

IN THE COURT OF COMMON PLEAS, MADISON COUNTY, OHIO

Pure Ohio Wellness, LLC,

Appellant,

v.

State of Ohio Board of Pharmacy, et al.,

Appellee.

FILED  
In The Court of Common Pleas  
Madison County, Ohio

NOV 04 2019

Renee J. Lovell  
Clerk of Courts

CASE NO.: CVH 20190197

(severed from Case No. 20190016)

Judge Eamon Costello

**DECISION AND ENTRY**

This matter is before the Court pursuant to Appellant’s, Pure Ohio Wellness, LLC (hereinafter “Pure Ohio”), administrative appeal from the Order by Appellee, State of Ohio Board of Pharmacy (hereinafter “the Board”), dated January 8, 2019 in which Pure Ohio was denied a provisional medical marijuana dispensary license for its location at 920 U.S. 42 West, London, Ohio 43140.

**BACKGROUND**

The parties have largely stipulated to the facts of this case. Pursuant to R.C. Chapter 3796, the Board was granted authority to implement and regulate the licensure of medical marijuana dispensaries in Ohio. Stipulation at ¶ 1. The Board promulgated Ohio Administrative Code 3796:6-2-05(A) that until September 8, 2018, the Board may issue up to 60 dispensary provisional licenses. *Id.* at ¶ 4. The Board was required to issue not less than fifteen percent of retail dispensary licenses to entities that are owned and controlled by members of economically disadvantaged groups. *Id.* at ¶ 5; R.C. 3796.10(C). Therefore, because there were up to 60 dispensary licenses, the Board concluded that it was required by R.C. 3796.10(C) to award 9 dispensary licenses to EDG applicants. *Id.* at ¶ 19.

Pursuant to the rules promulgated by the Board, one dispensary would be permitted in District Southwest 7, which includes Fayette, Madison and Greene counties. *Id.* at ¶ 10. The Board received eight applications for the one dispensary license in District Southwest 7 and scored each applicant accordingly. *Id.* at ¶ 14. Pure Ohio had the highest score of all applicants in District Southwest 7. *Id.* at ¶ 15. The Board issued Pure Ohio a denial letter which states, in pertinent part:

“Applicant’s score was high enough to qualify Applicant to receive a provisional dispensary license for the Address in the district in which the Applicant applied. However, an Applicant who qualified as an economically disadvantaged group (EDG) was awarded the remaining license in the district in which you applied pursuant to the requirement in Section 3796.10 of the Revised Code, which mandates no less than fifteen percent of retail dispensary licenses are issued to entities owned and controlled by U.S. citizens who are residents of the state and are members of the listed EDGs.”

*Id.* at ¶ 17.

The provisional dispensary license for District Southwest 7 was awarded to Harvest of Ohio, LLC, an entity that the Board concluded qualified as an EDG applicant. *Id.* at ¶ 18. The Board concluded that it was required under R.C. 3796.10(C) to award this license to Harvest of Ohio at this location because that application was the highest scoring EDG application that was not otherwise disqualified and it had not already been awarded a provisional dispensary license to operate a medical marijuana dispensary. *Id.* at ¶ 24.

The Board uses the following methodology to determine which entity to displace in a district due to R.C. 3796.10(C): (A) where available, the Board would displace a location for an entity that had more than five dispensaries statewide or more than 66% of the locations in the district; (B) if neither option was available, the Board would displace the lowest scoring winning applicant in the District. *Id.* at ¶ 25. Since the Board determined that District Southwest 7 would

have a maximum of one provisional license, Pure Ohio was the lowest scoring applicant who would otherwise be awarded a provisional dispensary license. *Id.* at ¶ 26.

Therefore, the only reason that Pure Ohio did not receive a provisional license to operate a medical marijuana dispensary was due to R.C. 3796.10(C) and the requirement that the Board award fifteen percent of all dispensaries to EDG applicants. *Id.* at 27. Pure Ohio timely requested a hearing on this decision to be heard before the Board pursuant to R.C. Chapter 119. *Id.* at ¶ 29.

The Hearing Examiner did not consider Pure Ohio's constitutional challenge and that issue was left for this appeal. Appellant Brief at 6. The Hearing Officer determined that Pure Ohio was required to demonstrate "fraud, bad faith, or an unreasonable or unconscionable attitude" in order to overturn the award of the license and it failed to do so. Report and Recommendation at 2. As such, the Board issued an order confirming and approving the Report and Recommendation of Hearing Examiner.

Pure Ohio timely filed an appeal from the Order of the Ohio Board of Pharmacy dated January 8, 2019 to this Court pursuant to R.C. 119.12. Pure Ohio submitted its Administrative Appeal Brief on April 1, 2019. The Board submitted their Brief on May 1, 2019. Pure Ohio submitted their Reply Brief on May 15, 2019.

The Parties have agreed to forego a hearing on this issue and thus the decision will be issued based on the briefs submitted by the parties.

## **STANDARD OF REVIEW**

Pursuant to R.C. 119.12, a reviewing trial court must uphold the agency's order if the order is supported by reliable, probative, and substantial evidence, and is in accordance with law. *Pons v. Ohio State Medical Board*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993). Evidence is

reliable, probative and substantial when it can be confidentially trusted, is relevant, and has some weight. *Our Place, Inc., v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

The court is to conduct a de novo review of the Board's conclusions of law. *Ohio Historical Soc. V. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 613 N.E. 2d 591 91993).

The Board, like any administrative agency, cannot resolve a facial challenge to the constitutionality of a statute. *See City of Reading v. PUC*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 14; *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 296, 2006-Ohio-2420 (state agencies do not have jurisdiction to review the constitutionality of statutes). Such a challenge may be brought on appeal. *City of Reading*, 846 N.E.2d 840 at ¶ 13.

## **DISCUSSION**

Pure Ohio alleges the Order and Report and Recommendation of the Hearing Examiner are not supported by reliable, probative, and substantial evidence and are not in accordance with the law. Specifically, Pure Ohio alleges the Order is based on a statute, R.C. 3796.10(C), which establishes a race-based quota is unconstitutional on its face and as applied to Pure Ohio. Further, Pure Ohio alleges that the Board's failure to promulgate a rule to establish how the quota would be enforced lacked fundamental fairness. Finally, Pure Ohio alleges that the Board applied an incorrect legal standard to Pure Ohio in their appeal of the denial of the license.

The Board argues that R.C. 3796.10(C) was modeled on the Minority Business Enterprise ("MBE") program which has been upheld as constitutional and as such, R.C. 3796.10(C) should be found constitutional. Further, the Board argues that an agency does not need to promulgate rules when it is interpreting a statute. Finally, the standard applied by the Hearing Examiner was correct in applying the *Danis* standard to Pure Ohio's appeal.

### **I. Constitutionality of R.C. 3796.10(C)**



The parties agree that R.C. 3796.10(C) shall be subject to strict scrutiny as the statute involves a race-based quota. Under strict scrutiny there are two prongs of examination: First, any racial classification must be justified by a compelling governmental interest; second, the means chosen by the State must be narrowly tailored to the achievement of that goal. *Wygant v. Jackson Bd. of Edn.*, 476 U.S. 267, 274 (1986).

Though legislation is given the presumption of validity and must be sustained when it is rationally related to a legitimate state interest, a classification that singles out a suspect class is subject to strict scrutiny. *State ex rel. O'Brien v. Heimlich*, 10<sup>th</sup> Dist. Franklin No. 08AP-521, 2009-Ohio-1550, ¶ 24; *Dillinger v. Schweiker*, 762 f.2d 506, 508 (6th Cir. 1985). And as such, strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. *Gilles v. Miller*, 501 F.Supp.2d 939, 950 (W.D.Ky. 2007). Yet, the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality. *Ritchey Produce Co., v. ODAS*, 85 Ohio St.3d 194, 227 (1999).

Ohio Revised Code 3796.10(C) states:

The board shall issue not less than fifteen percent of all retail dispensary licenses to entities that are owned and controlled by United States Citizens who are residents of this state and are members of one of the following economically disadvantaged groups: Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians. If no applications or an insufficient number of applications are submitted by entities that meet the conditions set forth in division (B) of this section, the licenses shall be issued according to usual procedures.

As used in this division, “owned and controlled” means that at least fifty-one per cent of the business, including corporate stock if a corporation, is owned by persons who belong to one or more of the groups set forth in this division, and that those owners have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership.

As stated above, the parties agree that R.C. 3796.10(C) should be subject to strict scrutiny. There is no doubt that R.C. 3796.10(C) singles out a suspect class, specifically “Blacks

or African Americans, American Indians, Hispanics or Latinos, and Asians.” Therefore, R.C. 3796.10(C) is presumed to be unconstitutional absent sufficient evidence of a compelling government interest. *Gilles v. Miller* at 950.

#### **A. Compelling Government Interest**

In creating this provision, the Board asserts that the State had a compelling interest in redressing past and present effects of racial discrimination. Both the United States Supreme Court and the Supreme Court of Ohio have held that remedying past and present racial discrimination is a compelling government interest. *Richmond v. J.A. Croson*, 488 U.S. 469, 492 (1989); *Ritchey Produce Co. v. State Dep’t of Admin Servs.*, 85 Ohio St.3d 194, 253 (1999).

However, for the court to find that a compelling interest exists, there must be a strong basis in evidence to support the legislature’s conclusion that remedial action was necessary. *Croson* at 500; *Ritchey* at 253-54. The government has the initial burden to show that a strong basis in evidence exists, then the burden shifts to the [appellant] to rebut that showing. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000). The court may rely on statistical and anecdotal evidence in making this determination. *Id.*

In support of the Board’s assertion that the General Assembly had a compelling interest in creating R.C. 3796.10(C), the Board put forth evidence of prior discrimination in the bidding for Ohio government contracts, statistical and anecdotal studies leading to the creation of the MBE and EDGE programs, other jurisdiction’s marijuana licensing programs, and news articles showing that minorities are underrepresented in the medical marijuana industry.

The Board first looks to the legislative history of the Minority Business Enterprise Program (MBE program) which was enacted in 1980. In support of the set-aside within the MBE program, the courts relied on decades worth of judicial decisions, executive orders, and

administrative agency task force studies that identified racial discrimination and disparities in minority participation in contracts with the State. *Ohio Contractors Ass'n v. Kelp*, 713 F.2d 167, 170-71 (6th Cir. 1983); *Ethridge v. Rhoades*, 268 F.Supp. 83 (S.D. Ohio 1967). Both Ohio and Federal courts have upheld the Ohio MBE set-aside provision finding the extensive evidence considered was a strong basis that remedial action was necessary. *Id.*; *Ritchey v. ODAS*, 85 Ohio St.3d 194, 195 (1999).

The last study the Board references in support of constitutionality is a 2001 anecdotal study that provides some likely reasons for disparities in the award of contracts and utilization of MBEs. This study was used to support the legislature's conclusion that remedial action was necessary in the industry of government procurement contracts and led to the creation of the Encouraging Diversity Growth and Equity Program (EDGE Program) in 2003. The EDGE program establishes goals for state entities in awarding contracts for procurement of supplies and services to minority-owned businesses. R.C. 123.152.

However, none of the evidence the Board points to in support of finding that the State had a compelling interest is specific to the medical marijuana industry. Further, it is not clear by the Board's brief that the General Assembly considered any of this evidence prior to the enactment of R.C. 3796.10(C). In fact, there is no evidence in the record before this Court that shows what of this evidence, if any, the General Assembly clearly considered prior to passage. Although this regulation does not exist in a vacuum and it is possible that the General Assembly considered all of the MBE program history and other states' handling of medical marijuana programs, the Board provided no evidence in support of that conclusion.

Even if the Court could find that this evidence was considered by the General Assembly in support of the R.C. 3796.10(C) language, this statistical evidence and case history pertain to



government procurement contracts only. The law requires that evidence considered by the legislature must be directly related to discrimination of that particular industry. *Croson*, 488 U.S. at 500; *Ritchey*, 85 Ohio St.3d at 242. The Board has not put forward any statistical evidence as to racial discrimination in the medical marijuana industry in Ohio. And while remedying the present effects of past discrimination can be a compelling interest, the state does not have a compelling interest in remedying generalized societal discrimination. *Croson* at 500.

The Board also refers to multiple news articles that conclude that minority groups are underrepresented in ownership of marijuana retail licenses. However, all of these articles were published after Governor Kasich signed H.B. 523 into law on June 8, 2016 which created R.C. 3796. When evidence is provided that was not available or considered by the legislature prior to the enactment of a statute, it is considered to be “post-enactment evidence.” Courts are split as to whether or not post-enactment evidence is admissible.

In *Shaw v. Hunt*, the Court held that the legislature must have a strong basis of evidence to conclude that remedial action was necessary *before* it embarks on an affirmative action program. *Shaw v. Hunt*, 517 U.S. 899, 910, citing *Wygant*, 467 U.S. at 277. *Shaw* emphasized *Wygant*'s requirement that a legislative body have pre-enactment evidence sufficient to support a racial classification in order to fulfill the requirements of strict scrutiny. *Shaw* at 908-10. Although *Wygant* did not specifically foreclose the admissibility of post-enactment evidence, *Shaw* held that a compelling interest requires that “the State... show that the alleged objective was the legislature’s actual purpose for the discriminatory classification... and the legislature must have a strong basis in evidence to support that justification before it implements the classification.” *Shaw* at 908. Therefore, the only way a court can determine whether a



legislature's intent was to remedy past racial discrimination is by looking at evidence before that body at the time it drafted the legislation. *Id.* at 908-09.

While Circuit Courts have been split as to the admissibility of post-enactment evidence, the Sixth Circuit follows *Shaw* in precluding post-enactment evidence. In *Associated General Contractors of Ohio, Inc. v. Drabik*, the court denied the State's motion to perform requisite statistical studies of the impact of the statute. The court wrote that under *Croson*, the state must have had a sufficient basis in evidence for racial classification *prior* to enactment. *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738-39 (6th Cir. 2000) (emphasis added).

In the administrative appeal filed in Franklin County with regard to R.C. 3796.09(C), the Franklin County Court relied on a Tennessee case that held post-enactment evidence may not be used to demonstrate the government's interest in remedying prior discrimination was a compelling interest. *Pharmacann Ohio, LLC v. Ohio Dept. of Commerce*, Franklin county Case No. 17CV10962 (Nov. 2018), *citing W. Tenn. Ch. Of Assoc. Builders and Contrs., Inc., v. Bd. Of Edn.*, 64 F.Supp2d 714, 719 (W.D. Tenn. 1999). The Court finds this line of cases persuasive. Thus, these articles referenced by the Board are post-enactment evidence and should not be considered by this Court in its determination of whether a compelling interest existed at the time R.C. 3796.10(C) was enacted.

Considering all of the evidence put forth by the Board, the Court finds there is not a strong basis in evidence supporting the General Assembly's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, a compelling government interest does not exist.

#### **B. Narrowly Tailored Remedy**

Should a court find that a compelling state interest exists, the court must still determine if the means are narrowly tailored. *Wygant*, 476 U.S. 267. In this assessment, the court must look to several factors, including: (1) necessity for relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1987); see also *Ritchey*, 85 Ohio St.3d 194 (1999).

### **1. Alternative Remedies**

First, the court should determine the necessity of the relief and evaluate the effectiveness of any alternative remedies. When considering the necessity for relief and efficacy of alternative remedies, the measure will only be upheld if it is the least intrusive and most effective means to achieve the program's goals. *Regents of the Univ. of Cal. v. Bakke*, 428 U.S. 265, 266 (1978). To determine if a program satisfies this requirement, courts should consider the purpose of the program, the policy reasons for the program, and the availability of alternative relief. *Paradise*, 480 U.S. at 170-74.

Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts before enacting race-conscious remedies. *Ritchey*, 85 Ohio St.3d 267. The Board argues that the General Assembly had a sound basis to conclude at the outset that it was necessary to adopt a licensure requirement that tracked the MBE requirements. The Board points out that Ohio has decades of experience with enforcing the MBE and EDGE equal opportunity programs. However, the Board shows no evidence that alternative remedies were either proposed or analyzed by the General Assembly. The Board's reliance on the MBE program is misplaced as

this evidence relates to the government contracting market rather than relating to the medical marijuana industry.

Pure Ohio proposed some narrowly tailored remedies that could have been considered by the General Assembly rather than the strict quota. However, there is no evidence that the General Assembly considered any of the alternative remedies proposed by Pure Ohio. Further, in the Board's brief, it shows several other medical marijuana statutes adopted in other states. None of these other statutes established a quota, instead they use more generalized requirements or goals which could have been alternative remedies if the General Assembly had considered them in their analysis.

The Court finds that alternative remedies could have been available to the General Assembly in order to alleviate the discrimination it sought to correct. However, no evidence was provided by either party that showed any alternative remedies were considered by the General Assembly prior to enacting R.C. 3796.09(C).

## **2. Flexibility and Duration of the Relief**

Second, the court should evaluate the flexibility and duration of the relief which includes the availability of waivers. Flexibility refers to how easily adaptable the program is to changing government needs. A program is waivable if it is easily terminated when it is not needed. Duration of such a program should be temporary or limited in duration. *Paradise* at 178; *Croson*, 288 U.S. 469.

The Board argues that R.C. 3796.10(C) is flexible because it was drafted in such a way so that if insufficient numbers of qualified minority applicants apply for licensure, the State does not have to award licenses to unqualified minority applicants just to make a quota. R.C. 3796.10(C). Further, the Board points out that the fifteen percent requirement in the MBE statute



was found to be flexible and had been applied in a flexible manner. *Ritchey*, 85 Ohio St.3d at 268.

Pure Ohio argues that the Supreme Court has explicitly rejected flat quotas in lieu of individualized procedures. *Croson*, at 508, *see also Gratz*, 559 U.S. at 270-72 (holding that automatic fixed racial preference that did not allow for individual analysis was not narrowly tailored); *Bakke*, 438 U.S. at 317 (holding that fixed racial quota was not a flexible alternative). Further, Pure Ohio argues the quota does not expire and as such is not limited in duration.

R.C. 3796.01(C) appears to be somewhat flexible in that it includes the waiver provision that the Board identifies. However, the entire statute section is not flexible. It outlines a strict percentage and no evidence has been provided to show how the quota is in any way related to the medical marijuana industry. It simply requires that fifteen percent of licenses are issued to economically disadvantaged group members. Additionally, the statute does not include a proposed duration or how it is terminated if no longer needed. Accordingly, the Court finds R.C. 3796.10(C) is not flexible.

### **3. Relationship of the Numerical Goals to Relevant Labor Market**

Third, the court should determine the relationship of the numerical goals to the relevant labor market. The court must consider the numerical relationship between an entity's goals for its race-based program and its desired end. *Wygant*, 476 U.S. 267. Statistical evidence can be used to support this relationship. *Id.* The court may find that the program's numerical goals bear a reasonable relationship to the relevant population when the policy's goals are measured against a population more closely tied to the particular group the policy seeks to benefit. *Croson* at 469.

The Board again argues that the numerical goals in R.C. 3796.10(C) are directly related to those MBE goals that were upheld in *Ritchey* and are therefore an appropriate benchmark for



the medical marijuana industry. In *Ritchey*, the Supreme Court of Ohio found the MBE goal of fifteen percent was directly related to the Ohio contracting market. *Ritchey* at 268.

Pure Ohio argues that there is no correlation between the fifteen percent quota and the medical marijuana market. The General Assembly did not make any statements about the basis of the fifteen percent quota. Further, the Board does not provide any evidence or any explanation as to why this percentage is related to the relevant labor market in the new medical marijuana industry.

The Court finds that there is no evidence to support a reasonable relationship to the relevant population and the policy's goals. As such, the numerical goal of R.C. 3796.10(C) is not reasonably related to the relevant labor market.

#### **4. Impact on Third Parties**

Fourth, the court should evaluate the impact of the relief on third parties. The impact on third parties will vary depending on the industry, the degree of minority participation, and the share of the market for particular goods and services. *Associated Gen. Contrs., Inc., v. San Francisco*, 813 F.2d 922 (9<sup>th</sup> Cir. 1987). Accordingly, the court must take into consideration the differences in markets when determining the burden placed on third parties.

The Board argues that third parties are minimally impacted. The Board relies once again on *Ritchey* in which the Court noted that non-minority contractors were not wholly excluded from participating in contracts set aside for MBEs because non-minorities could own up to 49% of the company. *Ritchey*, 85 Ohio St.3d at 268. The same is true with respect to R.C. 3796.10(C).

In this respect, the MBE statute encouraged legitimate collaborative partnerships and joint ventures between non-minority contractors and minority group members. *Ritchey* at 268-9. This potential interaction diffused the burdens placed on those not entitled to participate in the

MBE program. Also, the burdens created by the MBE statute for non-minorities were an incidental consequence, not a part of the program's objective. *Ritchey* at 270.

Pure Ohio argues that the Board ignores a critical distinction between the government contracts that are subject to the MBE program and the licenses at issue here. Specifically, a government bidder can always apply for another contract or work in the private sector. In this case, a denial of the license effectively bars Pure Ohio from the market place as growing medical marijuana without the license would be considered an illegal activity.

The Court agrees with Pure Ohio that the Board has ignored a critical distinction. Under the MBE program, potential contracts are constantly generated and are available for bidding by minority owned and non-minority businesses. That is not the case for R.C. 3796.10(C). By allotting a fifteen percent set aside, licenses will be reserved for applicants solely on the basis of race. Although more licenses may be issued in the future, those licenses will be impacted by the same set-aside, reserving more licenses for potentially lower qualified applicants solely on the basis of race.

The Court finds that the fifteen percent set aside is not insignificant in its impact on third parties as it can effectively bar qualified applicants from participation in the market. This burden is excessive for a new industry with limited participants.

## **5. Additional Factors**

In addition to the factors cited in *Paradise*, the Ohio Supreme Court in *Ritchey* takes into account additional factors which bolsters the Ohio MBE statute. Those factors include: (1) ensuring participation by qualified MBEs only; (2) penalties for misrepresentation of an MBE; (3) appropriate geographical limitations; and (4) reassessment and reevaluation of the program. *Ritchey*, 85 Ohio St. 3d at 269-70. The Board asserts that R.C. 3796.10(C) includes all of these

factors as well. Upon review of the statute, the court finds that these additional factors are met by the legislature in the drafting of R.C. 3796.10(C).

#### **6. Final Review of Narrowly-Tailored Analysis**

Upon review of all the factors together, the Court finds that the General Assembly failed to adequately evaluate or employ race-neutral remedies, the quota is inflexible and not limited in duration, there is a lack of relationship between the quota and the relevant labor market, and a large impact on the rights of third party. All of these taken together shows that the General Assembly failed to narrowly tailor R.C. 3796.10(C). Therefore, even if there was a strong basis in evidence to support a race-based remedial measure, the Court cannot find that the statute was narrowly tailored.

#### **II. Board Failure to Promulgate Rule**

In light of the finding above that R.C. 3796.10(C) is unconstitutional, the issue of whether the Board exceeded its authority by establishing a methodology in which to implement the quota requirement without promulgating a rule is therefore moot.

#### **III. Legal Standard Applied at Administrative Appeal**

Based on the above finding that R.C. 3796.10(C) is unconstitutional, the Board will need to reconsider the denial of Pure Ohio's provisional medical marijuana license. Therefore, the issue of what legal standard should be applied in an administrative appeal is not ripe at this time.

#### **CONCLUSION**

The Court finds that Pure Ohio has met its burden to demonstrate the unconstitutionality of R.C. 3796.10(C). There is insufficient evidence before this court to show that the General Assembly compiled and reviewed enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. In

addition, the General Assembly did not narrowly tailor R.C. 3796.10(C). Therefore, the Court finds R.C. 3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article 1, Section 2 of the Ohio constitution.

The Court holds that R.C. §3796.10(C) to be severable from the remainder of the statute. The intention of the General Assembly in passing Chapter 3796 was to provide access to medical marijuana for ailing Ohioans. As subsection 3796.10(C) only concerns preference for economically disadvantaged groups in the issuance of licenses, the Court finds that removal of this provision would not affect the implementation of R.C. §3796 in providing access to legal medical marijuana. Therefore, the Court orders the entirety of R.C. §3796.10(C) to be severed and stricken from R.C. §3796.10.

The Court finds Appellant's second issue of whether the Board exceeded its authority to be moot in light of the finding of R.C. 3796.10(C) unconstitutional.

The Court finds Appellant's third issue of whether the proper legal standard was applied in the administrative appeal to be not ripe in light of the finding of R.C. 3796.10(C) is unconstitutional.

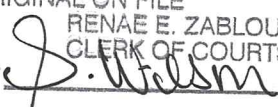
This matter is remanded to the State of Ohio Board of Pharmacy to reconsider the denial of Appellant's provisional medical marijuana dispensary license in accordance with this opinion.

It is SO ORDERED.

This is a final, appealable order. There is no just cause for delay.

ENTER: November 1, 2019

  
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Eamon P. Costello, Judge

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