CV-21-505

IN THE SUPREME COURT OF ARKANSAS

ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION; ARKANSAS ALCOHOLIC BEVERAGE CONTROL DIVISION; and ARKANSAS MEDICAL MARIJUANA COMMISSION — APPELLANTS

v. Case No. CV-21-505

2600 HOLDINGS, LLC d/b/a SOUTHERN ROOTS CULTIVATION — APPELLEE

On Appeal From The Circuit Court
Of Pulaski County

The Honorable Herbert T. Wright, Jr., Circuit Judge

APPELLEE'S BRIEF

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POINTS ON APPEAL

I. The circuit court did not abuse its discretion when it denied the State's Motion to Dismiss based on sovereign immunity because Southern Roots sufficiently pleaded facts showing that the MMC acted unconstitutionally in licensing RVRC, and because Southern Roots sufficiently pleaded facts showing that the ABC has yet to enforce the constitutional provisions that the MMC disregarded.

A. The State licensed RVRC in violation of amendment 98, section 8(g)(2) because RVRC's application proposed a physical location that was within 3,000′ of a school.

- ARK. CONST. amend. XCVIII, § 8(g)(2).

B. The State licensed RVRC in violation of amendment 98, section 10(b)(2) because RVRC was not an entity incorporated in the State of Arkansas when it was licensed.

- ARK. CONST. amend. XCVIII, § 10(b)(2).

C. The ABC is actively violating amendment 98, section 8(a)(3) because the ABC has yet to give force or effect to amendment 98, sections 8(g)(2) and 10(b)(2).

- ARK. CONST. amend. XCVIII, § 8(a)(3).

D. Southern Roots's Amended Complaint seeks injunctive relief.

- ARK. CONST. amend. XCVIII, § 8(b)(1), (d)(3).

II. Southern Roots sufficiently pleaded a claim for a writ of mandamus, and the circuit court had subject matter jurisdiction over this action.

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JURISDICTIONAL STATEMENT

Appellee 2600 Holdings, LLC d/b/a Southern Roots Cultivation ("Southern Roots") disputes the characterization of the facts and procedural history articulated in the State's Jurisdictional Statement. Southern Roots further disputes the State's overzealous attempt to expand this interlocutory appeal beyond the scope of the State's Notice of Appeal.

On February 10, 2021, Southern Roots filed an Amended Complaint in the Pulaski County Circuit Court suing the Arkansas Alcoholic Beverage Control Division ("ABC"), the Arkansas Medical Marijuana Commission ("MMC"), and the Arkansas Department of Finance and Administration ("DFA") (collectively, "the State"). (RP 218-243). On March 15, 2021, the State filed a Motion to Dismiss. (RP 248-251). The State argued that the doctrine of sovereign immunity barred judicial review of Southern Roots' claims. (RP 249, 260-261). Separate and distinct from its sovereign immunity argument, the State also argued that the circuit court lacked subject matter jurisdiction under the Administrative Procedures Act ("APA") and that Southern Roots's claims are otherwise moot. (RP 249, 262-269).

A hearing was held on July 22, 2021, and the State's Motion to Dismiss was denied shortly thereafter. (RP 403-404). On August 2, 2021, the State timely filed a Notice of Appeal. (RP 405-407).

The Notice of Appeal *only* challenges "the circuit court's denial of [the State's] motion to dismiss based on the defense of sovereign immunity[.]" (RP 406) (citing ARK. R. APP. P.—CIVIL 2(a)(10)). Despite the clear and limited nature of the issue presented in the Notice of Appeal, and despite the limited language of the corresponding jurisdictional hook, the State now characterizes the issue—at this interlocutory stage—as "whether the *circuit court erred* in denying [the State's] motion to dismiss on sovereign immunity *or subject-matter jurisdictional grounds*." (State's Br. 9) (emphasis added).

True, subject matter defects may be raised at any stage in the litigation. And true, the Court has a *sua sponte* obligation to satisfy itself of its own subject matter jurisdiction. But neither of these truths permit the State to *appeal* a circuit court's *ruling* on this topic without adhering to the proper procedural requirements. Simply put, an interlocutory appeal of a sovereign immunity ruling under Arkansas Rule of Appellate Procedure 2(a)(10) is just that. It cannot be twisted into an appeal of all subject matter

rulings made by the court below, especially where the State reflexively "always assert[s] sovereign immunity." (RT 6).

This Court has jurisdiction over this appeal under Supreme Court Rule 1-2(a)(1) because the appeal involves "the interpretation or construction of the Constitution of Arkansas." However, because this appeal is interlocutory, this Court's jurisdiction is expressly limited to a review of the circuit court's denial of the State's Motion to Dismiss "based on the defense of sovereign immunity." ARK. R. APP. P.—CIVIL 2 (a)(10).

STATEMENT OF THE CASE AND THE FACTS

In 2016, Arkansas voters passed amendment 98, commonly known as the Arkansas Medical Marijuana Amendment of 2016. ARK. CONST. amend. XCVIII, § 1. Amendment 98 created the MMC to administer and regulate "the licensing of dispensaries and cultivation facilities" and it tasked the ABC with administering and enforcing "the provisions of this amendment." *Id.* §§ 8(a), 19.

According to amendment 98, cultivation facilities must be licensed through an application process. *See, e.g.*, *id.* § 8(g)(1) ("[T]he commission *shall* begin accepting applications for licenses . . . .") (emphasis added); *Id.* § 8(d)(1) ("[T]he commission shall adopt rules governing . . . [t]he manner in which the commission considers applications . . . ."). Because the MMC is the entity tasked with administering and regulating the licensing of cultivation facilities, the MMC is necessarily required to impose and adhere to amendment 98's mandatory application requirements.

One such mandatory application requirement states that a cultivation facility application shall include a cultivation site that is a reasonable distance away from schools, daycares, and churches. Specifically,

> [t]he application *shall* include *without limitation* . . . the legal name of the cultivation facility . . . [and] . . . [t]he physical address of the . . . [c]ultivation facility the

> location of which *may not be* within three thousand feet (3,000′) of a public or private school . . . .

Id. § 8(g)(2) (emphasis added). Amendment 98 similarly requires that "a cultivation facility *shall* be an entity incorporated in the State of Arkansas." *Id.* § 10(b)(2) (emphasis added).

As explained below, the MMC disregarded both of those mandatory constitutional provisions when it licensed River Valley Production, LLC d/b/a River Valley Relief Cultivation ("RVRC"), and the ABC has refused to enforce those provisions despite its mandate to do so under amendment 98, section 8(a)(3).

A. The Facts Establishing the MMC's and the ABC's Unconstitutional Conduct.

On July 10, 2018, the MMC issued medical marijuana cultivation licenses to each of the five highest-scoring applicants and, at the same time, announced that the sixth, seventh, and eighth highest-scoring applicants were RVRC, New Day, and Southern Roots, respectively (the "Reserve Pool").[1] (RP 224-225). Not long thereafter, the MMC and the ABC received

[1] Applicant Carpenter Farms, which the MMC initially scored as the sixth highest-ranked applicant, was later disqualified. Carpenter Farms sued the State for, among other things, violations of the Constitution. After this Court's remand decision compelled the State to defend against

several protest letters, two of which specifically complained that RVRC's application was void because its proposed cultivation site was located within 3,000′ of a public school, which is a violation of the direct text of amendment 98, section 8(g)(2)(C)(ii). (RP 225).

ABC Agents investigated the allegations regarding the physical location of the cultivation site proposed in RVRC's application. (RP 63-99). On December 17, 2018, the Agents reported their findings (the "Violation Report") to the ABC. (*Id.*). The Violation Report concluded that the physical location of the cultivation site proposed in RVRC's application—100 South E Street, Fort Smith, Arkansas—was 2,481′ from a juvenile detention center, which is decidedly a school for amendment 98 purposes. (*Id.*). The Violation Report also revealed that, on September 8, 2017, seven days before RVRC submitted its application, RVRC acknowledged that its

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Carpenter Farms' constitutional claims on the merits, the State settled that lawsuit by restoring Carpenter Farms to the sixth position. That decision would have placed Southern Roots into ninth place if RVRC was a constitutionally qualified applicant. But because RVRC was "fully and formally dissolved" at the time the license was awarded (RP 150), Southern Roots is (and has always been) the eighth highest-ranked and final applicant.

proposed location (and consequently its application) was "compromised" in light of the MMC's Advisory Memo II. (RP 94-96, 100).

Notwithstanding those findings, on February 1, 2019, ABC Director Doralee Chandler issued an Administrative Order dismissing the complaints against RVRC's application without prejudice. (RP 103-104). Although the application requirement articulated in amendment 98, section 8(g)(2) indiscriminately applies to all applications "without limitation," Director Chandler inexplicably opined that, *at least in this instance*, this particular constitutional application requirement only applies if and when an applicant is issued one of the eight cultivation facility licenses. (*Id.*). Said differently, according to Director Chandler, unless and until a cultivation applicant is issued a license, an applicant need not comply with amendment 98. And with that, RVRC's unconstitutional application remained in the Reserve Pool.

On March 20, 2019, Bennett Nolan, II ("Mr. Nolan"), the individual who submitted the cultivation facility application on RVRC's behalf, voluntarily and formally dissolved RVRC, the cultivation entity listed in the application and scored by the MMC. (RP 106-108). Mr. Nolan's stated reason for dissolving RVRC was that the business "[n]ever started." (*Id.*).

From that day forward, RVRC was no longer an entity incorporated in the State of Arkansas as required by amendment 98, section 10(b)(2).

Despite two insurmountable constitutional deficiencies in RVRC's application, on June 30, 2020, the MMC awarded the eighth and final cultivation license to RVRC, a corporate ghost that Mr. Nolan voluntarily dissolved fourteen months earlier. (RP 228). One day later, on July 1, 2020, the ABC issued a medical marijuana cultivation permit to Mr. Nolan and RVRC. (*Id.*). This action by the ABC was in direct conflict with its duty to enforce the provisions of amendment 98. Not only was RVRC's application constitutionally deficient given its close proximity to a school, but RVRC no longer existed and had not existed for over a year.

Recognizing his suspiciously good fortune, on July 2, 2020, Mr. Nolan directed his attorney to file documents with the Secretary of State to recreate "River Valley Production, LLC." (RP 150). When the filing was rejected because of its similarity "to that of a previous filing," Mr. Nolan's attorney quickly responded:

> The first thing to note is that the previous entity by this name has been fully and formally dissolved and thus, that name should be available for use. . . . This is the second time I have recently attempted to re-create an LLC that has been properly dissolved and I am concerned as to why I have been given no guidance on how to resurrect an entity that may have been hastily (but properly) dissolved

> and the members now wish to re-activate that entity. Please advise. Thanks.

(*Id.*). Of course, there is no legal mechanism under Arkansas law that allows a limited liability company that has been voluntarily and formally dissolved to revoke its dissolution and restore itself back into existence. ARK. CODE ANN. §§ 4–32–101 *et seq*. Once a limited liability company is dissolved, it is dissolved forever.

On July 7, 2020, Mr. Nolan created a completely new business entity entitled "River Valley Relief Cultivation, LLC." (RP 152-153). On or about that same day, Mr. Nolan admitted to DFA Agent David Boyd that he dissolved RVRC after it was not selected to receive one of the initial five licenses, but "we're working on that." (RP 156). Mr. Nolan also stated that he sold the E Street location proposed as the cultivation site in RVRC's application and intended to file an after-the-fact application for a change of location. (*Id.*).

On July 10, 2020, Mr. Nolan obtained a performance bond on behalf of the newly created entity that was never scored by the MMC, and which—to date—has never applied for a cultivation license. (RP 163-166). On July 13, 2020, Mr. Nolan submitted a cultivation licensing fee and performance bond to the MMC on the new entity's behalf. (RP 230). On July 15, 2020, the new entity leased a warehouse located at 5601 Old Greenwood Road,

Fort Smith, Arkansas, for "cultivating and warehousing." (*Id.*). The owner of the warehouse was River Valley Relief Property, LLC, an entity Mr. Nolan created two days earlier. (*Id.*).

On July 23, 2020, Mr. Nolan created yet another business entity, "River Valley Production, LLC," with the fictitious name "River Valley Relief Cultivation." (RP 168-170). Mr. Nolan then dissolved "River Valley Relief Cultivation, LLC," which he had created just two weeks earlier. (RP 154). But no matter how many business entities Mr. Nolan created, he could not conceal, alter, or undo the fact that RVRC's application failed to pass constitutional muster *or* the fact that the *only* entity scored by the MMC no longer existed.

On October 27, 2020, Southern Roots sent a letter to the ABC contending that RVRC was disqualified from receiving a cultivation facility license because it was not "an entity incorporated in the State of Arkansas" when the license was issued. (RP 172-177). Only weeks later, the MMC was forced to consider this very issue when it was faced with deciding whether to issue a Zone 4 dispensary license to another entity that Mr. Nolan had previously administratively dissolved. (RP 202-207).

More specifically, Mr. Nolan—on behalf of River Valley Sales, LLC d/b/a River Valley Relief Dispensary (RVRD)—filed an application for a

dispensary license with the MMC. (RP 231). On the same date that Mr. Nolan administratively dissolved RVRC (March 20, 2019), he likewise filed Articles of Dissolution with the Arkansas Secretary of State on RVRD's behalf. (RP 206-207.) As was the case with RVRC, Mr. Nolan explained that his reason for terminating RVRD was because the business "[n]ever started." (*Id.*).

At its December 8, 2020 meeting, the MMC considered whether RVRD could receive a dispensary license given its defunct, deficient, and ultimately dead corporate status. (RP 231-232). Unsurprisingly, the MMC unanimously determined that RVRD was disqualified from receiving a dispensary license under amendment 98, section 10(b)(2) because RVRD—just like RVRC—was administratively dissolved prior to the MMC's licensure action. (*Id.*). Simply put, RVRD was ineligible for a dispensary license under amendment 98 because the scored entity did not exist. (RP 232). As a result, the Zone 4 dispensary license was issued to the next highest-ranked qualified applicant. (*Id.*).

After the MMC's ruling in the RVRD matter, Southern Roots *again* contacted the ABC and the MMC, requesting that they apply the same rationale to RVRC and revoke its unconstitutionally awarded cultivation license and permit. (RP 209-211). Nothing came of that request.

On December 17, 2020, the former members of then-dissolved RVRD filed suit and a motion for temporary restraining order against the ABC, the MMC, and the Secretary of State (among others), alleging that RVRD's application was wrongfully rejected because it should not have been treated as dissolved by the Secretary of State.[2] (RP 232). Shortly thereafter, the Attorney General, on behalf of the State defendants, made sweeping admissions that foreclose the State from now arguing that Southern Roots is not entitled to a writ of mandamus. (RP 234-235). In particular, the State asserted the following:

> [Mr. Nolan] was an individual applicant for a medical marijuana dispensary permit, and an entity previously incorporated in the State of Arkansas known as River Valley Sales, LLC . . . was "the applying entity" identified on Nolan's application as required by the MMC's Rules[.]
>
> . . .
>
> [A]t the December 8, 2020[] meeting, the MMC learned that Nolan had dissolved River Valley, the business entity identified on his application that would operate his proposed dispensary as required by Amendment 98 . . . . *See* Ark. Const. amend. 98 § 2(7) (defining a "dispensary" as "an ***entity*** that has been licensed by the Medical

[2] *See Nolan, et al. v. Arkansas Department of Finance, et al.*, Pulaski County Cir. Ct. Case No. 60cv-20-7213 (docket last accessed on February 8, 2021 at https://caseinfo.arcourts.gov/cconnect). As noted by the State, the Court can take judicial notice of public records. (State's Br. 11, n. 1).

> Marijuana Commission under § 8 of this amendment") (emphasis added). In other words, the MMC determined that, by the time they voted to issue the fifth license in Zone 4 on December 8, 2020, Nolan's application was no longer valid or complete, as there was no "applying entity" in good standing with the State as required by the MMC's rules.
>
> . . .
>
> Nolan's application [for a dispensary permit] was disqualified because he admittedly had dissolved River Valley with the Secretary of State's office for lack of operations. . . . *[T]he MMC had no discretion to excuse the deficient application that failed to meet minimum constitutional qualifications*.

Nolan, et al. v. Arkansas Department of Finance, et al., Pulaski County Cir. Ct. Case No. 60cv-20-7213, Brief in Support of Motion to Dismiss, at pp. 4, 26 (filed on February 1, 2021) (https://caseinfo.arcourts.gov/cconnect) (emphasis added).

On December 18, 2020, the circuit court entered an order denying Mr. Nolan's motion for temporary restraining order because the motion failed to establish a likelihood of success on the merits. (RP 213-214). Then, on January 22, 2021, despite the polar opposite ruling in the RVRD matter, Director Chandler proposed an "Offer of Settlement" to Mr. Nolan on terms that would allow the unscored RVRC entity to operate under the unconstitutionally awarded license. (RP 216-217). In making that offer, the ABC conceded all of the following facts:

a. On March 20, 2019, Mr. Nolan dissolved RVRC, the business entity that was scored by the MMC.

b. On June 30, 2020, the MMC voted to award a cultivation license to Mr. Nolan.

c. On July 7, 2020, Mr. Nolan created a new business entity, "River Valley Relief Cultivation, LLC."

d. On July 13, 2020, Mr. Nolan submitted a cultivation licensing fee and a performance bond to the MMC on behalf of the *newly created* "River Valley Relief Cultivation, LLC," *an entity which was never scored by the MMC.*

e. On July 23, 2020, Mr. Nolan created another business entity, "River Valley Production, LLC," with the fictitious name "River Valley Relief Cultivation."

f. Mr. Nolan dissolved "River Valley Relief Cultivation, LLC," which is the principal listed on the performance bond that Mr. Nolan submitted on July 13, 2020.

g. As of January 22, 2021, Mr. Nolan had not paid a performance bond on behalf of "River Valley Production, LLC d/b/a/ River Valley Relief Cultivation."

(*Id.*). The "Offer of Settlement" concludes that the actions by Mr. Nolan violated MMC Rule Section IV.16.d. While true, the Offer wholly ignores the constitutional violations and proposes that RVRC simply pay "a FINE in the amount of fifteen thousand dollars ($15,000.00), [submit to] PROBATION for a period of one (1) year, and . . . within sixty (60) days of the Order submit a performance bond in the amount of $500,000.00 setting forth the correct principal for Permit No. 00065." (*Id.*).

B. The Trial Court Proceedings.

On the same day that the ABC "settled" with Mr. Nolan, Southern Roots filed its Complaint in the circuit court. (RP 4-21). On February 10, 2021, Southern Roots filed an Amended Complaint. (RP 218-243). In short, the Amended Complaint alleges that the MMC violated at least two express constitutional provisions when the MMC awarded a cultivation facility license to RVRC. (*Id.*). The Amended Complaint further alleges that the ABC is actively violating amendment 98 by refusing to enforce the provisions that were disregarded by the MMC. (*Id.*).

Had these constitutional violations not occurred, Southern Roots, as next in line in the Reserve Pool, would have been the undisputed recipient of the license that was unconstitutionally awarded to RVRC. (*Id.*). Accordingly, Southern Roots asked the circuit court to issue a writ of mandamus, directing the ABC and Director Chandler to revoke the license that was unconstitutionally issued to RVRC, and directing the MMC to issue Southern Roots the license that it is rightfully owed. (*Id.*).

On March 15, 2021, the State filed a Motion to Dismiss Southern Roots's Amended Complaint. (RP 248-251). Among other things, the Motion argued that the circuit court must dismiss the Amended Complaint because the State is immune from suit under article 5, section 20 of the

Arkansas Constitution. (RP 249, 260-261). In response, Southern Roots explained that dismissal is not appropriate when a complaint alleges that a state actor is acting "outside the scope of its constitutional authority . . . ." (RP 291-295). Because that is true of Southern Roots's Amended Complaint, "the doctrine of sovereign immunity provides no quarter to the State." (RP 295).

On July 22, 2021, the Court held a hearing on the Motion to Dismiss. (RP 403-404). A few days later, on July 26, 2021, the Court entered an Order denying the Motion "based upon a review of the case file, pleadings of the parties, the arguments presented at the hearing . . . , and all other matters considered." (*Id.*). Shortly thereafter, the State filed a Notice of Appeal challenging the circuit court's Order "denying [its] motion to dismiss . . . based on the defense of sovereign immunity . . . ." (RP 405-406) (citing ARK. R. APP. P.—CIVIL 2 (a)(10)).

ARGUMENT

The sole question in this interlocutory appeal is whether the circuit court abused its discretion in denying the State's Motion to Dismiss based on the defense of sovereign immunity. *See, e.g.*, *Monsanto Co. v. Ark. State Plant Bd.*, 2019 Ark. 194, at 9, 576 S.W.3d 8, 13 (explaining that the denial of a motion to dismiss is reviewed for an abuse of discretion); *Ark. Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232, at 6, 428 S.W.3d 415, 419 ("Given that the circuit court made no substantive interpretations of law but instead made its decision by looking at Alpha's pleadings and finding that Alpha 'pled sufficient facts for each exception to sovereign immunity,' we apply the abuse-of-discretion standard of review.").

In reviewing a circuit court's decision on a motion to dismiss, this Court considers all of the facts alleged in the operative complaint as true and views them in the light most favorable to the plaintiff. *Monsanto Co.*, 2019 Ark. 194, at 8, 576 S.W.3d at 13 (citing *McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 368, 201 S.W.3d 375, 377–78 (2005)). Reversal under this standard is only appropriate if the circuit court erred to the degree that its ruling was made "improvidently, thoughtlessly, or without due consideration." *See e.g.*, *Steinbuch v. Univ. of Ark.*, 2019 Ark.

356, at 8, 589 S.W.3d 350, 356. Substantive interpretations of law are reviewed *de novo*.

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE STATE'S MOTION TO DISMISS BASED ON SOVEREIGN IMMUNITY BECAUSE SOUTHERN ROOTS SUFFICIENTLY PLEADED FACTS SHOWING THAT THE MMC ACTED UNCONSTITUTIONALLY IN LICENSING RVRC, AND BECAUSE SOUTHERN ROOTS SUFFICIENTLY PLEADED FACTS SHOWING THAT THE ABC HAS YET TO ENFORCE THE CONSTITUTIONAL PROVISIONS THAT THE MMC DISREGARDED.

As the State concedes, "an allegation of 'ultra vires' or 'illegal' acts" is an exception to sovereign immunity that is both "alive and well." (State's Br. 22); *Ark. Dep't of Fin. & Admin. v. Carpenter Farms Med. Grp., LLC*, 2020 Ark. 213, at 7, 601 S.W.3d 111, 117. But aside from its rather audacious claim to unlimited discretion, the State makes no effort to explain why or how the MMC's or the ABC's conduct comported with amendment 98. Instead, the State expends a significant amount of effort attempting to divert the Court's attention away from amendment 98's plain language, and indeed away from the topic of sovereign immunity.

The question this Court must answer is simple: Do the facts alleged in the Amended Complaint, when taken as true and viewed in the light most favorable to Southern Roots, demonstrate that the circuit court abused its discretion in denying the State's Motion to Dismiss based on the doctrine of

sovereign immunity? As demonstrated by the facts above, and as explained more fully below, the answer to that question is a resounding "no."

A. The State licensed RVRC in violation of amendment 98, section 8(g)(2) because RVRC's application proposed a physical location that was within 3,000′ of a school.

The State does not dispute that the only application submitted on RVRC's behalf proposed a cultivation facility location that was within 3,000′ from a juvenile detention center, which is decidedly a "school" for amendment 98 purposes. Nor does the State dispute that the MMC considered that same application for one of the final cultivation facility licenses, held that application in the Reserve Pool, and ultimately awarded RVRC a license based off that application. Nor does the State deny that the MMC licensed RVRC in direct contravention of amendment 98, section 8(g)(2), which mandates that an application "*shall* include *without limitation*" a physical address for a cultivation facility that is not "within three thousand feet (3,000′) of a public or private school . . . ."

Instead, the State takes the position that "Amendment 98 contains no limitations or restrictions on the MMC's exercise of its discretion . . . ." (State's Br. 21). In other words, the State asks this Court to find that compliance with amendment 98, section 8(g)(2) is discretionary not mandatory. But the State fails to reconcile this theory of unlimited power

with amendment 98's plain text, which is peppered with words and phrases such as "shall," "necessary," and "without limitation." This Court has consistently held that words such as "shall" and "must" indicate that the duty imposed is mandatory. *See, e.g.*, *Vaughn v. Mercy Clinic Fort Smith Communities*, 2019 Ark. 329, at 7, 587 S.W.3d 216, 221 ("The word 'shall' means mandatory compliance unless it would lead to an absurd result."); *Smith v. Wright*, 2015 Ark. 189, at 13, 461 S.W.3d 687, 695 (reiterating that the word "shall" means "mandatory" and requires "mandatory compliance").

The State is correct that the MMC is required to adopt rules for carrying out its respective duties under amendment 98. The State is also correct that the MMC has discretion in that process. But the MMC's discretion does not exceed the limits of the constitutional amendment that created it. Indeed, any rule adopted by the MMC must be consistent with both the purpose of amendment 98 and the MMC's prescribed duties under amendment 98. ARK. CONST. amend. XCVIII, § 8(b)(1). And any such rule must promote the "fair, impartial, stringent, and comprehensive administration of this amendment." *Id.* at § 8(d)(3). Thus, contrary to the State's suggestion, no amount of discretionary rulemaking authority allows

the MMC to cast aside or overlook any of amendment 98's express provisions, section 8(g)(2) included.

Curiously, the State recognizes and heeds other similar mandatory provisions contained in amendment 98. For example, the State repeatedly refers to amendment 98, section 8(j), which states that the MMC "*shall* issue at least four (4) but no more than eight (8) cultivation facility licenses." (State's Br. 11, 21). The State quite clearly and carefully recognizes that "shall"—*at least in that provision*—defines nonnegotiable boundaries on the MMC's licensing discretion. But the State does not offer any rationale whatsoever for drawing a distinction between the "shall" in section 8(j) and the "shall" in section (8)(g)(2). Presumably, that's because no sound rationale exists. Indeed, "[a] word or phrase is presumed to bear the same meaning throughout a text . . . ." *Tilley v. Malvern Nat'l Bank*, 2017 Ark. 343, at 21, 532 S.W.3d 570, 581–82 (WOOD, J., dissenting) (quoting Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 170 (2012)).

In the same way that it is outside of the MMC's constitutional authority to license less than four or more than eight cultivation facilities, it was outside of the MMC's constitutional authority to license a cultivation facility based on an application that proposed an address within 3,000′ of a

school. To be sure, the requirement articulated in amendment 98, section 8(g)(2) is no less mandatory or meaningful than the requirement found in amendment 98, section 8(j).

The MMC violated amendment 98, section 8(g)(2) when it accepted RVRC's unconstitutional application and awarded RVRC a license. Accordingly, the circuit court did not abuse its discretion when it concluded that the operative Complaint alleged facts demonstrating that the State is not entitled to sovereign immunity.

B. The State licensed RVRC in violation of amendment 98, section 10(b)(2) because RVRC was not an entity incorporated in the State of Arkansas when it was licensed.

It is undisputed that RVRC was the entity for which Mr. Nolan submitted a cultivation facility application. It is likewise undisputed that Mr. Nolan dissolved RVRC on March 20, 2019, and that, more than a year later, on June 30, 2020, the MMC awarded a cultivation license to RVRC, a defunct, nonexistent corporate ghost. And it is beyond dispute that a cultivation facility—just like a dispensary—must be incorporated in the State of Arkansas under amendment 98, section 10(b)(2). Nevertheless, the State attempts to sidestep this mandatory constitutional prerequisite by contending that the MMC actually licenses a "natural person" rather than a "cultivation facility." (State's Br. 13-14).

Amendment 98's plain text tells a different story. According to amendment 98, "cultivation facilities *shall* be licensed by the [MMC]." ARK. CONST. amend. XCVIII, § 8(a)(1) (emphasis added). Said differently, the MMC shall license "cultivation facilities." *Id.* Accordingly, the MMC is reasonably tasked with both administering and regulating the licensing of "cultivation facilities." *Id.* § 8(a)(2).

It should go without saying that "cultivation facilities" are not "natural persons." But even if there was room to wonder, amendment 98 defines a "cultivation facility" as "an *entity* that: (A) *Has been licensed* by the [MMC] under § 8 of this amendment; and (B) Cultivates, prepares, manufactures, processes, packages, sells to and delivers usable marijuana to a dispensary." *Id.* § 2(4) (emphasis added). Amendment 98 further requires that "a cultivation facility *shall* be an entity incorporated in the State of Arkansas." *Id.* § 10(b)(2) (emphasis added). A natural person or an individual cannot be a facility or an incorporated entity.

On the other hand, it should be no surprise that an "individual" must perform the physical act of submitting a cultivation license application. *Id.* § 8(c)(1). After all, entities—including cultivation facilities—act through their agents. But amendment 98 makes it clear that any such applications are submitted "to license a dispensary or cultivation facility." *Id.* In other

words, an application is not submitted to license an individual. Similarly, "[a] license *for* a cultivation facility" must be issued to a natural person. *Id.* § 8(q)(1) (emphasis added). But once again, amendment 98 makes it clear that the license belongs to—or is "issued for"—the cultivation facility. *Id.* § 8(q)(2). In other words, a natural person is not issued a license for the natural person.

Additional examples abound. For instance, consistent with the MMC's mandate to license cultivation facilities in the first place, the MMC is likewise mandated to issue "a renewal cultivation facility license . . . to *an entity* who complies with the requirements" found in amendment 98. *Id.* § 8(n) (emphasis added). And amendment 98 clearly states that the "licenses of dispensaries and cultivation facilities" can be suspended or terminated. *Id.* § 8(e)(6). Finally, amendment 98 mandates that a cultivation facility's owners, board members, and officers must not "have previously been an owner of a . . . cultivation facility that has had *its* license revoked." *Id.* § 8(g)(2) (emphasis added). None of these provisions have any meaning if, as the State suggests, cultivation facilities are not licensed.

Adopting the State's position would require this Court to find that section 8(g)(2)'s use of the word "shall" is merely superfluous and dispensable. This Court "do[es] not interpret language to render one

section dispensable." *Walther v. FLIS Enterprises, Inc.*, 2018 Ark. 64, at 11, 540 S.W.3d 264, 270–71 (citing *Ozark Gas Pipeline Corp.*, 342 Ark. 591, 29 S.W.3d 730 (2000)); Surplusage Canon, Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 174–79 (2012). Rather, "[e]very word and every provision is to be given effect . . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Barrett v. Thurston*, 2020 Ark. 36, at 15, 593 S.W.3d 1, 10 (WOOD, J., concurring) (citation omitted).

None of this should be new to the State. Just one year ago, the State argued that RVRD could not receive a dispensary license because Mr. Nolan dissolved the entity identified in the application as the "dispensary." *See supra* pp. 12-13. In making this argument, the State emphasized that amendment 98 defines a "'dispensary' as 'an ***entity*** that has been licensed by the Medical Marijuana Commission under § 8 of this amendment.'" *Id.* Because RVRD was dissolved before a license was issued, the State plainly conceded that "the MMC had *no discretion* to excuse the deficient application that failed to meet minimum constitutional qualifications." *Id.* (emphasis added). The State's analysis was correct then, and Southern Roots's analysis is correct now.

The State now attempts to distinguish its position in RVRD based on the MMC's knowledge at the time of the licensing decision. (State's Br. 23). Specifically, the State argues that the Amended Complaint fails to allege facts demonstrating "that the MMC was aware of the corporate dissolution" when it awarded RVRC its cultivation license. (*Id.*). According to the State, "[a]bsent factual allegations demonstrating that the MMC knowingly licensed an unqualified applicant . . . there is no basis whatsoever to find that the MMC's decision to award the license to [that unqualified applicant] was an illegal or ultra vires act." (*Id.*). To put it more generically, the State believes the less it knows, the less the constitution applies.

Not surprisingly, the State did not cite any legal support for this troubling proposition. Whether the MMC, *an arm of the State*, knew that RVRC was dissolved by the Arkansas Secretary of State, *also an arm of the State*, is immaterial. The MMC's lack of knowledge does not render otherwise unconstitutional conduct constitutional. A cultivation facility must be an entity incorporated in the State of Arkansas. Period.

The MMC therefore acted outside of its constitutional authority when it awarded RVRC a cultivation facility license. Accordingly, the circuit court did not abuse its discretion when it concluded that the State is not entitled to sovereign immunity.

C. The ABC is actively violating amendment 98, section 8(a)(3) because the ABC has yet to give force or effect to amendment 98, sections 8(g)(2) and 10 (b)(2).

As already noted above, amendment 98 states that the ABC "shall administer and enforce the provisions of [amendment 98] concerning dispensaries and cultivation facilities." ARK. CONST. amend. XCVIII, § 8(a)(3). That mandate is only limited to the extent that the rules promulgated by the ABC in meeting its duty must be consistent with the purposes of amendment 98 and must promote the "fair, impartial, stringent, and comprehensive administration" of the amendment. *Id.* § 8(b)(1), (e)(10).

The State does not dispute that the ABC is required to enforce amendment 98's mandate that cultivation facility applications include a physical address of at least 3,000′ from a school. Nor does the State dispute that the ABC is required to enforce amendment 98's mandate that a cultivation facility be an entity incorporated in the State of Arkansas. After all, both of those provisions are contained in amendment 98, and both of those provisions concern cultivation facilities. Instead, the State argues that the ABC fulfilled its enforcement mandate by simply imposing a one-year probationary period and a nominal fine. (State's Br. 24).

According to Black's Law Dictionary, to "enforce" a law means to "give force or effect to" that law. *See* ENFORCE, *Black's Law Dictionary* (11th ed. 2019). Thus, for the ABC to extinguish its enforcement obligation under amendment 98, the ABC must give "force or effect" to amendment 98, sections 8(g)(2) and 10(b)(2). So far, that has not occurred.

As explained above, section 8(g)(2) prescribes a mandatory application requirement. When the plain meaning of section 8(g)(2) is given force and effect, it operates to preclude certain applicants from receiving licenses. Similarly, when section 10(b)(2) is given force and effect, it operates to limit both the scope of entities that are qualified to receive a license as well as an entity's conduct after it's licensed. Thus, so long as RVRC continues to possess a license that was issued in violation of amendment 98, sections (8)(g)(2) and 10(b)(2), the ABC has not given force or effect to those provisions and is violating its mandatory obligation to do so.

The State maintains that the "ABC had *enforcement* discretion when resolving the administrative complaints against [RVRC]." (State's Br. 31) (emphasis added). Thus, even the State recognizes "enforcement" as the controlling term. But again, that discretion is not unfettered. No matter the

degree of discretion the ABC enjoys, enforcement must still occur. And so far, it has not.

Furthermore, the ABC's conduct, which results chiefly out of the rules it adopts, must comport with amendment 98's purposes, and must further facilitate the "fair, impartial, stringent, and comprehensive administration" of amendment 98. ARK. CONST. amend. XCVIII, § 8(b)(1), (e)(10). The State's pseudo "enforcement," which permits the unscored RVRC to continue to enjoy and use an unconstitutionally issued license, is neither consistent with amendment 98's purposes nor does it result in a fair, impartial, stringent, and comprehensive administration of the amendment. To allow the ABC to sidestep its constitutionally mandated enforcement obligation under the guise of discretion is to elevate the executive branch above the Arkansas Constitution and allow the ABC to unilaterally usurp the express will of the people of Arkansas.

The impracticality and inconsistency of the State's enforcement position is most easily appreciated when applied in an analogous enforcement provision found under amendment 98, section 4(a)(1). Similar to the ABC, the Department of Health ("DOH") must "administer and enforce the provisions of [amendment 98] concerning . . . the issuance of a registry identification card to a qualifying patient . . . ." *Id.* § 4(a)(1). And

similar to cultivation facility applications, an application for a registry identification card must meet certain mandatory constitutional requirements. For example, the DOH "*shall* deny an application" for a registry identification card if the applicant's written physician certification "was fraudulently obtained." *Id.* § 5(c)(2).

According to the State, should the DOH ever inadvertently issue a registry identification card to an applicant who obtained a fraudulent physician signature, the DOH is not required to revoke the unconstitutionally issued card to enforce section 5(c)(2). Instead, the fraudster may keep, use, and renew the card to obtain medical marijuana—that is, so long as the fraudster pays a nominal fine. And because the fraudster is permitted to keep and use the unconstitutionally issued registry card, the fraudster is protected under the amendment from "arrest, prosecution, or penalty in any manner" for the possession or use of the marijuana that was obtained in an unconstitutional manner. *Id.* § 3(a). This is not the picture of enforcement contemplated by amendment 98's plain text, or any reasonable application thereof.

By refusing to enforce amendment 98's provisions concerning cultivation licenses, the ABC is acting outside of its constitutional authority. Accordingly, the circuit court did not abuse its discretion in finding that the

operative Complaint alleged facts demonstrating that the State is not entitled to sovereign immunity.

D. Southern Roots's Amended Complaint seeks injunctive relief.

This Court recently reiterated that "[t]he scope of the exception to sovereign immunity for unconstitutional acts or for acts that are ultra vires extends only to injunctive relief." *Muntaqim v. Payne*, 2021 Ark. 162, at 4, 628 S.W.3d 629, 635. If a "state agency is acting illegally," then that state agency "may be enjoined from acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner." *Ark. Game & Fish Comm'n v. Heslep*, 2019 Ark. 226, at 6, 577 S.W.3d 1, 5. This holds true whether the unconstitutional conduct is pending or presently taking place. *Id.* at 7, 577 S.W.3d at 5–6.

Southern Roots's Amended Complaint does not seek monetary damages. Rather, Southern Roots seeks to enjoin the ABC from continuing to disregard its constitutional mandate to enforce the provisions of amendment 98. And Southern Roots further seeks to enjoin the MMC from pending unconstitutional conduct in administering the re-licensing of the eighth cultivation facility license.

The State contends that it was within the MMC's rightful discretion to issue the fifth, sixth, seventh, and eighth licenses. That's correct. But once

the MMC exercised its discretion to issue those licenses, the MMC was bound to issue them in accordance with the requirements set forth in amendment 98. And as evidenced above, had those requirements been followed—as they were when the MMC denied RVRD's application under identical circumstances—Southern Roots, not RVRC, would have been issued the eighth cultivation facility license.

Accordingly, when the ABC fulfills its enforcement mandate and revokes RVRC's unconstitutional license, the MMC will have but one option: to issue the license to Southern Roots, the entity that should have received the license in the first place. To take any other action would deprive the State of Arkansas of a cultivation facility that it intended to license through the proper application of amendment 98. And to the extent that any of the MMC's administrative rules might suggest a different result, they run afoul of amendment 98's express requirement mandating the MMC to adopt rules necessary for carrying out amendment 98's purposes fairly, impartially, stringently, and comprehensively. ARK. CONST. amend. XCVIII, § 8(b)(1), (d)(3).

II. SOUTHERN ROOTS SUFFICIENTLY PLEADED A CLAIM FOR A WRIT OF MANDAMUS, AND THE CIRCUIT COURT HAD JURISDICTION OVER THIS ACTION.

As emphasized above, the scope of this interlocutory appeal is limited to a review of the circuit court's denial of the State's Motion to Dismiss "based on the defense of sovereign immunity." ARK. R. APP. P.—CIVIL 2(a)(10). Nevertheless, the State argues that "[t]he *circuit court below* lacked subject-matter jurisdiction to issue a writ of mandamus," and that "th[is] Court should find that the *circuit court* lacked subject matter jurisdiction over [Southern Roots's] writ petition."[3] (State's Br. 31, 32) (emphasis added).

"Subject-matter jurisdiction is a court's authority to hear a particular *type* of case." *Ark. Dep't of Fin. & Admin. v. Naturalis Health, LLC*, 2018 Ark. 224, at 6, 549 S.W.3d 901, 906 (emphasis added). The type of case here is a writ of mandamus, which is expressly within a circuit court's jurisdictional province. ARK. CODE ANN. § 16-115-102 ("The circuit court shall have power to hear and determine petitions for the writ of mandamus

[3] Notably, the State does not address whether the circuit had subject-matter jurisdiction under the Declaratory Judgment Act (ARK. CODE ANN. § 16-11-101 *et seq.*), which the operative Complaint raised as an alternative ground for the circuit court's subject matter jurisdiction. (RP 220-221).

and writ of prohibition and to issue such writ of mandamus and writ of prohibition to all inferior courts, tribunals, and officers in its respective jurisdiction.").

If more proof were needed beyond the statute's express jurisdictional statement, the writ's very description contemplates a circuit court's jurisdiction. ARK. CODE ANN. § 16–115–101(1) (defining a writ of mandamus as "an order of the *circuit court* . . . commanding an executive, judicial, or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law") (emphasis added). And as already explained, the State is not otherwise immune from suit under the doctrine of sovereign immunity. Simply put, this is exactly the *type* of case for which a circuit court is authorized to issue a writ of mandamus.

Even still, the State contends that the circuit court lacked jurisdiction over this type of case—a writ of mandamus—because: (1) Southern Roots seeks to compel the ABC and the MMC to perform discretionary functions; (2) the Amended Complaint failed to allege facts showing a clear and certain right to the relief it seeks; and (3) Southern Roots failed to show the absence of any other adequate remedy. (State's Br. 31-32). None of these contentions have to do with the type of case over which a circuit court has jurisdiction. Instead, these contentions appear to be a repackaging of the

State's Rule 12(b)(6) arguments, arguments which have no relevance in determining whether a court has subject-matter jurisdiction much less the issue of sovereign immunity. But no matter how these arguments are presented, they remain wrong as a matter of fact and law.

The constitutional provisions that Southern Roots seeks to have enforced are anything but discretionary. Again, words and phrases such as "shall," "necessary," and "without limitation" simply cannot be confused as optional.

As the next highest-scoring applicant behind RVRC's unconstitutional application, Southern Roots has a clear and certain right to the relief requested. Indeed, had the MMC administered its duty to license cultivation facilities in accordance with amendment 98, Southern Roots, not RVRC, would currently hold the eighth and final cultivation facility license.

When the ABC fulfills its enforcement mandate and revokes RVRC's unconstitutional license, the MMC must issue the license to Southern Roots, the entity that should have received the license in the first place. That is the only outcome that is consistent with amendment 98's purpose. ARK. CONST. amend. XCVIII, § 8(b)(1). And, under these circumstances, no

other result can spring from a fair, impartial, stringent, and comprehensive administration of amendment 98. *Id.* § 8(d)(3).

To be clear, this outcome would not usurp the administrative functions of the State. The State exercised its discretion when the MMC decided to issue the eight licenses to the applicants that, in the MMC's discretion, scored highest. But, as the State has previously recognized, there is no room for "discretion to excuse the deficient application that failed to meet minimum constitutional qualifications." *See supra* pp. 12-13.

Finally, not only does the State contend that Southern Roots failed to establish that it lacks any other adequate remedy, but the State seems to suggest that Southern Roots has in fact already received its remedy, thereby mooting Southern Roots's claims. (State's Br. 32). But as far as Southern Roots is aware, it has not been issued the cultivation facility license that it should have received. And the ABC nominally fining Mr. Nolan instead of enforcing amendment 98 is no remedy.

For a remedy to be sufficiently adequate, the alternative remedy must be "plain and complete and as practical and efficient to the ends of justice and its proper administration as the remedy invoked." *Hanley v. Ark. State Claims Comm'n*, 333 Ark. 159, 164, 970 S.W.2d 198, 200 (1998). And the

viability of the remedy must be more than merely plausible. *Id.* The State points to no such remedy, and Southern Roots knows of none.

The rules adopted by the MMC and the ABC under amendment 98 are governed by the APA. But those rules do not provide Southern Roots with any administrative recourse. Indeed, under the MMC's rules, notice and a hearing is only afforded when the MMC "denies an application for the *renewal* of a cultivation facility license, the *transfer* of a license, or the *transfer* of the location for a license." ARK. CODE R. 006.28.1-IV (19)(a) (emphasis added). Said differently, administrative recourse only exists for those cultivation facilities that are already licensed. And the same is true under the ABC's rules, which only provide notice and a hearing to an existing "licensee" or its agent. *See* ARK. CODE R. 006.02.7-24 (6)-(10).

The State correctly recounts that "[t]here was no formal hearing or fact-finding by the agency." (State's Br. 30). That's because no such process exists for Southern Roots. But even still, the Amended Complaint reveals that Southern Roots has tirelessly and repeatedly attempted to resolve its grievances with the MMC and the ABC to no avail. Thus, to the extent any administrative remedies were available, those avenues have been exhausted. *See Harmon v. Jackson*, 2018 Ark. 196, at 4, 547 S.W.3d 686,

689 (a plaintiff need not exhaust administrative remedies where no genuine opportunity for adequate relief exists or efforts to be heard would be futile).

At this point, Southern Roots has done everything in its power to bring these constitutional violations to the attention of the MMC and the ABC. It's only legitimate, adequate avenue for recourse was to petition the circuit court to issue a writ of mandamus to the MMC and the ABC, requiring them to comply with their constitutionally prescribed duties under amendment 98.

Finally, the State off-handedly asserts that Southern Roots is precluded from seeking a writ of mandamus under this Court's ruling in *Naturalis*. (State's Br. 26). *Naturalis* involved an administrative rule challenge under APA sections 207 and 212. In particular, the plaintiff in *Naturalis* asserted that the MMC failed to uniformly apply "their rules when scoring applications." 2018 Ark. 224, at 549 S.W.3d at 904. To be clear, Southern Roots is not challenging the MMC's or the ABC's rules. Nor is Southern Roots challenging the "application" of either respective agencies' rules. Rather, Southern Roots's Amended Complaint seeks injunctive relief in the form of a writ of mandamus for plainly alleged constitutional violations. Thus, the holding in *Naturalis* is no bar to

mandamus relief for the constitutional violations alleged in the operative Complaint.

Accordingly, Southern Roots's request for writ of mandamus falls squarely within the jurisdictional province of an Arkansas circuit court. The State's arguments to the contrary ignore the plain text of amendment 98 and would allow the executive branch to elevate itself above the Arkansas Constitution, the Arkansas judiciary, and the will of the people who entrusted the State to perform its mandatory duties under amendment 98.

REQUEST FOR RELIEF

For all of the foregoing reasons, Southern Roots respectfully requests this Court to affirm the circuit court's order denying the State's Motion to Dismiss based on sovereign immunity, and to remand the case back to the circuit court for further proceedings.

CERTIFICATE OF SERVICE

I, Brett W. Taylor, do hereby certify that on January 5, 2022, I filed the foregoing Motion to Expedite Appeal and Memorandum in Support via the eFlex electronic filing system, which shall send notice of the filing to all counsel of record, to wit:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with Administrative Order No. 19 in that that all "confidential information" has been excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

I hereby certify that the foregoing Brief complies with Administrative Order 21, Section 9, which states that briefs shall not contain hyperlinks to external papers or websites.

Further, I certify that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d): the Brief contains 8,059 words.

Identification of paper documents not in PDF format: The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

/s/ Brett W. Taylor