrowardGro was conducted in derogation of the law and was conducted in an arbitrary, capricious, and/or unconstitutional manner and that therefore, all pre-approvals are invalid. It follows that if the pre-approval FrowardGro received is invalid, then its licenses is also invalid. Given this inescapably logical conclusion, Plaintiff respectfully requests that

this Honorable Court issue such an order that it deems just and appropriate with regard to ForwardGro's license.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2017, a copy of this Notice of Service of Discovery Material together with copies of the Notice to Take Deposition and Subpoena will be hand-delivered and emailed to:

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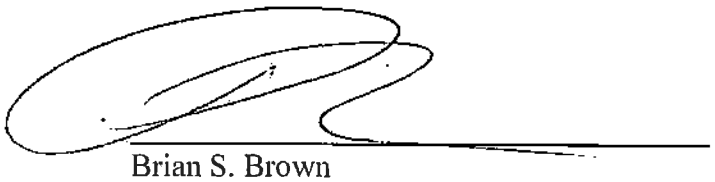

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