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. No. CV-21-505

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

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
THE HONORABLE HERBERT WRIGHT

BRIEF OF APPELLANTS

LESLIE RUTLEDGE
Arkansas Attorney General

By: JENNIFER L. MERRITT (2002148)
Senior Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Telephone: (501) 682-1319
Facsimile: (501) 682-2591
Jennifer.Merritt@ArkansasAG.gov

Attorneys for Appellants

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Points on Appeal

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Jurisdictional Statement

Appellee 2600 Holdings, LLC d/b/a Southern Roots Cultivation ("2600 Holdings") filed this lawsuit on January 22, 2021, in the Circuit Court of Pulaski County, Arkansas. (RP 4). 2600 Holdings filed an Amended Complaint on February 10, 2021. (RP 218). 2600 Holdings brought two claims. First, 2600 Holdings sought a writ of mandamus requiring the Defendants-Appellants to revoke a medical marijuana cultivation facility license awarded to a third party and to instead award it to 2600 Holdings, despite the fact that the public record showed that the Alcoholic Beverage Control Administration ("ABC") had already taken administrative enforcement action against the licensee at issue (RP 306-307), mooting out 2600 Holdings's claim. (RP 236-241). Second, 2600 Holdings sought declaratory and injunctive relief under section 214 of the Administrative Procedures Act, Ark. Code Ann. § 25-15-214, which applies only in cases "of rule making or adjudication." (RP 241-242).

On March 15, 2021, Appellants moved to dismiss the complaint and amended complaint (RP 248) asserting, among other arguments, sovereign immunity and lack of subject-matter jurisdiction, and filed a brief in support (RP 253). The circuit court held a hearing on the motion on July 22, 2021. (RT 1-47). On July 26, 2021, the circuit court entered an order denying the motion. (RP 403). Appellants timely filed a notice of appeal on August 2, 2021. (RP 405).

The issue on interlocutory appeal is whether the circuit court erred in denying Appellants' motion to dismiss on sovereign immunity or subject-matter jurisdictional grounds. Jurisdiction lies in the Supreme Court pursuant to Rule 1-2(a)(1) of the Rules of the Supreme Court because the appeal involves the interpretation or construction of the Constitution of Arkansas.

/s/ Jennifer L. Merritt
Jennifer L. Merritt
Senior Assistant Attorney General

Attorney for Appellants

Statement of the Case and the Facts

The Medical Marijuana Amendment of 2016 and MMC Rules. The people amended the Arkansas Constitution in 2016 to legalize (under state law) medical marijuana in Arkansas to treat or alleviate qualifying patients' qualifying medical conditions or symptoms. Ark. Const. amend. 98, § 2(13)(A). Amendment 98 created the Medical Marijuana Commission ("the MMC") within the Department of Finance and Administration ("DFA"). Pursuant to Amendment 98, the scope of MMC's authority is "to determine the qualifications for receiving a license to operate a dispensary or a license to operate a cultivation facility and the awarding of licenses." *Id.* § 19(a)(1). Under the constitutional amendment, the MMC "shall administer and regulate the licensing of dispensaries and cultivation facilities" and "shall . . . adopt rules necessary to" "[c]arry out the purposes of this amendment" and "[p]erform its duties under this amendment." *Id.* § 8(a)(2)(i)-(ii) & (b)(1)(A)-(B). Amendment 98 specifically requires the MMC to adopt rules governing:

> (1) [t]he manner in which it will consider applications for and renewals of licenses for dispensaries and cultivation facilities; (2) [t]he form and content of registration and renewal applications for dispensaries and cultivation facilities; and (3) [a]ny other matters necessary for the commission's fair, impartial, stringent, and comprehensive administration of its duties under this amendment.

Id. § 8(d)(1)-(3). Pursuant to this authority, the MMC promulgated its "Rules and Regulations Governing the Application for, Issuance, and Renewal of Licenses for Medical Marijuana Cultivation Facilities and Dispensaries in Arkansas," Ark. Admin. Code 006.28.1-I–V ("MMC Rules").[1]

Cultivation facility licensing. Amendment 98 has an entire section, Section 8, regulating the licensing of medical marijuana dispensaries and cultivation facilities. As relevant to this case, Section 8 gives the MMC discretion to issue between four (4) and eight (8) cultivation facility licenses. Ark. Const. amend. 98, §8(j). On July 10, 2018, the MMC issued five (5) cultivation licenses. (RP 9). MMC held the unselected applications, including 2600 Holdings's application, in a reserve pool for 24 months thereafter—until July 10, 2020—so that it could offer any license(s) that might become available in the future to the next highest scoring applicant(s). MMC R. § IV.9(g); (RP 9). If the MMC did not issue the remaining three (3) licenses prior to July 10, 2020, then it would have to reopen an entirely new application period.

[1] The Court may take judicial notice of the MMC Rules and other documents attached as exhibits to the pleadings along with other public records for purposes of a motion to dismiss. The Court is not required to accept as true allegations in the complaint or amended complaint that contradict facts that are judicially noticed. *See, e.g.*, *Hicks v. State*, No. CA CR 02-881, 2003 WL 1900710 (Ark. Ct. App. Apr. 16, 2003) (discussing the circuit court's judicial notice of facts in public records in considering a motion to dismiss); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *Mullis v. U.S. Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

Amendment 98 does not contain any limitations or conditions on the MMC's exercise of its discretion to issue the remaining three cultivation facility licenses. *See* Ark. Const. amend. 98, §8(j). MMC's Rules likewise recognize its broad "discretion to make licenses available" whenever the MMC determines that it would be appropriate to make new licenses available. MMC R. § IV.2(b)-(c). MMC's Rules provide that it may issue additional cultivation facility licenses upon one of two events: (1) "upon determining that there are not enough cultivation facilities to supply the dispensaries within the state," or (2) "upon revocation of any existing license by the Alcoholic Beverage Control Division." *Id.* § IV.9(h).

MMC's issuance of a cultivation facility license to Storm Nolan in June 2020. By June of 2020, the MMC still had not issued any more cultivation facility licenses, and the applications in the reserve pool were about to expire. The MMC Commissioners, existing licensees, and applicants in the reserve pool all knew that. At its June 8, 2020, meeting, three individuals who had ownership interests in applicants at the top of the cultivator reserve pool list appeared and expressed concerns regarding the need to issue additional cultivation facility licenses.[2] Those individuals included Storm Nolan, a representative of an entity doing business as

[2] *See* https://www.dfa.arkansas.gov/images/uploads/medicalMarijuanaCommission/MMC_Minutes06082020.pdf (last visited Dec. 6, 2021).

River Valley Relief Cultivation ("RVRC"), which ultimately received the eighth and final cultivation facility license at issue in this case. On June 30, 2020, the MMC held a meeting and voted 3-2 to award the final two cultivation facility licenses to the next applicants in line in the reserve pool,[3] one of which was Nolan/RVRC. (RP 228). After Nolan paid his license fee and posted his performance bond, the ABC and MMC issued a Medical Marijuana Permit to Bennett S. Nolan as the "permittee" who would be operating RVRC on July 17, 2020. (RP 252).

Under both Amendment 98 and the MMC Rules, only natural persons may hold cultivation facility licenses. Amendment 98 ***mandates*** that a "license for a . . . cultivation facility shall only be issued to a natural person." Ark. Const. amend. 98, § 8(q)(1). MMC's rules likewise recognize that natural persons, not corporate entities, are the license holders for cultivation facilities. For example, Section IV.1(b) of the MMC Rules provides that "[e]ach license for a cultivation facility license shall specify," among other things, the "name" and "address" "of the ***individual*** who holds the license." MMC R. §§ IV.1(b)(i)-(ii) (emphasis added). Similarly, consistent with Amendment 98, MMC's Rules state that

[3] *See* https://www.dfa.arkansas.gov/images/uploads/medicalMarijuanaCommission/MMC_Minutes06302020.pdf (last visited Dec. 6, 2021).

"[l]icenses shall only be effective for the ***individuals*** identified in the original application," and a "licensee may only sell, transfer or otherwise dispose of his or her license to another ***natural person***." *Id.* §§ IV.16(a) & (c) (emphases added).

ABC's administrative investigation and enforcement action against Nolan d/b/a RVRC. Prior to the award of the cultivation license to Nolan, ABC and MMC received two protest letters complaining that RVRC's application was void for various alleged violations of MMC's Rules. (RP 225-226). ABC initially dismissed the complaints without prejudice as unripe, because the Nolan/RVRC application was still in the reserve pool and had not yet been awarded a license. Therefore, ABC found that "any violation findings would be premature." (RP 103-104).

The complaints about RVRC's application/licensure continued and were ultimately resolved administratively by ABC. On June 29, 2020—the day before the MMC meeting where the Commission voted to issue the final two outstanding licenses—a complainant reasserted an old complaint about RVRC's application and asked that it be disqualified. (RP 105). ABC investigated the complaint but found it moot because Nolan no longer owned the building/location that was the subject of the complaint. (RP 156).

Then, on October 27, 2020, Appellee 2600 Holdings submitted a complaint to ABC asserting that RVRC's application was void *ab initio* because the

application purportedly violated the MMC's rules in two respects. (RP 109-114). First, 2600 Holdings claimed the location identified in RVRC's application was too close to a public or private school and, second, 2600 Holdings argued that RVRC had been voluntarily dissolved and was not a legal entity organized under the laws of the State of Arkansas when the MMC approved, and ABC issued, the cultivation permit to Nolan/RVRC. Accordingly, 2600 Holdings requested that ABC revoke the permit that it claimed was improperly granted to RVRC. (RP 109-114).

On December 16, 2020, 2600 Holdings submitted additional information to ABC and MMC and again requested that the cultivation license issued to RVRC be revoked because of its lack of corporate status when the license issued. (RP 146-148). 2600 Holdings argued that MMC had made an administrative decision to disqualify Nolan's application for a *dispensary* license on December 8, 2020, when it learned about the corporate dissolution and that ABC should revoke the *cultivation* license previously awarded to Nolan/RVRC in July 2020 on that same basis. (RP 147).

In January 2021, permittee Nolan accepted an Offer of Settlement resolving these matters administratively. (RP 216-217). In the Offer, ABC notified Nolan that it found he failed to submit a proper application in violation of MMC Rule Section IV.16(d) due to the dissolution of River Valley Production, LLC, the entity

listed on the application submitted and scored by the MMC. (RP 216). ABC also found that licensee Nolan improperly dissolved River Valley Relief Cultivation, LLC, the listed principal on the performance bond for his permit, and that there had been no performance bond presented for the actual entity operating the facility, RVRC. (RP 216). ABC offered to resolve these rule violations with the payment of a fine in the amount of $15,000, probation for a period of one (1) year, and the submission of a new performance bond setting forth the correct principal for Permit No. 00065. (RP 216-217). Nolan accepted the Offer, and the matter is now resolved administratively. (*See* RP 217).

The lawsuit. 2600 Holdings filed its original complaint for a writ of mandamus or alternatively for relief under section 214 of the Administrative Procedures Act ("APA"), on January 22, 2021. (RP 4). Plaintiff amended its complaint on February 10, 2021. (RP 218). In its amended complaint, 2600 Holdings asserts two causes of action. First, 2600 Holdings seeks a writ of mandamus compelling DFA, MMC, and/or ABC to revoke the cultivation facility license granted to Nolan, a nonparty, and award it instead to 2600 Holdings. (RP 236-241). Second, Plaintiff seeks declaratory and injunctive relief under section 214 of the APA (RP 241-242), which applies only in cases "of rule making or adjudication." Ark. Code Ann. § 25-15-214. Appellants moved to dismiss the complaint and amended complaint as barred by sovereign immunity and for lack of

subject-matter jurisdiction, among other reasons. (RP 248, 253). After a hearing (RT 1), the trial court denied the motion on July 26, 2021 (RP 403-404). On August 2, 2021, Appellants timely filed a notice of appeal. (RP 405).

Argument

2600 Holdings's disagreement with the administrative penalties assessed by ABC against third-party licensee Nolan for his violations of MMC's rules is not grounds for a writ of mandamus or relief under section 214 of the APA. This Court should reverse the circuit court's denial of Appellants' motion to dismiss and dismiss this case with prejudice.

I. THE TRIAL COURT ERRED IN DENYING THE STATE DEFENDANTS' MOTION TO DISMISS BASED UPON ITS ERRONEOUS INTERPRETATIONS OF LAW.

A. Standards of review

Arkansas Rule of Appellate Procedure—Civil 2(a)(10) permits an interlocutory appeal of an order denying a motion to dismiss based on the defense of sovereign immunity. On appellate review, this Court looks to the pleadings, treating the facts alleged in the complaint as true and viewing them in the light most favorable to the plaintiff. *Ark. Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232, at 6, 428 S.W.3d 415, 419. But Arkansas has a clear fact-pleading requirement. Ark. R. Civ. P. 8(a)(1). Any valid claim for relief must contain "a statement in ordinary and concise language of facts showing . . . that the pleader is entitled to relief[.]" Ark. R. Civ. P. 8(a)(1). 2600 Holdings must do more than allege that the State Defendants violated Amendment 98 or the MMC Rules or that the MMC's licensing decisions were *ultra vires*, arbitrary, capricious, or in bad

faith, because those are conclusions, not facts. *See Brown v. Ark. Dep't of Corr.*, 339 Ark. 458, 461, 6 S.W.3d 102, 104 (1999). To survive a motion to dismiss, a complaint must allege facts which, if proven, would establish "every *fact and element* essential to the cause of action[.]" *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 590, 510 S.W.2d 555, 560 (1974) (emphasis added). Allegations that characterize events through conclusions or labels, rather than describing the actual events, do not meet the plaintiff's burden of stating facts. *Simons v. Marshall*, 369 Ark. 447, 454-55, 255 S.W.3d 838, 843-44 (2007). For purposes of a motion to dismiss, a court treats only the facts alleged in a complaint as true, but not a party's theories, speculation, or statutory interpretation. *Ark. State Claims Comm'n v. Duit Constr. Co.*, 2014 Ark. 432, at 8, 445 S.W.3d 496, 503. "[A] complaint alleging illegal and unconstitutional acts by the State as an exception to the sovereign-immunity doctrine is not exempt from complying with our rules that require fact pleading." *Id.* at 7, 445 S.W.3d at 502. A complaint that fails to state facts upon which relief can be granted as to each named defendant should be dismissed. Ark. R. Civ. P. 12(b)(6); *Kohlenberger*, 256 Ark. at 590, 510 S.W.2d at 560.

This Court reviews issues of law, including a circuit court's substantive interpretations of law, *de novo*. *Hobbs v. Jones*, 2012 Ark. 293, at 8, 412 S.W.3d 844, 850. An abuse-of-discretion standard of review applies with regard to a

circuit court's factual findings that underpin its legal conclusions, including whether the plaintiff pled sufficient facts to establish an exception to sovereign immunity. *Alpha Mktg.*, 2013 Ark. 232, at 6, 428 S.W.3d at 419.

B. 2600 Holdings seeks to control the lawful administrative decisions of MMC and ABC and, therefore, its lawsuit is barred by sovereign immunity.

Under article 5, section 20 of the Arkansas Constitution, "[t]he State of Arkansas shall never be made defendant in any of her courts." Ark. Const. art. 5, § 20. "Sovereign immunity is jurisdictional immunity from suit." *Ark. Dep't of Human Servs. v. Fort Smith Sch. Dist.*, 2015 Ark. 81, 6, 455 S.W.3d 294, 299. A suit against the State is barred by the sovereign-immunity doctrine if a judgment for the plaintiff will subject the State to monetary liability or will operate to control the lawful actions of the State. *Id.*

Sovereign immunity extends to the various arms and branches of the state government through which the State discharges its functions, including State agencies. *Ark. Game & Fish Comm'n v. Eddings*, 2011 Ark. 47, at 4, 378 S.W.3d 694, 696–97 (citing *Fireman's Ins. Co. v. Ark. State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771, 773 (1990)). Where a suit is brought against an agency of the State such that a judgment for plaintiff would subject the state to monetary liability or operate to control the lawful action of the State, the lawsuit is, in effect, one against the State and prohibited by the doctrine of sovereign immunity. *Id.*

2600 Holdings's complaint and amended complaint make clear that it seeks to control the lawful administrative and discretionary functions of the MMC in awarding the final available medical marijuana cultivation permit allowed by Amendment 98 to the highest-ranking applicant in the reserve pool, Mr. Nolan. The complaint and amended complaint further make clear that 2600 Holdings seeks to control the lawful administrative and discretionary functions of the ABC in enforcing the MMC's rules. Despite the clear public record demonstrating that ABC has already taken enforcement action against Mr. Nolan (RP 216-217), 2600 Holdings does not think ABC went far enough and is instead asking the courts to order ABC to do more to remedy the rule violations it already investigated and resolved administratively. Its lawsuit is therefore barred by sovereign immunity, and the circuit court erred in denying Appellants' motion to dismiss on this basis.

As discussed above, Amendment 98 contains no limitations or restrictions on the MMC's exercise of its discretion in issuing between four and eight cultivation permits. Under Amendment 98 and Arkansas's medical marijuana regulatory scheme, the MMC only has the authority to ***issue*** medical marijuana cultivation facility licenses. (*See* MMC Rules, RP 22). And, once cultivation facility licenses have been issued, as in the case of the Nolan license, only the ABC has the discretionary authority to investigate alleged violations of Amendment 98 and the MMC/ABC rules and to sanction, suspend, or terminate licenses for

violations of the amendment or administrative rules.[4] DFA has no role in either the initial issuance of the licenses or in the oversight of licensees. *See supra* n.4. Because the doctrine of sovereign immunity shields DFA, MMC, and ABC from suit with regard to their administrative and discretionary functions, the Court should dismiss the complaint and amended complaint in their entirety, with prejudice, as barred by sovereign immunity.

In an attempt to avoid the sovereign immunity bar, 2600 Holdings asserts the illegal-acts exception to sovereign immunity, but the exception does not apply on the facts alleged. *See Ark. Dep't of Finance & Admin. v. Carpenter Farms Med. Group, LLC*, 2020 Ark. 213, at 7, 601 S.W.3d 111, 117 (reaffirming that "an allegation of 'ultra vires' or 'illegal' acts by the State remains an exception to sovereign immunity that is "alive and well") (citation omitted). Here, 2600 Holdings claims that MMC's June 30, 2020, decision to issue the final remaining

[4] *See* Section 2 of the Rules Governing the Oversight of Medical Marijuana Cultivation Facilities, Processors and Dispensaries by the Alcoholic Beverage Control Division, *available at* https://www.arkleg.state.ar.us/Calendars/Attachment?committee=040&agenda=3349&file=D.10a+DFA+ABCD+Rules+Gvning+Med+Marijuana+Cultivation+Facilities%2C+Processors+and+Dispensaries+and+Relevant+Acts.pdf (last visited Dec. 6, 2021).

cultivation license to Nolan was illegal or ultra vires because, as 2600 Holdings details in its pleadings and the exhibits thereto, everyone later learned that Mr. Nolan had voluntarily and formally dissolved the operating entity identified in his cultivation application on March 20, 2019, and the MMC later (in December 2020) disqualified his application for a *dispensary* license after learning about the corporate dissolution. (*See* RP 227). Significantly, however, 2600 Holdings does not allege any facts anywhere in its amended complaint that, even if accepted as true at this early stage of the proceedings, demonstrates that the MMC was aware of the corporate dissolution on or before June 30, 2020, when it voted to award the final cultivation facility license to Mr. Nolan. (*See* RP 227-228). The silence on this issue is fatal to 2600 Holdings's claims. Absent factual allegations demonstrating that the MMC knowingly licensed an unqualified applicant—of which there are none—there is no basis whatsoever to find that MMC's decision to award the license to Nolan was an illegal or ultra vires act. Instead, as the record reflects, ABC investigated the facts and circumstances after the license was issued and imposed administrative sanctions, including a $15,000 fine and a one-year probationary period. (RP 216-217).

The sovereign immunity bar prevents the trial court from second-guessing the lawful administrative and oversight functions of the ABC with regard to this matter. 2600 Holdings seeks a writ of mandamus and injunctive relief directing

the ABC and/or MMC to revoke the cultivation permit awarded to Mr. Nolan and to instead award the cultivation permit to 2600 Holdings, as the next highest-scoring applicant in the reserve pool after Nolan. (RP 242-243). Because such relief undoubtedly would control the lawful actions of the MMC and ABC as authorized by Amendment 98 and the applicable administrative rules, this action is plainly barred by article 5, section 20 of the Arkansas Constitution, and the Court should reverse and dismiss Plaintiff's amended complaint with prejudice.

Moreover, because ABC has already taken enforcement action against the Nolan license (RP 216-217), 2600 Holdings's requests for additional relief with regard to that license are moot. "A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy." *Shipp v. Franklin*, 370 Ark. 262, 267, 258 S.W.3d 744, 748 (2007). This Court "will not review issues that are moot" because "[t]o do so would be to render advisory opinions, which [the Court] will not do." *Shipp*, 370 Ark. at 266-67, 258 S.W.3d at 748. The Court will also decline to "pass upon constitutional questions if the litigation can be determined without doing so." *Id.* at 267, 258 S.W.3d at 748. The record in this case shows that this Court's review of the constitutional questions raised in the operative complaint will have no practical effect upon the case because ABC has already remedied Nolan's violations of MMC's rules through the Offer of Settlement Nolan accepted. (RP 216-217).

Thus, Nolan has already fully compromised and settled these matters with ABC, and there is nothing left for the courts to do. "A moot case presents no justiciable issue for determination by the court." *Shipp*, 370 Ark. at 267, 258 S.W.3d at 749. Furthermore, this Court "do[es] not sit for the purpose of determining speculative and abstract questions of law or laying down rules for future conduct." *Id.* If this Court or the trial court were to address 2600 Holdings's arguments about the validity of the Nolan application, it would be issuing an advisory opinion, and "[t]his we will not do." *Id.* Accordingly, because the issues with the Nolan application were resolved via an administrative Offer of Settlement between ABC and Nolan, the Court should find that 2600 Holdings's lawsuit is moot and dismiss the amended complaint with prejudice.

C. The circuit court lacks subject-matter jurisdiction over 2600 Holdings's claims.

In an attempt to avoid the application of sovereign immunity, 2600 Holdings filed a petition for a writ of mandamus seeking to compel alleged "ministerial" action by the Appellants and also sought declaratory and injunctive relief under section 214 of the Administrative Procedures Act ("APA"), Ark. Code Ann. § 25-15-214, which provides for circuit court review in cases of administrative "rule making or adjudication[.]" Ark. Code Ann. § 25-15-214. However, under this Court's controlling decision in *Ark. Dep't of Finance & Admin. v. Naturalis Health,*

LLC, the APA does not permit judicial review of the MMC's decision to award a cultivation license to an absent third party, and this Court therefore lacks subject-matter jurisdiction to review the claims raised in Count II of Appellee's amended complaint. 2018 Ark. 224, at 7-8, 549 S.W.3d 901, 906. And the reasoning of *Naturalis* likewise bars the request for relief in Count I of the amended complaint pursuant to a petition for a writ of mandamus because the duty to be compelled is discretionary, not ministerial, and because 2600 Holdings has no clear and certain right to the relief sought. *See Hanley v. Ark. State Claims Comm'n*, 970 S.W.2d 198, 333 Ark. 159 (1998). The Court therefore lacks subject-matter jurisdiction to review the matters raised in 2600 Holdings's action, and it should reverse and dismiss the amended complaint with prejudice.

Like this case, *Naturalis* involved various challenges to ABC's and MMC's administrative procedures for processing, reviewing, verifying, and scoring applications for medical marijuana cultivation facility licenses. 2018 Ark. 224, at 1, 549 S.W.3d 901, 903. The plaintiff in Naturalis, like 2600 Holdings here, did not receive a high enough score to obtain one of the five initial cultivation facility licenses. *Id.*, 549 S.W.3d at 903-04. That applicant filed a lawsuit against DFA, ABC, and MMC and claimed that MMC carried out the application scoring process in a flawed, biased, and arbitrary and capricious manner and failed to properly and uniformly apply its own rules when scoring the applications, which purportedly

violated the applicant's rights to due process and equal protection under the Arkansas and United States Constitutions. *See id.* at 2-3, 549 S.W.3d at 904. The Pulaski County Circuit Court (Judge Wendell Griffen) entered an *ex parte* temporary restraining order and later granted a preliminary injunction and declaratory judgment in favor of Naturalis. *Id.* The court also declared all of MMC's licensing decisions null and void and enjoined MMC from issuing any more licenses. *Id.* at 3, 549 S.W.3d at 904. The State agencies appealed. *Id.* at 3, 549 S.W.3d at 905.

This Court reversed and dismissed the case in its entirety, holding that the circuit court lacked subject-matter jurisdiction over Naturalis's complaint. *Id.* at 7, 549 S.W.3d at 906. In doing so, this Court explained that subject-matter jurisdiction is a court's authority to hear and decide a particular type of case. *Id.* at 6 (citing *Fatpipe, Inc. v. State*, 2012 Ark. 248, 410 S.W.3d 574). Jurisdiction over an action is determined entirely from the pleadings. *Id.* The *Naturalis* Court then discussed the limitations of court review of State agency decisions. The Court explained that the Arkansas Constitution divides our government into three branches and states that no branch "shall exercise any power belonging to any of the others." *Id.* (quoting Ark. Const. art. 4, § 2). "This is foundational to our government." *Id.* The Court reasoned, "[t]he judicial branch must not abdicate

this by reviewing the day-to-day actions of the executive branch." *Id.* (citation omitted).

To that end, the APA "subjects limited agency decisions to circuit court review." *Id.* (citing *Tripcony v. Ark. Sch. for the Deaf*, 2012 Ark. 188, 403 S.W.3d 559). In *Tripcony*, the Court explained that "the courts do not generally have jurisdiction to examine administrative decisions of state agencies." *Id.* "[I]t is only with respect to its judicial functions, which are basically adjudicatory or quasi-judicial in nature, that the APA purports to subject agency decisions to judicial review." *Id.* at 6-7, 549 S.W.3d at 906 (quoting *Tripcony*, 2012 Ark. 188, at 6-7, 403 S.W.3d at 561-62 and citing *Sikes v. Gen. Publ'g Co.*, 264 Ark. 1, 568 S.W.2d 33 (1978) (holding that a state board's decision was administrative and not an adjudication because the board heard no testimony, made no findings of fact, did not serve the parties with a copy of the decision, and certified no record of any proceeding)).

The Court next analyzed whether the circuit court had subject-matter jurisdiction over Naturalis's claims under the APA. *See Naturalis*, 2018 Ark. 224, at 7, 549 S.W.3d at 906. Naturalis had asserted two jurisdictional bases in its complaint, section 212 and section 207 of the APA. As to section 212, which provides circuit courts with jurisdiction to review agency decisions in "cases of adjudication" similar to section 214 at issue in this case, the Court concluded that,

"[i]f the agency has not conducted an adjudication, then there is no reviewable agency action under section 212." *Id.* The Court reviewed the Naturalis complaint in detail and could not identify "anything that occurred at the agency level that was an adjudication as defined by statute." *Id.* The Court held that ABC's and MMC's medical marijuana cultivation application scoring and licensing decisions "simply [were] not quasi-judicial." *Id.* at 8, 549 S.W.3d at 906. Therefore, the Court concluded that the circuit court did not have subject-matter jurisdiction to review those decisions under section 212 of the APA. *Id.* The Court also held that "[s]ection 207 also fails to provide subject-matter jurisdiction for the controversy at issue," because the plaintiff was not challenging "the validity or applicability of a rule," but rather the agencies' application of its rules during the application scoring process. *Id.*, 549 S.W.3d at 906-07. The Court held that the circuit court did not have subject-matter jurisdiction over such claims under section 207 and reversed and dismissed the case. *Id.* at 10, 549 S.W.3d at 907.

The same result is required here under the doctrine of *stare decisis*. *See Chamberlin v. State Farm Mut. Auto. Ins. Co.*, 343 Ark. 392, 397, 36 S.W.3d 281, 284 (2001) (explaining that, "[u]nder the doctrine of *stare decisis*, [courts] are bound to follow prior case law"). In both counts of 2600 Holdings's amended complaint, the disgruntled applicant, like Naturalis Health, challenges the administrative agencies' interpretation and application of its own Rules to the facts

of the Nolan application and its discretionary decisions to award the last available cultivation facility license to Nolan and to impose a fine and probation rather than license suspension or revocation. And now 2600 Holdings wants this State's courts to unwind those discretionary, administrative decisions, to revoke the license granted to Nolan on June 30, 2020, and to order MMC and ABC to issue the license to 2600 Holdings instead. Indeed, those claims are practically indistinguishable, legally and practically speaking, from *Naturalis*. However, just as in *Naturalis*, nothing occurred at the agency level that was an "adjudication" as defined by the APA. *See Naturalis*, 2018 Ark. 224, at 7-8, 549 S.W.3d at 906. There was no formal hearing or fact-finding by the agency. Because there was no adjudication at the agency level as that term is defined in the APA, this Court lacks subject-matter jurisdiction under section 214 of the APA, just as the circuit court did under section 212 in *Naturalis*. *See id.*

The Court likewise lacks subject-matter jurisdiction to issue a writ of mandamus on the facts alleged. A "writ of mandamus" is "an order of the circuit court granted upon the petition of an aggrieved party . . . 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[.]" Ark. Code Ann. § 16-115-101(1). As 2600 Holdings concedes in its complaint (RP 236), a court may only issue a writ of mandamus when (1) the duty to be compelled is ministerial and

not discretionary, (2) the plaintiff shows a clear and certain right to the relief sought, and (3) the plaintiff demonstrates the absence of any other adequate remedy. *Hanley*, 333 Ark. at 164, 970 S.W.2d at 200 (RP 236). A writ of mandamus cannot be used to compel, control, or review matters of discretion, though it may be used to force an official to exercise that discretion. *Id.*

The circuit court below lacked subject-matter jurisdiction to issue a writ of mandamus in this case for several reasons. First, as detailed above, the duty to be compelled is discretionary, not ministerial. MMC had absolute discretion to award the final available license to the next applicant in the reserve pool, and there is no allegation or evidence that the MMC had any information before it on June 30, 2020, that would have alerted it that Nolan had dissolved his corporate status. Further, under ABC's oversight rules, ABC had enforcement discretion when resolving the administrative complaints against Nolan. The courts cannot compel ABC to take different or more stringent enforcement action via a petition for a writ of mandamus, so this Court should hold that the circuit court lacked subject-matter jurisdiction over Count I, as well. *See Williams v. Porch*, 2018 Ark. 1, at 2, 534 S.W.3d 152, 153 (explaining that mandamus will compel an official "to take some action," but it will not lie to control or review matters of discretion, nor will it be used to tell an official *how* to decide a matter before him); *City of N. Little Rock v. Pfeifer*, 2017 Ark. 113, at 4-5, 515 S.W.3d 593, 596 (holding that the circuit court

abused its discretion when it ordered a city council to make specific findings in connection with passing an ordinance). Second, and relatedly, 2600 Holdings alleged no facts showing a clear and certain right to the relief it seeks. Instead, the facts alleged, taken as true, show that the agencies acted within their broad discretion in this matter. Third, 2600 Holdings failed to show the absence of any other adequate remedy. Indeed, on Appellee's own allegations and on the public record, ABC has already taken enforcement action for Nolan's rule violations, including the imposition of a fine, and Appellee's claims are moot. For each and all of these reasons, the Court should find that the circuit court lacked subject-matter jurisdiction over Appellee's writ petition.

Request for Relief

Based on the foregoing, Appellants respectfully request that this Court reverse the circuit court's order denying their motion to dismiss and dismiss this case with prejudice.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

By: */s/ Jennifer L. Merritt*

JENNIFER L. MERRITT (2002148)
Senior Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Telephone: (501) 682-1319
Facsimile: (501) 682-2591
Jennifer.Merritt@ArkansasAG.gov

Attorneys for Appellants

Certificate of Service

I hereby certify that on this 6th day of December, 2021, I electronically filed the foregoing via the eFlex electronic filing system, which shall send notification of the filing to any participants. I also certify that I will serve a paper copy of the brief within five calendar days upon the following:

The Honorable Herbert T. Wright
Pulaski County Circuit Judge – Fourth Division
401 West Markham Street, Suite 440
Little Rock, AR 72201

Ms. Carolyn B. Witherspoon
Ms. Bonnie Johnson
Mr. Abtin Mehdizadegan
Mr. Brett W. Taylor
CROSS, GUNTER, WITHERSPOON
& GALCHUS, P.C.
500 President Clinton Ave., Suite 200
Little Rock, AR 72201

Mr. Quentin E. May
QUENTIN E. MAY, PLC
300 Spring Street, Suite 500
Little Rock, AR 72201

/s/ Jennifer L. Merritt
Jennifer L. Merritt

Certificate of Compliance with Administrative Order No. 19, Administrative Order 21 Sec. 9, and With Word-Count Limitations

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, the undersigned states that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d) and said Brief contains 5,511 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/ Jennifer L. Merritt
Jennifer L. Merritt