THE SUPREME COURT OF MISSOURI

No. SC99205

STATE OF MO. *ex rel.* DEPARTMENT OF HEALTH AND SENIOR SERVICES,

Appellant/Relator,

v.

RENEE T. SLUSHER, COMMISSIONER, ADMINISTRATIVE HEARING COMMISSION,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri
20th Judicial Circuit

The Honorable Jon Edward Beetem, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of a petition for writ of prohibition. The denial was entered as a judgment on the merits on December 28, 2020, by the Circuit Court for Cole County. Doc. 21, App. A22-A-28 The notice of appeal to the Court of Appeals, Western District, was filed on January 7, 2021. Doc. 22. This Court granted transfer on October 5, 2021.

The matter was brought to the Court of Appeals, and now to this Court, as an appeal, rather than as a petition for an original writ, because the circuit court entered a preliminary writ ordering Respondent to "refrain from all action in the premises," Doc. 20, and then decided the matter on the merits. That places this case within one of two "limited circumstances [in which] an appeal may be taken from the denial of a writ petition" (*R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. App. W.D. 2015): "An appeal will lie from the denial of a writ petition when a lower court has issued a preliminary order in mandamus but then denies a permanent writ." *State ex rel. Ashby Road Partners, LLC v. State Tax Comm'n*, 297 S.W.3d 80, 83 (Mo. 2009), cited with approval, *R.M.A.*, 477 S.W.3d at 187.

INTRODUCTION

Over many years, support grew for legalizing the medical use of marijuana in the State of Missouri—but the General Assembly consistently declined to do so. Finally, in November 2018, the question was presented to the people through a constitutional amendment by initiative. In that amendment (now Article XIV of our constitution) the people set up a system for licensing the production of marijuana and marijuana-infused products and for dispensaries to sell those products, and for authorizing particular individuals to purchase them.

Despite that state-level authorization, the production, sale, possession, and use of marijuana remains problematic. Marijuana possession remains illegal under federal law: It is a controlled substance. 21 U.S.C. § 812(c); 21 C.F.R. part 1308. Its possession is unlawful, subject to fines and imprisonment. 21 U.S.C. § 812(c). And though trends show increased acceptance, marijuana legalization and use remain controversial. *See* Pew Research Center, "6 Facts about American and marijuana," https://www.pewresearch.org/fact-tank/2021/04/26/facts-about-marijuana/ (viewed Oct. 22, 2021).

Not surprisingly, then, the people of Missouri included in Article XIV strong confidentiality language, *requiring* the Department of Health and Senior Services to "maintain the confidentiality" the information submitted by those seeking all types of medical marijuana licenses. Article XIV, § 1.3(5).

This appeal arises from a decision by the Administrative Hearing Commission to require that the Department, despite that constitutional mandate, turn over protected, confidential information to the competitors and would-be competitors of those who submitted applications do the

Department. The Department brings the question to this Court because both the Administrative Hearing Commission (AHC) and the circuit court frustrated the Department's ability to fulfill its constitutional obligation to ensure that the information that applicants submit really is kept confidential.

STATEMENT OF FACTS

As noted above, in November 2018, the people of the State of Missouri, through the initiative, enacted Article XIV of the Missouri constitution. That article authorizes and sets out the terms for regulation of medical marijuana. Article XIV directed the Department of Health and Senior Services to administer the program under very specific terms and conditions.

Applying its constitutional authority, the Department promulgated regulations that set limits on the number of cultivation, manufacturing, and dispensary licenses to be issued. And as the constitution required, the Department established a procedure for evaluating or scoring the applications.

Once the Department opened the window to applications, it received applications for many more facilities than the limits permitted in Article XIV. That meant that the applications could not simply be reviewed for statutory and regulatory compliance, the type of review familiar to the AHC and the courts. Rather, the applications had to be ranked, with licenses going to the top 60 cultivation applications, the top 86 infused product manufacturing applications, and the top 24 dispensary applications in each congressional district.

So the competing applications were then scored. Scoring was blind; the applications were "separated from their identifying information." 19 CSR 30-95.025(4)(C).1; *see also* 19 CSR 30-95.025(4)(C).2.B. "Each type of facility or certification application [was] scored and ranked against the other applications of the same type." 19 CSR 30-95.025(4)(C).2.A. And "[t]he same evaluation criteria question in each application [were] scored by the same individual." 19 CSR 30-95.025(4)(C).4.

Licenses were then awarded to "the highest ranked facilities for each type of facility." 19 CSR 30-95.025(4)(D).1. But most of the applications were conditionally denied. As a result, 857 appeals were filed with the Administrative Hearing Commission, as Article XIV allows. Those appeals covered 1,061 denied applications.

Among the unsuccessful applicants appealing to the AHC was Kings Garden, LLC, the intervenor that appeared in this case in both the circuit court and the Court of Appeals in support of Respondent's order. Doc. 21 p. 2, Appendix (App.) A-23.[1] Kings Garden appealed the denials of two applications for cultivation licenses. Doc. 21 pp. 2-3; App. A-23-A-24. .

One of Kings Garden's arguments in its license denial appeal that is before the AHC is that its applications were improperly scored. Thus, in discovery, Kings Garden "requested complete unredacted copies of applications of applicants who were successful in obtaining a cultivation license." Doc. 21 p. 3; App. A-24. The Department objected, citing the requirement in Article XIV that it maintain the confidentiality of the information submitted by applicants for all types of medical marijuana

[1] Throughout this litigation, Respondent herself has chosen not to appear, nor to have intervenor appear on her behalf.

applications, including cultivation, manufacturing, dispensary, and patient. *See* Doc. 4 p. 2.

Kings Garden filed a motion to compel. Doc. 6. The Department opposed, again citing the constitutional mandate that it maintain the confidentiality of the information sought. Doc. 7.

Respondent Commissioner Slusher granted the motion to compel and ordered the Department "to produce substantially all of the documents requested by Kings Garden." Doc. 21 p. 3, App. A-23, referring to Doc. 4. Adopting verbatim language from an order entered in another medical marijuana license case by another commissioner, Respondent read the confidentiality sentence that opens Article XIV, § 1.3(5), to mean only that the application information is exempt from disclosure under the Missouri Sunshine Law, Chapter 610, RSMo. Doc. 4, pp. 2-4. She also entered a protective order with regard to the documents that she ordered be disclosed. Doc. 8; *see* Doc. 21 p. 3 App. A-23.[2]

The Department sought preliminary and permanent writs of prohibition, barring enforcement of Respondent Commissioner Slusher's order. Docs. 2-19. The circuit court entered a preliminary writ in prohibition, stating to Respondent Slusher: "You are ordered to refrain from all action in the premises until further order." Doc. 20.

[2] The protective order does not resolve what happens at hearing in the Kings Garden case. Though the issue has yet to arise in that case, some AHC commissioners have taken the position that the AHC cannot accept filings under seal—holding instead that the entire record in each case is subject to disclosure under the Missouri Sunshine Law. That would mean that if the documents at issue here were used at hearing, they would become public.

Meanwhile, some of the competing applicants whose information would be disclosed intervened at the AHC, seeking reconsideration. Docs. 7-13. Respondent granted some relief to one intervenor, allowing that applicant to designate some information as "trade secrets." But having been ordered by the circuit court not to proceed, Respondent did not act on the requests of other proposed intervenors.

After briefing and argument, the circuit court denied the petition and quashed the preliminary writ. Doc. 21 p. 6; App. A-27. That court did not follow the Respondent's rationale. Rather, the court concluded that "to allow all provisions of Article XIV § 1.3 to have meaning, the confidentiality provisions set forth in subsection 5 cannot apply to the discovery process during appeals of denied applications." Doc. 21, p. 5, App. A-26. In that court's view, allowing the AHC to breach the full confidentiality of application information is required in order for some other provision of that Article XIV "to have meaning." *Id*.

The circuit court stayed its order until "the later of forty (40) days or the final resolution of a timely appeal of this judgment by a court of higher jurisdiction." Doc. 21 p. 6, App. A-26.

Competing applications have now been sought in many, perhaps most, of the 578 appeals still pending at the AHC—appeals that cover 713 applications: 200 cultivation; 131 manufacturing; and 382 dispensary. Following the pattern set by the circuit court here, the AHC has postponed acting on or enforcing motions to compel production of other applications in those cases, pending a final judicial decision on the Department's writ request.

POINT RELIED ON

The circuit court erred in quashing the preliminary writ of prohibition and denying the petition for writ of prohibition because Respondent acted outside her authority as a matter of law in that she compelled the disclosure to competing applicants of information submitted by applicants to the Department of Health and Senior Services that the Department is constitutionally required to maintain as confidential.

Mo. Const. Article XIV, § 1.3(5)

State ex rel. Dept of Social Services v. Tucker, 413 S.W.3d 646 (Mo 2013)

STANDARD OF REVIEW AND PRESERVATION

The sole question presented here is whether the Missouri Constitution truly protects the confidentiality of information submitted by medical marijuana licenses (here, a cultivation license, but the same rule would apply to dispensary, manufacturing, and even patient licenses) in the course of discovery. That is a question of law. "This Court determines questions of law *de novo*." *Hamilton v. State*, 598 S.W.3d 607, 610 (Mo. 2020).

As noted above, the question of constitutional confidentiality was raised by the Department as a defense to discovery requests made by Kings Garden LLC, the petitioner at the AHC and intervenor below. Constitutional confidentiality was asserted in response to the motion to compel filed at the AHC by Intervenor. And it was asserted in the writ proceeding below.

ARGUMENT

The circuit court erred in quashing the preliminary writ of prohibition and denying the petition for writ of prohibition because Respondent acted outside her authority as a matter of law in that she compelled the disclosure to competing applicants of information submitted by applicants to the Department of Health and Senior Services that the Department is constitutionally required to maintain as confidential.

A. Introduction.

This appeal presents a question of first impression in Missouri law: whether a constitutional guarantee of confidentiality made to persons submitting information to a state agency prevents that state agency from disclosing that information to competitors even in the course of discovery.

The Missouri Constitution addresses confidentiality of information only twice.

The first provision addresses the submission of confidential information: In Article III, § 38(d)(4), the Constitution bars the submission of "private or confidential medical, scientific, or other information" in certain reports regarding "the nature of the human embryonic stem cells used in, and the purpose of, the research conducted during the prior calendar year." That provision protects confidential information by ensuring that it never gets into the State's hands.

The second provision, Article XIV, § 1.3(5), is at issue here. That provision recognizes that the State will necessarily receive personally or competitively sensitive information in the course of applications for all types of medical marijuana licenses, *e.g.*, dispensary, cultivation, manufacturing, testing, and patient licenses. The Constitution guarantees submitters that the recipient of their sensitive information—the Department of Health and Senior Services, Relator here—will "maintain the confidentiality" of that information. It thus protects the confidentiality of information once it is in the State's hands. The constitution states no exception to the confidentiality guarantee.

Respondent, a commissioner on the Administrative Hearing Commission, construed the medical marijuana confidentiality provision to permit, and its own authorizing statute and rules as sufficient to require, that the Department actually hand over information submitted by various applicants to a competitor because that competitor has appealed the denial of its own application. The Department sought a writ of prohibition because Respondent's Order, despite the accompanying Protective Order, deprives submitters of the confidentiality that the Missouri Constitution guaranteed them when they provided their information to the Department.

Though the constitutional provision applies to applications for all types of medical marijuana licenses, the particular AHC order at issue addresses the information submitted by applicants seeking medical marijuana cultivation licenses. That information includes business plans, real estate ownership and lease information, and other information that may be personally and competitively sensitive. *Personally* sensitive, because marijuana businesses, though now legal under Missouri law, may retain a stigma—and their operations are problematic under federal law. *Competitively* sensitive, because the Department's constitutionally-authorized limits on the number of licenses to be granted have led to competitive scoring, pitting one applicant against another; because those obtaining Missouri licenses compete against each other for business, using the plans submitted with their applications; and because those who apply in Missouri may apply for licenses in other states—and in doing so, may use some of the same plans, or variations thereon. The threatened harm to those third-party applicants should be apparent, though we discuss it further in (F) below.

But disclosure also threatens to harm the Department and the medical marijuana market in the state by eliminating not just the Department's obligation but even its ability to keep such information out of

the hands of competitors. Respondent's Order will have a chilling effect on the number of quality applicants who may seek licensure.

The question raised here is not idiosyncratic to the Kings Garden case. The context in which the Commission rendered its decision is not unique. In fact, soon after granting the motion to compel sought by Kings Landing, Respondent Commissioner Slusher took precisely the same step in 11 other cases—and two other commissioners have done so in cases before them.[3] In each case, the commissioner faced a request for *all* marijuana cultivation and manufacturing license applications. Though Respondent imposed modest limits to the required disclosures, she still ordered that the Department share with Kings Garden the answers given by dozens of its competitors on more than 50 of the questions posed in the Application.

[3] Among the cases in which Commissioner Slusher has entered substantially identical orders are: *Show-Me Botanicals v. DHSS* (20-0400); *Show-Me Botanicals v. DHSS* (20-0768); *Show-Me Botanicals v. DHSS* (20-1155); *Show-Me Manufacturing v. DHSS* (20-0746); *Show-Me Natural Gardens v. DHSS* (20-0398); *Tellus Manufacturing v. DHSS* (20-0749); *Tellus Farms v. DHSS* (20-0401); *Tellus Health Centers v. DHSS* (20-1123); *The Health Hub v. DHSS* (20-1034); and *True Level Investments v. DHSS* (20-0399). Commissioner Prewitt followed suit in *Local Leaf v. DHSS* (20-0755). Commissioners Slusher and Prewitt followed verbatim the rationale first adopted by then-Commissioner Dandamudi in *Heya v. DHSS*, AHC No. 20-0213. In response to then-Commissioner Dandamudi's order, DHSS sought a Writ of Prohibition in *Department of HSS v. Dandamudi*, No. 20AC-CC00327 (Cole County). But that petition was dismissed as moot. In many other cases, petitioners have filed motions to compel the production of competing applications, but the AHC has denied them without prejudice, waiting for a final decision in this case.

But the Constitution of Missouri, in language drafted by those seeking to obtain, as well as to cultivate, manufacture, or sell medical marijuana, guaranteed applicants confidentiality. For the reasons discussed below, this Court should reverse the decision of the circuit court and vindicate that right.

B. Article XIV, § 1.3(5) must be construed so as to vindicate the broad confidentiality interests guaranteed by and to the voters.

Again, when the people of Missouri enacted Article XIV as part of our Constitution, they guaranteed applicants confidentiality. That guarantee is found in § 1.3(5):

> The department shall maintain the confidentiality of reports or other information obtained from an applicant or licensee containing any individualized data, information, or records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans, or revealing any patient information, or any other records that are exempt from public inspection pursuant to state or federal law. Such reports or other information may be used only for a purpose authorized by this section. …

When the people of Missouri voted to enact Article XIV, then, the plain language before them stated that if they submit any information to DHSS, it will—it must—be kept confidential by the Department.

Because the people enacted that as a *constitutional* guarantee, the language of Article XIV must be given an interpretation that fully serves the broad purpose of § 1.3(5) and its assurance of confidentiality: "Constitutional provisions are subject to the same rules of construction as statutes except that consideration should be given to the broader purposes and scope of constitutional provisions." *Brown v. Morris*, 290 S.W.2d 160, 167 (Mo. banc 1956). Ultimately, the question is the intent of the people: "[T]he primary rule is to 'give effect to the intent of the voters who adopted the Amendment' by considering the plain and ordinary meaning of the word." *Johnson v. State*, 366 S.W.3d 11, 25 (Mo. 2012) (citations omitted).

So the court must ask these questions: When the people of the State of Missouri mandated that the Department maintain the confidentiality of all information in any medical marijuana license application, did they mean strictly confidential? Or did they mean sort-of confidential—keeping it from being disclosed pursuant to the public in response to a Sunshine Law request, as held by Commission Slusher (*see* (C) below), but making it easily obtainable through litigation, as the circuit court held (*see* (D) below)? And when elsewhere in Article XIV the people authorized disappointed applications to turn to the AHC for relief, did it grant the AHC authority to order the Department to breach the confidentiality of other applicants?

Though Respondent and the circuit court read the constitutional confidentiality provision quite differently, the result was the same: with AHC endorsement, information given a constitutional guarantee of confidentiality can be handed to competitors, without permission from (or even notice to) the applicant (and the applicants' owners) that submitted that information.

We turn in (C) to the language of the provision, which Respondent misread. Then we turn in (D) to the scope of protection, which the circuit court erroneously truncated. Then in (E) we address the erroneous conclusion that construing to constitution to bar disclosure of other applications renders some part of Article XIV to be without meaning or deprives unsuccessful applicants of meaningful review. Finally, in (F), we address the harm that would result from affirming the AHC and circuit court decisions.

C. The confidentiality provision does more than exempt applicants' information from the Sunshine Law, contrary to what Respondent held.

Section 1.3(5) identifies four categories of information that the Department must maintain as confidential: business information obtained in the application process; business information obtained in regulating operations; patient information; and information statutorily

protected from public disclosure. The provision's use of the word "or" signals these are four different categories of information that the Department must keep confidential.

By reformatting the constitutional provisions, the language setting out these four categories may be depicted as follows:

> The department shall maintain the confidentiality of [:]
>
> [1.] reports or other information obtained from an applicant or licensee containing any individualized data, information, or
>
> [2.] records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans, or
>
> [3.] revealing any patient information, or
>
> [4.] any other records that are exempt from public inspection pursuant to state or federal law.

Categories 1 and 2 reflect concern about sensitive information that the Department obtains ("information obtained from an applicant or licensee containing any individualized data, information, or records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans" shall be held confidential).

Category 3 evidences an awareness that the Department will obtain some sensitive personal health information from those Missourians availing themselves of medical marijuana (information "revealing any patient information" shall be held confidential).

Category 4 consists of "other records," *i.e.*, records *other than* those in categories 1-3. And it applies only to those "other records" that are "exempt from public inspection pursuant to state or federal law"—*e.g.*, those that the Missouri Sunshine law permits, but does not require, public governmental bodies to "close." The purpose of Category 4, shown in its plain language, is to take away from the Department with regard to medical marijuana records the discretion that the Department normally has to decide whether to close records under § 610.021.

Despite the provision's clear delineation of categories of information that must be kept confidential, Commissioner Slusher's August 12 Order interprets the entire provision only in the context of the Sunshine Law that is referenced in the last category. In other words, Respondent's reading of 1.3(5) treats the description of Category 4 as some kind of overlay for Categories 1-3:

> The provision lists specific types of information that the Department must maintain as confidential, and at the end of the list, it concludes with "or any other records that are

> exempt from public inspection pursuant to state or federal law." Art. XIV, § 1.3(5). This last phrase provides contextual meaning to the Department's duty to maintain confidentiality – that is, to prevent public inspection of confidential information or documents. Public inspection, both within the context of this provision and Missouri law generally, refers to the opportunity of a member of the public to request public records, which falls directly within Missouri's Sunshine Law.

Doc. 4 p. 3, App. A-5.

This interpretation violates long-held rules of interpreting the law. The plain meaning of the constitutional language commands confidentiality for information that falls into any of the four categories, *i.e.,* for confidential information submitted by applicants for dispensary, manufacturing, or cultivation licenses, and equally for "patient information." And that confidentiality is required in all circumstances, not just when the Department is responding to a Sunshine Law request.

D. The confidentiality provision bars disclosure even in litigation—thus creating the practical equivalent of a discovery privilege—contrary to the circuit court's conclusion.

The circuit court did not dispute that the confidentiality provision is broader than Respondent had concluded. But it held that the confidentiality guarantee does not create a discovery privilege, and thus that it permits the AHC to order and the Department to produce to one applicant, in discovery,

sensitive information filed with the Department by other applicants. In the circuit court's view, the Department can make that disclosure and still "maintain the confidentiality" of the information. That unduly narrows the scope of the confidentiality that the drafters contemplated and the voters enacted, and leads to absurd results.

And it is contrary to this Court's precedent.

The language the voters enacted is strikingly similar to the confidentiality mandate in § 210.150, RSMo.—language that this Court held, just a few years before Article XIV was enacted, *excludes* information from discovery:

> The records *are not subject to discovery* because section 210.150 provides that "[t]he children's division *shall ensure the confidentiality* of all reports and records" of child abuse and neglect hotline reports.

State ex rel. Dept of Social Services v. Tucker, 413 S.W.3d 646, 647 (Mo 2013) (emphasis added). Whether the word is "ensure," as in § 210.150, or "maintain," as in § 1.3(5), the intent is the same: to keep the information out of the hands of others who would use it for their own purposes, including purposes that are contrary to the interests of the person who submitted the information to the government.

The circuit court focused on whether the statute created a privilege. But as shown in *Tucker*, that is the wrong analysis. This Court did not dispute "the absence of a traditional evidentiary privilege" that applied to the information that the state was required to "ensure" remain confidential. 413 S.W.3d at 648. But it reiterated "the distinction between statutorily mandated confidentiality and an evidentiary privilege" that it had recognized in *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44, 49-50 (Mo. 2004). The Court contrasted the "'evidentiary rule that gives a witness the option not to disclose the fact asked for'" with "the confidentiality mandated by [a] confidentiality statute [that] mandates that the division keep confidential an entire body of information." 413 S.W.3d at 649. The constitutional confidentiality at issue here fits the *Tucker* model.

This Court should neither accept nor apply the broader conclusion stated in *State ex rel. Mo. Ethics Comm'n v. Nichols*, 978 S.W.2d 770, 773-74 (Mo. App. E.D. 1998), that "state statutes . . . which protect certain types of documents from disclosure, but do not specifically protect them from discovery, do not create a privilege to withhold relevant documents from judicial discovery in a court action." That conclusion was reached in a case where a person sought information about himself, not about competitors. It cannot be easily reconciled with *Tucker*, decided by this Court years later.

And it would not serve the broad purposes of the *constitutional* confidentiality provision here.

One final but very important note: The rationale adopted by the circuit court has much broader implications than its application in this particular case presents. That rationale is problematic in at least three respects.

First, although Respondent eventually excluded from her order here some information from the competing applications that Kings Garden sought, broader arguments being asserted in other cases will result in broader discovery, using the AHC's and the circuit court's rationales. Many petitioners at the AHC have asked for complete applications—which would include not just answers from which personal information might be discerned, as here, but answers that consist of such information.

Second, although this particular appeal arises from an order requiring disclosure of information submitted to obtain a cultivation license, neither the AHC's rationale nor the circuit court's rationale is limited to that license type. Either one would apply equally to information submitted by a patient—by a person seeking to use medical marijuana. This Court's interpretation of Article XIV must take that information into consideration because those who wanted permission to use marijuana for medical purposes—or wanted their loved ones to have permission for such use—were the key supporters of the

initiative. "Maintain confidential" must be given the broad meaning they intended it to have.

And third, those rationales would apply regardless of the tribunal or litigants. The threat is not limited to licensing actions before the AHC. Litigants in domestic, personal injury, tort, worker's compensation, and other disputes may routinely begin seeking the information submitted by Missouri citizens to the Department.

Ultimately, any interpretation of Article XIV that would erode the confidentiality of patient and applicants' personal information must be rejected because violates "the primary rule": it would not "give effect to the intent of the voters who adopted the Amendment." *Johnson v. State*, 366 S.W.3d at 25.

E. The clause of Article XIV permitting review by the AHC should not be read as authority for the AHC to give any and every applicant with an improper scoring theory access to their competitor's applications.

The asserted rational of the circuit court (and of the Court of Appeals, Western District) was that construing the confidentiality provision to permit disclosure to any and all competitors in litigation is necessary "to allow all provisions of Article XIV § 1.3 to have meaning." Doc. 21, p.5, App. A-23. The circuit court did not actually identify any part of Article XIV § 1.3 that would

be without meaning if the Department is barred—and barred entirely—from sharing applications with applicants' competitors. But presumably the court was referring to Art. XIV, § 1.3(23), which makes denials "appealable to the administrative hearing commission." Art. XIV, § 1.3(23). But Kings Garden (and hundreds of others) are already at the AHC. The confidentiality provision has not been and cannot be asserted as a basis for refusing AHC review. Subsection 23 certainly has meaning.

The lower courts' alternative assertion is that requiring strict confidentiality would deprive the applicants a "full and meaningful appeal." Doc. 21, p. 5, App. A-23; *see also* Court of Appeals slip op. at 9 ("no meaningful review … can occur"). That may be a bit closer to the mark—but it, too, is a stretch. It presumes, first, that there is some argument that litigants have a constitutional right to make, and second, that the argument cannot be made without forcing the Department to produce other applications, *i.e.*, that the unsuccessful, litigating applicant can't make some crucial, constitutionally protected argument.

First, then, as to the scope of AHC review, Article XIV does not promise that the AHC can do anything and everything it is allowed to do in other contexts. The scope of AHC review in medical marijuana licensing cases must

be constrained by the rest of Article XIV—*including* the confidentiality provision.

Subsection 1.3(23), which provides for an appeal to the AHC, goes on to provide for judicial review. But judicial review proceeds "as provided by law"—words that are missing from the sentence regarding AHC review. Thus the voters authorized the General Assembly to define the scope of judicial review of the AHC's decision. At the moment, that means judicial review per § 536.150 (because these are "contested cases" at the AHC). But at the AHC, review cannot exceed that permitted by Article XIV. And that includes the constraint imposed by section 1.3(5).

Second, Kings Garden and other petitioners can still make—and have made—effective challenges to the scores given to particular answers.

They have done so, first, by simply addressing the requirements of the application question and the content of their answer. Those are, obviously, within their knowledge. They argue that an answer that was given one score should have been given a higher one, because that answer provides all that the question sought. Litigating applicants have successfully made that point at hearing. *See*, *e.g.*, *DHSS v. Heya*, AHC Nos. 20-0215 and 20-0213, taken on judicial review to Cole County Circuit Court as No. 21AC-CC0010, but recently remanded and dismissed.

Litigating applicants can also compare their answers and scores to answers submitting by others without getting those answers from the Department. They can use their own multiple applications, or those that they obtain voluntarily from third parties rather than from the Department. Again, applicants have been doing just that, using applications from the same or overlapping ownership groups, or ones prepared with the assistance of the same consultant—applications to which they have access without using discovery. *See id.* In fact Kings Garden's petition asserts this very theory as grounds for relief—and needs no confidential, third-party information to pursue this approach. Or Kings Garden and others may assert that the scoring process violated the Department's rules—another scoring argument that does not require disclosure of the confidential applications.

Even assuming that third party applications were necessary for an appeal, applicants can obtain other applications through third-party discovery such as through subpoenas duces tecum. Notably, in that process the applicant whose information is about to be disclosed receives notice and has the opportunity to challenge the disclosure—either entirely, or in part. What Respondent ordered here provides no such opportunity: She ordered that the Department simply hand over confidential information to the

petitioner with no notice to other applicants, with no assurance that they will have an opportunity to be heard.

A few applicants nonetheless learned of the disclosure order and attempted to intervene and object. They objected despite Respondent's decision to enter a protective order—one that many applicants may deem to be insufficient, especially in light of the way in which the industry operates. For example, the experts who gain access to other applications during litigation are often consultants who assist others in preparing competing applications. They assisted others in preparing Missouri applications that are the subject of competing appeal at the AHC. And they assist with future applications, in Missouri and elsewhere.[4] It is unreasonable to suppose that they will forget what they learned through discovery at our AHC.

The current availability of sufficient application information to make a scoring challenge—in addition to myriad other challenges—demonstrates that the circuit court was wrong in concluding that applicants such as Kings Garden do not have a "meaningful appeal" unless the Department is ordered to breach its duty of confidentiality.

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[4] The potential for competitive use of application information could increase dramatically if a federal court proceeds, as it has stated it will do, to hold that Missouri's limitations on out-of-state ownership are invalid, opening the door to multistate operators. *Toigo v. DHSS*, No. 2:20-cv-04243-NKL (W.D. Mo.).

If that duty were ever ordered to be breached, it should be carefully constrained—not just by a protective order, but by being allowed only when a particular applicant makes a strong showing that the information sought is likely to be essential, that it lacks any alternative method of obtaining it, and that the information will never be publicly disclosed.

There were no such showings here. At the heart of this controversy is the Kings Garden complaint. Kings Garden asserts:

> 13. Upon information and belief, applicants who were awarded licenses, including top scoring applicants, had identical or nearly identical language in their answers to questions 22, 23, 24, 25, 32, 33, 34, 35, 36, 39, 40, 45, 48, 51, 52, 55, 56, 57, and 58 and received widely varying scores, many of which were higher than those scores received by Kings Garden.

Kings Garden did not identify to Respondent any particular comparator applicant in its complaint other than its own applications for other facility licenses. Nor did it identify other instances of "identical or nearly identical language" in any of the subsequent pleadings in which it attempts to justify its attempts to reach the confidential information of its competitors. Nor did it explain the basis for its purported belief that others happened to submit answers that were identical to those of Kings Garden. There is no evidence in the record before the AHC to establish that a fishing expedition into this confidential information is essential for it to have a "meaningful appeal." The sort of averments made by Kings Garden should not serve as the basis to

abrogate the constitutional right to confidentiality promised to competing applicants.

Moreover, Kings Garden has never persuaded Respondent to confirm that the other applications, if used at hearing, would be admitted under seal. Nor has Kings Garden articulated how it could make the arguments it posits without having the items from competing applications admitted. In other words, Kings Garden has not shown that there is any way for it to effectively use what it hopes to find without entirely defeating the confidentiality promised by the constitution.

This Court should not permit the broad opening ordered by Respondent—one that makes little effort to vindicate the confidentiality rights guaranteed to other applicants by the Constitution. Nor should it allow the AHC to impose on third-party applicants the obligation to watch hundreds of AHC cases and then hire attorneys to represent them in seeking to restrain disclosure of all or some of their confidential information in each case—both now, in discovery, and later, at hearing.

F. The Department and third parties—other applicants, both successful and not—will suffer irreparable harm if the information at issue is disclosed to their competitors.

The question of law here was presented to the circuit court in a petition for writ of prohibition. This Court has held that prohibition lies

where a party will suffer an absolute and irreparable harm that would otherwise escape review on appeal and the aggrieved party may suffer considerable hardship and expense. *State ex rel. Riverside Joint Venture v. Mo. Gaming Commission*, 969 S.W.2d 218, 221 (Mo. 1998). Likewise, in *State ex rel. Noranda Aluminum, Inc. v. Rains*, this Court described the basis for issuing a writ of prohibition against an administrative agency's action:

> This category often acts as a mechanism for deciding an important legal question that routinely escapes this Court's attention because of the litigation process and the lack of interest in some instances to prosecute an appeal at a client's expense. It might be noted that there are no interlocutory appeals in civil cases in Missouri, which in other jurisdictions might cover some of the situations in this third category. Thus, where there is an issue which might otherwise escape this Court's attention for some time and which in the meantime is being decided by administrative bodies or trial courts whose opinions may be reason of inertia or other cause become precedent; and, the issue is being decided wrongly and is not a mere misapplication of law; and, where the aggrieved party may suffer considerable hardship and expense as a consequence of such action, we may entertain the writ for purposes of judicial economy under our authority to "issue and determine original remedial writs.

State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862-63 (Mo. 1986) (citing Mo. Const. Art. V, § 4.1).

The circumstances articulated in *Noranda Aluminum* and *Riverside Joint Venture* are present here. Directly or indirectly, the identity of persons affiliated with applicants—employees and prospective employees, consultants, bankers, even owners[5]—will be disclosed. Proposed locations, and thus the identity of buyers, sellers, lessors, and lessees of real property will be disclosed. Detailed business plans will be disclosed. Security plans will be disclosed. And more. There is no way to regain confidentiality and perhaps no industry stands to face more peril were confidentiality to be eroded.

That each AHC case involves just one applicant does not ameliorate the problem. Disclosure to one litigant, even pursuant to a strict protective order, could result in broader harm. After all, as Intervenor pointed out below, "only a limited number of consultants who assisted with the application process were used by most applicants including the consultant used by Kings Garden." Court of Appeals Brief of Intervenor Kings Garden in Opposition, p. 2. That same small group of consultants are assisting in various challenges of the denials of the applications they helped prepare. And it seems certain that the same small group is now preparing competing applications in other states—applications that will be, again, in competition. So when the

[5] Though Respondent purported to permit the Department to omit the names of owners, Doc. 5 p. 4, identities may be discernible, if not readily apparent, from the responses to questions that address the background, experience, affiliations, etc., of those associated with the applicant.

information is disclosed to parties and their consultants, it is being made available to current and future competitors. There is no way to reconcile the "plain and ordinary meaning of the word" "confidential" with that breach of trust.

CONCLUSION

For these reasons, the Department respectfully requests that the Court reverse the circuit court and hold that the directive in the Missouri Constitution prohibits the Department from disclosing to Kings Garden information submitted by third-parties with the guarantee it would be kept confidential, even if the information is sought in discovery at the AHC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the foregoing Appellant's Substitute Brief complies with Rule 55.03 and with the limitations contained in Rule 84.06(b). I further certify that this Brief contains 6,734 words, as determined by the Microsoft Word 2010 word-counting system.

/s/ James R. Layton