IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2016

No. 98

JOHN AND JANE DOE, *et al.*,

Appellants,

v.

ALTERNATIVE MEDICINE, MARYLAND, LLC, *et al.*,

Appellees.

On Appeal from the Circuit Court for Baltimore City
(Barry G. Williams, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF APPELLEE NATALIE M. LAPRADE MARYLAND MEDICAL CANNABIS COMMISSION

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July 7, 2017

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Regulations

Miscellaneous

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STATEMENT OF THE CASE

This case involves a challenge to regulations promulgated in September 2015, but left unchallenged until more than a year later. After waiting to file this action for declaratory and injunctive relief until October 31, 2016,[1] Plaintiff Alternative Medicine

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[1] The defendants are the Natalie M. LaPrade Maryland Medical Cannabis Commission, the Department of Health and Mental Hygiene, and individually named commissioners (collectively, the "State Defendants"). The proposed intervenor-

Maryland, LLC then waited an additional seven months before filing an "emergency" motion for preliminary injunctive relief. In the meantime, the Commission had implemented the regulations establishing a process for selecting medical-cannabis licensees; advertised for applications for three different types of licenses; considered 145 applications for growers' licenses, 124 applications for processors' licenses, and 811 applications for dispensaries' licenses; and awarded 15 pre-approvals for growers' licenses, 15 pre-approvals for processors' licenses, and 102 pre-approvals for dispensaries' licenses. In this action, Plaintiff seeks an order reversing the Commission's decision to issue pre-approvals to 15 other applicants for medical-cannabis-growers' licenses, including seven of the appellants, because according to Plaintiff "all preapprovals are invalid." (E. 1003.)

In seeking to intervene as of right in this action, the Proposed Intervening Defendants adduced evidence that the licensee and pre-approved licensees have expended millions of dollars in meeting the regulatory requirement that they be operational by August

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defendants, who are appellants in this Court, are jointly represented patients Jane and John Doe; pre-approved licensee Curio Cultivation, LLC; pre-approved licensee Doctor's Orders Maryland, LLC; pre-approved licensee Green Leaf Medical, LLC; pre-approved licensee SunMed Growers, LLC; Maryland Wholesale Medical Cannabis Trade Association; the Coalition for Patient Medicinal Access, LLC; separately represented pre-approved licensee Temescal Wellness, LLC; separately represented pre-approved licensee Holistic Industries, LLC; and separately represented licensee ForwardGro, LLC (collectively, the "Proposed Intervening Defendants").

The Coalition for Patient Medicinal Access, LLC "is a Maryland limited liability company formed for the purpose of advocating for patient rights and prompt access to medical cannabis, and advocating for, and advancing the interests of, Curio Cultivation LLC, ForwardGro LLC, Doctors Orders Maryland LLC, and SunMed Growers, LLC . . . ." (E. 116.)

15, 2017, and that those investments would be lost, and other irreparable harm suffered, if Plaintiff were to prevail in this litigation. (E. 251-52, 255, 259-60.)

The State Defendants moved to dismiss the complaint on December 12, 2016, arguing, among other grounds, that the complaint should be dismissed for failure to join as required parties the pre-approved growers' licensees,[2] because "[Plaintiff] seeks a judicial order that would negatively impact the ability of those companies to convert those pre-approvals to licenses." (E. 86 ¶ 2.) On December 30, 2016, some of the now jointly represented Proposed Intervening Defendants moved to intervene as of right.[3] (E. 12, Dkt. No. 24/0; E. 115.) Pre-approved licensee Holistic Industries, LLC moved to intervene as of right on January 25, 2017.[4] (E. 14, Dkt. No. 38/0; E. 220.) Plaintiff opposed intervention. (E. 180-81.) The circuit court denied intervention on February 21, 2017, based on its view that the State Defendants' attorneys would protect the interests of the pre-approved licensees. (E. 13, Dkt. No. 24/6; E. 14, Dkt. No. 38/2; E. 36; E. 300-01, 306-07.) The jointly represented Proposed Intervening Defendants and Holistic Industries filed timely notices of appeal to the Court of Special Appeals. (E. 16, Dkt. Nos. 47, 48.)

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[2] At that time, none of the pre-approved growers' licensees had received a license. Since then, on May 17, 2017, the Commission awarded a license to ForwardGro. (E. 1094.) The Commission expects to award additional licenses in the coming weeks.

[3] The movants were patients Jane and John Doe; pre-approved licensee Curio Cultivation; pre-approved licensee Doctor's Orders Maryland; pre-approved licensee SunMed Growers; and the Coalition for Patient Medicinal Access. (E. 115.) At that time, ForwardGro was one of the jointly represented Proposed Intervening Defendants. (E. 33.) ForwardGro later obtained separate counsel, who entered the case on May 30, 2017. (E. 24, Dkt. Nos. 94/0, 101/0; E. 997, 1004.)

[4] Holistic Industries renewed its motion to intervene on May 31, 2017. (E. 24, Dkt. No. 93/0; E. 989.)

Seven months after filing suit, Plaintiff filed an emergency motion for a temporary restraining order. (E. 19, Dkt. No. 72; E. 409.) In its motion, Plaintiff requested that the circuit court preliminarily enjoin the Commission from "issuing any final licenses to cultivate and grow medical cannabis in Maryland" (E. 411-12), or "taking any additional action . . . in furtherance of the Commission's Stage 2 medical cannabis grower licensing scheme, including the immediate suspension of inspections of and for the fifteen (15) pre-approved medical cannabis growing facilities . . . ." (E. 411-12.) The circuit court issued a temporary restraining order on May 25, 2017 (E. 19, Dkt. No. 72/3; E. 667), and scheduled a preliminary-injunction hearing for June 2, 2017 (E. 667).

With its license in imminent jeopardy, ForwardGro again sought party status on May 30, 2017 (E. 24, Dkt. No. 100), but the circuit court denied that request on May 31, 2017 (E. 24, Dkt. No. 100/1). ForwardGro also filed on May 30 its opposition to preliminary injunctive relief. (E. 1070.) Pre-approved licensee Temescal Wellness, LLC also moved to intervene on May 31, and, on the same day, it moved to dissolve or modify the temporary restraining order (E. 24, Dkt. No. 98/0; E. 1103). Also the same day, Holistic Industries filed a motion to dissolve the temporary restraining order (E. 962), a renewed motion to intervene (E. 24, Dkt. No. 93/0; E. 989), and a motion to continue the June 2, 2017 preliminary injunction hearing (E. 957-58).

On May 30, 2017, the jointly represented Proposed Intervening Defendants[5] filed an emergency motion seeking, among other relief, to dissolve the temporary restraining order, intervene, and to participate in the hearing. (E. 695.) The circuit court denied their motion on June 1, 2017 (E. 29; E. 1009), and, on the same day, they filed a notice of appeal to the Court of Special Appeals (E. 25, Dkt. No. 103/0; E. 1009). Also the same day, Plaintiff filed a bench memorandum, in which Plaintiff stated that "all preapprovals are invalid" and that ForwardGro's "license[] is also invalid." (E. 1003.)

The next day, June 2, 2017, the jointly represented Proposed Intervening Defendants filed in this Court a petition for writ of certiorari and motion for stay pending appeal. The same day, the Court granted the stay pending further review. On June 5, 2017, ForwardGro, Holistic Industries, and Temescal Wellness each filed lines adopting the previously filed petition for a writ of certiorari and motion to stay. On June 9, 2017, the Court granted certiorari and stayed the circuit court proceedings pending further order of this Court. (E. 1014-16.)

QUESTION PRESENTED

Did the circuit court err in denying party status to a grower licensee and pre-approved growers' licensees, whose interests are not represented by existing parties, who have committed significant financial resources in working toward impending licensure, and who will suffer substantial harm if the circuit court grants Plaintiff's requested relief?

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[5] By this motion, pre-approved licensee Green Leaf Medical; pre-approved licensee Kind Therapeutics, USA; and the Maryland Wholesale Medical Cannabis Trade Association joined the group of jointly represented proposed intervening defendants.

STATEMENT OF FACTS

Statutory and Regulatory Background

The Commission, a 16-member independent commission within the Department of Health and Mental Hygiene, Md. Code Ann., Health-Gen. § 13-3302(b), is the licensing body for medical-cannabis growers, processors, and dispensaries, Health-Gen. §§ 13-3306, 13-3307, 13-3309. As relevant here, the Commission "shall license medical cannabis growers that meet all requirements established by the Commission to operate in the State." Health-Gen. § 13-3306(a)(1). The Commission has statutory authority to issue a maximum of 15 growers' licenses. Health-Gen. § 13-3306(a)(2)(i).

In fulfilling its statutory mandate, the Commission adopted regulations that "establish an application review process for granting medical cannabis grower licenses in which applications are reviewed, evaluated, and ranked based on criteria established by the Commission." Health-Gen. § 13-3306(a)(2)(iii). The Commission published revised draft regulations in the Maryland Register on June 26, 2015, 42 Md. Register 812-45 (June 26, 2015), and published final regulations on September 4, 2015, 42 Md. Register 1176-79 (Sept. 4, 2015); COMAR 10.62.08.05, 10.62.08.06, 10.62.08.07.

The Commission's regulations (1) govern the criteria by which applications for medical-cannabis-growers' licenses are reviewed and (2) establish the weight afforded to each of the weighted criteria. COMAR 10.62.08.05. The statute requires the Commission, in licensing medical-cannabis growers, to "actively seek to achieve racial, ethnic, and geographic diversity." Health-Gen. § 13-3306(a)(9)(i)1. The regulations do not identify either racial or ethnic diversity as criteria for judging applicants for growers' licenses.

(E. 560, at T. 82-84.) With the assistance of a consultant, the Commission attempted to meet the statutory goal through broad public outreach to potential minority applicants. (E. 551-52, at T. 49-50; E. 554, at T. 58-61; E. 638.)

The Commission's Licensing Process

The Commission's regulations adopted a two-stage process for issuing medical-cannabis-growers' licenses. In stage one, the Commission reviewed all applications submitted, and issued pre-approvals to 15 applicants "in consideration of the ranking of the applications in accordance with Regulation .05." COMAR 10.62.08.06A.(1)(b). The second stage requires the Commission to perform due diligence, including background and financial investigations and inspections of facilities and premises, and to award licenses to those pre-approved applicants that satisfy the due diligence criteria. COMAR 10.62.08.07.

The Application Process

Two weeks after publishing the final regulations, on September 28, 2015, the Commission released the form application for a medical-cannabis-grower's license and announced the application deadline of November 6, 2015. (E. 53 ¶ 43; R. 127.) The application did not require applicants to provide the race or ethnicity of their owners and investors. (E. 53 ¶ 45; R. 127-57.) The Commission received 145 applications for growers' licenses by the deadline (E. 54 ¶ 47), including an application from Plaintiff (E. 45 ¶ 5).

To assist with the application-review process, the Commission entered into an agreement with the Regional Economic Studies Institute ("RESI") at Towson University. (E. 54 ¶ 47.) The Commission and RESI designed a "double-blind" subject-matter-expert-

based analysis of applications. (E. 54 ¶ 47.) That is, the evaluation materials concealed the identities of applicants from the subject-matter experts and the Commission, RESI's subject-matter experts scored the applications by coded identification number, and the Commission voted on the top-ranked applications by coded identification number. (E. 54 ¶ 47.) As set forth in the regulations, the Commission did not consider race or ethnicity as a scoring or ranking criteria. (E. 396.)

On August 5, 2016, the Commission met in open session to consider issuing pre-approvals for growers' licenses. (E. 397.) The Commission awarded pre-approval to 15 applicants (E. 397), and posted the rankings of the top 20 applicants on its website. (E. 54 ¶ 52.) Plaintiff did not rank in the top 60 applicants. (E. 579.)

The Circuit Court Proceedings

Plaintiff's complaint alleges violations of (1) the statutory requirement that the Commission seek to achieve racial and ethnic diversity, (2) the dormant commerce clause, and (3) the privileges and immunities clause. (E. 55-57, 61.)[6] Plaintiff seeks an order reversing the Commission's decision to issue pre-approvals to 15 other applicants for medical-cannabis-growers' licenses, including seven of the appellants, because according to Plaintiff "all preapprovals are invalid" (E. 1003).

In response to the State Defendants' motion to dismiss the complaint for lack of required parties, Plaintiff "assume[d] [that the pre-approved growers] are interested in the

[6] Plaintiff's request for injunctive relief was based solely on the alleged statutory violation. (E. 415-16.)

proceedings," but argued that they were not required parties because the "Commission, in defending its actions, represents the interests of the pre-approved growers." (E. 90.) Alternatively, Plaintiff argued that dismissal of the action was not appropriate, because "all of the parties who the Commission contends must be joined can be joined." (E. 90.)

In opposing intervention, Plaintiff admitted that it sought to undo the Commission's award of pre-approval status to 15 applicants for growers' licenses (E. 180), but argued that the property rights of the Proposed Intervening Defendants "in a current pre-approval or future license" would not be "irrevocably governed" by a judgment undoing the Commission's award. (E. 181.) This was because, Plaintiff argued, the Proposed Intervening Defendants "will still be in the running for a license," even though, admittedly, "[t]hey will lack the certainty they have now, which is why they want their voices heard." (E. 181.) Plaintiff also argued, as it had earlier in its response to the State Defendants' motion to dismiss, that the Commission "adequately represents all of the [Proposed Intervening Defendants] interests" (E. 183), although Plaintiff admitted that the Proposed Intervening Defendants had "assert[ed] arguments that they believe the Commission should have made." (E. 184.) While maintaining that Plaintiff, a disappointed applicant, had standing to bring the action, Plaintiff argued that the successful applicants lacked standing to defend it. (E. 89, 181.)

On February 21, 2017, the circuit court denied both the State Defendants' motion to dismiss and intervention, expressing the view that the Attorney General's Office, which represents only the State Defendants, would protect the interests of the Proposed Intervening Defendants. (E. 12, Dkt. No. 21/3; E. 13, Dkt. No. 24/6; E. 14, Dkt. No. 38/2;

E. 36; E. 112; E. 300-01, 306-08.) The jointly represented Proposed Intervening Defendants and Holistic Industries filed timely notices of appeal to the Court of Special Appeals. (E. 16, Dkt. Nos. 47, 48.)

Three months later (and seven months after filing suit and more than 19 months after the final regulations were published), Plaintiff filed an emergency motion for a temporary restraining order (E. 19, Dkt. No. 72; E. 409), requesting that the circuit court immediately enjoin the Commission from "issuing any final licenses to cultivate and grow medical cannabis in Maryland" (E. 411-12), or "taking any additional action . . . in furtherance of the Commission's Stage 2 medical cannabis grower licensing scheme, including the immediate suspension of inspections of and for the fifteen (15) pre-approved medical cannabis growing facilities . . . ." (E. 411-12.) In addressing the balance of convenience, Plaintiff argued that there was "little potential for harm to the [State] Defendants because they "are not market participants, so they do not stand to lose economically in the event that the licensing process is halted and/or reinitiated . . . " (E. 416.) On May 25, 2017, the circuit court held a hearing on Plaintiff's motion, issued a temporary restraining order (E. 19, Dkt. No. 72/3; E. 667), and scheduled a preliminary injunction hearing for June 2, 2017 (E. 667).[7]

[7] A week before the hearing on the Plaintiff's motion for a temporary restraining order, the Commission granted ForwardGro a license. (E. 1094.) After granting the temporary restraining order on May 25, the court notified ForwardGro, by email, that ForwardGro had leave to speak "briefly" at the scheduled June 2 preliminary-injunction hearing, but "only on the issue of if the Preliminary Injunction is granted whether or not the license issued to ForwardGro, LLC should be suspended." (E. 1008.) On May 30, 2017, ForwardGro again sought party status. (E. 24, Dkt. No. 101.) The circuit court denied that request the next day. (E. 24, Dkt. No. 101/1.) In its May 31 order (E. 39-40), the court

In support of their May 30, 2017 emergency motion to dissolve the temporary restraining order, intervene, and to participate in the hearing (E. 695), the Proposed Intervening Defendants adduced additional evidence of the pre-approved growers' expenditures in meeting the regulatory requirement that they be operational by August 15, 2017, and that those investments would be lost, and other irreparable harm suffered, if Plaintiff were to prevail in this litigation.[8] (E. 722-24, 727-29, 735-38, 743-45, 756-58, 760-62, 778-80, 904-09, 918-19.)

The circuit court denied the jointly represented Proposed Intervening Defendants' motion on May 31, 2017 (E. 29; E. 1009), and, on June 1, they filed a notice of appeal to the Court of Special Appeals (E. 25, Dkt. No. 103/0; E. 1009). Also the same day, Plaintiff filed a bench memorandum, in which Plaintiff stated that "all preapprovals are invalid" and

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explained that its email of May 25 "did not serve as reconsideration of [its] February 21, 2017 denial of ForwardGro's Motion to Intervene nor is ForwardGro LLC permitted to 'govern itself as a party,' in this matter . . . " (E. 39).

[8] In support of its May 30 opposition to preliminary injunctive relief (E. 1070), ForwardGro filed an affidavit detailing its substantial financial expenditures in obtaining its grower's license, which exceeded $8,100,000 (E. 1094).

In support of its May 31 motion to intervene, pre-approved licensee Temescal Wellness adduced evidence that it had expended over $7,000,000 in constructing a cultivation facility. (E. 1110.) In commenting on "the [Commission's] goal to promote diversity in the Maryland cannabis industry," Temescal reported that it had sought to further that goal by holding "a diversity job fair in Baltimore City" and that fifty (50%) percent of [its] hired employees are minorities." (E. 1110.)

In support of its May 31 motion to dissolve the temporary restraining order (E. 962), Holistic Industries adduced evidence that it had expended, or become legally obligated to expend, millions of dollars to meet the Commission's regulatory requirements, and that it had incurred debt totaling almost $9,000,000, and an additional $5,000,000 in obligations under a lease for its cultivation facility. (E. 970-73.)

that ForwardGro's "license[] is also invalid." (E. 1003.) In this Court, Plaintiff maintains that position, arguing in its answer to the petition for a writ of certiorari "that all medical cannabis pre-approvals, and any licenses stemming therefrom, are categorically invalid," and that "no entity can maintain a legitimate property right" in a pre-approval or license. Answer Pet. Cert. 4.

SUMMARY OF ARGUMENT

Maryland Rules 2-211 and 2-214 and Courts and Judicial Proceedings § 3-405(a) require, as a matter of law, that the pre-approved growers and licensee ForwardGro be made parties in this lawsuit, because Plaintiff seeks (1) a declaration invalidating the growers' pre-approvals and ForwardGro's license and (2) an injunction forbidding the issuance of licenses to the pre-approved growers, despite the growers' expenditure of millions of dollars and other resources in preparing for impending licensure.

Under Maryland Rule 2-214(a), "a person shall be permitted to intervene in an action . . . (1) when the person has an unconditional right to intervene as a matter of law; or (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." Both Rule 2-211(a), addressing mandatory joinder of required parties, and Courts and Judicial Proceedings § 3-405(a), a provision of the Maryland Uniform Declaratory Judgments Act, require, as a matter of law, that the pre-approved growers and licensee ForwardGro be made parties to this lawsuit.

The growers are entitled to intervention under Maryland Rule 2-211(a), which requires joinder of a person "as a party in the action if in the person's absence (1) complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action. . . ."

This Court has construed Rule 2-211(a) liberally in favor of applicants for intervention. A person is entitled to intervene in an action if the person claims an interest in the subject matter of the litigation, is or may be bound by a judgment in the action, and representation by existing parties is or may be inadequate.

Here, the growers all have financial and other interests that "would be affected by the declaration" and injunction sought by Plaintiff, and only they can protect these interests. This is because the Commission and the proposed intervenors do not share the same objectives in the litigation. Although the Commission has an interest in defending the validity of its regulations and processes, it does not have the same interest in protecting either the financial interests or rights, if any, of the pre-approved growers and licensee ForwardGro. of the pre-approved growers and licensee ForwardGro. For example, the pre-approved growers and ForwardGro have argued that, as a result of their pre-approved status and ForwardGro's license, they have property rights at stake in the litigation, but the Commission has not made that argument.

Furthermore, although the Commission has raised laches as an affirmative defense, the pre-approved growers and licensee ForwardGro are uniquely qualified to establish prejudice to their interests as a result of Plaintiff's unreasonable delay in challenging the

regulatory process. Under these circumstances, the pre-approved growers and licensee ForwardGro are entitled to intervene as a matter of right.

Likewise, § 3-405(a) of the Courts and Judicial Proceedings Article, as pertinent here, requires that 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," and "the declaration may not prejudice the rights of any person not a party to the proceeding." Plaintiff seeks a declaration that all pre-approvals and licenses "are invalid," and an injunction forbidding the Commission to take any further steps toward grants of licenses to the pre-approved growers. If granted, the pre-approved growers would lose their pre-approved status; licensee ForwardGro would lose its license; and all would suffer significant financial harm. Thus, Courts and Judicial Proceedings § 3-405(a) requires joinder as a matter of law.

ARGUMENT

I. THIS COURT REVIEWS A DECISION OF A CIRCUIT COURT DENYING INTERVENTION FOR LEGAL ERROR AND ABUSE OF DISCRETION.

An order denying intervention under Maryland Rule 2-214, whether as a matter of right or permissively, is immediately appealable. *Maryland-Nat'l Capital Park & Planning Comm'n v. Town of Washington Grove*, 408 Md. 37, 63 (2009) (quoting *Maryland Radiological Soc'y, Inc. v. Health Servs. Cost Review Comm'n*, 285 Md. 383, 388 n.4 (1979)). This Court reviews a trial court's order denying intervention as of right for legal correctness under a non-deferential standard of review, and it reviews an order denying permissive intervention for abuse of discretion. *Id.*, 408 Md. at 65.

II. THE PRE-APPROVED GROWERS AND LICENSEE FORWARDGRO, LLC ARE INDISPENSABLE PARTIES AND HAVE AN UNCONDITIONAL RIGHT TO INTERVENE AS A MATTER OF LAW, BECAUSE THEY HAVE EXPENDED SUBSTANTIAL FINANCIAL RESOURCES IN PREPARING FOR FINAL LICENSURE, THEIR FINANCIAL INTERESTS ARE AT RISK IN THIS LITIGATION, AND ONLY THEY CAN PROTECT THOSE INTERESTS.

Under Maryland Rule 2-214(a), "a person shall be permitted to intervene in an action . . . (1) when the person has an unconditional right to intervene as a matter of law; or (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." Both Rule 2-211(a), addressing mandatory joinder of required parties, and Courts and Judicial Proceedings § 3-405(a), a provision of the Maryland Uniform Declaratory Judgments Act, require, as a matter of law, that the pre-approved growers and licensee ForwardGro be made parties to this action. *See Gardner v. Board of County Comm'rs*, 320 Md. 63, 76 (1990) ("Generally there is no difference in the rule as to necessary parties between a declaratory judgment proceeding and any other proceeding in personam." (quoting *Maryland Naturopathic Ass'n v. Kloman*, 191 Md. 626, 631 (1948))).

A. The Pre-Approved Growers and Licensee ForwardGro, LLC Are Entitled to Joinder Under Rule 2-211(a).

Rule 2-211(a) requires joinder of a person "as a party in the action if in the person's absence (1) complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action. . . ." The same section of the Rule provides

that "[t]he court shall order that the person be made a party if not joined as required by this section." Md. Rule 2-211(a)(2). *See Washington Grove*, 408 Md. at 99 (stating that in determining intervention as of right a court asks "whether 'the disposition of the action would at least potentially impair the applicant's ability to protect its interest'" relating to the subject of the action (quoting *Chapman v. Kamara*, 356 Md. 426, 443 (1999)); *see also Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." (quoting Fed. R. Civ. P. 24 advisory committee's note)).

This Court has construed Rule 2-211(a) liberally in favor of applicants for intervention. *Chapman*, 356 Md. at 443. A person is entitled to intervene in an action if the person claims an interest in the subject matter of the litigation, "is or may be bound by a judgment in the action," and "representation . . . by existing parties is or may be inadequate." *Citizens Coordinating Comm. on Friendship Heights, Inc. v. TKU Assocs.*, 276 Md. 705, 712-13 (1976) (quoting predecessor rule).

The growers have all been awarded pre-approval status, and ForwardGro has been awarded a license. These awards give the growers "a claimed interest relating to the subject of the action." Md. Rule 2-211(a)(2). As Plaintiff admits, stage-one pre-approval "is a substantial step towards obtaining a medical cannabis growing license," Answer Pet. Cert. 7, and Plaintiff seeks (1) a declaration invalidating the growers' pre-approvals and ForwardGro's license, and (2) an injunction forbidding the issuance of licenses to the pre-

approved growers, despite the growers' expenditure of millions of dollars and other resources in preparing for impending licensure.

"The burden of showing that existing representation may be inadequate [to protect a proposed intervenor's interest] is a minimal one." *Washington Grove*, 408 Md. at 102 (quoting *Citizens Coordinating Comm.*, 276 Md. at 714). To meet that burden, a proposed intervenor need not make "a positive showing of the inadequacy of existing representation . . . [,] only that the representation 'may be inadequate.'" *Citizens Coordinating Comm.*, 276 Md. at 713 (quoting *Kozak v. Wells*, 278 F.2d 104, 110 (8th Cir. 1960)); *see California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) ("The applicant is required only to make a minimal showing that representation of its interests may be inadequate.").

"Where the applicant's interest is similar to, but not identical with, that of an existing party, he ordinarily should be allowed to intervene 'unless it is clear that the (existing) party will provide adequate representation for the absentee.'" *Citizens Coordinating Comm.*, 276 Md. at 713 (quoting C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 1909 (1972)); *see Maryland Radiological Soc'y*, 285 Md. at 390 (stating that if the applicant's interest "is similar but not identical to that of an existing party," the applicant should be permitted to intervene "unless it is clear that the party will provide adequate representation for the absentee." (quoting Wright & Miller § 1909, at 524)); *Stewart v. Tuli*, 82 Md. App. 726, 731-32 (1990) (finding intervention as of right where parties' interests were "similar but not identical" and representation by existing party "may be inadequate"); *see also Tahoe Reg'l Planning Agency*, 792 F.2d at 778 ("In determining adequacy of

representation, we consider whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect.")

Here, as in *Citizens Coordinating Comm.*, "the interests of the existing parties and appellants are not the same." 276 Md. at 714. Each of the growers has financial and other interests that "would be affected by the declaration" and injunction. The Commission cannot protect the growers' interests because the Commission does not share those interests and the Commission and the growers do not share the same objectives in the litigation.

Although the Commission has an interest in defending the validity of its regulations and processes, it does not share the same interest in protecting either the financial interests or rights, if any, of the pre-approved growers and licensee ForwardGro. For example, the pre-approved growers and ForwardGro have argued that, as a result of their pre-approved status and ForwardGro's license, they have property rights at stake in the litigation (E. 116 ¶ 7; E. 221 ¶ 8; E. 992 ¶ 16; E. 1005; Appellant's Br. 2-3, 13 n.11, 30-34), but the Commission did not make that argument below (Apx. 1-15), and does not advance it here. This is reflective of a difference in the interests and objectives of the Commission and the proposed intervenor defendants, not a mere difference in litigation strategy. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (holding government agency did not adequately represent proposed intervenors because their differing objectives in the litigation amounted to "more than a mere difference in litigation strategy"); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001)

(observing that multiple federal courts have held that showing of inadequacy is "easily made when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor's particular interest"); *id.* at 1255-56 ("As the above cases make clear, however, the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation.").

Because of differing litigation objectives, the Commission does not represent, and will not necessarily protect, the interests of the pre-approved growers and licensee ForwardGro and will not represent those interests adequately in the litigation. *Id.* Accordingly, the growers are entitled to intervention as a matter of right.

B. The Pre-Approved Growers and Licensee ForwardGro, LLC Are Entitled to Joinder Under § 3-405(a) of the Courts and Judicial Proceedings Article.

Likewise, § 3-405(a) of the Courts and Judicial Proceedings Article, as pertinent here, requires that 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," and "the declaration may not prejudice the rights of any person not a party to the proceeding." Thus, as this Court has held, "in an action for declaratory judgment, . . . [a]ny person who, as a result of a declaration, may gain or be deprived of a legal right or other benefit has an interest that might be affected by the outcome of the action and is, therefore, a necessary party." *Bender v. Secretary, Md. Dep't of Pers.*, 290 Md. 345, 350 (1981) (citations omitted). "One

purpose of this rule is to assure that a person's rights are not adjudicated unless that person has had his 'day in court.'" *Id.*, 290 Md. at 351; *see also Chapman*, 356 Md. at 438 (in finding intervention as of right because the absent party would have suffered collateral estoppel consequences that would impair its ability to protect its interests, the Court observed, "It is a basic principle of law 'that before a court . . . may extinguish a personal right of the defendant it must have first obtained jurisdiction over the person of the defendant.'" (quoting *Lohman v. Lohman*, 331 Md. 113, 125 (1993))).

The proposed intervenors have exceeded the requirements established in *Chapman*, because here the harm is certain, not potential. The relief that Plaintiff seeks — a declaration that all pre-approvals and licenses "are invalid" (E. 1003) and an injunction forbidding the Commission to take any further steps toward grants of licenses to the pre-approved growers — would if granted cause substantial harm to the interests of the proposed intervenors. The pre-approved growers would lose their pre-approved status; licensee ForwardGro would lose its license; production would be delayed for an indeterminate period of time; and all of the growers would suffer significant financial harm. *See Southwest Ctr.*, 268 F.3d at 822 (holding that proposed intervenor builders had "legal protectable interests" because they "allege that their members have projects that are in the pipeline for approved projects[,] . . . and their interests could be affected" if the plaintiffs prevailed in the litigation).

C. The Pre-Approved Growers Are Uniquely Qualified to Establish Prejudice to Their Interests as a Result of Plaintiff's Unreasonable Delay in Challenging the Regulatory Process.

Although the Commission has raised laches as an affirmative defense, the pre-approved growers and licensee ForwardGro are uniquely qualified to establish prejudice to their interests as a result of Plaintiff's unreasonable delay in challenging the regulatory process, and should be entitled to intervene for that reason, as well.

Laches applies when there is an unreasonable and prejudicial delay in the assertion of one's rights. *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 584 (2014); *see Liddy v. Lamone*, 398 Md. 233, 244 (2007) ("[F]or the doctrine [of laches] to be applicable, there must be a showing that the delay [in the assertion of a right] worked a disadvantage to another") (quoting *Simpers v. Clark*, 239 Md. 395, 403 (1965)).

In support of their motions to intervene, the pre-approved growers and licensee ForwardGro produced evidence that Plaintiff's delay has caused severe disadvantage to their financial interests. This evidence included affidavits detailing the significant financial resources they have expended and the commitments they have made in reliance on the Commission's award of pre-approved status under the regulations that the Commission adopted more than a year before Plaintiff filed its action challenging the legality of the process and more than 19 months before Plaintiff moved for preliminary injunctive relief. The circuit court's error in failing to permit the pre-approved growers and licensee

ForwardGro to intervene will be significantly compounded if it is not corrected before the circuit court holds a hearing and rules on Plaintiff's request for a preliminary injunction.[9]

CONCLUSION

The orders of the Circuit Court for Baltimore City denying intervention should be reversed.

Respectfully submitted,

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[9] The appellants have requested that the Court remand the action to the circuit court with directions to dismiss the action as barred by laches. Appellants' Br. 43. The State Defendants agree that the record supports dismissal on the basis of laches. In *Lamone v. Schlakman*, the Court granted similar relief where the circuit court erred in granting a temporary restraining order, because the plaintiffs' action was "untimely" and "barred by laches," and the plaintiffs "had not demonstrated any basis for relief on the merits under any theory of action or avenue for relief." 451 Md. 468, 475 (2017).

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,816 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Julia Doyle Bernhardt

Julia Doyle Bernhardt

JOHN AND JANE DOE, *et al.*,	*	
	*	IN THE
Appellants,	*	COURT OF APPEALS
v.	*	OF MARYLAND
ALTERNATIVE MEDICINE, MARYLAND, LLC, *et al.*.	*	September Term, 2016
Appellees.	*	No. 98

* * * * * * * * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I certify that on this 7th day of July, 2017, two copies of the Brief of Appellee in the captioned case were served by first class mail on all counsel of record:

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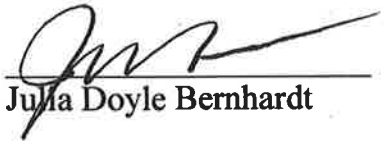

Julia Doyle Bernhardt

APPENDIX

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

* * * * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

The General Assembly created the Natalie M. LaPrade Maryland Medical Cannabis Commission (the "Commission") as an independent agency, Md. Code Ann., Health-Gen. § 12-3302, and by statute authorized the Commission to issue licenses to no more than 15 medical cannabis growers, who will then be authorized to supply medical cannabis for use in Maryland, Health-Gen. § 13-3306(a)(2)(i), as amended by 2015 Md. Laws, ch. 251. This suit is brought by an unsuccessful applicant for a medical cannabis grower license seeking judicial intervention to halt the medical cannabis grower licensing process and change course to evaluate applications in a manner contrary to regulation and intent. More precisely, Alternative Medicine Maryland, LLC ("AMM") alleges that it is entitled to (1) a preliminary injunction halting the medical cannabis licensing process pending this litigation, (2) a declaration that the Commission acted a) contrary to its licensing statute, b) contrary to the Commerce Clause and the Privileges and Immunities

Clause, and c) illegally failed to specify what should constitute sufficient capitalization and "accepted unfounded assertions about applicants' capitalization," and (3) further alleges that it is entitled to injunctive relief barring the licensing process from continuing until the Commission has taken unspecified "corrective action." AMM seems to suggest that the Commission should be ordered to re-evaluate all of the applications for medical cannabis grower license that were filed in November of 2015 under new criteria never enacted in statute or regulation, announced to the applicants, or suggested by AMM.

As explained below, the Court should dismiss the Complaint in its entirety because AMM lacks standing to seek a declaratory judgment on any of the issues raised. The Complaint does not allege that AMM has suffered any actual or imminent injury as a result of any of the alleged actions by the Commission. The Complaint does not allege that absent the Commission's challenged actions, AMM would have avoided any such injury. The Complaint thereby fails to establish the necessary elements of standing and the Complaint should be dismissed on that basis.

The Court should dismiss the Complaint in its entirety because it fails to name as parties those companies that have been granted Stage One pre-approvals for medical cannabis grower license. Those companies stand to suffer irreparable injury due to the loss of the pre-approvals if the requested declaratory and injunctive relief is granted. Therefore, under the Declaratory Judgments Act, Md. Code Ann., Cts. & Jud. Proc. § 3-405(a)(1), and Maryland Rule 2-211, this action may not proceed and must be dismissed in the absence of these necessary parties that have not been joined.

The Court should dismiss all claims against the Department of Health and Mental Hygiene (the "Department") and the individually-named commissioners for failure to state a claim upon which relief may be granted. AMM does not allege facts that would entitle it to relief against these defendants, none of which has any lawful authority or obligation to provide the relief sought in the Complaint. If any part of AMM's action survives this motion, the Court should issue an order pursuant to Rule 2-213 directing that the Department and the individually-named commissioners be dismissed due to their misjoinder.

Further, AMM lacks standing to assert any alleged violation of the Dormant Commerce Clause or the Privileges and Immunities Clause of the United States Constitution. The Complaint fails to allege that AMM suffered any harm under the scoring convention actually used by the Commission.

In addition, Counts I and III of the Complaint should be dismissed because AMM fails to allege facts that would justify injunctive relief. The allegations fail to establish any meaningful injury to AMM, fail to meet the standard for the balancing of harms among the parties, and fail to support any likelihood of success on the merits.

If the Court declines to dismiss the Complaint, then, in the alternative, it should enter summary judgment in favor of the Commission, and issue a declaration making clear that the Commission did not violate its statute, Constitutional provisions, or act arbitrarily and capriciously in considering applications and granting Stage One pre-approvals for medical cannabis grower license to qualified applicants other than AMM.

FACTUAL ALLEGATIONS IN THE COMPLAINT

AMM is a Maryland limited liability company with its principal office at 14 State Circle, Annapolis, Maryland 21401. Complaint ¶ 8. AMM applied for a medical cannabis grower's license but was not among the fifteen companies selected by the Commission for the first pre-approvals. Complaint ¶ 5.

MARYLAND'S STATUTORY AND REGULATORY SCHEME FOR MEDICAL CANNABIS

The Commission is an independent commission that functions within the Department of Health and Mental Hygiene. Md. Code Ann., Health-Gen. § 13-3302(b), Complaint ¶ 9. The Commission consists of 16[1] members: one designee of the Secretary of Health and Mental Hygiene and 15 members appointed by the Governor. Md. Code Ann., Health-Gen. § 13-3302, Complaint ¶ 11. The Commission's purpose is to "develop policies, procedures, guidelines, and regulations to implement programs to make medical cannabis available to qualifying patients in a safe and effective manner." Health-Gen. § 13-3302(c), Complaint ¶ 16.

The Commission is also expressly authorized to act as a licensing body. The statute provides that the Commission "shall license medical cannabis growers that meet all requirements established by the Commission to operate in the State."[2] Health-Gen. § 13-3306(a)(1), Complaint ¶ 16. The Commission has statutory authority to issue a maximum of 15 licenses to medical cannabis growers. Health-Gen. § 13-3306(a)(2)(i), Complaint ¶ 16. The medical cannabis grower licensing statute provides that the

[1] Due to a vacancy, there are currently 15 members of the Commission.

[2] The Commission is also responsible for issuing licenses for medical cannabis processors and medical cannabis dispensaries. Health-Gen. §§ 13-3307, 13-3309. These types of licenses are not at issue in this action.

Commission "shall actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." Health-Gen. § 13-3306(a)(9)(i)(1), Complaint ¶ 16. In order to exercise its licensing authority, the Commission was statutorily required to "establish an application review process for granting medical cannabis grower licenses in which applications are reviewed, evaluated, and ranked based on criteria established by the Commission." Health-Gen. § 13-3306(a)(2)(iii), Complaint ¶ 16.

The Commission fulfilled these statutory mandates by promulgating regulations governing the criteria by which applications for medical cannabis grower licenses would be reviewed and the weight afforded to each of the criteria. COMAR 10.62.08.05, Complaint ¶ 35. The scoring criteria set out in the regulations do not include race or ethnicity. Complaint ¶ 38. The medical cannabis grower licensing process is a two-stage process. Complaint at ¶ 34. In stage one, the Commission planned to issue pre-approvals to up to 15 applicants for medical cannabis grower licenses, "in consideration of the ranking of the applications in accordance with Regulation .05." COMAR 10.62.08.06A.(1)(b), Complaint at ¶ 34.

THE APPLICATION PROCESS

On September 28, 2015, the Commission released the Application for Medical Cannabis Grower License and announced that completed applications had to be submitted by 4:00 pm on November 6, 2015.[3] Complaint ¶ 43. The application did not require applicants to provide the race or ethnicity of their owners and investors. Exhibit

[3] The Application for Medical Cannabis Grower License is attached hereto as Exhibit A, and is available online at: http://mmcc.maryland.gov/pages/archives/Archives.aspx.

A, Complaint at ¶ 45. During the application period, the Commission posted on its website about 75 pages of answers to questions from potential applicants about the applications.[4] Complaint ¶ 46.

The Commission entered into an agreement with the Regional Economic Studies Institute ("RESI") at Towson University to assist the Commission with the medical cannabis grower license application review process. Complaint ¶ 47. The Commission and RESI designed a "double-blind" Subject Matter Expert-based analysis of applicants. Complaint ¶ 47. Applicant names were not included in the evaluation materials and the Commission voted on the top-ranked grower applications only by coded identification number, with applicant identities concealed. Complaint ¶ 47.

UNDISPUTED FACTS

AMM submitted a timely application for a medical cannabis grower license. AMM's application included proof of residency for at least nine Maryland residents represented to be among AMM's owners and investors. Exhibit C.

On July 12, 2016, the Commission voted to adopt a Grower Evaluation Guidance ("Guidance") document to support Commissioners' efforts in the review process. Complaint ¶ 50. The Guidance advised commissioners as to the information available for them to consider, and guided Commissioners on how to conform their review to current regulations. The Guidance did not indicate that Commissioners should consider race or ethnicity as a scoring or ranking criteria. Complaint ¶ 50; Exhibit D.

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[4] The Application FAQ document is attached hereto as Exhibit B, and is available online at: http://mmcc.maryland.gov/pages/archives/documents/APPLICATION_FAQ_12022015.pdf.

On August 5, 2016, the Commission met in open session to consider issuing pre-approvals for medical cannabis grower and processor licenses. Complaint ¶ 52; Exhibit D. During that meeting, the Commission received recommendations from the Grower Evaluation Subcommittee and the Processor Evaluation Subcommittee and discussed those recommendations. Exhibit D. The Commission then voted on the Commission's ranking of the top 20 applicants for a medical cannabis grower license and voted to issue pre-approvals to the top 15 applicants, subject to satisfactory examinations of good moral character and compliance with tax obligations.[5] Complaint ¶ 52; Exhibit D. AMM was not ranked within the Commission's top 20 applicants for a medical cannabis grower license. Exhibit C.

ARGUMENT

I. STANDARD AND SCOPE OF REVIEW FOR MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

The Court properly grants a motion to dismiss pursuant to Rule 2-322(b) if "the allegations [in the complaint] and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 496-97 (2014) (citation omitted). "In Maryland, . . . dismissals for failure to state a claim are *not* limited to those cases in which 'it appears beyond doubt that the plaintiff can prove no state of facts in support of his claim which would entitle him to relief.'" *Manikhi v. Mass Transit*

[5] Although not at issue in this case, at that August 5, 2016 meeting, the Commission also voted on a Commission ranking of the top 30 ranked applicants for a medical cannabis processor license and voted to issue immediate pre-approvals to the top 15 of those applicants, also subject to satisfactory examinations of good moral character and compliance with tax obligations. Exhibit D.

Admin., 360 Md. 333, 343 (2000) [quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007) (other citations omitted)]; *see Twombly*, 550 U.S. at 554-61 (adopting "plausibility" as minimum requirement for factual allegations in a complaint). Instead, Maryland's pleading standard requires, at a minimum, "a concise statement of facts that will identify for the professional reader, be it adverse counsel or the court, the cause of action that is being asserted." *Manikhi*, 360 Md. at 343. On the other hand, "[t]he well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *State Ctr., LLC*, 438 Md. at 497.

"[T]he court's analysis of the motion [to dismiss is] limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any." *Id.* Although "a court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them," *id.* at 496, "any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Sharrow v. State Farm Mut. Auto Ins. Co.*, 306 Md. 754, 768 (1986).

If, on a motion to dismiss for failure to state a claim, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. Rule 2-322(c); *see Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 475-76 (2004). Under Maryland Rule 2-501, the grant of a motion for summary

judgment is appropriate "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." *Barclay v. Briscoe*, 427 Md. 270, 281 (2012) [quoting Rule 2-501(f)]. "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *Matthews v. Howell*, 359 Md. 152, 161, 753 A.2d 69, 73 (2000).

II. THE COMPLAINT SHOULD BE DISMISSED FOR AMM'S LACK OF STANDING.

AMM alleges that it is entitled to a declaratory judgment that the Commission a) failed "to make any attempt at achieving racial and ethnic diversity among licensed growers," b) violated constitutional provisions by considering Maryland residency as a scoring criteria, and c) failed to sufficiently specify and scrutinize adequate capitalization. AMM does not allege that it suffered any injury thereby. Indeed, it cannot allege any injury with regard to the Maryland residency scoring criteria because AMM included nine Maryland residents on its application team and received the maximum credit available for that scoring criterion.

To have standing to sue, a plaintiff must have "suffered an injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressed by a decision in the plaintiff's favor." *State Ctr., LLC*, 438 Md. at 491 (internal quotation marks and citations omitted). "[T]he claimant alone is responsible for raising the grounds for which his right to access to the judiciary system exists." *State Ctr., LLC*, 438 Md. at 517. *See, e.g., Kendall v. Howard County*, 431 Md. 590, 607–08 (refusing to address taxpayer standing because petitioners did not assert it). The Complaint fails to plead a public wrong but instead vaguely alleges that the Commission's handling of the medical

cannabis grower license application process was legally flawed. Even assuming for purposes of argument that taxpayer standing could be invoked in a case such as this, the Complaint fails to plead taxpayer standing.

A. AMM LACKS STANDING TO CHALLENGE THE COMMISSION'S EFFORTS TO "ACTIVELY SEEK TO ACHIEVE RACIAL DIVERSITY."

AMM seeks a broad judicial declaration that the Commission "failed to make any attempt at achieving racial diversity" and asks that the Commission therefore be ordered to conduct a disparity study sufficient to support a race-based preference in scoring applications for medical cannabis grower licenses. Complaint ¶ 96, 98 and prayer for relief. AMM alleges that the efforts to broadly publicize the application opportunities in order to seek diversity in the pool of applicants for medical cannabis grower licenses were not enough to satisfy the statutory language, and implies that the Commission should have found a constitutionally-permissible way to use race and ethnicity as a scoring criteria. Yet, the statutory language cannot be read to require a specific set of actions to be undertaken by the Commission. It cannot be read to suggest that the Commission was either required to include racial and ethnic diversity as a scoring criterion or to provide any racially- or ethnically-based preference.

Importantly, even if AMM did argue that the Commission was required to use racial and ethnic diversity as a scoring criterion, there is no legal basis to support this, either in the statute or in the regulations, and AMM does not suggest that any legally-required approach prevented it from receiving a pre-approval. While AMM might suggest that its application could have been given great consideration for featuring 80%

African American ownership, there is no legal basis by which to argue or assess a) how much weight might have been given to racial or ethnic diversity or b) how much diversity might have been sufficient to earn the maximum consideration under any theoretical weighted criteria. AMM cannot allege that the Commission's actions or inactions with regard to racial or ethnic diversity led to its inability to obtain a pre-approval. The Complaint stops short of establishing standing because it fails to allege that AMM was injured by the Commission's legally-required conduct.

B. AMM LACKS STANDING TO CHALLENGE THE CONSIDERATION OF MARYLAND RESIDENCY BECAUSE IT RECEIVED ALL AVAILABLE CREDIT UNDER THAT SCORING CRITERION.

AMM seeks a declaration that the Commission's consideration of Maryland residency violated the Commerce Clause and the Privileges and Immunities Clause of the U.S. Constitution. Medical cannabis is a uniquely intra-State industry which is specifically designed to operate under State law. The Complaint fails to plead that AMM was in any way injured by the Commission's consideration of Maryland residency. The failure to allege any actual or imminent injury sustained as a result of the consideration by the Commission of Maryland residency requires that this claim be dismissed for lack of standing.

Indeed, AMM could not allege that it was injured by the Commission's consideration of Maryland residency. AMM designated multiple Maryland residents on its application and thereby received full credit under that scoring criterion. The Application for Medical Cannabis Grower License contained exactly one question that asked about Maryland residency. Exhibit A. The question is set out as follows:

> **4. Please certify residency for owners and investors in the State of Maryland and attach relevant documentation. ***
> ***(Reference 10.62.08.05 of the regulations. Graded yes/no. Weighted 20% of the Additional Factors subsection. Maximum length 1 page)***
> Click here to enter text.

As the application states, the Maryland residency question was graded yes or no – an applicant either had a Maryland resident among its owners and investors, or it did not. The Commission went to some lengths to advise applicants as to how Maryland

residency would be considered. The Application FAQs, attached hereto as Exhibit B, include the following responses intended to confirm how the criteria would be considered.

> **10b. Is Maryland residency required among all owners and investors?**
>
> No.
>
> [. . .]
>
> **21b. Among the owners and investors, how many residents does it take to check the residency box "yes" under the additional factors? Does everyone have to be a Maryland resident?**
>
> In order to check the Maryland Resident box "yes", applicants must have at minimum one owner or investor who is a Maryland resident. Not every owner or investor is required to be a Maryland Resident. Please see other FAQ's regarding the scoring for this question.
>
> [. . .]
>
> **10d. How much weight does the residency of owners and investors weigh? How do we receive the maximum point value for this question?**
>
> The question is scored as a simple "yes" or "no" response. If any of the owners or investors are Maryland residents, then the applicants should indicate that in their responses in the application. (For example, question 4 in the grower application.) They should also supply relevant documentation to support this statement. If the applicant successfully demonstrates that one or more of the owners or investors are Maryland residents, then the applicant will receive the full weight for this question.
>
> [. . .]
>
> **12d. Is there a minimum percentage of owners or investors required to receive the point value for Maryland Residency?**
>
> There is not a certain percentage. Only one member is needed to qualify for the point value assigned.

AMM included multiple Maryland resident owners or investors on its application. Exhibit C, Affidavit of Mary-jo Mather. AMM was not injured in any way by consideration of Maryland residency and therefore has no standing now to challenge the provision.

C. AMM LACKS STANDING TO CHALLENGE THE COMMISSION'S CONSIDERATION OF CAPITALIZATION.

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 1 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

for their respective facilities. Only after securing a medical cannabis grower license could any of these pre-approved applicants begin to recover any of the resources invested by them. Those pre-approved applicants for medical cannabis grower license are necessary parties to the matter under Maryland Rule 2-211, and this action should be dismissed for AMM's failure to join them.

"A person who is subject to service of process shall be joined as a party in the action if in the person's absence (1) complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest." Md. Rule 2-211. "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." Md. Code Ann., Cts. & Jud. Proc. § 3-405. AMM asks this Court to enjoin the Commission from issuing licenses to those companies that have been awarded pre-approvals for medical cannabis grower license and implies that this injunction should stand until the Commission can somehow evaluate those applicants according to different criteria that were never promulgated in statute or regulations, included in the application, or made known to the pre-approved applicants. Complaint at ¶ 98 and prayer for relief. AMM essentially asks that the Court compel the Commission to halt the licensing evaluation process and change the evaluation criteria in a way that could be detrimental to companies currently holding pre-approvals for medical cannabis grower license.

"Ordinarily, in an action for declaratory judgment, all persons who have an interest in the declaration are necessary parties. Any person who, as a result of a declaration, may gain or be deprived of a legal right or other benefit has an interest that might be affected by the outcome of the action and is, therefore, a necessary party." *Bender v. Sec'y, Maryland Dep't of Pers.*, 290 Md. 345, 350, 430 A.2d 66, 69 (1981) (internal citations omitted). Failure to join a party in violation of the Maryland Rules may warrant dismissal of an otherwise meritorious claim. *Maddox v. Stone*, 174 Md. App. 489, 506, 921 A.2d 912, 922 (2007). Dismissal is required where a complaint seeking declaratory relief lacks parties necessary to litigate the issue. *Chairman of Bd. of Trustees of Emp. Ret. Sys. v. Waldron*, 285 Md. 175, 180 (1979); *see Richmond v. Dist. Court of Maryland*, 412 Md. 672, 672 (2010) ("Under these circumstances, the Circuit Court should have dismissed the Complaint pursuant to Md. Rule 2-211(a)."). AMM seeks judicial declarations that, if granted, would adversely impact the business and economic interests of the pre-approved applicants for medical cannabis grower license. The case should not move forward without them, and the Complaint should be dismissed for failure to join necessary parties.

V. ALL CLAIMS AGAINST THE DEPARTMENT AND THE INDIVIDUALLY-NAMED COMMISSIONERS SHOULD BE DISMISSED.

AMM has sued the Department of Health and Mental Hygiene and the individually-named commissioners in their official capacities. The Complaint fails to state a claim upon which relief may be granted against the Department or the

individually-named commissioners, because, as a matter of law, none of these defendants has any independent authority or responsibility in licensing medical cannabis growers. Thus, they cannot provide any of the relief being sought, and they should be dismissed from this suit.

State law established the Commission as an independent unit of the State Government functioning within the Department, and conferred upon the Commission specific powers and duties that are unaffected by the Commission's placement within the Department. AMM concedes, as it must, that the Commission is an "independent commission" within the Department. Complaint ¶ 9. The Department of Health and Mental Hygiene is a principal department of the Executive Branch of the State Government. Md. Code Ann., State Gov't § 8-201. The powers and duties assigned by law to a unit, such as the Commission, are not changed by placement of a unit in a principal department. State Gov't § 8-202.

The Secretary of Health and Mental Hygiene (the "Secretary) heads the Department. Health-Gen. § 2-102(a). The Secretary has the authority and powers specifically granted to him/her by law, but powers not granted to the Secretary belong to the units of the Department, free of the control the Secretary. Health-Gen. § 2-106(c). The Secretary may designate a member of the Commission. Health-Gen § 13-3303(a)(1). No other specific grants of power or authority to the Secretary or the Department exist with respect to the Commission. All other responsibilities and powers belong to the Commission, *e.g.*, licensing medical cannabis growers and processors, and licensing

dispensaries. Health-Gen §§ 13-3306, 13-3307, 13-3309. Indeed, the Complaint does not allege any act or omission attributable to the Department.

In their official capacities, the individually-named commissioners had no individual authority to act to award State One pre-approvals for medical cannabis grower license on behalf of the Commission. State law authorized the Commission as a body, not the commissioners individually, to review, evaluate, and rank applicants for medical cannabis grower licenses based on criteria established by the Commission. The commissioners each individually have no independent authority to issue medical cannabis grower licenses. The Complaint lodges no allegations of wrongdoing against any individual commissioner and seeks no order against any individual commissioner. Because the individually-named commissioners have no authority to provide the relief sought by AMM, the individually-named commissioners should be dismissed as parties.

Because none of these defendants has authority to create standards for or to award medical cannabis grower licenses, none is a proper defendant to this action. *See Glover v. Glendening*, 376 Md. 142, 148 (2003); *Jackson v. Millstone*, 369 Md. 575, 590-91 (2002); *Davis v. State*, 183 Md. 385, 393 (1944); *see also Police Comm'n v. Siegel*, 223 Md. 110, 115 (1960) (book store owner seeking injunction and declaratory judgment that State's criminal comic book statute was unconstitutional sued defendants "charged with the enforcement of the criminal laws of [Maryland] in the City of Baltimore"). Therefore, the claims against the Department and the individually-named commissioners should be dismissed.

VI. THE CLAIM FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Count I of the Complaint, which asserts a claim for preliminary and permanent injunction, should be dismissed for failure to state a claim upon which relief may be granted. The grant of a motion to dismiss is proper if a complaint does not disclose, on its face, a legally sufficient cause of action. *McMahon v. Piazze*, 162 Md. App. 588, 597 (2005). Failure to plead properly can be fatal if the complaint does not properly allege the intended cause of action. *Zeller v. Balt. Med. Ctr.*, 67 Md. App. 75, 81-83 (1986). The complaint should contain "such statements of fact as may be necessary to show the pleader's entitlement to relief." Md. Rule 2-303(b), *quoted in Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 725-26 (2007), *aff'd on other grounds*, 403 Md. 367 (2008).

To determine whether AMM has stated a claim for injunctive relief, the Court should consider "allegations of fact and inferences deducible therefrom; not merely conclusory charges." *Faya v. Almaraz*, 329 Md. 435, 444 (1993) (quoting *Berman v. Karvounis*, 308 Md. 259 (1987)). Any "'ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader.'" *Faya*, 329 Md. at 444 (citations omitted).

A complaint for a preliminary injunction must allege and demonstrate the following: (1) the likelihood that the plaintiff will succeed on the merits; (2) the "balance of convenience" determined by whether greater injury would be inflicted upon the defendant by granting the injunction than would result from its refusal; (3) whether the

plaintiff will suffer irreparable injury unless the injunction is granted; and (4) when appropriate, that the public interest is best served by granting the injunction. *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 452-53 (1995). The burden of satisfying the Court with respect to each of these factors rests with the plaintiff seeking the preliminary injunction, and "[t]he failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief." *Fogle*, 337 Md. at 456. The standard for determining whether to issue a permanent injunction "is essentially the same" as "[t]he standard for a preliminary injunction. . ." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 32 (2008), except a permanent injunction may be issued only after "there has been a determination on the merits of the claim," *Maloof*, 136 Md. App. at 693.

Count I of the Complaint fails to state a claim for injunction upon which relief can be granted because the allegations, even if assumed to be true, do not suffice to establish entitlement to injunctive relief. AMM alleges that without an injunction it will "lose the ability to grow and dispense medical cannabis for the first two years that growing and dispensing is legal in Maryland." Complaint 83. With or without the injunction, AMM has no right to grow medical cannabis. AMM did not receive a pre-approval for medical cannabis grower license, and it did not rank in the top five alternates selected by the Commission in the event that one of the pre-approved companies is disqualified from further consideration. AMM has not pleaded facts sufficient to support the likelihood that it would succeed on the merits. AMM implies, but does not expressly state, that the statutory language instructing the Commission to actively seek to achieve racial and

ethnic diversity could not have been satisfied in any way short of a race-based scoring preference in the application process. This is simply not so.

The statutory language at issue may be read to provide broad authority, but it does not set out precise requirements. The language may have authorized a range of possible actions, but because the legislature did not specify what steps were required of the Commission, it cannot be said that the requirements of the statute were not met.[6]

Further, by omitting necessary parties, AMM has presented an inaccurate view of the potential injuries that will be inflicted if the requested injunction is granted. AMM alleges that the Commission should "reassess" Stage 1 applicants for medical cannabis grower license under "proper statutory criteria." AMM does not seem to contest that the Commission has already assessed the applicants for medical cannabis grower license according to the scoring criteria set out in regulations that took effect in September of 2015 and that remained in effect while applicants were preparing and submitting the applications in question. There would be immeasurable harm to pre-approved applicants for medical cannabis grower license if the Commission were enjoined from proceeding with the licensing process and then required to re-assess those pre-approved applicants

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[6] In stark contrast to the minimal statutory language - "shall actively seek to achieve [...] diversity" - at issue in the Commission's cannabis grower licensing statute, the legislature created very detailed statutory provisions to support efforts to achieve diversity in off-shore wind farming. *See* State Gov't §§ 9-20C-01 through 9-20C-04 (defining, creating, and authorizing the Maryland Offshore Wind Business Development Advisory Committee and Fund to provide encouragement, financial assistance, business development assistance, and employee training opportunities for the benefit of emerging businesses in the State, including minority-owned emerging businesses, to prepare those businesses to participate in the emerging offshore wind industry).

for medical cannabis grower license by criteria that were not required or articulated at the time they submitted their applications. The Complaint fails to present a legally-sufficient claim for injunctive relief and those counts should be dismissed.

VII. IF THE COMPLAINT IS NOT DISMISSED, THE COURT SHOULD GRANT DEFENDANTS SUMMARY JUDGMENT AND ISSUE A DECLARATION CONFIRMING THE COMMISSION'S STATUTORY AND REGULATORY AUTHORITY.

If the Court declines to dismiss the Complaint, then in the alternative, the Court should enter summary judgment in favor of the Commission and declare that the Commission did not violate the law in its licensing process.

AMM asks the Court to determine and declare that the Commission's efforts to actively seek to achieve racial and ethnic diversity were insufficient, despite the race-neutral language of the authorizing statute. AMM asks the Court to declare that the Commission acted arbitrarily and capriciously in failing to specify the nature and type of capitalization needed by applicants and by scoring the applicants' capitalization on a scale of 0-5. Those arguments disregard the statutory authority of the Commission to exercise its independent discretion, and the judicial deference owed to such administrative decisions. In essence, AMM asks the Court to disregard the language of the medical cannabis grower licensing statute and the constitutional requirements for a State agency seeking to implement a race-based preference. With regard to the Commission's statutory authority and mandate, AMM seeks to set aside the Commission's regulations and have the Court step into the shoes of a licensing authority. The law does not permit any of this, and judgment should be entered for the Commission.

AMM brings its request for declaratory judgment under § 3-409 of the Courts and Judicial Proceedings Article. Section 3-409 provides, generally, that a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:

> (1) An actual controversy exists between contending parties;
> (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or
> (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

Cts. & Jud. Proc. § 3-409. AMM seeks a judicial declaration that the Commission's decision to begin with a race-neutral approach to seek racial and ethnic diversity was contrary to the language of the licensing statute. That argument cannot prevail under the current law. Even if there was standing to assert the claim, AMM is not entitled to a judicial declaration on the Maryland residency requirement, because those considerations serve important public health and safety concerns surrounding a unique emerging industry. Finally, the Commission cannot be held to have acted arbitrarily and capriciously in requiring applicants for medical cannabis grower license to budget and certify their own capital needs when the operations contemplated by these applicants are so widely varied and accordingly will have such vastly different capital requirements.

A. THE COMMISSION WAS NOT STATUTORILY REQUIRED TO PROVIDE A RACE-BASED PREFERENCE IN SCORING APPLICATIONS FOR MEDICAL CANNABIS GROWER LICENSES.

The Equal Protection Clause prohibits the government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. In evaluating an equal protection challenge to a rule, courts must first determine the standard of review to apply. If the rule neither infringes a fundamental right nor disadvantages a suspect class, such as a rule intended to achieve geographic diversity in licensing medical cannabis, courts apply rational basis review. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *see Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (noting that equal protection analysis is the same under the Fifth Amendment as it is under the Fourteenth Amendment). Under rational basis review, the challenged rule "comes ... bearing a strong presumption of validity, and those attacking the rationality of the [rule] have the burden to negative every conceivable basis which might support it." *Id.* at 314–15, 113 S.Ct. 2096 (internal citations omitted). "Where there are 'plausible reasons' for [the rule], 'our inquiry is at an end.' " *Id.* at 313–14, 113 S.Ct. 2096 (*quoting U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980)).

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc.*, 515 U.S. at

227, 115 S. Ct. at 2113. In order to meet this standard, the government actor must be prepared to support the race-conscious measure with an evidentiary basis demonstrating a history of disparate treatment in the relevant field and jurisdiction. In reviewing the constitutionality of race-based preferences, the Supreme Court has also instructed that entities should first consider the use of race-neutral means to increase minority participation. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507, 109 S. Ct. 706, 729, 102 L. Ed. 2d 854 (1989) (citing *United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987)) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies").

The Commission's medical cannabis grower licensing statute requires it to actively seek to achieve racial and ethnic diversity in licensing medical cannabis growers. Health-Gen. § 13-3306 (a)(9)(i)(1). The statute contains race-neutral language and the Commission approached this goal in a race-neutral manner consistent with judicial guidance. Although it may be argued that the statute authorized vigorous efforts to explore whether an adequate evidentiary basis could be found upon which to support a scoring preference for racially or ethnically diverse applicants, the statute does not require that action. The Commission sought legal guidance on how to interpret that provision, enacted regulations accordingly, and endeavored to achieve racial and ethnic diversity in a race-neutral manner by conducting broad publicity about opportunities within the new medical cannabis industry in Maryland. In a newly-established and unique industry, a race-neutral approach at the outset is wholly consistent with

constitutional decisions. *City of Richmond*, 488 U.S. at 507. There is nothing to support a finding that the Commission violated the statute by first acting to seek diversity through race-neutral means because that conduct is precisely what Supreme Court precedent instructs.

B. COMAR 10.62.08.05I(6)(A) DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

COMAR 10.62.08.05I(6)(a) does not violate the dormant Commerce Clause because federal law and enforcement priorities prevent medical cannabis from crossing state lines, so there is no interstate commerce implicated here. Even if medical cannabis was an article of interstate commerce, the regulation passes the Supreme Court's *Pike* test, and is not an unreasonable burden on interstate commerce.

The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is considered as the negative aspect of the Commerce Clause, which denies states the power "unjustifiably to discriminate against or burden . . . " interstate commerce. *Md. State Comptroller of Treasury v. Wynne*, 431 Md. 147, 161 (2013) (citation omitted). A regulation may violate the dormant Commerce Clause in instances of economic protectionism. S*ee id.* (citing *Dep't of Revenue v. Davis*, 553 U.S. 328, 333–38 (2008)). The dormant Commerce Clause, however, does not prohibit states from regulating interstate commerce. *See Frey v. Comptroller of Treasury*, 422 Md. 111, 142-44, 29 A.3d 475, 493–94 (2011) (citation omitted).

In this case, COMAR 10.62.08.05I(6)(a) does not violate the dormant Commerce Clause. Because the Maryland Medical Cannabis statute authorizes the growing, processing, and dispensing of medical cannabis solely within the borders of the State of Maryland, there is no interstate commerce implicated with respect to the growing (or processing or dispensing) of medical cannabis in Maryland. Health-Gen. § 13-3306 (and §§ 13-3307, 13-3309). The federal Controlled Substances Act ("CSA") prohibits a person from intentionally or knowingly manufacturing, distributing, possessing or dispensing a controlled substance. 21 U.S.C. § 841(a)(1) (2012). Although marijuana is a schedule I drug subject to the CSA, the 2013 memorandum from the Deputy Attorney General stipulated that the Department of Justice (DOJ) would have eight enforcement priorities in light of states which have legalized marijuana use.[7] One such enforcement priority is to prevent the "diversion of marijuana from states where it is legal under state law . . . " to other states.[8] Aside from the eight enforcement priorities, it is up to states and local law enforcement agencies to address marijuana activity through the enforcement of their own narcotics laws.[9] Under current law, medical cannabis or cannabis products cannot cross state lines in any way. The Cole Memorandum further stated that jurisdictions which have legalized marijuana in some form—and have strong regulatory and enforcement schemes to control the cultivation, distribution, sale, and

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[7] *See* James M. Cole, *Memorandum: Guidance Regarding Marijuana Enforcement*, U.S. DEP'T OF JUSTICE, OFFICE OF THE DEPUTY GEN. 1, 2 (Aug. 29, 2013) (the "Cole Memorandum").

[8] *Id.* at 1.

[9] *Id.* at 2.

possession thereof—are less likely to threaten the enforcement priorities.[10] Thus, though cultivation and sale of medical cannabis is technically illegal under federal law, states can permit persons to grow, process, and sell medical cannabis (as long as the cannabis does not cross state lines), if there is a state statute authorizing it and a regulatory scheme.[11] Because medical cannabis grown in Maryland cannot cross state lines, and the industry is uniquely designed to avoid federal enforcement priority, there is no article of interstate commerce in this case, so COMAR 10.62.08.05I(6)(a) does not violate the Dormant Commerce Clause.

Even if medical cannabis were an article of interstate commerce, COMAR 10.62.08.05I(6)(a) would pass both prongs of the *Pike* test, and is not an unreasonable burden on interstate commerce. The regulation evenhandedly effectuates a legitimate local public interest of health and safety. Medical cannabis growers who are State residents are more likely to be concerned with the health effects that their medical cannabis has on users in Maryland than would out-of-State applicants.

Under the *Pike* test, a statute or regulation is valid if: (1) the statute regulates "evenhandedly to effectuate a legitimate local public interest . . . " with there being only incidental effects on interstate commerce, and (2) the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits." *See MaryCLE, LLC v. First Choice Internet, Inc.*, 166 Md. App 481, 515-16, 890 A.2d 818, 838 (2006) (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)). Regarding the *Pike*

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[10] *Id.* at 3.

[11] *See id.*; *see also* 21 U.S.C. § 841(a)(1) (2012).

test's first prong, when a regulation discriminates against interstate commerce, the regulation will be invalid unless the discrimination is justified by a factor unrelated to economic protectionism, such as the interests of local health and safety. *See Colon Health Ctrs. of America, LLC. V. Hazel*, 813 F.3d 145, 151–52 (4th Cir. 2016) (citations omitted). The Supreme Court has advised that courts in this analysis should eschew "'formalism for a sensitive case-by-case analysis,'" and courts are afforded latitude to determine the practical impact of a statute. *See id.* at 152 (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

Regarding the second prong of the *Pike* test, the burden on any potential interstate commerce here is not excessive in relation to the local benefits because being a Maryland resident accounts for only three percent out of one hundred percent towards the score of the application. Exhibit A. The burden on interstate commerce, if any, is unsubstantial, and the benefits of health and safety by having the medical cannabis cultivated by growers with local ties (*i.e.*, Maryland residents) outweigh any burdens on any interstate commerce. AMM was deemed to be a Maryland resident in its application, so AMM was not disadvantaged even slightly by COMAR 10.62.08.05I(6)(a). Therefore, COMAR 10.62.08.05I(6)(a) does not violate the Dormant Commerce Clause.

C. COMAR 10.62.08.05I(6)(A) DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

The Privileges and Immunities Clause states that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. This Clause is designed to place the citizens of each State on the same

footing as citizens of other States, with respect to the advantages resulting from citizenship in those States. *See Frey v. Comptroller of the Treasury*, 184 Md. App. 315, 401 (2009), *aff'd*, 422 Md. 111, 136 (Md. 2011) (citation omitted). This Clause protects the right of a citizen of one State to pass into any other State to engage in lawful commerce, trade, or business; to acquire real property; and to be exempt any higher taxes or excises (to name a few). *See id.* (citation omitted). One privilege which this Clause grants to citizens of State A is the right to do business in State B on terms "of substantial equality with the citizens of that State . . . ." *Id.* (citation omitted). The Clause does not, however, preclude discrimination against nonresidents where (1) there is a "substantial reason for the difference in treatment . . . ;" and (2) the discrimination against nonresidents "bears a substantial relationship to the State's objective." *Id.* at 975. (citation omitted).

COMAR 10.62.08.05I(6)(a) does not violate the Privileges and Immunities Clause because there is a substantial reason for the difference in treatment between Maryland and non-Maryland residents; and the treatment of residency bears a substantial relationship to the State's objective. Here, where the State is creating a new industry that must be strictly regulated and confined within the State in order to promote health and public safety, such a regulation is completely warranted. Public health interests are promoted because medical cannabis growers with strong ties to the State logically have greater concern for in-State patients who will be the sole users of the medical cannabis. Also, giving a three-point scoring consideration for Maryland residency serves the interest of compliance with the CSA and enforcement priorities from the 2013 Cole

Memorandum, because Maryland-resident medical cannabis growers are more likely to prevent diversion and distribution of medical cannabis across State lines than nonresident cannabis growers. Additionally, there are no less restrictive means for achieving the State objectives of public health and compliance with the CSA and enforcement priorities with respect to medical cannabis.

D. THE COMMISSION DID NOT ACT IN AN ARBITRARY AND CAPRICIOUS MANNER BY REQUIRING APPLICANTS TO BUDGET AND DEMONSTRATE ADEQUATE CAPITAL.

Administrative bodies in Maryland, like the Commission, have long been recognized as having independent authority to exercise their legislatively-authorized powers as they determine best.

> The primary function of administrative agencies is to advance the will and weal of the people as ordained by their representatives-the Legislature. These agencies are created in order to perform activities which the Legislature deems desirable and necessary to forward the health, safety, welfare and morals of the citizens of this State.

Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 222, 334 A.2d 514, 522 (1975). Although "the judiciary has an undeniable constitutionally-inherent power to review, within limits, the decisions of these administrative agencies," the exercise of that power of review "cannot be a substitution of the court's judgment for that of the agency." *Id.*, 223-24, 523. When a reviewing court does examine an administrative decision, that review is necessarily limited to "whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner." *Linchester Sand & Gravel Corp.*, 274 Md. at 224, 334 A.2d at 523 (citations omitted).

The Commission was statutorily authorized to create an application process, criteria and standards for medical cannabis grower licensing. Health-Gen § 13-3306. The Commission determined that applicants should be required to demonstrate that they could adequately plan for the amount of capital that their unique operations would require, and then demonstrate that they held adequate capitalization to the Commission. COMAR 10.62.08.05.I.(5). There is nothing arbitrary or capricious about establishing a requirement that would assist the Commission in identifying which applicants could create an appropriate business plan, budget accordingly, and demonstrate sufficient capital to sustain the operation. To the contrary, it would have been arbitrary to require the same manner of capitalization from all applicants because applicants are legally permitted to plan to grow in warehouses, greenhouses, or open fields. Some applicants have planned new construction of facilities and some have planned to simply convert existing greenhouses. There are no capacity restrictions on a medical cannabis grow operation, so one can be as large or as small as the applicant wishes. No single capitalization threshold could adequately provide for those numerous variables.

CONCLUSION

For the reasons stated, the Court should dismiss the Complaint for failure to state a claim upon which relief can be granted due to (1) lack of standing and (2) failure to join necessary parties. If the Court does not grant dismissal on those grounds, then the Court should (1) dismiss all claims against the Department and the individually-named commissioners and (2) grant defendants summary judgment declaring that the

Commission has in all pertinent respects acted in accordance with its statutory and regulatory authority.

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