**IN THE COURT OF APPEALS OF MARYLAND**

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| JANE AND JOHN DOE, *et al.* | * | |
| *Appellants/Petitioners*, | * | |
| v. | * | September Term, 2017 |
| ALTERNATIVE MEDICINE MARYLAND, LLC | * | Case No. 148 |
| *Appellee/Respondent.* | * | |

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

**RESPONDENT'S OPPOSITION TO PETITIONERS' ANTICIPATED EMERGENCY BYPASS PETITION FOR WRIT OF CERTIORARI AND MOTION TO STAY CIRCUIT COURT ACTION**
**AND**
**APPELLEE'S OPPOSITION TO APPELLANTS' ANTICIPATED EMERGENCY MOTION FOR STAY OF PROCEEDINGS IN THE CIRCUIT COURT FOR BALTIMORE CITY AND/OR INJUNCTION**
**AND**
**REQUEST FOR HEARING**

COMES NOW the Appellee/Respondent, Alternative Medicine Maryland, LLC (hereinafter "Respondent"), by and through counsel, Brian S. Brown, Christopher T. Casciano, Brown & Barron, LLC, Byron L. Warnken, Byron B. Warnken, Warnken, LLC, John A. Pica, Jr., and John Pica and Associates, LLC, and hereby respectfully moves this Honorable Court to summarily deny (1) Appellants/Petitioners' anticipated emergency bypass petition for writ of certiorari and motion to stay circuit court action, and (2) Appellants/Petitioners' anticipated emergency motion for stay of proceedings in the Circuit Court for Baltimore City and/or injunction, and respectfully requests a hearing and a reasonable opportunity to be heard with regard to the above, and in support thereof, states as follows:

## I. INTRODUCTION

Based upon emails received from the moving parties, it is anticipated that, on June 2, 2017,

the Appellants/Petitioners/Proposed Intervenors, Jane Doe, John Doe, Curio Wellness, LLC, Doctor's Orders Maryland, LLC, Green Leaf Medical, LLC, Kind Therapeutics, USA, LLC, SunMed Growers, LLC, Maryland Wholesale Medical Cannabis Trade Association, and the Coalition for Patient Medicinal Access, LLC (hereinafter "Petitioners") will seek an emergency bypass petition for writ of certiorari and motion to stay circuit court action, and an emergency motion for stay of proceedings in the Circuit Court for Baltimore City and/or injunction. For the reasons stated herein, Petitioners' anticipated requests for "emergency" relief must be summarily denied.

Respondent received Petitioners' aforementioned petition and motions shortly after 4:00 p.m. on June 1, 2017, and upon review of such, felt compelled to respond in an expedited fashion to correct numerous errors, oversights, omissions and misrepresentations made by the Petitioners.

Respondent, in pursuing the underlying lawsuit, seeks, among other things, injunctive relief to address the Defendant below Natalie M. Laprade Maryland Medical Cannabis Commission's (the "Commission") unlawful, unconstitutional, arbitrary, and capricious actions, omissions and patent missteps in implementing and administering Maryland's Medical Cannabis Program. Specifically, the record developed below reflects that the Commission intentionally and/or negligently ignored its legislatively-mandated duty and directive to "actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." MD. CODE ANN., HEALTH GEN. §13-3306(a)(9) (2017). The Commission admittedly ignored race and ethnicity throughout the entire licensing process in clear contravention of its authorizing statute. Then, the Commission compounded this failure by replacing top ranked applicants with lower ranked applicants in the name of "geographic diversity," yet gave no consideration whatsoever to the racial and ethnic diversity of its applicant pool, and

subsequent pre-approved licensees.

At this juncture, the Commission (and now the Petitioners) with the underpinnings of a categorically flawed and unlawfully-implemented Medical Cannabis Program, now intend to turn a blind eye to the Commission's flagrant errors and omissions that have fatally infected the entire medical cannabis grower application and pre-approval process, and push forward with Stage 2 of the medical cannabis licensing process (*i.e.*, the granting and issuance of final licenses to begin growing, cultivating, selling and otherwise profiting from medical cannabis), without the inclusion of deserving applicants like the Plaintiff AMM, without the requisite programmatic active seeking of racial and ethnic diversity mandated by the Maryland Legislature, and with numerous inadequately capitalized licensees; again, all to the detriment of individually aggrieved and unsuccessful applicants who relied on the Commission to follow the law in implementing its licensing scheme, and the general public as a whole.

At the outset, Respondent is compelled to address various unfounded assertions by Petitioners that, by filing the instant action, it is somehow deliberately seeking to delay the distribution of medicine to patients. Nothing could be further from the truth. Instead, if there is any delay in implementing the Medical Cannabis Program, it is of the Defendant Commission's own making, in utterly failing to follow and/or blatantly disregarding the law. In an effort to expedite the underlying Circuit Court matter, Respondents have requested an expedited Scheduling Order with a short trial date, so as to ensure that the laws of Maryland are followed, and patients are permitted access to medical cannabis in a safe and expeditious manner.

Petitioners arguments in support of the requested "emergency" relief are fundamentally flawed in that they are based on an erroneous premise that the Commission's Stage 1 pre-approvals, and Stage 2 final licenses have been and will be issued and obtained in legal manner

and consistent with the intent of the Maryland Legislature; when, in reality, the facts demonstrate otherwise. It is Respondent's position that the entire licensing process, including but not limited to the granting of pre-approvals and the issuance of a final license to ForwardGro, LLC, was conducted in derogation of the law and in an unconstitutional, arbitrary and capricious manner, such that all medical cannabis pre-approvals, and any licenses stemming therefrom, are categorically invalid, and for which no entity can maintain a legitimate property right.

## II. BACKGROUND

### A. The Maryland Medical Cannabis Program

In 2013, the Maryland Medical Cannabis Commission was established by the Maryland Legislature to "develop policies, procedures, guidelines, and regulations to implement programs to make medical cannabis available to qualifying patients in a safe and effective manner." MD. CODE ANN., HEALTH GEN. §13-3302 (2017). In tasking the Commission with the implementation of Maryland's Medical Cannabis Program, which necessarily included the pre-approval and licensure of medical cannabis growers, the Maryland Legislature promulgated a series of statutory laws and directives, which affirmatively required that the Commission "**shall actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers**," and "**[e]ncourage applicants who qualify as a minority business enterprise**...." *Id.* § 13-3306(a)(9) (emphasis added).

A detailed review of the legislative history of Maryland Medical Cannabis Program, and its enacting and enabling legislation, evinces the Legislature's increasingly adamant demand for racial diversity and demonstrates a clear, unmistakable Legislature intent to achieve racial diversity in awarding medical cannabis grower licenses. As further evidence that the statute requires racial diversity in the awarding of medical cannabis grower licenses, the Legislature differentiated

between the awarding of licenses and encouraging applicants who qualify as minority business enterprises. It is clear that "actively seek" means something more than encourage minority applicants to apply. There is a striking change of expression between the requirement to "actively seek to achieve" diversity, Health Gen. § 13-3306(a)(9)(i)(1), and the requirement to "encourage" minority business enterprises to apply in the very next section of the statute. *Id.* § 13-3306(a)(9)(i)(2). Thus, had the Legislature only intended the Commission to merely encourage racial diversity, it would have done so. Instead, the Legislature made it clear that the Commission was to ***actively seek*** achieve racial and ethnic diversity in the awarding of grower licenses.

The Maryland Legislature, by way of Health Gen. § 13-3316, authorized and directed the Commission to "adopt regulations to implement" the medical cannabis statute and program. The Commission devised a two-stage application review and scoring process and promulgated regulations, which went through several drafts and public comment periods. The Commission determined that, during Stage I, it would issue "pre-approval" for up to 15 grower license applicants. COMAR 10.62.08.06(A)(1)(b). The Commission stated it intended to "award [grower] licenses to the best applications that most efficiently and effectively ensure public safety and safe access to medical cannabis." COMAR 10.62.08.05(G).

On January 23, 2015, the Commission issued "proposed" regulations that considered "racial, ethnic, and geographic diversity," and minority business enterprises in the criteria for Stage 1 grower license pre-approval.

During the 2015 Legislative Session, Delegate Christopher West requested advice from the Attorney General's ("AG") office about the constitutionality of the requirement to "actively seek to achieve" racial and ethnic diversity, and to "encourage" minority business enterprises to apply. Importantly, this request was not made by the Commission or any of its representatives. It was

made by a delegate solely in his capacity as a delegate. The Attorney General responded to Delegate West on March 13, 2015, by letter authored by Kathryn M. Rowe, an Assistant Attorney General, and the Commission subsequently obtained a copy of the letter. (*See* the March 13, 2015 Letter from Assistant Attorney General Kathryn M. Rowe to Delegate Chris West, attached hereto as **Exhibit A**). The letter stated, in part, that "constitutional limits, however, would prevent the Commission from conducting race or ethnicity-conscious licensing in the absence of a disparity study showing past discrimination in similar programs." The Attorney General also indicated that absent a disparity study, "the efforts of the Commission to seek racial and ethnic diversity among growers and dispensaries would have to be limited to broad publicity given to the availability of the licenses and encouragement of those from various groups."

On September 14, 2015, the Commission removed all references to and mention of racial and ethnic diversity from its regulations. This was seemingly after obtaining a copy and misinterpreting the letter from the Attorney General's office. The letter was never directed to the Commission, nor was it legal advice.

The final version of COMAR 10.62.08.05 provides that the Commission may consider geographic diversity for scoring purposes, but does not prescribe how geographic diversity factors into the Stage 1 rating system. **It is undisputed that none of the Commission's regulations mention or consider racial or ethnic diversity as part of the application or licensing process.** In fact, the Commission has acknowledged, through the testimony of witnesses, that it did not consider racial and ethnic diversity when awarding stage 1 license pre-approvals.

The Commission, in drafting, revising and finalizing the aforementioned regulations, and otherwise implementing Maryland's Medical Cannabis Program, failed to request additional advice from the Attorney General about whether and how to conduct the requisite "disparity study"

mentioned in the AG's letter. The Attorney General's Office has since (1) publicly admonished the Commission for completely failing to take racial and ethnic diversity into consideration based on the content of the March 13, 2015 letter; (2) publicly stated that the Commission could have researched whether there was evidence of racial disparity in industries similar to medical cannabis; and (3) noted that other agencies have employed efforts to promote racial and ethnic diversity in other new industries in Maryland, such as wind farming and gaming.

Stage 1 pre-approval is a substantial step towards obtaining a medical cannabis growing license. Once "pre-approved" by the Commission, the Stage 2 process requires the "pre-approved" applicant to submit an audited financial statement and an additional licensing fee; thereafter, by way of an on-site facility inspection, the Commission then determines whether the "pre-approved" applicant's growing premises and operations conform to the specifications in its pre-approved license. COMAR 10.62.08.07. Regrettably, in Stage 2, like in Stage 1, the Commission provides no opportunity to actively seek to achieve racial and ethnic diversity amongst the prospective medical cannabis grower licensees. Because the Commission presently can award no more than 15 medical cannabis growing licenses (*see* Health Gen. § 13-3306(a)(2)), those applicants not selected for Stage 1 pre-approval are forever precluded from participating in the program.

In erroneously believing that expressly considering applicants' race or ethnicity was somehow unconstitutional, the Commission completely abandoned any attempt to "actively seek to achieve racial or ethnic diversity" among licensed medical cannabis growers, including, but not limited to, conducting or ordering a disparity study, maintaining a bonafide outreach program, or any other available option to satisfy their legislative mandate. **It is undisputed that the Commission made no attempt to follow the express directive of the Legislature and "actively seek" racial and ethnic diversity when licensing medical cannabis growers.**

On September 28, 2015, the Commission released the Application for Medical Cannabis Grower License and announced that completed applications had to be submitted to the Maryland Department of Health and Mental Hygiene by 4:00 p.m. on November 6, 2015, together with the Stage 1 application fee of $2,000. On October 7, 2015, the Commission released a revised Application for Medical Cannabis Grower License to correct certain problems in the original, including that the weighted percentage scoring system set out in the original grower application totaled 105 percent rather than 100 percent. Each applicant was required to include with its application the name of each individual with at least five percent (5%) investment in the applicant company. COMAR 10.62.08.02(C)(2). **In is undisputed that the final grower application does not ask for the applicant's race, ethnicity, and/or anticipated growing location.**

The Commission received approximately 145 grower applications. It engaged the Towson University Regional Economic Studies Institute (hereinafter "RESI") to coordinate review of the grower applications. The Commission represented that RESI would conduct a "double-blind" Subject Matter Expert-based analysis of key applicant qualifications. Applicants' names were purportedly redacted from the applications and not revealed to the evaluators, and the Commission voted on the top-ranked grower applications only by coded number, with applicant identities ostensibly concealed. **It is undisputed that RESI did not consider a grower applicant's race, ethnicity and/or geographic growing location when scoring applications.**

On or about June 6, 2016, the Commission's Executive Director, Patrick Jameson, appointed the Grower Evaluation Subcommittee to review RESI's rankings. The Grower Evaluation Subcommittee was chaired by Commissioner Harry Robshaw, and included then Commissioner Deborah Miran, Commissioners Nancy Rosen-Cohen, Christina Gouin-Paul, and Jon Traunfeld.

The Grower Evaluation Subcommittee received RESI's final rankings on or about July 13, 2016, and received RESI's explanations for said rankings, based on the Subject Matter Expert analyses, one or two weeks later. On or about July 19, 2016, the Commission requested by email that grower applicants identify the location of their proposed facilities.

On or about July 28, 2016, Commissioner Robshaw reconvened the Grower Evaluation Subcommittee, which then replaced two of the top-15 applicants with lower-scored applicants in the name of "geographic diversity," but **took no action, after the top-15 applicants were identified, to actively seek to achieve racial or ethnic diversity among the prospective grower licensees.**

On August 5, 2016, the Commission held a public meeting at the University of Maryland Medical School where it announced the reshuffling of grower applicants, and on August 15, 2016, posted the final list of 15 "pre-approved" applicants on its website. Thereafter, on August 24, 2016, the Commission posted the rankings of the top-20 grower applicants.

Notwithstanding the regulations and actions taken by the Commission, at the time medical cannabis grower "pre-approvals" were issued on August 15, 2016, the medical cannabis statute nevertheless affirmatively stated that the Commission was required to actively seek to achieve racial and ethnic diversity amongst medical cannabis grower licensees; regrettably, the Commission made no effort to comply with this legislative mandate.

Respondent[1] filed a timely application to grow medical cannabis pursuant to the

[1] Respondent, Alternative Medicine Maryland, LLC is more than 80% African-American owned, and had verified and adequate capitalization to fund its comprehensive plan to help supply Maryland patients with medical cannabis. More specifically, Respondent has raised and/or secured commitments for in excess of Ten Million Dollars ($10,000,000) in capitalization to be utilized and invested in a medical cannabis growing operation in Easton, Maryland. Respondent has also actively sought to secure medical cannabis research partnerships with several companies in Canada whose executives and staff have been growing medical

Maryland Medical Cannabis Commission's fatally flawed scheme to license medical cannabis growers in Maryland. Respondent was not awarded a Stage 1 pre-approval to obtain a license to grow medical cannabis in Maryland. Subsequent to learning that it had not been awarded a Stage 1 pre-approval to grow medical cannabis in Maryland, Respondent came to believe that the law was not followed by the Commission in Stage 1 of the medical cannabis grower licensing process.

On October 31, 2016, Respondent filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief,[2] affirmatively seeking, among things, (1) a preliminary and permanent injunction prohibiting the Commission from granting and/or issuing final licenses to the first 15 pre-approved growers or taking any other steps under Stage 2 of the Commission's licensing scheme, until such time as the Commission took corrective action with respect to its unlawful, unconstitutional, arbitrary and capricious actions in implementing Maryland's Medical Cannabis Program; (2) a declaratory judgment declaring that the Commission's actions and omissions were unlawful, unconstitutional, arbitrary and capricious; (3) a judicial order requiring the Commission to redo Stage 1 of the grower license pre-approval process, in accordance with the requisite statutory criteria; and (4) a judicial order requiring the Commission to conduct or order a disparity study.

On December 30, 2016, some of the Petitioners moved to intervene in Respondent's underlying circuit court case, and on February 23, 2016, after a full hearing on the merits of intervention, the Circuit Court denied the Petitioners' motion to intervene. Respondent was

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marijuana for more than twenty years, in an effort to optimize the efficiency and effectiveness of any future medical cannabis product.

[2] Appellants falsely state in their Emergency Motion for Stay and/or Injunction, at p. 2, that Respondent waited until "May 2017 to file its motion for…preliminary injunction."

also successful in defeating a Motion to Dismiss during this same timeframe.

Thereafter, discovery ensued, with the Respondent propounding written discovery upon the Defendant Commission, noting and taking numerous discovery depositions, and otherwise proceeding forward with the litigation in preparation for a full trial on the merits.[3]

On May 15, 2017, upon learning that the issuance of final Stage 2 grower licenses was imminent, and with discovery ongoing, Respondents filed a Motion for Emergency Temporary Restraining Order. On May 25, 2017, the Circuit Court issued a Temporary Restraining Order[4] precluding the Commission from issuing any additional licenses, and scheduling a "full adversarial hearing on the propriety of granting a Preliminary Injunction" for 10:00 a.m. on June 2, 2017. (See May 25, 2017 Temporary Restraining Order, attached hereto as **Exhibit B**).

## III. PETITIONERS' UNSUCCESSFUL EFFORTS TO INTERVENE

As noted above, on December 30, 2016, some of the Petitioners moved to intervene in Respondent's underlying circuit court case, and on February 23, 2016, after a full hearing on the merits of intervention, the Circuit Court denied the Petitioners' motion to intervene. (See February 21, 2017 Order, attached hereto as **Exhibit C**). Thereafter, on May 31, 2017, Petitioners renewed their motion to intervene, which was again denied, as nothing had effectively changed from the time of the Circuit Court's earlier ruling in February 2017, aside

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[3] On April 27, 2017, Governor Larry Hogan formally requested that the Governor's Office of Minority Affairs (GOMA) "initiate a disparity study of the state's regulated medical cannabis industry and market" and directed that the study be completed "as expeditiously as possible **in order to ensure diversity in Maryland's medical cannabis industry**...as the issue of promoting diversity is of great importance to [the Governor] and [his] administration."

[4] The May 25, 2017 Temporary Restraining Order states, in part, "that Defendants, the Natalie M. LaPRade Maryland Medical Cannabis Commission, et al., including their agents, servants and/or employees, are hereby RESTRAINED and ENJOINED from authorizing, granting and/or issuing any final licenses to cultivate and grow medical cannabis in Maryland prior to a full adversarial hearing on the propriety of granting Preliminary Injunction." (See **Exhibit B**).

from the granting the temporary restraining order. (See May 31, 2017 Order, attached hereto as Exhibit D).

Petitioners would have this Court believe that the Circuit Court's rulings as to intervention were arbitrary and based upon inaccurate representations by Respondents, when in fact, the Court's Order references the Court's findings on the record supporting its ruling that intervention was inappropriate. (See Exhibit C).

In denying Petitioners' motion to intervene for the first time, the Circuit Court appropriately considered four factors that must be satisfied to justify intervention: (1) that the application for intervention was timely; (2) that the person claimed an interest related to the property or transaction that is the substance of the action; (3) that the person is so situated that the disposition of the action as a practical matter may impair or impede that person's ability to protect their interest; and (4) that the person's interest is not adequately represented by existing parties to the suit. Id. at pp. 3-4.

First, the Court determined that the intervenor's application was timely. Id. at 4. The Court then determined that the transaction at issue stemmed from the implementation of the medical cannabis statute by the Commission, and whether or not the statute had been applied or implemented in an unconstitutional, arbitrary or capricious manner; an interest that the Court determined rested solely with the Commission. Id. at 4-5. The Court noted that Petitioners had a general interest in the outcome of the litigation, but that said interest did not rise to the level to warrant a right of intervention. Id. at 7. Lastly, the Court recognized that the Commission, represented by the Attorney General's office, more than adequately represented the interests of Petitioners, both growers and potential patients alike. Id.

Petitioners have already appealed the Circuit Court's first denial of their Motion to

Intervene, and the Court of Special Appeals has issued a briefing schedule. (See Exhibit E). Notably, Petitioners never requested that the Court of Special Appeals expedite or advance the schedule in any fashion. Now, as a last ditch effort of pure desperation, Petitioners are attempting to hijack the litigation from which they have already been appropriately denied access. This Honorable Court should deny all requested relief.

## IV. PETITIONERS' REQUEST FOR STAY OF CIRCUIT COURT PROCEEDINGS AND/OR FOR INJUNCTIVE RELIEF

In seeking a stay of the circuit court proceedings and/or injunctive relief, Petitioners have failed to satisfy the prerequisites for such extraordinary relief, and have conveniently ignored the distinct and real likelihood that Respondent will succeed on the merits.

The record thus far evinces the Commission's illegal and unfounded abandonment of racial and ethnic diversity throughout its implementation and management of Maryland's Medical Cannabis Program. Furthermore, Respondent has conclusive and undeniable proof that the Defendant Commission acted illegally, unconstitutionally, arbitrarily, and capriciously, in intentionally and/or negligently ignoring its legislatively-mandated duty to "actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." The Commission categorically ignored race and ethnicity throughout the medical cannabis grower application, pre-approval and licensing processes, in clear contravention of its authorizing statute.

On August 26, 2016, the Washington Post printed an article wherein Raquel Coombs, a spokeswoman for Attorney General Frosh, indicated that "the commission could have researched whether there is evidence of racial disparity in industries similar to medical marijuana" and "[i]f there is…the commission would be justified in taking race into account." (Fenit Nirappil, *Hogan, Frosh concerned about lack of diversity in Maryland's medical pot licenses*, The Washington Post,

August 26, 2016). Ms. Coombs was further quoted as saying that "[t]he attorney general strongly believes that this [medical cannabis] industry should reflect the diversity of the state." *Id.*

The Maryland Legislature's clear directive to actively seek to achieve racial and ethnic diversity amongst the medical marijuana grower licensees was demonstrably clear. Equally patent from the factual record and sworn testimony thus far is the fact that the Commission admittedly, completely, and unjustifiably ignored race and ethnicity when pre-approving 15 stage 1 medical cannabis grower licenses. The Commission is owed no deference when it fails to follow an express statutory directive.

WHEREFORE, Appellee/Respondent respectfully requests that this Honorable Court:

A. Deny Petitioners' Emergency Bypass Petition for Writ of Certiorari;

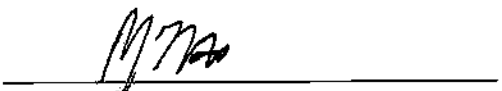
B. Deny Petitioners' Motion to Stay Circuit Court Action;

C. Deny Appellants' Emergency Motion for Stay of Proceedings in the Circuit Court for Baltimore City and/or Injunction; and

D. For such other and further relief as this Honorable Court deems appropriate and just.

Dated: June 2, 2017

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 2017, copies of the forgoing were sent by first-class mail, postage prepaid, and via electronic mail, to:

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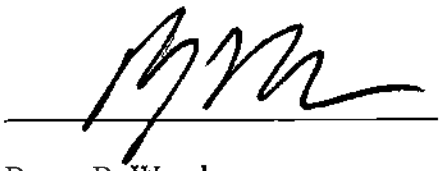

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**IN THE COURT OF APPEALS OF MARYLAND**

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| ALTERNATIVE MEDICINE MARYLAND, LLC | * | Case No. |
| *Appellee/Respondent.* | * | |

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

**REQUEST FOR HEARING**

Appellee/Respondent, Alternative Medicine Maryland, LLC, hereby requests a hearing and a reasonable opportunity to be heard on the foregoing (1) Petitioners' anticipated emergency bypass petition for Writ of Certiorari and motion to stay circuit court action, and (2) Appellants' anticipated emergency motion for stay of proceedings in the Circuit Court for Baltimore City and/or injunction.

Brian S. Brown

**IN THE COURT OF APPEALS OF MARYLAND**

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**CERTIFICATION OF RESPONDENT'S OPPOSITION TO PETITIONERS' ANTICIPATED EMERGENCY BYPASS PETITION FOR WRIT OF CERTIORARI AND MOTION TO STAY CIRCUIT COURT ACTION AND APPELLEE'S OPPOSITION TO APPELLANTS' ANTICIPATED EMERGENCY MOTION FOR STAY OF PROCEEDINGS IN THE CIRCUIT COURT FOR BALTIMORE CITY AND/OR INJUNCTION AND REQUEST FOR HEARING**

Appellee/Respondent, Alternative Medicine Maryland, LLC, by undersigned counsel hereby certifies that:

1.) The word count of the above captioned motion is 3,878 using the Microsoft Word track changes feature.

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# EXHIBIT A

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 13, 2015

The Honorable Chris West
303 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate West:

You have asked for advice concerning the validity of certain provisions of the Natalie M. LaPrade Medical Marijuana Commission Law. Specifically, you have asked whether these provisions are unconstitutional. It is my view that these provisions must be administered in accordance with the United States Constitution, but, in the event that they were found to be unconstitutional, they would be severable from the remainder of the law.

Health - General Article, § 13-3309(a)(9)(i) provides that, in licensing growers of medical marijuana, the Medical Marijuana Commission ("the Commission") shall:

> 1. Actively seek to achieve racial, ethnic, and geographic diversity when licensing medical marijuana growers; and
>
> 2. Encourage applicants who qualify as a minority business enterprise, as defined in § 14-301 of the State Finance and Procurement Article.

Health - General Article, § 13-3310(c), which relates to the licensing of dispensaries, provides that the Commission shall:

> (2) Actively seek to achieve racial, ethnic, and geographic diversity when licensing dispensaries.

In the bill review letter on House Bill 881 (Chapter 240) and Senate Bill 923 (Chapter 256) of 2014, the Attorney General advised "that these provisions be implemented consistent with the provisions of the United States Constitution as described in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013)." *See* Form Bill Review letter dated April 11, 2014. It is well-established that a race-conscious affirmative action program is subject to strict scrutiny and will be upheld by the courts only if it is narrowly tailored to achieve a compelling public purpose. 91 *Opinions of the Attorney General* 181, 182 (2006), citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488

U.S. 469 (1989). The *Croson* case held that a governmental entity has a compelling interest in remedying identified past and present race discrimination. *Id.* at 492, 509. For this interest to be compelling, the government must be able to identify discrimination in the relevant market in which the entity is a participant. *Id.* at 501-504. In addition, there must be a "strong basis in evidence" of that discrimination at the time the program is established. *Id.* at 500, 510. In the context of government contracting, which was the subject of *Croson*, this requires a study showing a "significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *HB Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 241 (4th Cir. 2010). The *Fisher* case, for our purposes, confirms that the test set out in *Croson* still stands, and that a Court will closely scrutinize a government's justification of a race-conscious program and its evidence in support of that program.

The provisions of *Croson* and *Fisher* apply to ethnicity in the same way as race. They do not, however, apply to geographically conscious programs. Thus, the law should be read to have full force to the extent that it requires the Commission to seek geographic diversity to the extent possible. Moreover, it is not unconstitutional to encourage businesses of any type, including those in the minority business enterprise program, to apply to participate in any type of government program. Constitutional limits, however, would prevent the Commission from conducting race- or ethnicity conscious licensing in the absence of a disparity study showing past discrimination in similar programs. I am aware of no study that would cover grower or dispensary licensees, or even licensing in general. Most State licensing programs license everyone who meets the licensing qualifications, and thus would not give rise to the ability to pick some and not others. As a result, the efforts of the Commission to seek racial and ethnic diversity among growers and dispensaries would have to be limited to broad publicity given to the availability of the licenses and encouragement of those from various groups.

Even if the provisions are implemented in a way that leads to a determination of their invalidity, however, it is my view that they are severable from the remainder of the law. The primary inquiry in this determination is what would have been the intent of the legislature had they known that these provisions could not be given effect. *Davis v. State*, 294 Md. 370, 383 (1982). Generally courts will assume "that a legislative body generally intends its enactments to be severed if possible." *Id*; *see also* Article 1, § 23 ("[t]he provisions of all statutes . . . are severable unless the statute specifically provides that its provisions are not severable."). Thus, "when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion." *Id.* at 384. In this case, it is clear that the program is "complete and capable of execution," *Migdal v. State*, 358 Md. 308, 324 (2000), without the diversity provisions. Therefore, it is our view that, if found invalid, the diversity provisions would be treated as severable and the remainder of the law would remain in effect.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
west01.wpd

# EXHIBIT B

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

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

ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION

FOR TEMPORARY RESTRAINING ORDER

Upon consideration of Plaintiff's Emergency Motion for Temporary Restraining Order (#72), Defendants' response, affidavits filed, arguments presented at the hearing, and for the reasons stated on the record, it is this 25th day of May, 2017, at 3:10 p.m., by the Circuit Court for Baltimore City,

**ORDERED** that the Plaintiff's Emergency Motion for Temporary Restraining Order (#72) be, and the same hereby is, **GRANTED** conditioned on posting of bond in the amount of $ 100.00 and pursuant to Maryland Rule § 15-504 on the grounds that irreparable harm will result to Plaintiff in the form of loss of ability, once all licenses are issued, to seek redress to resolve a potentially arbitrary and capricious or unconstitutional first time application of the applicable statutes to the medical cannabis industry, if this order is not issued; and it is further

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

**ORDERED** that any person affected by this order may apply for a modification or dissolution of the order on two days' notice to the party who obtained the order; and it is further

**ORDERED** that a full adversarial hearing on the propriety of granting a Preliminary Injunction will be held in front of this Court on Friday June 2, 2017 at 10:00am; and it is further

**ORDERED** that this order shall expire in ten (10) days time, on June 4th, 2017.

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TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

Judge Barry G. Williams
Circuit Court for Baltimore City
Signature appears on the original document

Judge Barry G. Williams
Circuit Court for Baltimore City

CIRCUIT COURT FOR BALTIMORE CITY
1983

**Notice to the Clerk:**
**Please Mail Copies to All Parties**

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# EXHIBIT C

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

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

**ORDER**

Proposed Intervening Defendants, John and Jane Doe, the Coalition for Patient Medical Access, LLC, Curio Cultivation, LLC, ForwardGro, LLC, Doctors Orders Maryland, LLC, and SunMed Growers, LLC, filed a Motion to Intervene in this case on December 30, 2016. (Pleading No. 24). Defendants Natalie M. Laprade Maryland Medical Cannabis Commission, *et al.*, filed a timely response (Pleading No. 24/2). Plaintiff Alternative Medicine Maryland, LLC (Pleading No. 24/4) filed a timely opposition and on February 21, 2017, the court heard argument.

The Court has considered Proposed Intervening Defendants' Motion to Intervene, the Opposition thereto, and the oral arguments of counsel. For the reasons set forth on the record in open court, it is this 21st day of February, 2017,

**ORDERED**, that the Proposed Intervening Defendants' Motion to Intervene (Pleading No. 24) is hereby **DENIED**.

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Marilyn Bentley
MARILYN BENTLEY, CLERK

The Judge's signature appears on the original document.
Judge Barry G. Williams

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# EXHIBIT D

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

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

**ORDER**

Upon consideration of Jane Doe, John Doe, Curio Wellness, LLC, Doctor's Orders Maryland, LLC, Green Leaf Medical, LLC Kind Theraputics, USA, LLC, SunMed Growers, LLC, Maryland Wholesale Medical Cannabis Trade Association, and the Coalition for Patient Medicinal Access, LLC's motions entitled "Emergency Motion to Dissolve or Modify TRO; For Renewal of the Motion to Intervene; To Intervene in this Action; To Consolidate; For Stay Pending Appeal; And In Opposition To Motion for Preliminary Injunction," and "Motion to Shorten Time to Respond to Renewal of the Motion to Intervene, Motion to Intervene in this Action, To Consolidate, For Stay Pending Appeal And Motion To Continue June 2, 2017 Hearing; and Opposition to Motion for Preliminary Injunction" and "Motion to Continue June 2, 2017 Hearing" it is this 31st day of May, 2017, by the Circuit Court for Baltimore City:

**ORDERED**, that that above entities' motion entitled "Emergency Motion to Dissolve or Modify TRO; For Renewal of the Motion to Intervene; To Intervene in this Action; To Consolidate; For Stay Pending Appeal; And In Opposition To Motion for Preliminary Injunction" is **DENIED** and all motions therein are **DENIED**; and it is further

**ORDERED** that that above entities' motion entitled "Motion to Shorten Time to Respond to Renewal of the Motion to Intervene, Motion to Intervene in this Action, To

**Notice to Clerk: Please mail copies to all parties.**

Consolidate, For Stay Pending Appeal And Motion To Continue June 2, 2017 Hearing; and Opposition to Motion for Preliminary Injunction" is **DENIED** and all motions therein are **DENIED**; and it is further

**ORDERED** that that above entities' motion entitled "Motion to Continue June 2, 2017 Hearing" is **DENIED.**

Judge Barry G Williams
Circuit Court for Baltimore City
Signature appears on the original document

Judge Barry G. Williams
Circuit Court for Baltimore City

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TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY
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# EXHIBIT E

# Court of Special Appeals

*Robert C. Murphy Courts of Appeal Building*
*Annapolis, Md. 21401-1699*

GREGORY HILTON
CLERK

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No. 00040, September Term, 2017
CROSS APPEAL FILED
MULTIPLE APPEAL FILED

**IMPORTANT**
**This is how the case must be titled on all briefs.**

Jane Doe et al.
vs.
Alternative Medicine Maryland LLC et al.

The Record in the captioned appeal was received and docketed on 05/25/2017.

The brief of the APPELLANT is to be filed with the office of the Clerk on or before 07/05/2017. (Rule 8-502(a)(1)).

The brief of the APPELLEE is to be filed with the office of the Clerk on or before 30 days after filing of appellant's brief (Rule 8-502(a)(2)).

This appeal has been set for argument before this Court one of the following days:
February 01, 02, 05, 06, 07, 08, 09, 12, 2018.

IF, DUE TO A CURRENTLY SCHEDULED COURT APPEARANCE OR OTHER EXTRAORDINARY CAUSE, YOU WILL BE UNABLE TO APPEAR ON ONE OR MORE OF THESE DATES, YOU MUST INFORM THE CLERK WITHIN TEN DAYS AFTER THE DATE OF THIS NOTICE. OTHERWISE, THE DATE SELECTED FOR ARGUMENT WILL NOT BE CHANGED.

Stipulations for extensions of time within which to file briefs will only be accepted if the appellee's brief will be filed at least 30 days, and any reply brief, at least 10 days, before the scheduled argument or submission on brief (Rule 8-502(b)).

NOTICE: Law firm name and address must be printed on brief and record extract.

May 25, 2017

No. 00040, September Term, 2017

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GREGORY HILTON

CLERK OF THE COURT
OF SPECIAL APPEALS

Circuit Court Case #: 024C16005801R00

May 25, 2017

## NOTICE TO ALL COUNSEL

Your Name and Address and your law firm's name, must be printed on your brief and record extract.

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