AlaFile E-Notice

03-CV-2024-900524.00

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC V. ALABAMA MEDICAL CANNABIS COMMISSION ET AL
03-CV-2024-900524.00

The following complaint was FILED on 4/15/2024 10:10:51 AM

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GINA J. ISHMAN
CIRCUIT COURT CLERK
MONTGOMERY COUNTY, ALABAMA
251 S. LAWRENCE STREET
MONTGOMERY, AL, 36104

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03-CV-2024-900524.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC; Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION; REX VAUGHAN, in his official capacity as Member of the Alabama Medical Cannabis Commission; SAM BLAKEMORE, in his official capacity as Member of the Alabama Medical Cannabis Commission; DWIGHT GAMBLE, in his official capacity as Member of the Alabama Medical Cannabis Commission; DR. JIMMIE HARVEY, in his official capacity as Member of the Alabama Medical Cannabis Commission; JAMES HARWELL, in his official capacity as Member of the Alabama Medical Cannabis Commission; TAYLOR HATCHETT, in her official capacity as Member of the Alabama Medical Cannabis Commission; DR. ERIC JENSEN, in his official capacity as Member of the Alabama Medical Cannabis Commission; DR. ANGELA MARTIN in her official capacity as Member of Alabama Medical Cannabis Commission; CHARLES PRICE, in his official capacity as Member of the Alabama Medical Cannabis Commission; DR. WILLIAM SALISKI, in his official capacity as Member of the Alabama Medical Cannabis Commission; LOREE SKELTON, in her official capacity as Member of the Alabama Medical Cannabis Commission; DR. JERZY SZAFLARSKI, in his official capacity as Member of the Alabama Medical Cannabis Commission; and RICK PATE, in his official capacity as Commissioner of the Alabama Department of Agriculture and Industries, Defendants.	)	Case No. 03-CV-2024-900524

FIRST AMENDED VERIFIED PETITION FOR JUDICIAL REVIEW AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

On May 17, 2021, Governor Ivey signed the Darren Wesley "Ato" Hall Compassion Act

(the Compassion Act) into law. The Compassion Act was intended to create an intrastate medical cannabis industry to provide cannabinoid medication to Alabamians with medical conditions treatable with such medication. The Legislature carefully crafted the Compassion Act to avoid the problems that plagued medical cannabis programs in other states. But the Alabama Medical Cannabis Commission has assiduously ignored the Compassion Act's mandates, and in so doing has caused the entire program to be mired in litigation for over a year. Now, it appears obvious that due process deficiencies in the Commission's investigative hearing "remedy" will delay the process for another year. Accordingly, Alabama Always, LLC (Alabama Always) asks the Court to take control over the process, appoint a special master, and determine which applicants are able to satisfy the Compassion Act's requirements.

With proposed legislation delayed by the Commission's lobbying for immunity from litigation and for protection from the Alabama Administrative Procedure Act (AAPA) and the Open Meetings Act, which are designed to ensure that government operates in the daylight, the only path forward is for this Court to take control and use its equitable powers to enforce the original provisions of the Compassion Act so that medical cannabis gets to the patients who need it.

The Legislature designed the Compassion Act with three overriding, equally important goals in mind: first, to prevent medical cannabis from being a stalking horse to pave the way for the legalization of recreational cannabis and all of its attendant ills; second, to ensure that the industry would be in a position to get medication to patients as quickly as possible; and third, to ensure that the integrated licensees were responsible entities with the means to get up and running and then to stay the course in the event of unforeseen business difficulties. The Commission has attempted to award integrated licenses on three occasions—June 12, August 10, and December 12—and on each occasion has ignored the Compassion Act's statutory mandates. In fact, in those three meetings, the Commission awarded licenses to a total of nine integrated applicants, *none of whom fully complied with the Compassion Act's statutory mandates*.

The Compassion Act contained three provisions stating the Legislature's clear intent to prevent licenses being issued to companies with ownership by persons and entities involved in the recreational cannabis industry in other states. The Commission has ignored these statutory restrictions. On December 12, for example, the Commission again awarded licenses to companies whose ownership includes major players active in the recreational cannabis industry in other states.

To ensure that the industry would get medication to patients as quickly as possible the Compassion Act required cultivators and integrated licensees to demonstrate the ability to commence cultivation within 60 days after licensure notification. The Act also required that the Commission adopt a process for inspecting each cultivation facility before licensing, and also specifically required that each cultivation facility undergo an inspection prior to being issued a license to insure that the applicant was ready to cultivate in 60 days. The Commission has completely ignored these statutory mandates at every turn.

The Compassion Act also had provisions designed to ensure that integrated licensees had the ability to stay the course. To ensure that the integrated licensees were responsible entities with the means to get up and running, the Compassion Act requires applicants to have $250,000.00 in capital *and also* sufficient funds to sustain their cultivation of cannabis in sufficient quantities to supply five retail dispensaries *for two years without income*. And to give the State a remedy if the licensee doesn't perform, the Legislature required that each integrated licensee obtain a $2 million performance bond from a reputable surety who would underwrite that risk by assessing the applicant's compliance with the requirements of the law and their financial ability to sustain their business. Recognizing that medical cannabis cultivation is a challenging undertaking that can be beset with production challenges from pests and weather, the Legislature required that 51 percent of a licensee's equity ownership have at least 15 years of agriculture experience. The Commission ignored all of these requirements in awarding licenses on June 12, August 10, and December 12.

On December 12, 2023, the Commission awarded integrated licenses for the third time,

the two previous attempts occurring on June 12 and August 10, 2023. As with the previous two occasions, at its December 12 meeting, the Commission violated the Open Meetings Act and the AAPA. These violations are not mere technicalities; instead, they allowed the Commission to conduct its business in secret, out of the public eye. The end result is that, of the nine applicants who have been awarded integrated licenses at one time or another, a majority are unable to meet the statutory requirements, including but not limited to the 60-day cultivation requirement, the $2 million performance bond requirement, the agriculture experience requirement, the prohibition against ownership by recreational cannabis companies, and other mandatory "pass-fail" statutory requirements.

The Commission's disregard of the Compassion Act's mandatory requirements was initially accomplished by the use of a complicated, 48-page scoring system that awarded points for irrelevant and insignificant criteria such as commercial drivers' licenses and transportation but *did not award points for the mandatory statutory criteria.* It is notable that this scoring system was not published as a rule for public notice and comment as required by the AAPA so that applicants were not able to point out its shortcomings. As a result, the Commission's first and second license awards on June 12 and August 10 were largely to companies that were involved in recreational cannabis in other states, and that did not have performance bonds, the required agricultural ownership, the ability to commence cultivation in 60 days, or even a production facility.

The Commission ultimately agreed not to use the scoring system that was responsible for the skewed results of the June 12 and August 10 awards, but replaced it with an arbitrary ranking system that did not require compliance with the Compassion Act's mandatory requirements. As before, the Commission was able to accomplish this by ignoring the requirements of the Open Meetings Act and the AAPA.

There is an unwritten rule in American life: three strikes and you're out. The Commission has had three opportunities to effectuate the mandates of the Compassion Act, to abide by the due process guarantees of the AAPA, and to conduct its business in public as

mandated by the Open Meetings Act. It has failed miserably every time. And rather than demonstrating contrition and a desire to abide by the law, the Commission has, on information and belief, lobbied the Legislature to exempt it from the AAPA and the Open Meetings Act, the very laws that ensure that government in Alabama is accountable to the Alabama people.

After a year of litigation and failed licensure attempts, no reasonable person could conclude that the Commission will change its ways and start following the law. The investigative hearing process touted by the Commission is hopelessly in conflict with the AAPA due process guarantees, and it will take the Commission the better part of a year to devise a contested case procedure that comports with the AAPA's due process requirements. Because of these exceptional circumstances, Alabama Always respectfully asks the Court to take control, appoint a special master, and direct the special master to effectuate the mandates of the Compassion Act by ascertaining which applicants comply with those mandates. This is the most expeditious way to end the Commission's insanity and get medical cannabis to the people who need it.

Petition for Judicial Review and Complaint

In accordance with Alabama Code §§ 41-22-10, -20(a) & -20(d), and Alabama Code § 20-2A-57(f), Alabama Always files this first amended verified petition for judicial review and complaint for declaratory and injunctive relief against the Alabama Medical Cannabis Commission, Rex Vaughan, Sam Blakemore, Dwight Gamble, Dr. Jimmie Harvey, James Harwell, Taylor Hatchett, Dr. Eric Jensen, Dr. Angela Martin, Charles Price, Dr. William Saliski, Loree Skelton, and Dr. Jerzy Szaflarski,[1] each in their official capacities as members of the Alabama Medical Cannabis Commission (collectively, the Commission members); and Rick Pate, in his official capacity as the Commissioner of the Alabama Department of Agriculture and Industries (the AG Department), as follows:

[1] Alabama Always understands that Dr. Szaflarski has resigned from the Commission.

I. The Nature of the Agency Action Which is the Subject of the Petition, and the Particular Agency Action Appealed From

1. Alabama Always appeals from the Commission's December 12, 2023 agency action denying Alabama Always's application for an integrated facilities license under the Compassion Act. Alabama Always also appeals from the Commission's inspections and certifications of cultivator and integrated facilities that have occurred since December 1 and December 12, but which have not been properly noticed.

2. As explained in this petition and complaint for declaratory and injunctive relief, the Commission failed to comply with the Compassion Act's very clear licensing requirements. The Commission also has failed to comply with AAPA and the Commission's own rules. In addition, its actions were unreasonable, arbitrary, capricious, and an abuse of discretion. Finally, the Commission has adopted rules that exceed its authority, or whose adoption violated the AAPA.

II. The Facts and Law on Which Jurisdiction and Venue are Based

3. Alabama Always is an Alabama limited liability company and an applicant for an integrated facility license pursuant to the Compassion Act.

4. The Commission is an agency of the State of Alabama created by the Compassion Act to license medical cannabis cultivators, processors, transporters, dispensaries, and integrated producers.

5. William Saliski, Jr., D.O.; Sam Blakemore; Dwight Gamble; Angela Martin, M.D.; Dr. Eric Jensen; Loree Skelton; Rex Vaughn; Charles Price; Taylor Hatchett; James Harwell; Jimmie Harvey, M.D., Jerzy Szaflarski, M.D., Ph.D.;[2] and Dion Robinson are all members of the Commission.

6. Rick Pate is the Commissioner of the AG Department and is sued in his official capacity.

[2] As noted, Dr. Szaflarski has resigned from the Commission. Once his resignation is effective, Alabama Always will add his replacement as a defendant.

7. Alabama Code § 20-2A-57(f) grants any person who is aggrieved by an action of the Commission the right to appeal the action in the circuit court where the Commission is located. Venue is thus proper in this Court.

8. In addition, venue is also proper in this Court because Alabama Code § 41-22-20(b) provides that all petitions challenging agency action "shall be filed either in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters."

9. Prior to filing this petition, Alabama Always has served the Commission via hand delivery with a notice of appeal and appropriate cost bond, as required by Alabama Code § 41-22-20(b), on January 3, 2024 and April 3, 2024.

10. Alabama Always seeks relief under Alabama Code § 41-22-20(a) from a preliminary or intermediate action that, in the absence of injunctive relief, threatens Alabama Always with irreparable harm.

11. Alabama Always also seeks relief under Alabama Code § 41-22-10, which provides for injunctive and declaratory relief against any rule that exceeds an administrative agency's authority or that was adopted in violation of the AAPA.

III. Grounds on which Relief is Sought

Background

The Compassion Act

12. Under the Compassion Act, the Commission is charged with awarding licenses to cultivate, transport, test, and dispense medical cannabis in the State, including integrated facility licenses that combine cultivation, processing, transport, and dispensing of medical cannabis.

13. The Compassion Act and the Commission established criteria that it must consider when granting licenses under the Compassion Act.

14. Some of these criteria related to market and demographic conditions in Alabama and communities where facilities might be located, such as population, the anticipated number

of qualified patients, market demand, unemployment, access to healthcare, and infrastructure. *See* Ala. Admin. Code r. 586-X-3-.11(a)-(g). The Commission did not follow these criteria in awarding and denying licenses.

15. Other criteria adopted by the Commission related to specific qualifications of potential licensees. Among these criteria were whether an applicant would fully utilize its license authorization, how quickly an applicant could commence operations and reach full capacity, and whether an applicant would be able to minimize cost to patients. Ala. Admin. Code r. 586-X-3-.11(h)–(j). The Commission did not follow these criteria in awarding and denying licenses.

16. Other criteria related to financial ability and responsibility, business history, moral suitability, and minority participation. For example, the Compassion Act requires that applicants have $250,000 of capital on hand, have sufficient funds in their company to sustain cultivation of cannabis in sufficient quantities to supply five retail dispensaries for two years without income, and provide a performance bond in the amount of $2 million dollars or a letter of commitment (or other similar acknowledgment) of the applicant's ability to secure a two-million-dollar performance bond from a highly rated insurance company. Ala. Code § 20-2A-67(c). Four of the five integrated licenses that the Commission awarded on December 12 were to applicants that did not satisfy the statutory bond requirement.

17. And still other statutory criteria required cultivators (including integrated facilities) to be able to "demonstrate the ability to commence cultivation of cannabis within 60 days of application approval notification." *Id.* § 20-2A-62(c)(1). And the rules adopted by the Commission pursuant to this statute provide that consideration should be given to "[t]he number of days, if awarded a license, within which the Applicant reasonably projects it will commence operations as to each facility identified in the application, and the number of days within which the Applicant reasonably projects it will reach full capacity as to the operations contemplated with regard to each facility identified in the Application." Ala. Admin. Code r. 538-x-3-.05. At least three of the Commission's integrated license awards on December 12 were

to applicants who did not demonstrate the ability to commence cultivation in a permanent, enclosed facility within 60 days. The requirement of a permanent, enclosed facility is found in the rules and regulations adopted by the AG Department, which means that it has the force of law.

18. Another statutory requirement was that at least fifty-one percent of the ownership in each successful applicant was required to have at least fifteen years of agricultural experience. The Commission has not enforced this requirement, and some of the December 12 awards were to entities who did not satisfy this requirement.

19. The Commission's repeated refusal to follow the law has delayed the availability of medical cannabis in two major ways. First, it has resulted in extensive litigation because applicants were well aware that the Commission was refusing to follow the law. Applicants are not legally entitled to an integrated cannabis license, but they are entitled to require that the Commission follow the Compassion Act and all other Alabama laws and rules in awarding licenses. Second, the companies who have been awarded licenses have been generally unable to begin operations and produce medical cannabis expeditiously so that it can get into the hands of the people who need it.

20. Notably, the AG Department has exclusive authority to issue licenses and to regulate licensees in the cultivator category under the Compassion Act:

> The commission shall license and regulate all aspects of medical cannabis under this article, *excluding cultivation. The Department of Agriculture and Industries shall license and regulate the cultivation of cannabis*. For integrated facility licenses, the commission and the department shall enter into a memorandum of understanding relating to *the sharing of regulatory and licensing and enforcement authority over licensees with regard to the cultivation function.*

Ala. Code § 20-2A-50(b) (emphasis added).

21. The AG Department thus has sole and exclusive authority to issue licenses and to regulate all persons and entities licensed as cultivators under the Compassion Act.

22. The AG Department has issued its own regulations with which cultivators and integrated facilities must comply. *See generally* Ala. Admin. Code r. 80-14-1-.01 *et seq.*

The AAPA's Contested Case Provisions

23. The Commission is subject to the AAPA. *See* Ala. Code § 20-2A-20(p).

24. Compliance with the AAPA "assur[es] a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions" and provides a "minimum procedural code for the operation of all state agencies." *Id.* § 41-22-2(a) & (b)(1)c.

25. The AAPA requires each state agency (like the Commission) to adopt "rules of practice." *Id.* § 41-22-4(a)(2). "Adoption of rules describing the internal organization of an agency and the actual procedures and policies of a state agency will enable the public to hold agencies to the standards to which it is intended they be held." *Id.* As explained by the commentary to the AAPA, "there can be no openness in government, indeed no due process of law, without publication of, and full public access to, the rules by which the government governs." *Id.* § 41-22-7 cmt.

26. In addition to its rule-making requirements, the AAPA sets forth minimum procedures for when an applicant (like Alabama Always) is granted or denied a license. A proceeding for the grant or denial of a license is called a "contested case" proceeding. *See id.* § 41-22-19(a). The minimum procedures required by the AAPA include an "opportunity for a hearing" in a contested case proceeding. *Id.* § 41-22-12(a). "These provisions are intended to ensure that no action is taken against the licensee without due process of law." *Id.* § 41-22-19 cmt.; *see also id.* ("[T]he licensee does have a right to due process of law in the application of licensing provisions.").

27. Before an application for a license can be denied, the AAPA requires the agency to serve notice on the applicant with a "short and plain statement of the matters asserted"—in other words, the reasons why the application was denied. *Id.* § 41-22-12(b). The Compassion Act reiterates this in Alabama Code § 20-2A-57(c), stating that "[t]he commission shall comply with the hearing procedures of the Administrative Procedure Act when denying, revoking, suspending, or restricting a license."

28. Then a hearing must occur and "[o]pportunity shall be afforded all parties to

respond and present evidence and argument on all material issues involved and to be represented by counsel at their own expense." Ala. Code § 41-22-12(e). Discovery can occur before the hearing, and the "[f]indings of fact [from the hearing] shall be based solely on the evidence in the record and on matters officially noticed in the record." *Id.* § 41-22-12(e) & (h).

29. The hearing requirement of the AAPA "conforms to due process requirements by allowing each interested party to present favorable evidence and by providing the opportunity to attack adverse evidence, as well as providing for legal representation at the expense of the client." *Id.* § 42-22-12 cmt.

The Commission's Emergency Rule and Ranking Rule

30. At the Commission's October 12 meeting, it adopted a new "emergency rule," Alabama Administrative Code r. 538-x-3-.20 (the Emergency Rule). The Emergency Rule provided a procedure for considering applications and for considering the scores that had been generated by the illegal application scoring rules.

31. The procedure requires each Commissioner to rank all 36 applicants for integrated licenses in descending order. The staff then averages the rankings to obtain a single composite ranking, and the average ranking thus generated determines the order in which the applicants are considered for licenses.

> In order to determine the order in which Applicants should be considered, each Commissioner will be given an opportunity to submit, in an open meeting, *a written form providing an overall preliminary rank, in descending order, of each of the Applicants in the license category*, giving due consideration to all statutory and regulatory criteria. Such forms shall be tabulated and averaged by the Commission staff and used solely to determine the order in which individual Applicants are subsequently considered. In those instances where two or more applicants receive identical average rankings, the order shall be determined by a drawing. The Chair will call for a motion to approve or deny each application in the order established above. Following such motion, duly seconded, the Chair will provide an opportunity for further deliberations and a vote.

Ala. Admin. Code r. 538-X-3-.20 & -.20ER (emphasis added).

32. This procedure (the Ranking Rule) is also contained in a non-emergency Commission rule, Alabama Administrative Code r. 538-X-3-.20, which was also adopted at the

October 12, 2023 meeting.

The Commission's Investigative Hearing Procedure

33. Also, at its October 12 meeting, the Commission voted to revise its rule entitled, "Denial of Application; Request for hearing from Application Denial," Alabama Administrative Code r. 538-x-3-.18," which sets forth an investigative hearing procedure for applicants whose license applicants have been denied (Rule .18).

34. This investigative hearing in Rule .18, however, does not have any procedure for providing notice of charges as required by Alabama Code § 41-22-12(b), which requires that notice must contain, *inter alia,* a statement of the legal authority and the matters asserted.

The Commission's December 12 Voting Procedure & Meeting

35. On December 12, 2023, the Commission voted on awarding licenses to integrated facility applicants, like Alabama Always.

36. Based on a staff recommendation, at its December 12 meeting, the Commission utilized the voting procedure in the Emergency Rule and the Ranking Rule.

37. As noted, the procedure requires each Commissioner to rank all applicants for integrated licenses in descending order. The staff then averages the rankings to obtain a single composite ranking, and the average ranking thus generated determines the order in which the applicants are considered for licenses.

38. At the December 12 meeting, Alabama Always received votes of 1, 2, 5, 10, 13, 16, 17, 19, and 20, for an average ranking of 11.4444, putting Alabama Always in eleventh place. The Commission then proceeded to vote on applicants in the order of this ranking, issuing the five available licenses before Alabama Always could even be considered for a vote. Consequently, Alabama Always was not considered for a license.

39. The Commission both granted and denied licenses at its December 12 meeting.

40. There is no explanation of why any Commissioner ranked Alabama Always or any other applicant in a particular place. The numerical rankings were arbitrary and capricious. For example, some of the companies who were awarded licenses on December 12 had previously

given presentations at which they admitted that they did not yet have a cultivation facility, which meant that they were incapable of commencing cultivation.

41. There were no deliberations during the meeting, and no Commissioner set forth any explanation of why he or she assigned a particular rank to any applicant, including Alabama Always.

42. As with its previous two attempts to award licenses—on June 12, 2023 and August 10, 2023—the Commission engaged in no debate or deliberation, leaving applicants and the public with no clue as to why the Commission chose certain applicants and not others.

43. The AG Department played no role in the December 12 meeting, and the AG Department has had no involvement at all regarding cultivator licenses or the cultivation aspects of integrated facility applicants.

44. Instead, the Commission exercised sole and exclusive decision-making over the license awards for integrated facility applicants on December 12, 2023.

The Commission's December 28, 2023 Meeting

45. On December 28, 2023, following this Court's hearing on various parties' (including Alabama Always's) motions for injunctive relief, the Commission held a meeting at which it voted not to stay its previously announced license awards in any category, despite the fact that the Commission's regulations permit it to enter such a stay pending the Commission's investigative hearing process. In fact, the rationale announced in support of the resolution was to place the decision "in the hands of the courts" or words to that effect.

46. There are only five integrated licenses available under the Compassion Act. The Commission's decision not to stay the licensure process effectively ensured that, without a judicially imposed stay, the investigative hearing process would be futile, because after the five licenses are issued, the Commission will lack the power to claw them back.

The Commission's Illegal Rules

The Commission's Emergency Rule is Invalid.

47. The AAPA does not permit the adoption of an emergency rule except to avert "an

immediate danger to the public health, safety, or welfare . . . ." Ala. Code § 41-22-5(b)(1). There is no "immediate danger" justifying the adoption of the Emergency Rule without complying with the public notice and comment requirements of the AAPA. The commentary to § 41-22-5 adds the following:

> Subsection (b) of this section is intended to enable an agency to exercise its rulemaking powers without the constraints of normal procedure as provided by this act when protection of the public health, safety, or welfare requires immediate action or when immediate implementation is required by federal statute or rule. *Such action may include, but is not limited to summary processes such as quarantines, contrabands, seizures and the like* authorized by law without notice.

Id. cmt. (emphasis added). There is simply no "emergency" here.

48. The Commission's express justification for adopting the Emergency Rule is found in the "Certification of Emergency Rules" it filed with the Legislative Services Agency on October 19, 2023. The Certification recites litigation and delays associated with the licensure process and finds that "uncertainties and delays surrounding the licensing process presents an immediate danger to public health and welfare," and that the adoption of the Emergency Rule is necessary to protect the public health and welfare to carry out the legislative mandate of licensing medical cannabis providers to provide relief to qualified patients.

49. The inability of qualified patients to obtain medical cannabis is not an emergency within the meaning of Alabama Code § 41-22-5(b)(1). The unavailability of medical cannabis is not a recent development; in fact, medical cannabis has never been available in Alabama. The problem with the Commission's Emergency Rule is that declaring a decades-long state of affairs an "emergency" does not make it so. *See Oliver v. Williams*, 567 So. 2d 304, 308 (Ala. Civ. App. 1989) ("However, as the trial court noted, this crisis had been in existence for many years and, thus, did not constitute an 'emergency' as defined in § 41–22–5(b).").

50. The Commission also ignores the availability of cannabis products over the counter in retail shops across that state. Following the passage of the Agriculture Improvement Act of 2018, *see* PL 115-334, December 20, 2018, 132 Stat 4490 (often referenced as the Farm Bill), and related laws, cannabinoid compounds such as CBD and THC (in concentrations of not

greater than 0.3%) are available without a prescription or a permit.

51. The Commission's true intent in adopting the Emergency Rule was to create a justification for considering the scores that were created by the illegal scoring system described above.

The Commission's Ranking Rule is Invalid.

52. The Ranking Rule improperly gave a minority of Commission members the ability to effectively veto the judgment of the majority.

53. The Ranking Rule did not require the Commissioners to rank or score the applicants according to statutory criteria (such as the demonstrated ability to commence cultivation within 60 days of notification of a license award), but instead allowed the Commissioners to vote arbitrarily and capriciously.

54. In addition, the Ranking Rule's voting system is not exemplary of the concept of majority rule or the open deliberation intended under the AAPA.

55. The use of the Ranking Rule at the December 12, 2023 meeting also violated the Commission's own rules, which require applicants to be ranked and scored according to the Act's requirements: "Applicants shall be scored, averaged, and ranked using an *impartial numerical process* in accordance with the requirements of the Act and the Criteria for Awarding Licenses set forth in r. 538-X-3-.11." *See* Ala. Admin. Code r. 538-X-3-.10(1) (emphasis added).

The Commission's Rule .18 is Invalid.

56. This is a contested case proceeding within the meaning of the AAPA because the Commission's vote on December 12 resulted in both the grant and denial of licenses. *See* Ala. Code § 41- 22-19(a) ("The provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license.").

57. Rule .18 is illegal because it purports to comply with the AAPA's contested case proceedings but fails to do so.

58. Rule .18's purported right to intervene is illusory because it does not provide

unsuccessful applicants the ability to intervene in licensure proceedings relating to successful applicants, in violation of Alabama Code § 41-22-14. In fact, the licensure process for successful applicants has proceeded in secret, with inspections and certifications of awardees' facilities proceeding without any notification to the public or denied applicants.

59. In addition, as explained below, Rule .18 fails to have a mechanism that provides notice to unsuccessful applicants and fails to provide an adequate procedure that gives an opportunity to all parties to respond and present evidence on the license application issues.

The Commission's Violations of the AAPA

60. The Commission has violated the AAPA in at least four ways.

61. *One*, the Commission gave no notice as to why any license was denied in violation of the AAPA.

62. In making decisions to grant or deny licenses, the Commission is bound by the "contested case" provisions of the AAPA: "The provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license." Ala. Code § 41-22-19(a).

63. Under the AAPA, before denying a license, the Commission must give a notice of charges as required by Alabama Code § 41-22-12(b), which requires that notice must contain, *inter alia*, a statement of the legal authority and the matters asserted.

64. The AAPA requires that "in a contested case, all parties shall be afforded an opportunity for hearing *after reasonable notice in writing* delivered by personal service as in civil actions or by certified mail." *Id.* § 41-22-12(a) (emphasis added). The notice must contain a short and plain statement of the "matters asserted," *i.e.*, in this case, the reasons for the denial of the license.

65. The Commission has issued no such notice relating to any of its license "awards."

66. The Commission has adopted no rule that requires that an applicant be notified of any reasons prior to the investigative hearing why it is being denied a license.

67. Because there is no rule requiring the Commission to specify the reasons why

the unsuccessful applicants were not "awarded" licenses, not even a rule that has not been properly adopted, the unsuccessful applicants have not been informed why they were not awarded a license.

68. And the Commission has adopted no rule pursuant to the AAPA that requires it to communicate the reasons for its decision to deny licenses to these applicants.

69. The Commission claims that its investigative hearing process under Alabama Code § 20-2A-56(e) is a contested case that complies with the AAPA.

70. Taking the Commission's position as true, the Commission's investigative hearing process violates the AAPA. The AAPA requires that, *prior to* a contested case proceeding, the Commission must give notice to applicants explaining why they were denied a license, and the factual and legal grounds for the denial.

71. The Commission has not done that. (In fact, it has not adopted a rule that requires it to communicate the reasons for its decision to deny licenses.)

72. Nor will the Commission likely be able to provide any such notice. Judging from the proceedings during the December 12, 2023 Commission meeting, however, it will be impossible to fashion a notice explaining the legal and factual grounds for denying Alabama Always, or any applicant, a license.

73. Because there is *no* contemporaneous record of why any applicant was granted or denied a license, no notice complying with Alabama Code § 41-22-12(b) can be issued. And even if the Commission's staff were to manufacture such a notice, there would be no reason to believe that the notice reflected the Commissioners' actual state of mind during the votes.

74. In short, no one (not even the Commissioners and the staff members) knows why some applications were granted and others denied on December 12. There is simply no way to issue a notice that complies with Alabama Code § 41-22-12.

75. Accordingly, any investigative hearing process flouts the due process requirements of the AAPA because it would require Alabama Always and other denied applicants to ferret out the reasons why their applications were denied.

76. The unsuccessful applicants, therefore, must file their requests for investigative hearings based on their best guess as to why they were not awarded a license. Or perhaps the "investigative hearing" is so named because the onus is on the unsuccessful applicant to investigate possible reasons why it was denied a license.

77. The Commission has issued no such notice relating to any "investigative hearing" relating to the license "awards." Instead, it has turned the AAPA's contested case requirements on their head by arbitrarily and capriciously adopting a rule (but not in accordance with the AAPA's publication, notice, and comment mandates) requiring the denied applicant rather than the agency to identify the matters asserted.

78. Alabama Always has not received a notification explaining why its application was being denied and giving it an opportunity to be heard as required by the AAPA. The Commission has no rule in place to provide such a notification at any point in the licensure process.

79. And, as noted, it will be impossible to fashion a notice explaining the legal and factual grounds for denying any applicant a license. There were no deliberations during the meeting, and no Commissioner set forth any explanation of why he or she assigned a particular rank to any applicant.

80. *Two*, the Commission violated the AAPA by failing to provide a process that allows an unsuccessful applicant to challenge a successful applicant in violation of the AAPA.

81. Although the Commission's revised rules permit intervention in the investigative hearings, investigative hearings will be sought only by unsuccessful applicants, so there will be no chance to challenge a successful applicant.

82. In a proper contested case proceeding relating to granting and denying limited licenses, such as Alabama's Certificate of Need program, all applicants are permitted to intervene in other applicants' contested cases. This is because the granting of any of the five available integrated medical cannabis licenses affects the ability of all other applicants to receive a license, just as the granting of a CON for a certain number of beds under the State

Health Plan limits the number available to other applicants.

83. The process the Commission devised provides no mechanism, whether in the form of a rule or otherwise, for unsuccessful applicants to challenge the awards of licenses to successful applicants, or more importantly, to challenge the qualifications of other applicants before they are awarded a license.

84. The Commission's disregard of the AAPA's contested case provisions deprives applicants of the right to intervene in the consideration of other applicants' applications as guaranteed by Alabama Code § 41-22-14.

85. That statute provides for a right to intervene "when the applicant has an *individual interest* in the outcome of the case as distinguished from a public interest." Ala. Code § 41-22-14 (emphasis added). Every single applicant has an individual interest in the outcome of every other applicant's application and should have been allowed to intervene.

86. Because grants and denials of licenses must take place as contested cases pursuant to Alabama Code § 41-22-19(a), each applicant should have been given the right to intervene in the Commission's decision to grant and deny licenses. But the Commission has no rules permitting such intervention. (Notably, there is a model for multiple applicants competing in a contested case for limited licenses, and that model is the CON program.)

87. *Three*, the Commission violated the AAPA by failing to offer a procedure (properly adopted as a rule or otherwise) to satisfy the AAPA's requirement that "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved." Ala. Code § 41-22-12.

88. The Commission adopted no rule outlining the process for investigative hearings at all.

89. The Commission has not developed rules of practice and procedure to govern the investigative hearing process despite the AAPA's requirement that all state agencies adopt rules governing practice and procedure. Ala. Code § 41-22-4.

90. The AAPA requires the Commission to "[a]dopt rules of practice setting forth

the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency." Ala. Code § 41-22-4.

91. Typically, state agencies have promulgated rules relating to the manner of filing of materials, briefing deadlines, burdens of proof, and the like. But the Commission generally has not done so. Although it has adopted a rule stating that requests for investigative hearings must be filed electronically, applicants have received very little guidance on filing.

92. In fact, the Commission has promulgated nothing about time limits for the Commission's decisions on requests for investigative hearings, whether discovery is permissible and under what conditions, the filing of briefs and motions, the standard of review, the forms to be used, the instructions to be followed, or anything else. Simply put, the Commission adopted no rule outlining the process for investigative hearings at all.

93. Alabama Always sent an email to the Commission on December 21, 2023, asking the Commission for guidance on how to request an investigative hearing. The Commission's response essentially admits that it is creating the process as it goes:

From: Applications (AMCC) <applications@amcc.alabama.gov>
Sent: Thursday, December 21, 2023 9:08:19 AM
To: Mike Bruce <mbruce@ivycreekhealth.com>
Subject: RE: Questions

CAUTION: This email originated from outside of Ivy Creek Healthcare. Do not click links or open attachments unless you recognize the sender and know the content is safe.

The written request for an investigative hearing sent to AMCC at applications@amcc.alabama.gov is all that is required form the applicant at this time. At the close of the period to receive requests AMCC will send notice to all applicants of those applicants who have timely submitted a request for investigative hearing.

94. Similarly, the Commission informed another applicant that "additional details on the hearing process" would be provided "at a later date":

From: Applications (AMCC) <applications@amcc.alabama.gov>
Sent: Thursday, December 14, 2023 8:14 AM
To: Patrick Dungan <Patrick.Dungan@arlaw.com>
Subject: RE: Investigative Hearing Form

At this time, only the request, in writing (via email to applications@amcc.alabama.gov), is required. Once the request is received, AMCC will confirm receipt and docket the applicant for the investigative hearing process. The applicant will be contacted, at a later date, with additional details on the hearing process, scheduling, required filings, including service on other parties, etc.

Additionally, the Commission, at its meeting on December 12, 2023, voted to waive the fee associated with the request for investigative hearing. This action was taken to relieve applicants of the fee requirement of the current version of Rule 538-X-3-.18, given the deadline for requests running before the effective date of the amended version of the rule.

95. Any hearings conducted without these things will necessarily violate the AAPA, because the procedures will not have been adopted pursuant to the requirements of the AAPA. Thus, any procedure, any time limit, any instruction, any standard of review, will be invalid because it cannot possibly have been adopted in accordance with the AAPA.

96. To the extent that the Compassion Act provides guidance, the Commission's version of the procedure required by the Compassion Act conflicts with the AAPA. The Compassion Act establishes the applicant's right to an investigative hearing (which the Commission contends is the commencement of a "contested case" under the AAPA, though that process violates the AAPA itself), but then states that the Commission cannot limit its decision to testimony and evidence submitted at the hearing:

> After denial of a license, the Commission, upon request, shall provide a public investigative hearing at which the applicant is given the opportunity to present testimony and evidence to establish its suitability for a license. Other testimony and evidence may be presented at the hearing, but *the commission's decision must be based on the whole record before the commission and is not limited to testimony and evidence submitted at the public investigative hearing.*

Ala. Code § 20-2A-56(e) (emphasis added). This provision, that the Commission's decision may be based on evidence and testimony not submitted at the hearing, is in irreconcilable conflict with the AAPA, which requires that, in a contested case "opportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved." *Id.* § 41-22-12.

97. Any statutory provision that conflicts with the AAPA is invalid, unless the statute expressly provides that it takes precedence over the AAPA. *Id.* § 41-22-25 ("If any other statute . . . diminishes any right conferred upon a person by this chapter or diminishes any

requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter.").

98. The Compassion Act's investigative hearing provision does not expressly provide that it takes precedence over the AAPA and is therefore null and void.

99. Any investigative hearing process would turn the due process requirements of the AAPA on its head, because it would require Alabama Always and other denied applicants to both (a) request a hearing (rather than receive notice) and (b) ferret out the reasons why their applications were denied (rather than be provided the reason(s) as required by the AAPA).

100. *Four*, the Commission has also failed to adopt rules, in further violation of the AAPA, governing the inspection and certification of facilities. Instead, the inspections are being done in secret, utilizing forms and procedures that have not been adopted pursuant to the AAPA.

101. During the Court's March 11, 2024 hearing, the unsuccessful applicants heard for the first time that certain facilities had been certified by the Commission, its agents, or by the AG Department.

102. These forms and procedures constitute rules that must be adopted pursuant to the AAPA. They were not adopted pursuant to the AAPA.

The Commission's Violations of the Compassion Act and its Own Rules

103. There is also no indication that the Commission considered the mandatory statutory criteria, such as the 60-day cultivation requirement, when making its licensing awards at the December 12 meeting.

104. Alabama Always likely is the only applicant that meets all of the Compassion Act's requirements for integrated licenses.

105. The rankings the Commission used at its December 12 meeting also violated the Commission's own rules, which require applicants to be ranked and scored according to the

Compassion Act's requirements: "Applicants shall be scored, averaged, and ranked using an impartial numerical process in accordance with the requirements of the Act and the Criteria for Awarding Licenses set forth in r. 538-X-3-.11." *See* Ala. Admin. Code r. 538-X-3-.10(1) (emphasis added).

106. Additionally, despite the unambiguous mandate of the Compassion Act, the AG Department has had no participation in the awards of cultivator or integrated facility licenses by the Commission.

107. Rather, the Commission purported to award licenses to cultivators on December 1, 2023, and to integrated facilities on December 12, 2023 (and in each of the Commission's two prior unsuccessful attempts to award licenses in these categories) without any involvement of the AG Department or consideration of the AG Department's regulations.

108. The Commission has no legal authority to arrogate to itself any authority—much less the sole and exclusive authority it purportedly exercised—to award cultivator licenses. Nor does the Commission have the legal authority to exercise exclusive decision-making over the license awarding decisions regarding integrated facility license applications, when the Compassion Act requires the AG Department to have involvement and to exercise decision-making with respect to the license awards of integrated facility applicants regarding their cultivation operations.

109. Moreover, the Commission's rules require that the Commission "notify any interested party of proceedings before it not less than fourteen (14) days before the proceeding is to occur," absent extraordinary circumstances. Ala. Admin. Code r. 538-x-1-.09.

110. The Commission has engaged in inspections and certifications of facilities for certain applicants but has never given notice to the other interested parties (like Alabama Always) in violation of its own rules.

Judicial Review of the Denial of Alabama Always's Application

111. Judicial review of the Commission's action is subject to the AAPA, and this Court's review of the Commission's action and its application of the law is de novo. *See Medical*

Licensure Comm'n of Alabama v. Herrera, 918 So. 2d 918, 926 (Ala. Civ. App. 2005) ("[T]here is no presumption of correctness afforded to [an administrative decision-maker's] legal conclusions or its application of the law to the facts.").

112. Alabama Code § 41-22-20 provides that a circuit court "may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

1) In violation of constitutional or statutory provisions;
2) In excess of the statutory authority of the agency;
3) In violation of any pertinent agency rule;
4) Made upon unlawful procedure;
5) Affected by other error of law;
6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
7) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

Id. § 41-22-20(k).

113. Here, the Commission's action in denying Alabama Always's license application violated the Compassion Act, exceeded the statutory authority of the Commission, violated the Commission's own rules, violated the AAPA, and was arbitrary and capricious for the reasons explained in this petition, including but not limited to that:

a. the Commission provided no notice or opportunity for hearing before denying Alabama Always's license;

b. The Commission gave no indication that it considered the statutory and regulatory criteria in making its licensure decisions;

c. The Commission's voting procedure used at the December 12 meeting violated the AAPA;

d. the Commission did not follow its own rules at the December 12 meeting, which require applicants to be "scored, averaged, and ranked using an impartial numerical process";

e. The Commission violated the Compassion Act by failing to have the AG Department involved in issuing cultivator licenses;

f. the Commission provided no explanation for its decision or evidence that it considered the mandatory criteria when granting licenses; and

g. the Commission has not promulgated sufficient rules of practice for its investigative hearing proceeding.

Exhaustion of Administrative Remedies is Not Required

114. Finally, exhaustion of administrative remedies is not required here for at least three reasons.

115. *First*, Alabama Always is challenging Commission rules, and exhaustion is thus not required. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41-22-10, Code (1975).").

116. *Second*, the administrative remedy available (the investigative hearing process) is futile because, in the absence of immediate injunctive relief, the five "awarded" integrated facility licenses would be "issued," without any further action from the Commission itself, after which there would be no more licenses to issue, and the investigative hearing process could not change that. In other words, any final agency action after an investigative hearing would not provide an adequate remedy.

117. To be sure, the Commission contends that it has the power to revoke licenses after the investigative hearing process, so, says the Commission, Alabama Always has an adequate administrative remedy. But the Commission's revocation authority is limited to cases of "grave" or "repeated" misconduct by a licensee, not cases where the Commission made a mistake in issuing a license or violated its own rules or other law:

> Revocation of License -- The Commission's revocation of license is the most serious disciplinary measure that the Commission, acting on its own, may impose. Revocation should not be imposed arbitrarily or capriciously, but *only for grave misconduct* by the licensee in contradiction of § 20-2A-57(a), Code of Ala. 1975, (as amended), *and usually only upon repeated instances of serious misconduct; or posing a serious risk of loss to property, injury, or death; or involving overtly intentional disregard of the authority of the Commission*, the Act, or these Rules. In most instances, revocation will not be imposed until other forms of discipline have been unsuccessful, after the licensee has been provided a fair opportunity to correct its misconduct, and/or a clear pattern of misconduct

has become apparent.

Ala. Admin. Code r. 538-x-4-.22 (emphasis added).

118. There is nothing in the Commission's regulations that would permit it to rescind a license that has already been issued simply because it awarded a license to an applicant that was not sufficiently qualified. The Commission's rules, even the new and amended ones, do not permit applicants to intervene in other applicants' licensing procedures, contrary to the express requirements of the AAPA.

119. *Third*, exhaustion is futile because the Commission's "investigative hearing" process violates the AAPA, including but not limited to the fact that the procedure cannot possibly comply with the AAPA's contested case hearing requirements, as explained above.

Count One
(Declaratory Judgment – the Emergency Rule)

120. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

121. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

122. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

123. Alabama Always submits that the Emergency Rule is invalid.

124. There was no emergency as required by Alabama Code § 41-22-5(b)(1) to justify the Commission's adoption of the Emergency Rule.

125. The Commission has no authority for enacting the Rule because it did not comply with the AAPA.

126. In addition, the Emergency Rule interferes with and impairs Alabama Always's legal rights.

127. Exhaustion of administrative remedies is not a prerequisite to challenging the

validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

128. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Rule is invalid. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Two
(Declaratory Judgment – the Ranking Rule)

129. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

130. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

131. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

132. Alabama Always submits that the Ranking Rule is invalid.

133. The Commission has no authority for enacting the Rule because it did not comply with the AAPA.

134. In addition, the Ranking Rule interferes with and impairs Alabama Always's legal rights.

135. Exhaustion of administrative remedies is not a prerequisite to challenging the

validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

136. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Rule is invalid. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Three
(Declaratory Judgment – Rule .18)

137. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

138. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

139. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

140. Alabama Always submits that Rule .18 is invalid.

141. The Commission has no authority for enacting the Rule .18 because it did not comply with the AAPA.

142. Alabama Always submits that the Commission's investigative hearing process and its purported administrative remedy violates the AAPA, as explained above.

143. The Commission failed to provide notice as required by the AAPA.

144. The Commission's investigative hearing process does not allow for intervention to challenge successful applicants.

145. And the Commission has not established any rules of procedure or practice for the investigative hearing process.

146. In addition, Rule .18 interferes with and impairs Alabama Always's legal rights.

147. Exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

148. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Rule .18 is invalid. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Four
(Declaratory Judgment – the Inspection/Certification Process)

149. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

150. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

151. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with

rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

152. The Commission has also failed to adopt rules, in violation of the AAPA, governing the inspection and certification of facilities.

153. Instead, the inspections are being done in secret, utilizing forms and procedures that have not been adopted pursuant to the AAPA.

154. Alabama Always submits that the Commission's Inspection/Certification Process is invalid because the Commission did not comply with the AAPA.

155. In addition, the Inspection/Certification Process violates the Commission's own rules, requiring notice to any interested parties fourteen days before an action is taken.

156. The Inspection/Certification Process thus interferes with and impairs Alabama Always's legal rights.

157. Exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

158. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Inspection/Certification Process is invalid and fails to comply with the AAPA. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Five
(Declaratory Judgment – the AG Department Issues)

159. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

160. This claim is brought under Alabama Rule of Civil Procedure 57 and Alabama Code § 6-6-220, to declare certain actions of Commission invalid and in derogation of law and Commission's own rules.

161. Pursuant to the Compassion Act, the AG Department has sole and exclusive authority to issue licenses and to regulate all persons and entities licensed as cultivators under the Act.

162. Despite the unambiguous mandate of the Compassion Act, the AG Department has had no participation in the awards of cultivator licenses by the Commission.

163. Rather, the Commission purported to award licenses to cultivators on December 1, 2023 (and in each of the Commission's two prior unsuccessful attempts to award licenses as well) without any involvement of the AG Department.

164. Pursuant to the Compassion Act, the AG Department is to participate in licensing decisions of the Commission with respect to the cultivation aspects of putative integrated facility licensees.

165. Contrary to the Compassion Act, the Commission either (a) has no "memorandum of understanding relating to the sharing of regulatory and licensing and enforcement authority over licensees with regard to the cultivation function[,]" as required by the Compassion Act, or at the very least, (b) the AG Department has had no involvement whatsoever with the review or decision-making regarding integrated license applicants.

166. The Commission has no legal authority to arrogate to itself any authority—much less the sole and exclusive authority it purportedly exercised—to award cultivator licenses.

167. Nor does the Commission have the legal authority to exercise exclusive decision-

making over the license awarding decisions regarding integrated facility license applications, when the Compassion Act required the AG Department to have involvement and to exercise decision-making with respect to the license awards of integrated facility applicants regarding their cultivation operations.

168. By allowing the Commission to exercise exclusive decision-making authority regarding cultivator licenses, Mr. Pate, as Commissioner of the AG Department, has unlawfully abdicated his statutory duty to exercise exclusive decision-making authority over the same.

169. By allowing the Commission to exercise exclusive decision-making authority regarding integrated facility licenses, Mr. Pate, as Commissioner of the AG Department, has unlawfully abdicated his statutory duty to exercise decision.

FOR THESE REASONS, Alabama Always requests that this Court enter: (1) a declaratory judgment that, pursuant to the Compassion Act, the AG Department has sole and exclusive authority to issue all cultivator licenses, and thus any such licenses awarded by the Commission are void; (2) a declaratory judgment that, pursuant to the Compassion Act, the AG Department has authority to license and regulate the cultivation aspects of integrated facility license applicants, and thus that integrated facility licenses purportedly awarded by the Compassion Act without involvement of the AG Department are void; (3) a preliminary and permanent injunction barring the Commission from taking any action in furtherance of any cultivator licenses purportedly awarded by the Compassion Act on December 1, 2023; (4) a preliminary and permanent injunction barring the Commission from taking any action in furtherance of any integrated licenses purportedly awarded by the Compassion Act on December 12, 2023; and (5) for such further relief as may be just and equitable.

Count Six
(Injunctive Relief)

170. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

171. As noted, the Emergency Rule, the Ranking Rule, Rule .18, and the Inspection/Certification Process all threaten Alabama Always with irreparable harm. The entry of a temporary restraining order, preliminary injunction, and permanent injunction would preserve the status quo, and would not inconvenience the Commission, particularly since the Commission does not have the right to violate Alabama law. The balance of the equities therefore favors the issuance of a temporary restraining order and an injunction.

172. The AAPA permits this Court to stay enforcement of an agency rule "by injunctive relief." Ala. Code § 41-22-10.

173. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury.

174. Furthermore, the harm that Alabama Always faces is not susceptible of being compensated with money damages.

175. Alabama Always has no adequate remedy at law.

176. There is no remedy for the Commission's failure to judge all applications fairly and in compliance with its own rules and regulations.

177. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with its business.

178. Alabama Always is likely to succeed on the merits of its claim, for the reasons explained, including because the Commission failed to substantially comply with the AAPA.

179. Any hardship imposed on the Commission by the requested injunction does not outweigh the benefit to Alabama Always in receiving the requested injunction.

180. In addition, not issuing the injunction would severely harm the public.

181. The Compassion Act exists to help ensure that the best entities cultivate, transport, and dispense the best medical cannabis to Alabama residents suffering from medical conditions whose symptoms could be alleviated by medical cannabis.

182. The public is deprived of potentially obtaining the best integrated facility licensees when the Commission, by act or omission, violates the AAPA, as it has in this case,

and causes ongoing and irreparable harm to the licensing process.

183. Immediate and irreparable injury, loss, or damage will result to Alabama Always before the Commission can be heard in opposition.

FOR THESE REASONS, Alabama Always requests that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction against the use of the administrative rules set out in this petition and staying the Commission's post-award and investigative hearing process.

Count Seven
(Appointment of Special Master)

184. The Commission has failed to adopt rules of practice and procedure that comply with the AAPA, including but not limited to rules of practice for the "investigative hearing" process.

185. If the Commission holds the investigative hearing process using an invalid rule, the entire process and, including the result, will be void under Alabama law.

186. It will take the Commission the better part of a year to adopt rules for the investigative hearing to comply with the AAPA. If an actual contested case hearing is held after the adoption of AAPA compliant rules, the entire process will take well over a year.

187. These are exceptional circumstances.

FOR THESE REASONS, Alabama Always asks that the Court appoint a special master to determine which applicants are able to satisfy the requirements of the Compassion Act.

IV. The Relief Sought

188. Additionally, in accordance with Alabama Code § 41-22-20, Alabama Always asks the Court to take jurisdiction of this action and enter appropriate orders for the following relief:

A. Granting a stay of the Commission's award of licenses done at the December 12, 2023 meeting;

B. Reversing the December 12, 2023 vote of the Commission to deny Alabama Always's integrated facility license application;

C. Directing the Commission to comply with the AAPA, the Compassion Act, and its own regulations;

D. Awarding all other appropriate relief from the Commission action, equitable or legal, including declaratory relief, pursuant to Alabama Code § 41-22-20(k);

E. Appointing a special master pursuant to Alabama Rule of Civil Procedure 53 for the purpose of reporting on the ability of medical cannabis applicants to satisfy the statutory requirements of the Compassion Act; and

F. Awarding Alabama Always all costs of this action.

Respectfully submitted,

/s/ William G. Somerville
WILLIAM G. SOMERVILLE
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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2024, the foregoing has been served upon all counsel of record via electronic filing:

/s/ Jade E. Sipes
OF COUNSEL

VERIFICATION FOR ALABAMA ALWAYS, LLC

In accordance with Alabama Rule of Civil Procedure 65(b), James Eaton, the representative for Alabama Always LLC, being first duly sworn in accordance with the law, being informed of and familiar with the facts set forth and the statements made in the foregoing first amended verified petition for judicial review and complaint for declaratory and injunctive relief, which sets forth specific facts that immediate and irreparable injury, loss, or damage will result, make oath that the foregoing averments concerning facts that immediate and irreparable injury, loss, or damage will result are true to the best of my knowledge and where stated my information and belief.

Given under my hand and official seal this ____ day of April 2024.

_____
James Eaton, CEO

STATE OF FLORIDA

COUNTY OF LEO

I, the undersigned authority, a Notary Public in and for said State and County, do hereby certify that James Eaton, who is known to me, acknowledged before me, on this day, that, being informed of the contents of the instrument, he has signed, sealed, and delivered the same voluntarily, and with full authority for said entity.

Given under my hand and official seal this ____ day of April 2024.

_____
NOTARY PUBLIC

My Commission Expires: _____